December 10, 2001

Regulations Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552

Attention: Docket No. 2001-69

Dear Sirs/Mesdames:

E*TRADE Group, Inc. ("E*TRADE"), the savings and loan holding company parent of E*TRADE Bank, appreciates the opportunity to submit its comments on the November 8, 2001 Notice of Proposed Rulemaking ("Notice") by the Office of Thrift Supervision ("OTS") that would clarify the new financial and other non-banking activities in which nonexempt savings and loan holding companies ("SLHCs") may engage following the enactment of the Gramm-Leach-Bliley Act of 1999 ("GLBA").[1]

Overview of E*TRADE Comments

We support the flexible approach taken by the OTS in its proposal that recognizes the differences that exist between financial holding companies ("FHCs") and SLHCs and the statutes and regulations that apply to each type of entity. We agree with the OTS that, unlike FHCs, there is no need for the OTS to require nonexempt SLHCs such as

[1] Because E*TRADE was not an SLHC and did not have an application pending to become an SLHC on or before May 4, 1999, it would constitute a "nonexempt" SLHC that would be subject to this proposed regulation.

E*TRADE to provide notice to the agency after they commence new financial activities. We also believe that the OTS should be able to apply its own supervisory judgment on safety and soundness and other regulatory matters affecting SLHCs rather than being locked into the supervisory determinations of another banking agency such as the Federal Reserve Board ("Fed"). We therefore support inclusion in a final regulation of the OTS' proposed procedures that would allow for deviations from conditions imposed by the Fed in its regulations and orders governing the conduct of financial activities by FHCs. In this regard, we would strongly recommend that the OTS consider making a determination in advance that any condition imposed by the Fed relating to an FHC's regulatory capital would not apply in the SLHC context because SLHCs historically have never been subject to any capital requirements at the holding company level.

Discussion

In the Notice, the OTS proposed that its regulations governing the financial and other nonbanking activities of nonexempt SLHCs incorporate the following principal agency determinations:

- The regulations would not require an SLHC to notify the OTS when it engages in a permissible activity other than an activity that is complementary to a financial activity.
- An SLHC would generally be subject to the same conditions imposed by the Fed on an FHC's conduct of a financial activity; however, the SLHC could deviate from Fed conditions with the prior approval of the OTS.

- An SLHC would be required to provide a detailed notification to the OTS prior to engaging in an activity that is complementary to a financial activity.

E*TRADE's more detailed comments on each of these aspects of the proposed regulations are as follows:

No Notifications for Permissible Activities Other Than Complementary Activities

In the Notice, the OTS explains that it does not believe that any post-commencement financial activity notices should be required because the agency is already able to obtain sufficient information about an SLHC's activities from existing reports and the examination process. E*TRADE is in strong agreement with the OTS' position on this point. In addition to information from periodic reports and examinations, the OTS receives regular communications from many SLHCs such as E*TRADE regarding proposed holding company parent and affiliate activities and the impact, if any, of those planned activities on their subsidiary thrifts. Thus, there is no informational need for or benefit to be gained from the filing of post-commencement notices by nonexempt SLHCs with the OTS. Further bolstering the OTS' position is the fact that, in contrast to FHCs, SLHCs are not statutorily required to file such notices, thus evidencing a congressional intent that SLHC activities continue to be subject to a slightly different regulatory regime.

Fed Conditions Applicable to Financial Activities Conducted by SLHCs

E*TRADE recognizes that in perhaps most instances the OTS would want to impose many if not all of the same restrictions on SLHCs' financial activities that are

made applicable to similar FHC activities by the Fed. Thus, we understand the reasoning behind the OTS' preliminary decision to make SLHCs engaging in financial activities subject to the same Fed conditions.

We also agree, moreover, that it is important for the OTS to preserve the flexibility to waive or deviate from certain Fed-imposed requirements on financial activities by SLHCs. Rather than being statutorily required under Section 4(k) of the Bank Holding Company Act, most of the conditions on FHC activities are likely to be imposed by the Fed in its regulations and orders for safety and soundness reasons. In the exercise of its independent regulatory oversight, the OTS, as well as the holding companies it regulates, should not be locked into the same conditions. Thus, E*TRADE supports the ability of an SLHC, with the approval of the OTS, to have a Fed condition modified or made not applicable to it in the three situations identified by the OTS: (1) where the deviation from a Fed condition is not material; (2) where such a condition does not apply to SLHCs generally; or (3) where an SLHC shows good cause why the condition should not apply to it. [2]

Proposed Section 584.120(b) states that in applying holding company capital limitations with respect to financial activities in Fed regulations and orders, the OTS will interpret Tier 1 capital of an FHC to mean in the SLHC context the holding company's

[2] Instead of the phraseology "the conditions do not apply to SLHCs generally" in proposed Section 584.120(c)(2), we would recommend that the provision state that the conditions *"should not"* apply. Also, we would suggest that the "good cause" showing requirement in proposed Section 584.120(c)(3) be deleted, thereby enabling the OTS to not follow a Fed condition in a particular case whenever it finds that circumstances warrant such a departure. The inclusion of "good cause" language in clause (3) as currently proposed suggests that SLHCs requesting a deviation from a Fed condition under that provision will be held to a higher standard of persuasion, which we do not believe is the OTS' intent here.

GAAP consolidated tangible capital. In footnote 12 of the Notice, the OTS explains that the purpose of this provision is to

> "provide guidance on how SLHCs would comply with the FRB's regulations on merchant banking that limit the aggregate value of certain merchant banking investments to a percentage of the financial holding company's Tier 1 capital."

In E*TRADE's view, the Fed's capital-related limitation on merchant banking activities is the type of condition that should not apply to SLHCs as a general matter because SLHCs are not subject to any regulatory capital requirements. This is a key difference in the way bank holding companies and FHCs, on the one hand, and SLHCs, on the other hand, are regulated and is a significant reason why many financial services companies have chosen to acquire savings associations and be regulated as SLHCs instead of acquiring commercial banks and making themselves subject to regulation by the Fed under the Bank Holding Company Act. Any condition that limits a particular SLHC's financial activities to some percentage of capital has the effect of indirectly imposing a capital requirement on thrift holding companies and, in so doing, reduces a significant regulatory advantage that SLHCs have compared to bank holding companies and FHCs.

As a consequence, while we appreciate the OTS' attempt to accomplish regulatory parity between FHCs and SLHCs by devising an alternative capital measure that would apply to SLHCs engaged in merchant banking activities, we believe that the OTS may want to give serious consideration to a pronouncement in the context of proposed Section 584.120(c)(2) or otherwise that capital-related conditions imposed by

the Fed on FHCs will not be applied to SLHCs. In those situations where the OTS does believe that a capital-related condition should be imposed, E*TRADE would support the agency doing so on a selective case-by-case basis.

Prior Notifications for Complementary Activities by SLHCs

Given that in the two years since the enactment of GLBA the Fed has made no determinations with respect to activities that are complementary to financial activities, and that the federal banking agencies have therefore had very limited experience with these types of activities, we understand why the OTS would want to take an initially cautious approach in situations where a nonexempt SLHC proposes to engage in such complementary activities. In our view, it is eminently reasonable for the OTS to require prior notification for SLHCs proposing to engage in complementary activities until such time as there is greater familiarity with the concept. Once the OTS has a better sense of what constitutes a complementary activity, or should the Fed adopt regulations indicating which activities it deems complementary to financial activities, the OTS may wish to consider whether SLHCs proposing to engage in this third category of financial activities could be made subject to the same rules that apply to the commencement of activities that are financial in nature or are incidental to financial activities.

With respect to the specific notification content requirements in proposed Section 584.130(c), we are in agreement with essentially all of these requirements. Where the Fed has not yet made a determination as to whether a particular proposed activity is complementary to a financial activity, or where the proposed activity varies somewhat from an activity that the Fed has deemed to be complementary, the detailed information

called for in clause (3) of the section to support the SLHC's claim to that effect is entirely appropriate. In those instances where the Fed has already found an activity to be complementary to a financial activity and an SLHC proposes to engage in the same activity in the same manner as the FHC that received approval to engage in the activity, the OTS may wish to consider dispensing with the information called for in clause (3).[3]

Conclusion

In summary, E*TRADE is in general agreement with the tenor and spirit of the OTS' proposed regulations and the OTS' determinations with respect to the three issues discussed above. In our view, the OTS' proposal strikes the proper balance between the interests of nonexempt SLHCs desiring to engage in financial activities and the OTS' legitimate safety and soundness concerns. E*TRADE is hopeful that in the final version of the regulation the OTS will provide additional clarity and across-the-board certainty as to the types of conditions imposed by the Fed on FHCs that would not apply to SLHCs.

Sincerely,

/S/ MITCHELL H. CAPLAN

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[3] Similarly, a simple reference to the FRB approval order may suffice in lieu of the description of the Fed approval currently called for in proposed Section 584.130(c)(2).