February 28, 2011

Via Electronic Mail

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Docket No. R–1402; RIN No. 7100–AD62

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW,
Washington, DC 20429

RIN 3064-AD58

Office of the Comptroller of the Currency
250 E Street, SW.
Mail Stop 2–3
Washington, DC 20219

Docket ID OCC–2010–0009

Re: Notice of Proposed Rulemaking on Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor

Ladies and Gentlemen:

The Toronto-Dominion Bank ("TD Bank") and TD Bank, N.A., Wilmington, Delaware ("TD Bank NA") (collectively "TD") appreciate this opportunity to provide comments to the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") (collectively "the Agencies") on certain aspects of the joint interagency notice of proposed rulemaking ("the proposed rule" or "the proposal") to amend (i) the advanced risk-based capital adequacy standards to be consistent with certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("D-F Act")[1]; and (ii) the general risk-based capital rules to provide limited flexibility consistent with section 171(b) of the D-F Act regarding recognition of the relative risk of certain assets generally not held by depository institutions.

[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

TD Bank is a chartered bank subject to the provisions of the *Bank Act* (Canada) and is the second largest banking organization in Canada with total consolidated assets of approximately C$ 619 billion, as of October 31, 2010. TD Bank also is a financial holding company ("FHC") pursuant to the Bank Holding Company Act of 1956, as amended ("BHCA"). Its US intermediate holding company, TD Bank US Holding Company, headquartered in Portland, Maine, is the 14th largest bank holding company ("BHC") in the United States, with total consolidated assets of $178 billion held primarily through its two US subsidiary insured depository institutions: TD Bank NA and TD Bank USA, National Association, Portland, Maine ("TD Bank USA"). TD Bank is subject to the Basel II Capital Accord as implemented and applied by its home country supervisor, the Office of the Superintendent of Financial Institutions Canada ("OSFI"). TD Bank US Holding Company, by virtue of having more than $10 billion in foreign exposure as of December 31, 2009, is in the process of qualifying both TD Bank NA and TD Bank USA for the US Basel II-Advanced framework.

In their proposal, the Agencies seek comment on four specific issues:

- how the proposed rule's imposition of a Basel I capital floor should be applied to foreign (i.e., non-US) banks in evaluating their capital equivalency in the context of applications to establish branches or make bank or nonbank acquisitions in the United States, and in evaluating capital comparability in the context of a foreign bank's FHC declarations;
- how replacing the 3-year transitional sliding scale floors tied to Basel I with a permanent floor will affect banking organizations that are subject to the US Basel II advanced approaches rules;
- whether the proposal provides the Federal Reserve with sufficient flexibility to satisfy the requirement of section 171 of the D-F Act (the "Collins Amendment") to establish bank-level capital as a floor when imposing capital requirements on systemically important non-bank financial institutions and thrift holding companies that hold assets not recognized under bank-level capital requirements; and
- the appropriate method of conducting a quantitative analysis of the likely effect on capital requirements that future amendments to the capital rules may have, to ensure that any new capital framework is not quantitatively lower than the requirements in effect as of the date of enactment of the D-F Act.

TD has focused its comments below on what it believes to be the compelling reasons why the proposed rule's capital floor should not be applied to foreign banks like TD Bank. However, TD also wishes to express its support for the Agencies' proposal to perform a quantitative analysis of any future amendments to the capital requirements to ensure that they meet the "not quantitatively lower" standard of Section 171(b)(2) of the D-F Act and thus avoid the need for banking organizations to calculate capital under two sets of "generally applicable" capital requirements.[2] In addition, TD believes that, similar to the approach proposed for the generally applicable risk-based capital requirement floor, the quantitative analysis should be based on a

[2] Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor, 75 Fed. Reg. 82,318, 82,320 (Dec. 30, 2010).

comparison of the overall ratio results rather than an item-by-item comparison of the capital requirements when determining whether proposed future changes meet Section 171(b)(2)'s "not quantitatively lower" standard. Any other approach would be both unnecessarily restrictive and burdensome.

Applicability of Basel I Floor to Foreign Banking Organizations

Summary

TD strongly opposes any application of a Collins Amendment-type Basel I capital floor extraterritorially on foreign banks as part of the capital equivalency and capital comparability determinations made by the Federal Reserve in the context of various applications and FHC declarations. As discussed more fully below, TD believes doing so would represent a significant departure from longstanding Federal Reserve policy, is not required by existing statutory capital equivalency requirements, would be directly contrary to the language and intent of the Collins Amendment, would represent a significant extraterritorial application of US laws and policies, and is not necessary or appropriate as a policy matter. Moreover, TD believes such an approach would be particularly inappropriate and unnecessary in the case of a foreign banking organization like TD Bank which controls one or more US depository institutions through an intermediate US bank holding company that, as a result of the Collins Amendment, will also have to satisfy fully all applicable US regulatory capital requirements.

Fundamental Reversal of Longstanding Policy

In 1991 Congress instructed the Federal Reserve and the Treasury to perform a study that, among other things, required the establishment of guidelines that the Federal Reserve could follow in converting data on foreign bank capital to the equivalent risk-based capital and leverage requirements for US banks for purposes of determining whether a foreign bank's capital was equivalent to that of US banks in the context of approving applications under the International Banking Act of 1978 ("IBA")and BHCA.[3]

As the proposed rule recognizes, since 1992, the Federal Reserve has relied on the guidelines developed in that study: "The [Federal Reserve] has been making capital equivalency findings for foreign banks under the International Banking Act and the Bank Holding Company Act since 1992 pursuant to guidelines developed as part of a joint study by the [Federal Reserve] and Treasury on capital equivalency."[4] A central tenet of the 1992 joint study, and one which the Federal Reserve has consistently applied with respect to assessing the capital adequacy of foreign banking organizations in connection with applications (both before and after the study was released), is that "capital ratios should be equivalent, but not necessarily identical."[5]

[3] Foreign Bank Supervision Enhancement Act, Pub. L. No. 102-242, § 214(b), 105 Stat. 2286 (1991) (codified at 12 U.S.C. § 3105(j)).
[4] 75 Fed. Reg. at 82,319.
[5] Board of Governors of the Federal Reserve System and Secretary of the Department of the Treasury, Capital Equivalency Report 3 (June 19, 1992) ("1992 Capital Equivalency Report").

In accepting this approach, the Federal Reserve and Treasury understood that in countries that subscribe to the general risk-based capital framework of the Basel capital framework, variations in the financial markets, types of financial instruments and applicable accounting practices can and often do produce differences in the actual capital calculations. However, they concluded that those differences "do not necessarily have a substantive effect on overall safety and soundness" because all of the entities are "implementing uniformly the [Basel] minimum capital ratios of four percent Tier 1 capital and eight percent total capital in relation to total risk-weighted assets."[6] Also, accepting these variations was considered reasonable and necessary in achieving the broader policy goal of achieving international convergence of capital standards.[7]

Accordingly, as long as a foreign banking organization is from a country that subscribes to the international capital standards, the Federal Reserve has not sought strict application of US capital requirements to foreign banking organizations. Instead, US policy has been to defer to the home country approach to implementing the international standard. As summarized by a knowledgeable staff member of the Federal Reserve – "In the future, when determining whether a foreign bank's capital meets the minimum standard, as an initial requirement, applicants from countries that adhere to the [Basel] Accord will be required, at a minimum, to meet the [Basel] guidelines as administered by their home country supervisors."[8] This policy was essentially reaffirmed by the Federal Reserve in 2001, and has remained in place since then.[9]

Reversing this longstanding and prudent policy of deferring to home country capital requirements in order to apply a Collins Amendment-type Basel I capital floor to foreign banks operating under the internationally agreed-upon Basel II regime would represent an unnecessary and unjustified extraterritorial application of US standards. It also would threaten to undercut a fundamental premise of the Basel capital framework as well as the basic notion of international comity that has long been an important feature of Federal Reserve policy.

Contrary to Language and Intent of Collins Amendment

Far from being required by the Collins Amendment, application of a Basel I floor to foreign banks would actually be inconsistent with its express language and intent. Section 171(b)(3) explicitly states that a "depository institution holding company" subject to the Collins

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[6] Id. at 2, 3. Of course, at the time of the Report, the global standard was what is now referred to as "Basel I." However, the same principles apply now that the global standard has become Basel II. 75 Fed. Reg. at 82,319 ("For foreign banks that have begun operating under the New Accord's capital standards in making capital equivalency determinations, the Board has evaluated the capital of the foreign bank as reported in compliance with the New Accord, while also taking into account a range of factors including compliance with the New Accord's capital requirement floors linked to Basel I, where applicable.").

[7] 1992 Capital Equivalency Report at 3 ("A fundamental premise of the [Basel] Accord is the acceptance of such differences in order to advance the international convergence of capital standards.").

[8] Ann E. Misback, The Foreign Bank Supervision Enhancement Act of 1991, 79 Fed. Res. Bull. 1, 4 (Jan. 1993) (emphasis added).

[9] For example, in 2000-2001, the Federal Reserve initially proposed and later abandoned applying a 3 percent leverage ratio requirement for foreign banks as part of the "well-capitalized" standards required to become a FHC. 65 Fed. Reg. 3785 (Jan. 25, 2000); 66 Fed. Reg. 400 (Jan. 3, 2001). In abandoning a leverage ratio test, the Federal Reserve observed that "home country supervisors of most foreign banks do not require a bank to meet or manage toward any specific leverage ratio and generally do not take it into account in the consolidated supervision of the bank." 66 Fed. Reg. at 408.

Amendment's capital requirements includes US bank holding companies, including those owned by a foreign banking organization, but explicitly excludes the parent foreign banking organization. When Congress has specifically stated that a unique US capital requirement, which has not generally been adopted by other countries under Basel, applies to the US bank holding companies (therefore including intermediate US bank holding companies owned by foreign banks) but not to the parent foreign bank, TD respectfully submits that the Federal Reserve should not apply its capital equivalency policy in a manner that would result in those unique US capital requirements being applied to foreign banks in direct contradiction to the statute imposing the requirement in the first place. And, if the Federal Reserve has not in the past applied to foreign banks US requirements that differ from Basel standards (e.g., the 3 percent leverage ratio discussed above) when there was no explicit statute preventing it from doing so, TD certainly does not see the rationale for applying such a requirement when the statute explicitly states that it should not apply to foreign banks.

No Compelling Policy Reason

Failure to mandate imposition of a permanent Basel I floor on foreign banks would not result in significant competitive inequalities. As described above, for nearly 20 years, the Federal Reserve has consistently avoided a literal approach to its evaluations of foreign bank capital, recognizing that it need only be found to be "equivalent" or "comparable," not identical. Moreover, given the significant recent developments in global capital standards—including the much more stringent quantitative and qualitative standards contained in the only just-finalized Basel III framework—it would seem particularly inappropriate for the Federal Reserve to choose this time to abandon its longstanding policy of deferring to home country capital regimes. Finally, TD notes that disclosures regarding the details of regulatory capital requirements have become much more robust since the 1992 study, and will be made even more so under the Basel III Pillar 3 components. Accordingly, the Federal Reserve should have more than enough information available to it to be able to identify and address on a case-by-case basis any unusual situations in which fundamental differences between home country and US capital regimes produce material deviations that could in fact result in significant competitive advantages.

Accommodation for Foreign Banking Organizations That Have a US Holding Company That Complies with US Capital Requirements

For the reasons discussed above, TD believes that the proposed Basel I capital floor contemplated by the Agencies in the proposal should not be applied extraterritorially to any foreign banks, regardless of whether they operate in the United States through US bank subsidiaries or only through direct branches and agencies. However, if the Agencies were to conclude otherwise, TD strongly urges that an accommodation should be made for those foreign banking organizations like TD Bank that operate in the United States through a US BHC subsidiary that will fully comply with US regulatory capital requirements.

By way of background, contemporaneously with the release of its final rule implementing the FHC provisions of the Gramm-Leach-Bliley Act, the Federal Reserve issued Supervision and Regulation ("SR") Letter 01-1 addressing the applicability of its capital adequacy standards to

top-tier US BHCs owned by foreign banking organizations.[10] The SR Letter explained that the Federal Reserve was forgoing its "longstanding practice" of applying its capital adequacy standards to the top tier US BHC in cases where the top tier US BHC is owned by a foreign FHC that meets the Federal Reserve's "well capitalized" standard.[11] In other words, since January 2001, the Federal Reserve has taken the position that a foreign FHC subject to home country capital standards that are equivalent but not necessarily identical to US standards provides a sufficient source of strength for the entire banking organization, including its US depository institutions, making it unnecessary to require the US BHC itself to comply with the regulatory capital requirements applicable to other US BHCs.

The Collins Amendment to the D-F Act requires all US bank holding companies to meet bank-like regulatory capital requirements, thus effectively overriding the SR-01-1 exemption.[12] Thus, even a foreign FHC like TD Bank that has been specifically found by the Federal Reserve to be well-capitalized must now ensure that its US intermediate BHC itself maintains sufficient capital to comply with US capital requirements. In light of the Collins Amendment's focus on ensuring sufficient stand-alone capital at the intermediate US holding company level, it would be ironic indeed for the Federal Reserve now to reverse its longstanding policy and require a well-capitalized FHC parent like TD Bank not only to meet US well-capitalized requirements calculated under home country capital standards, but also to meet each detail of the actual US standards, when applying to expand its banking or nonbanking operations in the United States, especially when the expansion takes place through the US holding company. This is particularly true when the foreign FHC is from a country like Canada which has a history of conservative capital requirements and strong prudential regulation and whose financial institutions emerged relatively unscathed from the recent financial crisis.

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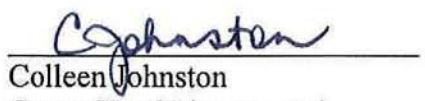
[10] Application of the Board's Capital Adequacy Guidelines to Bank Holding Companies owned by Foreign Banking Organizations, SR Letter 01-1 (SUP) from Richard Spillenkothen (Jan. 5, 2001).

[11] Id. ("Thus, as a general matter, a U.S. BHC that is owned and controlled by a foreign bank that is an FHC that the Board has determined to be well-capitalized and well-managed will not be required to comply with the Board's capital adequacy guidelines.").

[12] Section 171(b)(4)(E) of the D-F Act gives intermediate US holding companies owned by foreign FHCs until July 21, 2015 to comply with those requirements. In addition, Section 174(b) of the D-F Act directs the Government Accountability Office, in consultation with the Agencies, to conduct a study of capital requirements applicable to those intermediate US holding companies.

TD appreciates this opportunity to share its views on the proposal with the Agencies. Please feel free to contact either Colleen Johnston at 416-308-8279 or Stephen J. Boyle at 856-874-2409 if you have any questions about this submission or if we can be of any further assistance.

Respectfully submitted,



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