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February 2, 2015

Via Electronic Mail

Mr. Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

RE: Docket No. R-1503 - Application of Enhanced Prudential Standards and Reporting Requirements to General Electric Capital Corporation

Dear Mr. deV. Frierson:

We appreciate the opportunity to comment on the Federal Reserve Board's ("Board") request for public comment on the application of enhanced prudential standards and reporting requirements to General Electric Capital Corporation ("GECC"). On behalf of our client ASB Hawaii, Inc. ("ASBH") and its subsidiary, American Savings Bank, F.S.B., we urge the Board to issue proposed rules clarifying that the assets of intermediate holding company ("IHC") parent companies should not be counted toward computation of the asset size test under the Durbin "small issuer" exemption, as discussed below.

We understand that the Board is soliciting public feedback that would, among other things, "help guide the Board in future application of enhanced prudential standards to other nonbank financial companies" as part of the Board's responsibilities for implementing Section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").¹ We understand the Board's obligations pursuant to Section 165 to establish enhanced prudential standards for nonbank financial companies designated for supervision by the Board and bank holding companies ("BHCs") with total consolidated assets of \$50 billion or more. However, as discussed below, we encourage the Board to continue its development of the IHC rules required under Sections 167 and 626 of the Dodd-Frank Act (collectively, "IHC Provisions")² with an eye toward minimizing the regulatory impact of the so-called Durbin

¹ 79 Fed. Reg. 71768, 71769 (Dec. 3, 2014).

² Section 167 of the Dodd-Frank Act provides, in pertinent part, "the Board of Governors shall require a nonbank financial company supervised by the Board of Governors to establish an intermediate holding company if the Board of Governors makes a determination that the establishment of such intermediate holding company is necessary to—(i) appropriately supervise activities that are determined to be financial in nature or incidental thereto; or (ii) to ensure that supervision by the Board of Governors does not extend to the commercial activities of such nonbank financial company". Section 167(b)(1)(B) of the Dodd-Frank Act, 12 U.S.C. § 5367(b)(1)(B). Similarly, Section 626 of the Dodd-Frank Act provides, in pertinent part, "the Board shall require a grandfathered unitary savings and loan holding company to establish an intermediate holding company if the Board makes a determination that the establishment of such intermediate holding company is necessary—(i) to appropriately supervise activities that are determined to be financial activities; or (ii) to ensure that supervision by the Board does not extend to the activities of such company that are not financial activities." Section 626(b)(1)(B) of the Dodd-Frank Act, 12 U.S.C. § 1467b(b)(1)(B). As noted in the legislative history, Sections 167 and 626 were intended by

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Amendment³ on “grandfathered” unitary savings and loan holding companies (“SLHCs”)⁴ such as Hawaiian Electric Industries, Inc. (“HEI”), the ultimate parent holding company of our client ASBH and its subsidiary, American Savings Bank, F.S.B. a community bank that has less than \$10 billion in assets.

Specifically, we urge the Board, in issuing proposed rules implementing the IHC Provisions, to consider clarifying that the assets of IHC parent companies—i.e., nonfinancial companies such as grandfathered SLHCs that are not subject to limitations on nonfinancial activities and are the ultimate parent companies of banks that otherwise fall under the Durbin “small issuer” exemption—should not be counted toward computation of the asset size test thereunder.

About ASBH and HEI

ASBH (formerly named American Savings Holdings, Inc.) is a subsidiary of HEI, a grandfathered unitary SLHC with total assets of approximately \$10.6 billion as of September 30, 2014 that is subject to supervision by the Board and is permitted to engage in nonfinancial activities under the governing statute for SLHCs, the Home Owners' Loan Act (“HOLA”). The Board became the federal regulator for HEI on July 21, 2011 when authority over SLHCs was transferred to the Board from the Office of Thrift Supervision. HEI's two principal business segments operate exclusively in the State of Hawaii and include: (i) ASBH, an intermediate holding company of ASB, a federally chartered savings bank (“ASB” – total assets of approximately \$5.4 billion as of September 30, 2014), and (ii) Hawaiian Electric Company, Inc., a rate regulated electric utility that provides electricity for approximately 95% of the population of Hawaii (“Hawaiian Electric” – total assets of approximately \$5.2 billion as of September 30, 2014). Hawaiian Electric is regulated under the exclusive jurisdiction of the Hawaii Public Utilities Commission.

Congress to be “applied in harmony,” such that an organization subject to both provisions “will have a single intermediate holding company.” Cong. Record (June 30, 2010), H5226, quoting Financial Services Committee Chairman Barney Frank, “[a]nd just to sum it up, we want regulated some activities and not regulated other activities when you have a hybrid kind of situation, and what the gentleman has described is how you accomplish that.”

³ Section 920 of the Electronic Fund Transfer Act, as added by Section 1075 of the Dodd-Frank Act, i.e., the so-called “Durbin Amendment,” requires that the amount of any interchange fee that an issuer of debit cards receives or charges with respect to an electronic debit transaction be “reasonable and proportional” to the cost incurred by the issuer with respect to the transaction. 15 U.S.C. § 1693o-2. The Durbin Amendment requires the Board to establish standards by regulation for assessing whether the amount of any interchange fee is reasonable and proportional to the cost incurred by the issuer, which the Board has done with the issuance of Regulation II. 15 U.S.C. § 1693o-2(a)(3)(A); 12 C.F.R. Part 235. The interchange fee restriction on the amount that a debit card issuer may receive from or charge to a merchant does *not* apply to “small” issuers that, “together with [their] affiliates,” have assets of less than \$10 billion. 15 U.S.C. § 1693o-2(a)(6); 12 C.F.R. § 235.5(a)(1).

⁴ A “grandfathered unitary savings and loan holding company” refers to a company described in Section 1467a(c)(9)(C) of Title 12 of the United States Code, as added by the Gramm-Leach-Bliley Act. Unlike other SLHCs, grandfathered unitary SLHCs retain their ability to conduct commercial activities consistent with their grandfathered status.

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Board Regulation of Financial Activities vs. Nonfinancial Activities

In our opinion, the application of supervisory and regulatory requirements stemming from the Dodd-Frank Act to the nonfinancial activities of grandfathered unitary SLHCs and other nonfinancial companies that engage in businesses that are entirely dissimilar to traditional banking organizations (e.g., in HEI's case, an electric utility business) was not intended by Congress and would not produce a meaningful result for purposes of the regulation of banking organizations in the U.S. The Board has previously acknowledged the uniqueness of grandfathered unitary SLHCs and treated such SLHCs differently than traditional SLHCs in its final rule implementing the Basel III regulatory capital framework ("Final Capital Rule").⁵ In the Final Capital Rule, the Board temporarily exempted SLHCs substantially engaged in commercial (i.e., nonfinancial) activities while it considers a proposal relating to capital and other requirements for IHCs of SLHCs required under Section 626 of the Dodd-Frank Act.⁶

According to the preamble of the Final Capital Rule, the Board anticipates that it will release a proposal on IHCs in the near term that would specify the criteria for establishing and transferring activities to IHCs and propose to apply the Board's capital requirements to such IHCs.⁷ Consistent with the IHC Provisions of the Dodd-Frank Act, we anticipate that the IHC rules will provide guidance as to when the Board may require nonfinancial companies subject to Board supervision (but not subject to limitations on nonfinancial activities) and grandfathered unitary SLHCs to establish and conduct all or a portion of their permissible financial activities in or through an IHC subsidiary that shall be interposed between the bank and its nonfinancial parent company. While the FRB *may* require reports from the nonfinancial parent company, it may do so *solely* for the purpose of assessing the company's ability to serve as a source of strength to its bank subsidiary and enforce compliance. The IHC Provisions, by design, seem to generally exempt bank parent companies (such as a grandfathered SLHC) engaged in nonfinancial activities from day-to-day bank holding company regulation.

Thus, consistent with the IHC Provisions, we do not see a compelling reason why the nonfinancial assets of these entities should be included in computing asset sizes for purposes of determining the applicability of bank regulatory requirements. We await the upcoming IHC proposal, which we urge the Board to act promptly and steadfastly on and look forward to the opportunity to comment. We believe that the Board is correct in recognizing the view that, for many regulatory purposes, exclusion of the nonbanking business(es) of grandfathered unitary SLHCs is appropriate and aptly focuses oversight on the banking business.

⁵ 78 Fed. Reg. 62018, 62028 (Oct. 11, 2013). See also 77 Fed. Reg. 21637, 12639 (Apr. 11, 2012) (noting that, while promulgating a rule regarding the process for requiring Board supervision of systematically significant nonbank financial companies, other regulatory activities including "the rule regarding the establishment of an intermediate holding company under section 626 of the Dodd-Frank Act . . . [is] in various stages of the rulemaking process.") Fed. Banking L. Rep. Transfer Binder 97-548 (Jan. 1, 2011) (noting that "[t]he FRB has established a working group to consider the issues associated with this authority [to require SLHCs to establish an IHC] and its potential advantages to effective supervision of such grandfathered companies.").

⁶ 78 Fed. Reg. 62018, 62028 (Oct. 11, 2013).

⁷ *Id.*

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As applied to HEI's and ASBH's community bank subsidiary, ASB, the Durbin Amendment's interchange fee restriction that was implemented under Regulation II has cost ASB millions of dollars per year in lost revenue. Specifically, unavailability of the small issuer exemption for ASB due to the inclusion of HEI's nonfinancial assets in the asset determination calculation has cost ASB approximately \$6 million per year in lost revenue and has placed ASB at a significant disadvantage relative to its competitors of comparable size and thus impacts the bank's primary mission of serving its customers and community in Hawaii. As ASB is part of a small and static universe of thrift institutions owned by nonfinancial companies that are grandfathered unitary SLHCs, such punitive effect on a community bank subsidiary of a grandfathered unitary SLHC was clearly not intended by Congress with respect to the small issuer exemption which, as specified in the legislative record, was intended to "not harm local and community banks."⁸

Therefore, we strongly urge the Board to take these concerns under consideration as it works to implement the IHC Provisions. In so doing, the Board should interpret its current regulations, including Regulation I, in a manner that implements the purpose and effect of the small issuer exemption by providing relief as intended to community banks with banking-related assets of less than \$10 billion from the interchange fee restriction, including ASBH's impacted community bank subsidiary in Hawaii.

Conclusion

Finalization and implementation of the IHC rules would provide much-needed clarification and guidance for ASBH and other similarly situated subsidiaries of nonfinancial companies that may become subject to the IHC rules. Such rules should clarify that an IHC established under the IHC Provisions of the Dodd-Frank Act shall generally be deemed to be the top-tier institution for Board supervisory and regulatory purposes, as is proposed to be the case for the application of the enhanced prudential standards and reporting requirements to GECC rather than General Electric Company. Specifically, the IHC rules should clarify that activities conducted outside of the IHC structure, i.e., nonfinancial activities, shall not be included in the assets of the consolidated organization for purposes of Board rules that are triggered by asset thresholds, including but not limited to, Regulation II which implements Section 1075 of the Dodd-Frank Act.

* * *

⁸ Cong. Rec. S3588 (May 12, 2010) (comments of Senator Richard Durbin, also noting "[w]ith a \$10 billion exemption, 99 percent of banks would be exempt. All but the very largest banks in America--the ones that have a controlling interest in establishing interchange fees, might add--99 percent of banks would be exempt." *Id.*

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We appreciate the Board's consideration of our comments and would be pleased to meet with the Board's staff to discuss these issues further. Please feel free to contact me at (202) 551-1272 or vgerardcomizio@paulhastings.com with any questions about the contents of this letter.

Very truly yours,



V. Gerard Comizio
of PAUL HASTINGS LLP

cc: Michelle Stone, SVP, General Counsel, American Savings Bank and ASB Hawaii, Inc.
Beth Whitehead, EVP, Chief Administrative Officer, American Savings Bank and ASB Hawaii, Inc.
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