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

**Re: Docket No. 2000-91, 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 (October 27, 2000)**

Dear Sir or Madam:

INTRODUCTION

These comments are submitted by the Coalition for Savings Associations ("Coalition") in response to the above-referenced notice of proposed rulemaking ("NPR") published by the Office of Thrift Supervision ("OTS") on October 22, 2000. The initial deadline for responding to the NPR was extended on December 12, 2000 until February 9, 2001. See 65 Fed. Reg. 77,528 (December 12, 2000).

The Coalition was created in 2000 in response to the provisions of the Gramm-Leach-Bliley Act ("GLB") that relate to the thrift charter. The mission of the Coalition is to explore all legislative and regulatory options for restoring certain charter benefits and avenues for future expansion. The decision to file this comment was reached because the NPR represents a direct assault on this agenda.

The Coalition membership is comprised of savings and loan holding companies ("SLHCs") whose subsidiaries engage in financial activities including lending, securities and insurance, as well as non-financial activities such as retailing and manufacturing. Although the NPR would affect the Coalition's members in varying degrees, the Coalition's membership is

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unanimously opposed to the NPR because of its immediate-term impact on members' lawful activities and/or because of its potential to impinge on these activities in the future.

The Coalition fully associates itself with the comments filed on February 8, 2000 in response to the NPR by the law firm of Sidley & Austin on behalf of a group of SLHCs whose interests are very similar to the Coalition's. (Such comments are designated hereinafter as the "Sidley Comments.") The five points articulated on page two of the Sidley Comments in the "overview" section establish that adoption of the NPR would be arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law (*see* 5 U.S.C. § 706(2)(A) and (B)). For that reason, the Coalition also believes that the OTS should withdraw the NPR and end this rulemaking.

Because the Coalition's members were each extremely active during the legislative debate leading up to enactment of GLB, we focus our comments on the ways in which the NPR contravenes clearly articulated Congressional intent, as expressed in GLB, and relevant policy objectives. As our comments will show, the NPR is entirely without foundation in legislative intent or public policy.

DISCUSSION

1. *The Notice and Approval Provisions in the NPR are Inconsistent With Congressional Intent as Articulated in GLB.*

As noted in the "Sidley Comments," the administrative rulemaking process is not intended to allow an agency to re-write the language, history and purposes of a statutory provision. *See Sidley Comments, p. 7, citing, Board of Governors v. Dimension Financial Corp.* 474 U.S. 361, 374 (1986). The notice and approval provisions in the NPR are precisely a wholesale rewrite of the underlying statute without any statutory mandate; as the NPR imposes a strict requirement that certain SLHCs and their non-thrift subsidiaries must receive prior OTS approval before engaging in certain transactions.¹

Neither in GLB, nor in any other statute, is there authority or direction for the OTS to impose this proposed rule. Congress has never directed or authorized OTS to require unitary SLHCs to obtain prior approval for the transactions covered by the scope of the NPR. Instead, Congress, after careful consideration of the entire statutory structure for both multiple and unitary thrift holding companies, took an opposite approach in GLB -- by affirmatively grandfathering unitary SLHCs, and restricting the transferability of the grandfathered

¹ Although the notice and approval provisions are ostensibly limited to SLHCs that meet certain "limiting" criteria, the proposal allows the OTS broad latitude to apply these provisions to other SLHCs. Specifically, if a SLHC does not meet the criteria, OTS Regional Directors are authorized to require prior approval for any type of transaction, if, in the opinion of the Regional Director, the transaction "may pose a risk to the financial safety, soundness or stability of a subsidiary savings association." 65 Fed. Reg. at 64,400. Likewise, a Regional Director could require that a specific SLHC obtain prior approval for significant transactions, even if the SLHC is otherwise subject to the NPR's exemptions. *Id.* Thus, the Coalition believes that the OTS envisions a broad exercise of authority under the NPR, potentially impacting significantly more SLHCs than those specifically covered by the NPR.

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institutions. Notably, Congress otherwise maintained the preexisting regulatory framework for grandfathered SLHCs, including the absence of any prior approval requirement for the types of transactions included in the NPR.

It cannot be argued that the failure of Congress to take any particular action in this area was an oversight. The thrift industry was under relentless attack for the entire duration of the GLB debate. Representatives from other industry sectors argued vehemently for the elimination of the thrift charter and/or a myriad of other restrictive proposals. These proposals included subjecting unitary SLHCs to the notice and approval requirement imposed on multiple SLHCs under the Home Owners' Loan Act ("HOLA"). *See, e.g.*, 12 U.S.C. § 1467a(c)(4). Congress carefully considered a range of structural options regarding SLHCs, including such notice and approval requirements, and developed a comprehensive scheme that *excluded* notice and approval requirements for grandfathered unitary SLHCs. Such action is conclusive evidence of unambiguous intent.² The notice and approval provisions of the NPR adopt an approach rejected by Congress, violating the Administrative Procedures Act requirement that all regulations be consistent with their authorizing statute. *See* 5 U.S.C. § 706(2)(a)(b).

2. *The NPR is Not Supported by Safety and Soundness Concerns.*

In the explanation for issuing the NPR, the OTS raises the potential for material risk to the safety, soundness or stability of savings associations resulting from an increase in non-traditional SLHCs ("increasingly, savings associations are becoming part of highly integrated corporate structures.") 65 Fed. Reg. at 64392. This premise is entirely unfounded. Furthermore, the suggestion that the thrift universe is subject to safety and soundness concerns represents a dramatic departure from the OTS position, articulated persuasively by Director Seidman in the recent past, that OTS' authority under the thrift charter is sufficient to assure industry soundness.³ Therefore, even if there was a statutory basis for the NPR, there is no public policy premise for taking the action.

There is no apparent factual basis for any concern regarding the safety and soundness of SLHCs generally, and non-traditional SLHCs in particular. The OTS, as recently as 1997, reported that SLHCs that engage in non-banking activities are even more safe and sound than traditional SLHCs. Specifically, in 1997, the OTS issued a study entitled "Holding Companies in the Thrift Industry Background Paper," which concluded that thrifts engaged in non-banking activities (at that time five percent of the total thrift universe) accounted for only 0.3 percent of enforcement actions from January 1993 through the end of the second quarter of 1997. During

² Indeed, an entire title of GLB (Title IV) is devoted to unitary SLHCs. The title extensively amends the HOLA, which is the statute relied upon by the OTS to justify the notice and approval provisions in the NPR. However, GLB did not amend the HOLA's provisions relied upon by the OTS for the NPR. The absence of any such express action in the context of extensive amendments of the HOLA further demonstrates Congressional intent to retain the existing framework for these activities.

³ Compare Director Seidman's statements in 1999, see p. 4, *infra* to her statements in the last quarter of 2000, including "Nonbank Thrift Owners to Face More Scrutiny," *American Banker* (Oct. 16, 2000). *See also*, *Remarks Prepared for Ellen Seidman, Director, OTS, For the 11th Annual Seminar on International Finance*, Palace Hotel, Tokyo, Japan (Sept. 20, 2000); *Remarks of Ellen Seidman, Director, OTS for Exchequer of Washington, D.C.* (Jan. 17, 2001).

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that period, there were only fourteen thrift failures, of which only five were owned by holding companies. Only two of those five were engaged in non-banking activities. The OTS report further notes that in those two circumstances, non-banking activities were not the cause of the failures.

Although the number of SLHCs engaged in non-banking activities has increased since 1997, there is absolutely no evidence offered by OTS or otherwise available to suggest that the industry's relative safety record has changed. Instead, it appears that the NPR is aimed at an uncertain future potential for which there is no historical record. The mere unsubstantiated specter of an increase in safety and soundness concerns is insufficient to justify the dramatic change in course proposed in the NPR. Moreover, the Coalition believes that the influx of new SLHCs since 1997, including many of the country's foremost corporations, instills a form of market discipline with respect to the operation of thrift subsidiaries. Corporations that are "household" names are unlikely to impugn their hard-earned reputations due to questionable practices at a subsidiary savings association. OTS should follow the Office of the Comptroller of the Currency's approach in formally recognizing that reputational risk is an important factor in a supervisory context.

The NPR is also at odds with statements made by Director Seidman as recently as 1999 regarding the status of the thrift industry. In testimony before the Senate Banking Committee on February 24, 1999, Director Seidman offered the OTS perspective on pending financial modernization legislation.

First, Ms. Seidman noted that the thrift charter "is a model" for the principles which should guide modernization. She noted that the thrift charter "gives the OTS full authority to supervise the thrift industry in a way that both assures the safety and soundness of the industry and protects the consumer." She also offered that the charter "minimizes regulatory burdens on thrifts." In her conclusion, as a rebuttal to allegations of inherent risk resulting from the mixing of commerce and banking, Ms. Seidman noted that "there is no evidence that shows that affiliations permitted in the unitary thrift holding company structure are inherently risky and should be constrained. In fact, there are numerous reasons to retain the structure in its current form." See Statement of the Honorable Ellen Seidman, Director, OTS, before the Senate Banking Committee, 106th Cong., 1st Sess. (February 24, 1999).

As noted above, although there has been some recent growth in the number of charters and charter applications involving "non-traditional SLHCs," there is no evidence, either recent or historical, to suggest that this development poses any additional risk to the safety and soundness of the thrift industry. The NPR, however, appears directly to contravene Ms. Seidman's statements regarding the ability of OTS to supervise the industry, the industry's excellent safety and soundness record, and the absence of any threat presented by the affiliation authority.

Although the NPR would require SLHCs to comply with a burdensome regulatory application process, the NPR implicitly expands the agency's enforcement arsenal due to OTS's misperception that the increase in non-traditional thrifts, or thrifts engaging in lawful transactions with their affiliates, automatically raises a safety and soundness concern. In the absence of any evidence of an increase in thrift failures resulting from the activities of SLHCs

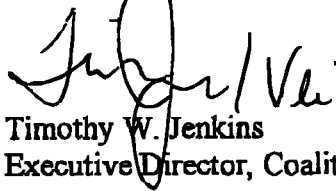
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and affiliates, the NPR is unjustified and directly at odds with the consistent public pronouncements of Director Seidman in 1999. Therefore, even if there was statutory justification for the NPR, there clearly is no policy or practical reason to pursue the proposal.

CONCLUSION

For the reasons above, as well as those stated in the Sidley Comments, the NPR should be withdrawn, and the instant rulemaking proceeding should be terminated.

Sincerely yours,



Timothy W. Jenkins
Executive Director, Coalition for Savings Associations

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