

July 9, 2004

VIA EMAIL

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Notice of Proposed Rulemaking - Risk-Based Capital Standards:
Trust Preferred Securities and the Definition of Capital (Docket No. R-1193)

Dear Ms. Johnson:

We are pleased to respond to Docket No. R-1193, in which the Board of Governors of the Federal Reserve System (the "Federal Reserve") solicited comments to its Notice of Proposed Rulemaking - Risk-Based Capital Standards: Trust Preferred Securities and the Definition of Capital (the "Proposed Rule"). Our firm represents clients in both public and private trust preferred transactions and acts as counsel to issuers, underwriters, placement agents and investors. We are writing this comment letter largely to clarify or confirm certain elements of the Proposed Rule.

1. General

We support the Federal Reserve's determination to continue to allow the inclusion of trust preferred securities as an element of tier 1 capital for bank holding companies. Since their first inclusion in 1996, trust preferred securities have become a valuable tool for raising capital, particularly in recent years with the advent of the pooled structure for small and medium sized financial institutions for whom capital markets alternatives are either very expensive or non-existent.

We also support the Federal Reserve's position that the new quantitative limits on the inclusion of trust preferred securities in tier 1 capital will not become effective until after a three-year transition period. This will enable issuers to evaluate the role of trust preferred securities in

their current capital structure and make the appropriate determinations about future issuances of trust preferred securities.

We generally support the Federal Reserve's proposal to grandfather certain issuances that may not be in strict compliance with the Federal Reserve's subordinated debt policy statement. However, as discussed in more detail below, we believe that the proposed grandfather date of May 31, 2004 should be extended to a date that is at least 30 days after the adoption of any final rule.

We ask the Federal Reserve to consider the following comments in connection with its adoption of a final rule.

2. Prior Notice for Interest Deferral Periods

The Proposed Rule states that any notification period before entering into an interest deferral period must be reasonably short, generally no more than one business week. While we understand that, as a supervisory matter, the Federal Reserve would like a bank holding company to be able to defer interest payments on relatively short notice, we believe that the Proposed Rule's one business week notice period is too short a period of time to provide adequate notice of a deferral to investors. Because of the way most trust preferred documents are currently structured, this notice will generally go to the trustee under the indenture, which is then obligated to inform the property trustee under the trust agreement, which in turn must notify the holders of the preferred securities themselves. Therefore, the practical result of the Proposed Rule is that the holders of the preferred securities will not get notice until immediately before, or possibly after, the relevant interest payment date.

We believe that the notice period that an issuer must provide before entering into a deferral period should be 15-20 days before the next succeeding interest payment date, or several business days prior to any relevant record date (which is typically 15 days prior to the interest payment date). By increasing the notice period from one week to 15-20 days prior to the relevant interest payment date, there will be sufficient time for the issuers and their trustees to notify the record holders that the payment is being deferred, and therefore allow the holders to make the decisions necessary to account for or otherwise absorb any loss associated with the missed interest payment. We believe this additional period of time to be brief enough so as not to compromise the ability of the appropriate regulatory authority to effectively supervise the relevant bank holding company.

3. Clarification of Elements of the Proposed Rule

In the final rule, we ask that the Federal Reserve confirm or clarify the following elements in the Proposed Rule:

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a) *Content of Subordination*

The Proposed Rule states that the note underlying the trust preferred securities must comply with the Federal Reserve's subordinated debt policy statement set forth in 12 C.F.R. § 250.166. This policy statement provides, *inter alia*, that subordinated debt must be subordinated in right of payment to the claims of the issuer's general creditors. The vast majority of indentures currently in the market exclude trade accounts payable and other accrued liabilities arising in the ordinary course of business from the definition of "senior debt." This exclusion supports the treatment of these securities as debt for tax purposes, and we understand that the Federal Reserve has concurred with this exception to the requirements of the subordinated debt policy statement. Therefore, please confirm this historical position that trade accounts payable and other accrued liabilities arising in the ordinary course of business may be excluded from debt as to which the trust preferred securities are subordinate.

Further, please confirm the Federal Reserve's position that other trust preferred securities issued by a bank holding company may also be excluded from debt as to which the trust preferred securities being issued are subordinate.

b) *Nonpayment as an Acceleration Event*

Under the Proposed Rule, a deferral of interest that continues for more than 20 consecutive quarters may constitute an acceleration event, in essence becoming a permissible deviation from the Federal Reserve's subordinated debt policy statement. In order to prevent the technical avoidance by an issuer of such an acceleration event by deliberately failing to affirmatively elect to enter into an interest deferral period yet fail to make scheduled interest payments, we suggest revising the acceleration event to refer to nonpayment (for any reason) for more than 20 consecutive quarters.

c) *Bankruptcy of the Trust as an Acceleration Event*

Under the Proposed Rule, events of default that can lead to an acceleration of the entire outstanding amount of the securities are limited to those permitted for tier 2 subordinated debt, as provided in the Federal Reserve's subordinated debt policy statement (i.e., bankruptcy of the bank holding company) or following deferral for 20 or more consecutive quarters. In most indentures, there is a provision for an event of default in the circumstance in which the trust goes into bankruptcy or is dissolved, but the notes are not redeemed or otherwise distributed to the holders of the trust preferred securities. **An** example of such a circumstance would be if there is a judgment against the trust for an amount greater than the trust's assets, and the creditors put the trust into bankruptcy and attach the sole asset of the trust, which is the subordinated note of the holding company. Prior to the Proposed Rule, this event of default would give the holders the right to accelerate the note. We believe the Federal Reserve should include this event of default as an acceleration event so that the holders of the preferred securities would have a fair claim on the assets of the trust. It is also worth noting that in SR 92-37, a clarification of the Federal Reserve's subordinated debt policy statement, the Federal Reserve stated that a provision in a

subordinated debt instrument that permits acceleration in the event a major bank subsidiary (and not just the holding company) enters into receivership would be acceptable.

d) *Entering into an Interest Deferral Period upon the Occurrence of an Event of Default*

The definition of trust preferred securities in the Proposed Rule provides, among other things, that qualifying securities must allow for dividends to be deferred for at least 20 consecutive quarters without an event of default (section II.A.1.c.iv. of Part II of Appendix A to Part 225). We wish to point out that, in our experience, indentures typically provide that an issuer may not enter into a deferral period so long as an event of default has occurred and is continuing. This provision has been in documents that the Federal Reserve and Federal Reserve Banks have reviewed and determined qualify as Tier 1 capital. We believe this approval was granted, in part, because prior to the Proposed Rule, *any* event of default could give rise to an acceleration. Therefore, this language prevented an issuer from going into a deferral period if the holders had a right to accelerate the entire principal amount of the note. Since the Proposed Rule limits the events of default that can lead to an acceleration, we believe that this language should be permissible so long as it is limited to those events of default that could give rise to acceleration (this will only be in the limited circumstances of a bankruptcy event or following deferral for 20 or more consecutive quarters). Therefore, we request that the Federal Reserve confirm in the final rule that the indenture for the related subordinated debt may prohibit an issuer from entering into an interest deferral period if there exists and is continuing an event of default that could give rise to acceleration.

e) *Netting of Goodwill for New Quantitative Limit*

The Proposed Rule states that the restricted core capital elements that may be included in tier 1 capital must not exceed 25% of the sum of all core capital elements, including restricted core capital elements, net of goodwill. Please clarify in the Final Rule that only goodwill is netted out, and not other intangible assets such as core deposit intangibles or deferred taxes.

4. Extension of Grandfathering Date

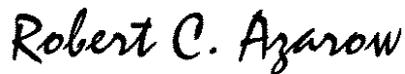
The Proposed Rule states that trust preferred securities issued before May 31, 2004 that do not comply with 12 C.F.R. § 250.166 will not, by that fact alone, be ineligible to qualify as tier 1 capital. Because of the several items needing clarification in the Proposed Rule with respect to the subordination and acceleration provisions, we respectfully ask the Federal Reserve to extend the grandfathering date for noncompliance to a date that is at least 30 days after the adoption of the final rule. In working on trust preferred transactions that have closed since the publication of the Proposed Rule, we have made changes to our underlying documents to comply with the Proposed Rule, and we have consulted with the Federal Reserve whenever we felt a provision was ambiguous or not otherwise addressed. However, we cannot be certain that the changes we have made will be accurately reflected in any final rule.

Further, in our experience the majority of indentures in trust preferred transactions contain certain provisions that may not be in technical compliance with some of the qualitative standards in the Proposed Rule. Two of these provisions (which are discussed in greater detail above) are (1) a notice period for an interest deferral period that is longer than the notice period required in the Proposed Rule and (2) the provision that an issuer may not enter into an interest deferral period if an event of default exists (which may include events of default which, under the Proposed Rule, may not be grounds for acceleration). We respectfully ask the Federal Reserve to grandfather in the final rule any indentures that contain these types of provisions and that the new qualitative provisions be applied solely on a prospective basis.

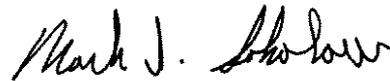
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We hope the comments set forth herein are helpful in your efforts to clarify the Proposed Rule and provide some insight into some current market standard terms in many of today's existing trust preferred documents. We would be pleased to discuss these comments in greater detail at your convenience. Please call one of the undersigned at (212) 912-7400 if you have any questions regarding the foregoing.

Very truly yours:



Robert C. Azarow



Mark I. Sokolow