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Via email (regs.comments@federalreserve.gov)

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

RE: Proposal for New Regulatory Capital Requirements for SLHCs
Docket No. R-1430; RIN No. 7100-AD87

Board of Governors:

On behalf of Stinson Morrison Hecker LLP ("SMH"), I write to comment on the joint notice of proposed rulemaking (the "NPR") originally released on June 7, 2012[1] by the Board of Governors of the Federal Reserve (the "Board") and other federal bank regulators, for comments to be submitted by September 7, 2012. By a press release dated August 8, 2012, the Board announced the extension of the comment period to October 22, 2012.

Our comments are specific to the effective date for the Board's proposed regulatory capital requirements for savings and loan holdings companies ("SLHCs"). SMH represents SLHCs throughout the Midwest and nationally. The effective date for the Board's proposed regulatory capital requirements for SLHCs will have a material impact upon our clients and other SLHCs.

Our comments are divided into three sections. First, we analyze the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") provisions that provide for a July 21, 2015 effective date for SLHC capital regulations. Second, we explain why making SLHC capital regulations effective on July 21, 2015 does not conflict with the Board's commitments to begin implementation of Basel III on January 1, 2013. Third, we discuss the policy reasons why the Board should exercise regulatory discretion to make the SLHC regulatory capital requirements effective on July 21, 2015.

[1] Bd. of Governors of the Fed. Reserve Sys. et al., Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum Regulatory Capital Ratios, Capital Adequacy, Transition Provisions, and Prompt Corrective Action [hereinafter Regulatory Capital], http://federalregister.gov/a/2012-16757 (proposed rule to be published in the Federal Register on Aug. 30, 2012).

I. Congress intended that SLHCs become subject to regulatory capital requirements on July 21, 2015.

Historically, bank holding companies ("BHCs") have been subject to uniform regulatory capital requirements, while the capital adequacy of SLHCs (which may engage in a broader range of activities than BHCs) have been addressed on an institution-specific basis. The Dodd-Frank Act made significant changes in the regulation of SLHCs, including transferring, as of July 21, 2011, regulation of SLHCs from the Office of Thrift Supervision (the "OTS") to the Board[2] and, for the first time, requiring the Board to issue consolidated capital requirements for SLHCs.

Capital Requirements for BHCs and SLHCs. Section 616 of the Dodd-Frank Act authorized (but did not require) the Board to issue "regulations and orders relating to the capital requirements" for SLHCs and BHCs.[3] While Section 616 provides for the development of countercyclical capital requirements for both types of holding companies, it does not require the Board to adopt the same capital requirements for BHCs and SLHCs, nor does it dictate any content or impose any deadlines for such capital requirements. If Congress intended for the Board to apply the same capital requirements for SLHCs and BHCs, it could clearly have said so, but it did not. Instead, Congress gave the Board broad discretion to promulgate different capital requirements for SLHCs (subject only to a uniform floor). The NPR, however, would apply the same capital requirements to SLHCs and BHCs beginning on January 1, 2013.

Collins Amendment. Section 171 of the Dodd-Frank Act (the "Collins Amendment") requires the Board to establish minimum leverage and risk-based capital requirements for both BHCs and SLHCs. These minimum standards establish a common floor for capital requirements that is to be no less stringent than the capital requirements in effect for insured depository institutions on July 21, 2010.

The Collins Amendment also includes an important and explicit five-year deferral of the effective date for such minimum regulatory capital requirements for SLHCs (the "Collins SLHC Deferral Period"):

> For any depository institution holding company that was not supervised by the Board of Governors as of May 19, 2010, the requirements of this section, except as set forth in subparagraph (A) and (B), **shall be effective 5 years after July 21, 2010**.[4]

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[2] Dodd-Frank Act § 312(b)(1), 12 U.S.C. § 5412(b)(1) (Supp. 2012).

[3] 12 U.S.C. § 1844(b) (Supp. 2012); 12 U.S.C. § 1467a(g)(1) (Supp. 2012).

[4] Dodd-Frank Act § 171(b)(4)(D), 12 U.S.C. § 5371(b)(4)(D) (Supp. 2012) (emphasis added). The "except as set forth in subparagraph (A)" clause in the Collins SLHC Deferral Period prevents SLHCs from issuing trust preferred securities during the period May 19, 2010 through July 20, 2015. Without such clause, the "requirements of this section" would not be effective for SLHCs until July 21, 2015, arguably moving the May 19, 2010 cut-off date – just for SLHCs – to July 21, 2015. With such clause, the May 19, 2010 cut-off date for trust preferred securities is immediately applicable to both BHCs and SLHCs.

The "except as set forth in subparagraph . . . (B)" clause in the Collins SLHC Deferral Period refers to the three year phase-in deduction period for grandfathered trust preferred securities that were issued by

The purpose of the Collins SLHC Deferral Period is self-evident: it is a transition period for SLHCs for which uniform, quantitative capital requirements are a new phenomenon. The proposal in the NPR to make the uniform regulatory capital requirements effective for SLHCs beginning on January 1, 2013, is inconsistent with the Collins SLHC Deferral Period.

Interpretation of Dodd-Frank Act. Since the Collins Amendment explicitly defers the effective date of minimum regulatory capital requirements for SLHCs, Congress did not expect the Board to issue SLHC regulatory capital requirements that become effective during the deferral period. Dodd-Frank Act § 616(b) authorizes the Board to issue regulations and orders relating to capital requirements for SLHCs. It was passed at the same time as the Collins SLHC Deferral Period. Two provisions from the same statute can and should be consistently construed and both given effect. If there is any question or inconsistency, then the more specific statutory directive regarding the effective date of the regulations controls the more general grant of authority to issue the regulations.[5] Congress gave the Board regulatory authority to issue SLHC capital regulations, and in the Collins Amendment directed the Board when to use that general regulatory authority. Construing Dodd-Frank Act § 616(b) to give the Board authority to issue capital requirements for SLHCs that become effective on January 1, 2013, would render Dodd-Frank Act § 171(b)(4)(D) inoperative and effectively superfluous.[6]

Five Year Deferral for Foreign-Owned BHCs. Applying the Collins SLHC Deferral Period to all new capital requirements for SLHCs would be consistent with the Board's application of the other five-year deferral period in the Collins Amendment. Immediately following the Collins SLHC Deferral Period provisions, subparagraph (E) of Section 171(b)(4) establishes another five-year deferral period for certain BHC subsidiaries of foreign banking corporations.[7] The statutory language "shall be effective 5 years after July 21, 2010" in subparagraph (E) is identical to the language in subparagraph (D) immediately preceding it. In the NPR, the Board proposed "consistent with the Dodd-Frank Act" to make the new capital requirements for BHC subsidiaries of foreign corporations effective on July 21, 2015.[8] Even though the

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depository institution holding companies before May 19, 2010. Without such clause, the "requirements of this section" would not be effective for SLHCs until July 21, 2015, which would arguably start a three-year phase-in deduction period – just for SLHCs – beginning on July 21, 2015. With such clause, there is just one three-year phase-in deduction period that begins for both BHCs and SLHCs on January 1, 2013. On July 21, 2015, – 31 months into the three-year phase-in deduction period – SLHCs become subject to consolidated regulatory capital requirements. At that time, SLHCs receive the benefit of the remaining five months of the three year phase-in deduction period. This exception is meaningful since some SLHCs have issued trust preferred securities.

[5] *See, e.g.*, Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 335-36 (2002) (stating that "specific statutory language should control more general language when there is a conflict between the two").

[6] *Cf., e.g.*, Hibbs v. Winn, 542 U.S. 88, 101 (2004) (providing that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

[7] Dodd-Frank Act § 171(b)(4)(E), 12 U.S.C. § 5371(b)(4)(E) (Supp. 2012).

[8] The NPR states that **"[c]onsistent with the Dodd-Frank Act**, a bank holding company subsidiary of a foreign banking organization that is currently relying on the Board's Supervision and Regulation Letter (SR) 01-1 would not be required to comply with the proposed capital requirements under any of these NPRs **until July 21, 2015**." Regulatory Capital, *supra* note 1, at 16 n.9 (emphasis added).

related statutory language is the same for SLHCs, the NPR did not include the same five year deferral of the effective date for SLHC capital requirements, and contained no reference to Section 171(b)(4)(D). It is unclear whether this inconsistency was intentional or a mere oversight. In either case, SLHCs expect the Board to construe the Collins SLHC Deferral Period the same as it has construed the five-year deferral period for BHC subsidiaries of foreign banking organizations. Common statutory language dictates common regulatory treatment.

Specific Date for SLHC Capital Requirements. Congress set a specific date *on which* the requirements of Section 171 would become effective for SLHCs. If Congress had intended to establish an outside date *by which* such requirements would become effective, subparagraph (D) would have stated that its requirements "shall be effective *within* five years after . . ." or "shall be effective *not later than* five years after . . . ." The Board and other banking regulators recently construed the words "*shall be effective* two years following the date on which this Act is effective" in Dodd-Frank Act Section 716 to mean "*shall become effective on* that date."[9]

II. The Collins SLHC Deferral Period does not conflict with international commitments by United States financial regulators to implement Basel III capital requirements for large, internationally active banking groups beginning on January 1, 2013.

We acknowledge the desire of federal banking regulators to begin implementing the Basel III capital requirements on January 1, 2013. Basel III, however, was drafted to apply only to complex, internationally active banks and their holding companies that are the parent entity within a banking group.[10] Under current United States rules, this includes banking groups with consolidated total assets of $250 billion or more or consolidated on-balance sheet total foreign exposure of $10 billion or more.[11] The Basel III standards were not developed to apply to smaller banks and thrifts or their holding companies. Accordingly, the proposed capital requirements, insofar as they cover U.S. banking organizations that are not internationally active, are not subject to any Basel III deadlines or effective dates.

SLHCs, on the whole, are not large internationally active financial institutions, and many are primarily engaged in businesses other than banking (including retail,

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[9] Dodd-Frank Act Section 716(h) states that the prohibition on bailouts of SWAP entities "shall be effective 2 years following the date on which this Act is effective." *See* Dodd-Frank Act § 716(h), 15 U.S.C. § 8305(h) (Supp. 2012). When the Board and other federal banking regulators recently issued guidance on the effective date of this prohibition, they stated "section 716 specifically adopts an effective date that is 2 years following the effective date of [the Act]." 77 Fed Reg. 27456, 27457 (May 10, 2012).

[10] *See* BASEL COMMITTEE ON BANKING SUPERVISION, BANK FOR INTERNATIONAL SETTLEMENTS, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS 11 (December 2010, rev. June 2011), *available at* http://www.bis.org/publ/bcbs189.pdf (cross-referencing the scope of Basel II); BASEL COMMITTEE ON BANKING SUPERVISION, BANK FOR INTERNATIONAL SETTLEMENTS, BASEL II: INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS 7 (June 2006), *available at* http://www.bis.org/publ/bcbs128.pdf (scope of Basel II covers internationally active banks and holding companies of groups that engage predominantly in banking activities).

[11] *See* 12 C.F.R. Part 225, App. G, § I.1(b)(1).

manufacturing and insurance). Only about a dozen savings and loans have assets greater than $15 billion, and only a handful of savings and loans have assets greater than $50 billion. In our opinion, no SLHC presents any serious risk to the international banking system.

Basel III Not Required for SLHCs. Nowhere in the Dodd-Frank Act did Congress direct the Federal Reserve to apply Basel III capital requirements to SLHCs. The only place that Congress expressly directed the Federal Reserve to promulgate minimum capital requirements for SLHCs was in the Collins Amendment. The Collins Amendment directed the Board to apply the regulatory capital rules *then in effect* for banks to BHCs and SLHCs. If the final regulation imposes the Basel III capital requirements on SLHCs beginning January 1, 2013, then SLHCs would be required to meet such capital requirements two years sooner than contemplated by the Collins Amendment, effectively rendering the Collins SLHC Deferral Period meaningless.[12] We believe the Collins Amendment evidences a different Congressional intent and timetable for SLHCs.

We do not believe there is any conflict between Basel III and the Collins Amendment because Basel III was never intended to apply to small, non-internationally active SLHCs. If the Board sees a conflict between its Basel III commitments and the Collins SLHC Deferral Period, then the express intent of Congress regarding the effective date for SLHC capital requirements should control.

III. Even if the Collins SLHC Deferral Period had not been included in the Dodd-Frank Act, the Board should exercise regulatory discretion to defer the effective date for SLHC capital requirements until July 21, 2015.

We ask the Board to also consider the substantial burden placed upon SLHCs of complying for the first time with complex regulatory capital requirements without significant lead time. The proposed regulatory capital requirements would require some SLHCs to significantly change their capital structure and balance sheets. Changes of this magnitude require thoughtful planning and should not be made hastily.

Reasonable Notice of SLHC Capital Requirements. SLHCs should be given a reasonable amount of time after final regulations are issued to plan for compliance with such capital requirements, as the Board did for BHCs. The Board issued final consolidated risk-based capital guidelines for BHCs on January 18, 1989.[13] The transition provision for such capital requirements, however, did not begin for BHCs until December 31, 1990,[14] nearly two full years later. SLHCs should receive the same

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[12] *See supra* text accompanying notes 6-7.

[13] 54 Fed. Reg. 4186, 4186 (January 27, 1989). The final risk-based capital guidelines for BHCs were the culmination of a five-year process of proposed and modified capital regulations. *See id.* First in 1986 and again in 1987, the Board issued for public comment risk-based capital proposals applicable to BHCs. On March 1, 1988, the Board issued a revised risk-based capital framework that incorporated the Basel I capital requirements. After still further modifications to its March 1988 proposal, the Board issued final risk-based capital guidelines for BHCs on January 27, 1989, which provided that BHCs were not required to meet the interim capital ratios until December 31, 1990. *Id.*

[14] *Id.* at 4186.

reasonable advance notice and lead time for new and more complex risk-based capital requirements as the Board previously gave to BHCs. Accordingly, we would ask the Board to exercise regulatory discretion and defer the effective date of all capital requirements for SLHCs until July 21, 2015.

Disruption of Business Plans. The SLHC industry has generally believed that the Collins Amendment deferred the effective date for all SLHC regulatory capital requirements for five years.[15] SLHCs have relied upon the Collins SLHC Deferral Period in their communications and representations to their shareholders, creditors and contractual counterparties. Many SLHCs are public companies that may suffer due to uncertainty regarding the timing and effect of the SLHC capital requirements. Suddenly becoming subject to consolidated regulatory capital requirements may require the public SLHCs to decrease or eliminate expected dividends and share repurchases, scale back plans for expansion and job growth, reconsider beneficial acquisitions that create GAAP goodwill and otherwise modify their strategic plans.

Imposing new regulatory capital requirements on SLHCs, with no meaningful prior notice, would be unfair and highly disruptive, and would exacerbate the financial challenges that SLHCs already face. We ask the Board to conclude as a matter of policy that the adverse consequences of applying the proposed capital regulations to SLHCs beginning on January 1, 2013 greatly exceed the benefits of doing so.

Conclusion

For all the foregoing reasons, we ask that the Board adopt July 21, 2015, as the effective date for all new SLHC capital requirements. We appreciate the Board's consideration of these comments. If you have questions regarding these comments, please contact Mike Lochmann at 816-691-3208 or mlochmann@stinson.com.

Sincerely yours,

STINSON MORRISON HECKER LLP

/s/ MIKE W. LOCHMANN

[15] *See, e.g.,* Comment letter from Joseph Longino, Principal, Sandler O'Neill + Partners, L.P. to Jennifer J. Johnson, Secretary, Bd. of Governors of the Fed. Reserve Sys., Re: Docket No. OP-1416, at 2 (May 23, 2011), *available at* http://www.federalreserve.gov/apps/foia/ViewComments.aspx?doc_id=OP-1416&doc_ver=1