Office of Thrift Supervision

February 11, 2004

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: File No. [S7-21-03]

Dear Mr. Katz:

The Office of Thrift Supervision (OTS) appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC's) proposed rule on Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities, 68 Fed. Reg. 62872 (November 6, 2003). The OTS has statutory responsibility under section 10 of the Home Owners' Loan Act, 12 U.S.C. 1467a, and the Federal Deposit Insurance Act, 12 U.S.C. 1813(q), for the examination, supervision, and regulation of over 950 savings and loan holding companies (SLHCs). A significant number of these SLHCs have broker-dealers in their organizational structure and could be affected by this proposal.

The Gramm-Leach-Bliley Act (GLBA) sought to establish a structure that would minimize duplication of regulation and potential for conflicts to the greatest extent possible when banking and insurance or securities firms were affiliated in one holding company structure. GLBA recognized the special responsibilities that attach to the holding company regulator of an insured depository institution, regardless of whether that holding company also controls non-depository institutions. In assigning the responsibilities for primary supervision of functionally regulated affiliates to their functional regulators, it carefully kept the responsibility for supervision of the holding company itself with the OTS or the Federal Reserve Board, depending upon whether the holding company was a SLHC or a bank holding company. This was in recognition of the expertise developed over the years by these regulators in evaluating the risks posed to depository institutions and the federal deposit insurance funds by depository institution holding companies and their affiliates. The investment bank holding company structure established under Title I, Subtitle C, of GLBA was specifically crafted to allow only those companies that did not have a bank or savings association in their structure to elect SEC supervision of their holding company. Nothing in GLBA's text or legislative history indicates Congressional intent for the SEC to create an overlapping or alternative regulatory structure that could apply to SLHCs.

A number of provisions in the SEC's proposal for a supervisory regime over a Consolidated Supervisory Entity (CSE) have the potential to duplicate or conflict with OTS's supervisory responsibilities for SLHCs that would also be CSEs.

The SEC's proposal would require the SEC's approval whenever the SLHC sought to make any material changes to its group-wide internal risk management control system. This provision would create regulatory conflicts for an SLHC that had been directed by OTS to address deficiencies in its internal risk system by making material changes. This would put the SLHC in an untenable position, as it could be subject to OTS enforcement actions if it did not expeditiously comply with OTS directives. It would also expose the underlying

savings association to possible risk while the SLHC attempted to obtain the SEC's approval. In addition, as the statutorily authorized regulator of SLHCs, we might be compelled in particular instances to direct a SLHC to not follow SEC guidance in order to protect the depository institution and the FDIC insurance fund.

The proposal's examination provisions would significantly increase regulatory burden on entities in a SLHC structure that are not currently subject to examination by the SEC or another functional regulator. First, the proposal appears to provide the SEC with the authority to examine any non-depository institution subsidiary of a CSE (other than an insurance company or CFTC-registered entity). This appears to be in direct conflict with the intent of Congress in enacting GLBA; that is, to minimize supervisory overlap and burden. OTS already has the responsibility to examine these entities. Thus, there may be significant overlap and extra burden for these entities.

Second, while the SEC provides an exemption for examination of the parent holding companies of a depository institution, that exemption is conditioned on findings by the SEC that 1) it can obtain sufficiently reliable information concerning the holding company and its group-wide activities through information sharing arrangements; and 2) the holding companies are "primarily engaged in the insured depository business." A substantial number of SLHCs would likely be unable to qualify for the exemption because their primary business is insurance or commercial activities. Thus, they would also be subject to significant overlap and extra burden.

The proposal requires a holding company that becomes a CSE to provide the SEC with a wide variety of information on a monthly, quarterly, and annual basis. Even an entity that has a principal regulator must agree to provide the SEC with information on its operations that the SEC believes necessary to evaluate financial and operational risks within the structure. This information may also include, apparently, the operations of any subsidiary with a principal regulator that would otherwise be exempt from SEC examination (e.g., a subsidiary savings association).[1]

These information requirements would duplicate information that SLHCs may be required to provide to the OTS. However, the proposal does not provide that the SEC will, to the maximum extent possible, rely on reports already provided by a CSE to the OTS or another regulatory body, or provide that the SEC will first seek to obtain information about a SLHC from OTS.[2] It is unclear whether the SEC will be able to maintain the confidentiality of any information obtained directly from a SLHC under the proposal.[3]

The capital aspects of the proposal will also increase regulatory burden on SLHCs. The SEC proposal would purport to require the holding company to obtain SEC approval to calculate its capital. This directly conflicts with the statutory responsibilities of OTS as the holding company regulator to determine the level of capital that a holding company must hold and the types of capital that must be used to satisfy that requirement. OTS has long supervised a variety of companies that are SLHCs, and has found, based on its experience, that capital levels for SLHCs are best set and monitored on an individual basis. In our experience, it is not appropriate to have one capital standard when SLHC activities are so diverse. The structure the SEC proposes to impose on CSEs could be confusing for SLHCs that would also be required to satisfy OTS requirements. This duplication would inevitably lead to additional regulatory burden and confusion.

Under the proposal, all CSEs must report capital adequacy information to the SEC on a

monthly basis. A CSE that is also a SLHC cannot automatically submit its OTS-required capital adequacy information in place of the SEC-determined capital information. Instead, each CSE that is a SLHC must demonstrate to the SEC that the OTS's capital adequacy guidelines are consistent with the Basel Accord and must obtain approval from the SEC to submit that capital information. This application process to the SEC may be prolonged, and may require additional consultations with the SEC as OTS monitors and modifies the SLHC's capital requirement. If the application is denied, it will be very burdensome on SLHCs that are CSEs to compute separate consolidated capital information for the two regulators. The monthly reporting requirement would be an additional burden because SLHCs are not required to submit monthly capital information to OTS, or to compute capital levels daily, as the SEC would require.

Because OTS evaluates capital for each SLHC on an individual basis, taking into account its particular structure and attendant risks, the potential exists for significant variations in the effect of the SEC capital requirements on SLHCs. OTS supervision of SLHCs relies heavily on continuous monitoring of the risks the SLHC may present to the subsidiary savings association as well as on regular on-site examinations. In response to a particular risk, OTS may direct that capital levels be adjusted quickly to prevent the potential for losses. The SEC's proposed structure would conflict with this regulatory approach, which could lead to losses for the insured depository institution, the FDIC insurance fund and perhaps, ultimately, the taxpayers.

Given that Congress specifically addressed the interplay among financial regulators in the GLBA and provided the SEC with only limited holding company jurisdiction over entities not affiliated with an insured depository institution, we believe that the SEC's proposed assertion of authority over SLHCs is unfounded and could pose significant risks to these entities, their insured deposit institution subsidiaries and the federal deposit insurance funds. Any restructuring of holding company jurisdiction should be left to Congress. If the SEC does proceed with its CSE proposal, we urge it to reconsider the significant regulatory overlap and potential for confusion and increased regulatory burden created by aspects of the proposal.

Thank you for the opportunity to comment on this proposal. We would be happy to discuss any aspect of these comments at your convenience.

Sincerely,

James E. Gilleran
Director

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1 See Proposed Rule § 240.15c3-1e(a)(1)(viii)(F).

2 In contrast, GLBA requires OTS to rely, to the fullest extent possible, on reports that a broker-dealer subsidiary of a SLHC is required to file with the SEC or a self-regulatory organization. It also provides that, if OTS seeks a specialized report from a broker-dealer subsidiary of a bank holding company, it must first ask the SEC to obtain such information from the broker-dealer.

3 The Securities Exchange Act of 1934 ("1934 Act") expressly authorizes the SEC to maintain the confidentiality of any information that is provided to the SEC by a U.S. or foreign regulatory agency, or by an affiliate of a broker-dealer under the "market risk"

and "investment bank holding company" provisions of the 1934 Act. See 15 U.S.C. § 78q(j). No similar statutory protection would be available for information provided directly to the SEC by a holding company under the CSE proposal.