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February 9, 2001

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

Attention: Docket No. 2000-91

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INFORMATION SERVICES  
DIVISION

Dear Sirs/Mesdames:

E\*TRADE Group, Inc., the savings and loan holding company parent of E\*TRADE Bank, hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") by the Office of Thrift Supervision ("OTS") that would require certain savings and loan holding companies to notify the OTS before engaging in or committing to engage in debt transactions, transactions that reduce capital, certain asset acquisitions and other transactions that come within the scope of the conditions set forth in the Notice.

We support the OTS' concept of enhanced communications as an important supplement to capital and enhanced off-site monitoring of savings and loan holding companies and their subsidiary thrifts. We also believe that it may be appropriate under certain circumstances for the OTS to require prior notice of significant transactions by a savings and loan holding company as a means of alerting the agency to significant changes that could have a materially adverse impact on a holding company's subsidiary thrift. We appreciate the OTS' recognition that such a prior notification requirement, if

generally applied, could make it more difficult for savings and loan holding companies such as E\*TRADE to compete against other regulated and non-regulated financial services providers, a result that we know the OTS wishes to avoid. In this regard, we commend the OTS for its efforts in attempting to strike the proper balance between its own supervisory concerns and the views of the thrift industry.

E\*TRADE is hopeful that, working together with the industry, the OTS will be able to devise "creative and constructive alternatives" that will facilitate open, honest and frequent communication between thrift holding companies and the OTS and will keep the agency informed of significant proposed transactions while not disadvantaging the vast majority of entities with which the agency currently has a good working relationship. Our preferred approach would be one in which the OTS Regional Directors could impose such a prior notice requirement on a case-by-case basis on thrift holding companies with higher risk profiles. Among the other potential solutions that the OTS may wish to consider would be to exempt holding companies from the need to provide prior notice if all of their subsidiary thrifts qualified for expedited processing under 12 C.F.R. Part 516. Alternatively, the OTS could require a post-consummation notification for most holding companies as provided for financial holding companies acquiring companies engaged in financial activities in Section 4(k)(6) of the Bank Holding Company Act, with a prior notification requirement imposed on a selective case-by-case basis.

Regarding the OTS' capital adequacy proposal, we support the OTS' articulation and use of the criteria described in the Notice for assessing the capital adequacy of

savings and loan holding companies and, when necessary, requiring additional capital on a case-by-case basis. E\*TRADE agrees with the OTS that there are numerous factors to be taken into account in addition to capital by itself and agrees that this individualized approach is more appropriate than a "one-size-fits-all" minimum capital requirement. In our view, the factors outlined in the Notice could be set forth equally effectively in a regulation or a regulatory bulletin.

We respectfully offer the following more detailed comments on the Notice. E\*TRADE strongly urges the OTS to ensure that any final regulation preserve and enhance effective two-way communication between the thrift industry and the agency while at the same time allowing thrift institutions and their holding companies to compete vigorously in today's rapidly evolving financial marketplace. E\*TRADE commends the OTS for the guidance it has provided with respect to its regulation of savings and loan holding companies and its willingness to consider alternatives to the approach set forth in the Notice.

## **I. Discussion**

### *A. Overview*

E\*TRADE agrees with the underlying premise of the OTS' proposal that the health of a savings and loan holding company can have a direct impact on the financial condition of its subsidiary thrift -- particularly when the thrift is integrated into the

corporate structure and strategy of the savings and loan holding company. We also support enhanced communications between the thrift industry and the OTS as part of the OTS' comprehensive risk-focused strategy to ensure the financial stability and competitiveness of thrift institutions and their parent savings and loan holding companies.

With respect to OTS' overall supervisory strategy, E\*TRADE supports the OTS' view that a savings and loan holding company's capital levels and risk profile, as well as the relationship between a thrift subsidiary and its affiliates, can impact the safety and soundness of the subsidiary. We agree that the condition of a thrift cannot be viewed in isolation from companies that control or are under common control with it. For these reasons, we strongly support the five-part comprehensive holding company examination and supervision strategy outlined by the Director of the OTS and other agency staff in their recent speeches.

The OTS is to be particularly commended for its flexible, case-by-case approach with respect to holding company capital. While equity capital is the traditional measurement of potential assistance to the subsidiary thrift, and can also serve as a buffer to protect the thrift from any financial problems that the holding company parent may experience, the OTS is correct to identify that other less quantifiable forms of assistance, such as cross-marketing and technology, that a thrift's affiliates can provide. E\*TRADE strongly supports the notion of a flexible regulatory review structure that properly accounts for the value of these less traditional measurements of a savings and loan holding company's impact on a subsidiary thrift. We also strongly agree that the flexible,

case-by-case approach adopted by the OTS with respect to holding company capital is much preferable to a more rigid minimum capital requirement applied equally to all thrift holding companies. Indeed, as the OTS has recognized, a single capital standard applied to the many different kinds of savings and loan holding companies that currently exist would probably be unworkable and, for those holding companies that are predominantly engaged in securities and insurance activities, would be inconsistent with the entire concept of functional regulation.

In considering the five-part strategy adopted by the OTS for regulating savings and loan holding companies, E\*TRADE agrees with the OTS that this flexible approach will adequately address the agency's legitimate safety and soundness concerns by enabling it to focus on those institutions and their affiliates that pose the greatest degree of risk. At the same time, a less formal and intrusive regulatory structure will allow the OTS, thrift holding companies and other regulators to work together to address and resolve unique issues and problems as they arise. Thus, E\*TRADE strongly supports the OTS' initiatives in obtaining additional holding company information on TFRs and publicly-filed reports as a means of identifying and dealing with potential problems. Increased communication and coordination with other functional regulators, as well as the OTS' risk-focused examination procedures, will also ensure that those institutions that are in most need of more careful scrutiny will receive it.

*B. Notice Requirement*

The Notice states that, under the proposed rule, a savings and loan holding company that met certain criteria would be required to file a notice with its OTS Regional Director at least 30 days before engaging in or committing to engage in certain transactions that would increase a holding company's non-thrift debt by five percent or more, increase its consolidated assets by 15 percent or more, or reduce its capital levels below ten percent of assets. Under the proposal, a holding company would be required to include in the notice the basis for the filing requirement, a description of the transaction or activity, an analysis of the impact on consolidated earnings and consolidated capital, and an analysis of the impact of the transaction on the thrift subsidiary. The savings and loan holding company also would be required to identify the amount of the debt, capital reduction, or asset acquisition, indicating the intended use of the funds or the reasons for the capital reduction or asset acquisition, and summarize the transaction.

E\*TRADE agrees with the OTS that a prior notice requirement of the type contemplated by the Notice may be appropriate for certain savings and loan holding companies that have relatively high risk profiles. Conversely, there is less of a need for prior notice of transactions for those holding companies that are well-managed, have capital levels appropriate for their overall operations, and have good communication with the OTS. From E\*TRADE's perspective, we view it as a matter of common sense to keep the OTS well apprised through informal discussions of possible future transactions and new activities. In our and many similar situations, the imposition of a formalized

advance notice requirement would add very little to the mix of information that we already provide to the agency in advance of our undertaking acquisitions or new business initiatives.

E\*TRADE has maintained a competitive advantage against its peers by quickly identifying, analyzing and, in some cases, acquiring strategic partners that best fit into its overall business objectives. E\*TRADE Bank and the OTS have worked together since the passage of Gramm-Leach-Bliley to implement a streamlined acquisition approval process that has included prior notification of significant transactions by the Bank, but a formalized prior approval or notification requirement has not applied to transactions engaged in by E\*TRADE. E\*TRADE commends the OTS for its responsiveness to E\*TRADE Bank's proposed transactions over the past year. It should be noted that if prior notification were required as set forth in the Notice, such a regulation could present a competitive challenge for us, especially in the case of an acquisition where the target has been approached by other potential acquirers not subject to the time delay and uncertainty inherent in a notification requirement. As the OTS has stated as its objective the adoption of a flexible regulatory framework for holding companies that will allow the thrift industry to "thrive and flourish", E\*TRADE is confident that the agency would not adopt any regulation that would place it and other similarly situated thrift holding companies at a disadvantage in an extremely competitive and rapidly evolving marketplace.

In our view, the issue comes down to where the OTS should draw the prior notice line, or, as the Director of the OTS recently stated, "the focus . . . will be on better defining both the class of entities and the class of transactions that raise sufficient regulatory concern to justify the inconvenience of transaction-based communication." Ideally, from E\*TRADE's perspective, the OTS in drawing that line would adopt the same kind of flexible, case-by-case approach as it has in the area of holding company capital. Under this approach, the OTS Regional Directors would have the discretion to impose a prior notification requirement on those holding companies that, in their view, pose an excessive degree of risk on their thrift subsidiaries. The Regional Directors' ability to require prior notification could be made subject to such standards or criteria as the OTS deemed appropriate in order to allay any industry concerns regarding possible over-application of the requirement.

If greater certainty were felt desirable, the OTS could adopt an approach similar to that set forth in the agency's applications processing regulation, 12 C.F.R. Part 516. If all of a holding company's thrift subsidiaries qualified for "expedited treatment" as set forth in Section 516.3(a)(1), then the holding company would be exempt from any prior notice requirement. Only holding company parents of thrifts that did not satisfy the expedited treatment conditions in the regulation would be required to provide the OTS with the prescribed prior notice.

A third approach that the OTS may wish to consider would be to impose a post-transaction notice requirement similar to the notifications that financial holding



companies are required to provide under Section 4(k)(6) of the Bank Holding Company Act. This solution has the benefit of ensuring that thrift holding companies would not be at a competitive disadvantage vis-à-vis other types of regulated bank holding companies. Again, prior notification would only be required for thrift holding companies on a case-by-case basis.

The foregoing list is by no means exhaustive. To the extent that the OTS might deem it helpful, E\*TRADE stands ready to work with the agency to explore other options and alternatives that would strike the appropriate balance between the legitimate interests and concerns of the OTS and the thrift industry.

*C. Capital Adequacy for Savings and Loan Holding Companies*

The Notice proposes to codify the OTS' current practices for evaluating the capital adequacy of a savings and loan holding company on a case-by-case basis. Specifically, the OTS states in the Notice that it has not established, and will not establish, capital guidelines applicable to all savings and loan holding companies. Furthermore, the Notice suggests that the proposed rule would clarify the factors that the OTS uses in reviewing a savings and loan holding company's capital adequacy ensuring that capital principles are consistently applied in the savings and loan holding company context.

As noted above, E\*TRADE strongly supports the determination by the OTS not to establish a rigid capital standard, but rather to evaluate the capital adequacy of a savings and loan holding company on a case-by-case basis. This standard implements the intent of Gramm-Leach-Bliley and allows for maximum flexibility in working with savings and loan holding companies to ensure safe and sound operation of subsidiary thrifts. Additionally, the Notice suggests that there are many elements of strength that a savings and loan holding company can offer a subsidiary thrift in addition to capital support.

E\*TRADE suggests that the OTS consider several factors in determining capital adequacy that are in addition to the factors that the Notice provides. The Notice lists four general elements of capital adequacy including debt, capital, cash flow and earnings and overall risk profile. E\*TRADE supports the OTS' suggestion that there are additional values that a savings and loan holding company provides to its subsidiary thrift including brand name recognition, technology and even strategy in evaluating the overall risk profile of a savings and loan holding company. These additional factors should be considered in relation to the overall risk profile of the thrift as well as factored into any review of savings and loan holding company capital adequacy.

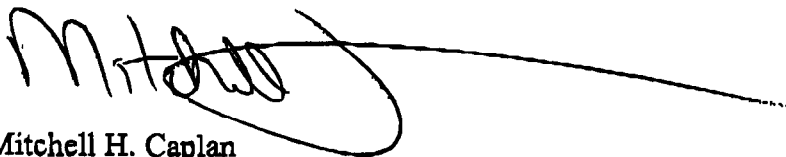
E\*TRADE is aware of the OTS' continual monitoring of the proposed rulemaking regarding global capital adequacy that is being performed by the Basel Committee on Banking Supervision. E\*TRADE has a significant global presence and is cognizant of the impact of the Basel Committees' global recommendations. E\*TRADE supports the

OTS' efforts to define the most flexible savings and loan holding company capital structure and to promote this structure globally.

## II. Conclusion

In summary, E\*TRADE agrees with the intent and objectives of the OTS in publishing the Notice and highlighting the safety and soundness concerns regarding savings and loan holding companies. We applaud the OTS for recognizing the need to develop flexible regulatory standards and encouraging a constructive dialogue with the industry regarding the appropriate level of holding company oversight in view of the trend towards much greater integration of thrift subsidiaries into savings and loan holding companies.

Sincerely,

A handwritten signature in black ink, appearing to read "Mitchell H. Caplan", with a long horizontal line extending to the right.

Mitchell H. Caplan  
General Manager, North America &  
Chief Global Banking and Asset Gathering  
E\*TRADE