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Edward Jones

February 9, 2001

Manager, Dissemination Branch
Information Management Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552

Re: Notice of Proposed Rulemaking: Savings and Loan Holding Companies Notice of Significant Transactions or Activities and OTS Review of Capital Adequacy

Dear Sir or Madam:

These comments are submitted to the Office of Thrift Supervision (the "OTS") on behalf of the Jones Financial Companies, L.P., LLP (the "Company") and its wholly owned subsidiary, Edward Jones & Co., a registered broker dealer. The Company is a registered, diversified savings and loan holding company ("SLHC") by virtue of its ownership of Boone National Savings and Loan Association, F.A., Columbia, Missouri. The Company submits this letter in response to the notice of proposed rulemaking ("the Proposal") published by the OTS in the *Federal Register* on October 27, 2000.[1]

**Overview of the Proposal**

The proposed regulation would require certain SLHCs and their non-thrift subsidiaries to obtain prior OTS approval before engaging in certain transactions and would allow the OTS to review holding company capital levels and to require increases in those capital levels where the OTS deems appropriate.

The proposed regulation is intended to apply only to transactions that meet certain threshold requirements, specifically: (1) debt transactions that increase the amount of a SLHC's consolidated non-thrift liabilities by 5% or more where the SLHC's post-transaction consolidated non-thrift liabilities will be greater than or equal to 50% of consolidated tangible capital; (2) asset acquisitions in which a SLHC acquires assets in excess of 15% of its consolidated assets; and (3) transactions that reduce a SLHC's ratio of consolidated tangible capital to consolidated tangible assets by 10% or more.

1 *Notice of Proposed Rulemaking: Savings and Loan Holding Companies Notice of Significant Transactions or Activities and OTS Review of Capital Adequacy*, 65 Fed. Reg. 64,392 (Oct. 27, 2000).

However, the proposed regulation would cast a wider net by authorizing OTS's Regional Directors to require *any* SLHC to file and obtain approval of certain transactions if the Regional Director has "concerns" about the SLHC's financial condition or the safety and soundness of its thrift subsidiary. In addition, the Regional Director would be authorized to require prior approval for *any* type of transaction if the Regional Director believes the transaction "may pose a risk" to the financial safety, soundness, or stability of the subsidiary savings association. The proposed regulation would authorize the Regional Director to disapprove a transaction where the Director thinks that the transaction or activity "will pose a material risk" to the safety and soundness or stability of the SLHC's subsidiary savings association.

While the Company would not currently be affected by implementation of the proposed thresholds, since regulations tend to be long-lived and economic conditions are not always within our control, we have evaluated the Proposal as if it currently applies to the Company. For the reasons set forth below, the Company opposes implementation of the Proposal.

**I. Lack of Legal Foundation**

The Proposal does not identify any provision of the Home Owners' Loan Act (the "HOLA") that could be construed to require a unitary SLHC to obtain prior OTS approval for transactions or activities in which the SLHC intends to engage. This is not the result of inadvertent Congressional error; it is part of the historical framework of SLHC regulation,[2] and the product of a legislative policy formulated more than thirty years ago and repeatedly blessed by Congress since.

Most recently, during the extensive deliberations over financial modernization legislation, securities firms and insurance companies focused on the proposed prior notice and approval requirements for new activities of bank holding companies and urged Congress not to impose the requirements on financial holding companies or their non-bank subsidiaries. Congress responded by permitting financial holding companies to engage in new activities based solely upon an after-the-fact notice to the responsible

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[2] *See Financial Services Modernization Act: Hearings on S.900 Before the Senate Comm. on Banking, Housing and Urban Affairs, 106th Cong., 1st Sess. 32* (1999) (statement of the Honorable Ellen S. Seidman, Director, OTS).

agency. The OTS, by proposing to implement prior notice and approval requirements, seeks to impose a burden on SLHCs not shared by their counterparts in the commercial banking industry.

Also of legal significance is the repeal of former Section 408(g) of the National Housing Act (the "NHA"), which required non-diversified SLHCs to obtain Federal Home Loan Bank Board approval before issuing, selling, renewing, or guaranteeing any debt that would increase the SLHC's total indebtedness to more than 15% of its consolidated net worth. When Congress incorporated the NHA into the HOLA as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Congress repealed former NHA Section 408(g). Congress took this action because it determined that reviewing and approving holding company debt transactions was not a proper agency function, and was burdensome, and unnecessary as well.[3] We believe that Congress's repeal of holding company debt preapproval requirements should not be overidden by implementation of the OTS Proposal.

The prompt corrective action ("PCA") sections of the Federal Deposit Insurance Act (the "FDIA") authorize the banking agencies, in express circumstances, to take action against holding companies when necessary to protect an undercapitalized or significantly undercapitalized insured institution subsidiary. Again, the PCA provisions of the FDIA reflect Congress's judgment of the appropriate level of the OTS's supervisory authority over SLHCs and should not be overridden by implementation of the OTS Proposal.

## II. Negative Impact on Business Operations

The Proposal requires that a SLHC seek OTS prior approval *before* it "commits to engage in any transaction or activity" described in the Proposal. The uncertainty and delay inherent in this requirement inevitably will disadvantage SLHCs and their subsidiary financial institutions. The proposed 30-day prior notice timeframe will almost surely result in significantly longer processing times as complex transactions are reviewed by a supervisory staff unfamiliar with such transactions and already stretched thin by their current oversight responsibilities. Many debt issuances and asset acquisitions are consummated within

[3] 34 Cong. Rec. S956 (daily ed. Feb. 18, 1988) (Statement of Sen. Karnes).

very tight timeframes. The Proposal would effectively prevent such transactions because the prior approval requirement will cause companies to miss the market.

The Proposal vests broad discretionary authority with regional OTS offices. We are especially concerned with the delegation of authority that authorizes a regional office to require a notice from any SLHC that it deems necessary. This potential for *ad hoc* review of business decisions will certainly impair the ability of OTS-regulated holding companies to negotiate and complete legitimate business transactions.

We believe that the open-ended standard under which Regional Directors may disapprove transactions carries the potential for differential application among the various regions in evaluating complex, non-banking transactions outside of OTS's traditional areas of expertise.

**III. Capital Adequacy Provisions**

The Capital Proposal would, by regulation, authorize the OTS review the capital adequacy of savings and loan holding companies and, when necessary, require additional capital on a case-by-case basis. As a threshold matter, it should be noted that the HOLA contains no provision that authorizes the OTS to engage in the practice of "requiring additional capital" from SLHCs, either on a case-by-case basis or by adoption of general rules. It appears that the Proposal seeks to resurrect, in hybrid form, the old Net Worth Maintenance Agreement cross-bred with the Federal Reserve Board's "source of strength" doctrine.

As the OTS is well aware, Net Worth Maintenance Agreements caused major companies to exit the savings and loan industry or avoid it altogether, and the decision in *MCorp v. Board of Governors* struck down the Federal Reserve Board's attempt to enforce its "source of strength" doctrine, which asserted that the Federal Reserve had the authority to require bank holding companies to provide capital funds to their depository institution subsidiaries. The 5th Circuit decision in *MCorp* remains the law today. Indeed, in 1987, 1988, 1989, and 1991 both before and after *MCorp*, Congress considered and declined to

enact legislation imposing a specific "source of strength" requirement. Even a sister agency, the FDIC, has determined that mandatory capital infusion regulations are self-defeating and reduce market efficiency, limit the ability of banks to be viable competitors in the financial marketplace and limit the ability to obtain new capital for the banking agency. Federal Deposit Insurance Corporation, *Deposit Insurance for the Nineties, Meeting the Challenge* at 230 (1989).

## IV. Need for Regulation

The Proposal does not establish a need for OTS action in these areas now. The OTS has a wide range of supervisory tools to use in monitoring the activities of traditional and non-traditional SLHCs and their savings association subsidiaries. These include Section 10(b) of the HOLA, which requires SLHCs to provide the OTS with reports requested by the OTS; and Sections 23A and 23B of the Federal Reserve Act governing transactions with affiliates and imposing strict limitations on transactions between a thrift and its affiliates. In addition, capital distributions from a savings association to its parent are prohibited without prior notice to the OTS, which may disapprove the proposed distribution. Just a little over a year ago, the OTS informed Congress that existing supervisory tools provided a system of "sound regulatory oversight."[4] The Proposal fails to document why this is no longer the case.

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For all of the reasons set forth above, we are opposed to adoption of the proposed regulations. We thank you for the opportunity to express our views on the Proposal and would be pleased to respond to any questions raised by our comments.

Very truly yours,

Steven Novik
Chief Financial Officer

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[4] *See Financial Services Modernization Act: Hearings on S.900 Before the Senate Comm. on Banking, Housing and Urban Affairs, 106th Cong., 1st Sess. 32* (1999) (statement of the Honorable Ellen S. Seidman, Director, OTS).