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TEMPLE-INLAND
INC.
FINANCIAL SERVICES

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

Attention: Docket No. 2000-91

Ladies and Gentlemen:

This letter is written in response to the notice of proposed rule making that the Office of Thrift Supervision ("OTS") published in the *Federal Register* on Friday, October 27, 2000, regarding Savings and Loan Holding Companies Notice of Significant Transactions or Activities and OTS Review of Capital Adequacy (the "Proposed Rule"). Temple-Inland Financial Services Inc. ("TIFS") is the parent holding company of Guaranty Bank, a $15 billion federal thrift headquartered in Dallas, Texas. TIFS is an indirect, wholly owned subsidiary of Temple-Inland Inc., which is a diversified forest products, paper and financial services company. Both Temple-Inland Inc. and TIFS are exempt multiple savings and loan holding companies under 12 U.S.C. §1467a(c)(3). TIFS and Temple-Inland Inc. respectfully submit that the Proposed Rule is overly broad, unduly burdensome, wholly unnecessary and of questionable legality. We therefore are opposed to the Proposed Rule and urge the OTS to withdraw it.

The Proposed Rule attempts to address the legitimate regulatory concern of how to prevent the financial stability of a federally chartered thrift from being undermined by questionable behavior of the thrift's parent holding company. In particular, the OTS is concerned about the possible negative impact that integration of a savings association into the corporate financial structure of many newly formed savings and loan holding companies may have on the savings association's financial viability. We appreciate that the OTS has a legitimate interest in maintaining the financial viability

of savings associations, including ensuring that a savings and loan holding company does not take inappropriate financial advantage of its thrift subsidiary. The Proposed Rule, however, purports to address the issue of *savings association* financial viability by establishing a series of arbitrary and imprecise *savings and loan holding company* capital and other financial criteria as the benchmark for identifying which holding company activities *might* be detrimental to the financial health of a savings association. No discernable rationale explains why the specific holding company transactions and financial criteria that trigger scrutiny under the Proposed Rule, versus any alternative transactions and/or criteria, pose such significant risk to a *savings association's* financial security that heightened regulatory scrutiny of *holding company* activities is required. In fact, the Proposed Rule recognizes this imprecision by giving each OTS Regional Director *unlimited* power to stop and review *any* holding company transaction or activity which that Director feels "*may* pose a risk to the financial safety, soundness, or stability of the subsidiary savings association." Proposed Rule, Section 584.120(b). Rather than clarifying or bringing certainty to holding company transactions that might threaten the financial strength of savings associations, the Proposed Rule gives neither holding companies nor OTS field personnel any meaningful guidance while bestowing infinite regulatory authority to delay and possibly derail important, even essential, holding company transactions.

For diversified savings and loan holding companies such as Temple-Inland Inc., the Proposed Rule's broad regulatory authority to intervene in the business judgment of the company poses significant risk to the viability of the holding company itself. The business of Temple-Inland's non-banking subsidiaries are governed by financial and business realities that often differ from those of its savings association. In order to effectively compete in these non-financial markets, Temple-Inland Inc. must have the flexibility to pursue and negotiate debt transactions, asset acquisitions and other business arrangements that don't directly impact its thrift subsidiary as it deems appropriate for the fiscal well-being of its corporate structure as a whole without having those transactions unnecessarily delayed and scrutinized in a regulatory forum by individuals who, though they may be highly trained and experienced in one facet of Temple-Inland's business (i.e., financial services) may not have the requisite expertise and experience in transactions involving paper, forest products and timber assets and businesses. It would be imprudent to substitute regulatory business judgment for that of management of a duly authorized savings and loan holding company with diverse business interests and expertise. When Temple-Inland Inc. actively entered the thrift business in the late 1980's, we did so with a very clear understanding that neither the activities nor the capital of the thrift holding company would be regulated by the OTS or any other federal regulatory agency, with the exception of transactions between the thrift subsidiary and any affiliate of Temple-Inland Inc. The OTS is now

proposing to change the rules in a manner that will be materially detrimental to Temple-Inland Inc. and other similarly situated thrift holding companies.

In addition to the negative effect the Proposed Rule will have on Temple-Inland Inc. and other diversified thrift holding companies, the Proposed Rule fails to effectively address the issue of savings association financial soundness because it attempts to *directly* connect certain activities of a savings and loan holding company to the financial condition of the subsidiary savings association when, in fact, no direct connection exists. The fact that a holding company acquires assets, issues debt or reduces its capital does not, standing alone, have any impact on the financial well being of a savings association. As the anecdotal examples set forth in the preamble to the Proposed Rule make clear, a holding company's activities can only put financial pressure on its subsidiary savings association when the *patterns and practices of the savings association itself* are changed. The most direct and effective method to deal with such holding company behavior, therefore, whether by capital-challenged holdings companies or otherwise, is through the already existing powers of the OTS to regulate savings associations *directly*. Contrary to the suggestions set forth in the Proposed Rule, there are *many* existing regulatory and statutory restrictions designed to protect the financial integrity of savings associations and reduce the risks posed to thrifts by imprudent holding company activities. The OTS can restrict the payment of savings association dividends,[1] set thrift minimum capital requirements[2] and enforce statutory lending limits,[3] to name just a few of the sweeping powers that the OTS has to regulate savings associations. If the OTS believes that Temple-Inland Inc. (or any other thrift holding company) is causing its thrift subsidiary to engage in illegal or unsafe and unsound transactions for the benefit of the holding company or its affiliates, the OTS certainly can (and should) cause the thrift to cease and desist such activities. See 12 U.S.C. § 1467a(g)(5) and (p). However, if the holding company and its non-thrift subsidiaries are involved in transactions that do not directly impact the thrift subsidiary, the OTS should not be concerned with (or have any supervisory authority over) those transactions. Diversified unitary thrift holding companies, such as Temple-Inland Inc., brought tremendous amounts of capital to the thrift industry at a time when the industry was in desperate need of outside capital, and we believe that we should continue to be able to operate our non-thrift businesses in the manner which makes the most financial sense from a corporate-wide perspective.

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[1] 12 U.S.C. §1467a(f) and (p)(1)(A) and 12 C.F.R. Part 563, Subpart D.
[2] 12 U.S.C. §1464(s) and (t); and 12 C.F.R. Part 567.
[3] 12 U.S.C. §1464(v); and 12 C.F.R. Part 560.

In addition to the policy reasons set forth above, we believe Congress has dictated, in Section 10 of the Home Owners' Loan Act ("HOLA"), that the activities of a exempt thrift holding company whose thrift subsidiaries meet the qualified thrift lender test are not subject to the scrutiny and regulation of the OTS espoused in the Proposed Rule with respect to transactions and activities that do not involve the thrift subsidiaries. See 12 U.S.C. § 1467a(c)(3). We recognize the great discretion that the courts grant to Federal agencies in promulgating regulations. See, Chevron U.S.A., Inc., v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 at 842-43, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). However, "[A] federal agency does not have the power to act unless Congress by statute, has empowered it to do so. Agency actions beyond delegated authority are ultra vires, and courts must invalidate them."[4] To be substantively valid, regulations must be consistent with the statute under which they are promulgated.[5] Administrative regulations may not override clearly stated statutory requirements nor add to the statute something which is not there.[6] Additionally, courts have held that a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

Thrift holding company activities are governed by Section 10 of HOLA, and its implementing regulations found at 12 C.F.R. Part 584. HOLA prohibits most savings and loan holding companies from commencing certain business activities (or continuing any business activity after a 2-year period beginning on the date it becomes a thrift holding company) without prior regulatory approval. 12 U.S.C. §1467a(c)(1),(2) and (4). Clearly, the OTS has the authority (and the obligation) to prospectively scrutinize and prohibit certain new activities by such holding companies under Section

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[4] Transohio Savings Bank v. Director, Officer of Thrift Supervision, 967 F.2d 598, 620-621 (U.S. Ct. App.-D.C. Cir., 1992). *See also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 102 L.Ed. 2d 493, 109 S. Ct. 468 (1988), and Louisiana Pub. Serv. Commission v. FCC, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 106 S.Ct.1890 (1986).

[5] Federal Land Bank of Springfield v. Farm Credit Administration, 676 F.Supp. 1239, 1250 (U.S. Dist. Ct.– Mass., 1987). *See also* Jordan v. Riley, 26 F. Supp. 2d 173 (U.S. Dist. Ct., 1998).

[6] *See* Barseback Draft AB v. U.S., 121 F.3d 1475 (U.S. Ct. App.–Fed.Cir, 1997); California Cosmetology Coalition v. Riley, 110 F.3d 1454 (U.S. Ct. App.– 9th Cir, 1997); Chauffeur's Training School, Inc., v. Riley, 967 F. Supp. 719 (U.S. Dist. Ct– N.D. New York, 1997); and Lansing Dairy, Inc., v. Espy, 39 F.3d 1339 (U.S. Ct. App.– 6th Cir., 1994).

10(c)(4). See 12 U.S.C. § 1467a(c)(4). It is equally clear, however, that the prior approval authority given to the OTS under Section 10(c)(4) does not apply to holding companies, such as TIFS and Temple-Inland Inc., that are exempt under Section 10(c)(3), which clearly states that the prospective limitation on activities does not apply to holding companies that satisfy the criteria set forth in Section 10(c)(3). If the Proposed Rule is adopted, the OTS will be attempting to do by regulation what Congress has chosen not to do by legislation.

With respect to the provisions of the Proposed Rule that attempt to limit the amount of debt that a thrift holding company can incur and to otherwise regulate the capital of a thrift holding company, we believe that these provisions are beyond the scope of the OTS's rulemaking authority. Congress gave the OTS the authority to regulate the capital of *savings associations*. See 12 U.S.C. §§ 1464(s), 1464(t) and 3907. It is just as clear that the OTS does not have the authority to regulate the capital of thrift holding companies. Sections 5(s) and (t) of HOLA, by their unambiguous terms, are limited to "savings associations" and the establishment of capital standards therefor. Nowhere in HOLA is the OTS given the authority to limit the amount of leverage a holding company can have or to otherwise set capital standards for a holding company.

In addition, under the International Lending Supervision Act (12 U.S.C. § 3901 et. seq.) ("ILSA"), which is the statutory authority pursuant to which all of the Federal banking agencies (including the OTS) derive their power to set capital standards for insured depository institutions, the OTS is not given the authority to regulate the capital of savings and loan holding companies. Under 12 U.S.C. § 3907, the Federal banking agencies are authorized to establish minimum capital levels for "banking institutions." In ILSA, "banking institution" means "an insured bank as defined in [12 U.S.C. §] 1813(h)." 12 U.S.C. § 3902 (2)(A)(i). Section 1813(h) defines an "insured bank" as "any bank ... the deposits of which are insured in accordance with the provisions of [the Federal Deposit Insurance Act.]" And the term "bank" is defined in Section 1813(a)(1) in such a way so as to exclude savings associations. Since the OTS is "an appropriate Federal banking agency" under ILSA, and since Section 5(s) of HOLA directly points to ILSA when giving the OTS the authority to set capital standards for savings associations, it is clear that Congress intended for the OTS to be able to regulate the capital of thrift institutions. The plain language of HOLA and ILSA also leaves little doubt that the OTS does not have the authority to regulate the capital of thrift holding companies. Therefore, under the standards established in Chevron and Bowen, it would be ultra vires, for the OTS to require certain thrift holding companies to obtain OTS approval prior to incurring debt or otherwise reducing its capital.

For the reasons set forth above, we strongly encourage the OTS to withdraw the Proposed Rule in its entirety. If the OTS believes that certain holding companies are engaging (or are likely to engage) in conduct detrimental to their thrift subsidiaries, the OTS has more than ample authority to cause those holding companies, and their thrift subsidiaries, to cease the activities about which the OTS is concerned. It would be counterproductive and detrimental, however, to impose a burdensome regulatory scheme on the entire industry in order to remedy the wrongs of a few institutions.

Sincerely,

J. Bradley Johnston
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General Counsel and Secretary

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