



America's Mutual Holding Companies

Where the Community and the Market Bank

November 1, 2011

Jennifer Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N W
Washington, DC 20551

Re: Docket No. R-1429 / RIN No. 7100-AD-80
VIA ELECTRONIC MAIL: regs.comments@federalreserve.gov

Dear Ms. Johnson,

America's Mutual Holding Companies ("AMHC") appreciates the opportunity to provide comments to the Board of Governors of the Federal Reserve System (the "Board") on the interim final rule on mutual holding companies, found at Regulation MM. AMHC is an association of mutual holding companies with minority public stockholders, located throughout the United States. AMHC was formed for the purpose of advocating for treatment that recognizes the inherent characteristics unique to mutual holding companies with public shareholders. Currently, there are over 50 MHCs with over \$50 billion in assets located in 20 states from Maine to Washington State and New Mexico to Georgia.

1. Regulation MM Exceeds the Statutory Authority of the Dodd Frank Act

AMHC is particularly concerned with the provision in Regulation MM that requires a mutual holding company ("MHC") to seek and obtain an annual approval of members before the MHC may waive its right to dividends paid by a stock subsidiary. The Board adopted this requirement pursuant to Section 625 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA"). That section of the DFA amended Section 10(o) of the HOLA (12 U.S.C. § 1467a(o)), to set forth the conditions under which an MHC may waive its rights to a dividend. Specifically under that statute, dividend waivers are permitted if: (1) no insider of the MHC, associate of an insider, or tax-qualified or non-tax-qualified employee stock benefit plan of the MHC holds any share of the stock in the class of stock to which the waiver would apply, or (2) the MHC gives written notice to the Board of its intent to waive its right to receive dividends ("Dividend Waiver Notice") not later than 30 days before the date of the proposed date of payment of the dividend, and the Board does not object to the waiver. The DFA provides that the Board may not object to

Jennifer Johnson
Board of Governors of the Federal Reserve System
November 1, 2011
Page 2

a waiver of dividends if: (1) the waiver would not be detrimental to the safe and sound operation of the savings association; and (2) the MHC's board of directors expressly determines that a waiver of dividends by the MHC is consistent with the fiduciary duties of the board of directors to the MHC's mutual members; and (3) the MHC was organized as an MHC, issued minority stock and waived its right to dividends, in each case, prior to December 1, 2009 (a "grandfathered MHC").

In Regulation MM, the Board has established requirements to implement Section 625 of the DFA with respect to both grandfathered and "nongrandfathered MHCs" (those MHCs that were not reorganized as an MHC, issued shares to the public and waived dividends, in each case, prior to December 1, 2009). In both cases, Regulation MM requires that prior to an MHC waiving a dividend, a majority of the members must have approved the dividend waiver within 12 months prior to the declaration date of the dividend. This requirement goes well beyond anything contained in Section 625 of the DFA. That section only requires that the board of directors demonstrate that the waiver of the dividend is consistent with its fiduciary duty to the MHC's members.

Neither section 625, nor any of its legislative history, discuss the need for a member vote. If Congress had wanted to impose a member vote requirement (or any requirement for that matter that would demonstrate how a board should meet its fiduciary duty) Congress could have easily included such language in the Section 625. The absence of member vote language in Section 625 creates a strong implication that Congress did not intend to impose such a burdensome standard on an MHC. Instead, Congress left it to principles of general corporate law to determine whether a board has met its fiduciary duty requirements. This is supported by the express language of Section 625 which requires a board of directors to provide the Board with a copy of the resolution and any supporting materials relied upon by the board of the MHC that were used to enable the board to conclude that the waiver is consistent with its fiduciary duties to the members of the MHC.

It is well established that a board of directors is the appropriate body to determine matters relating to the stock of a corporation. In this regard, it is general hornbook law that directors are authorized to make the sole determination as to if and when dividends are to be paid on shares of stock. Similarly, a board of directors is authorized generally under an institution's organizational documents to issue shares of stock with the terms and at prices determined by the board. Boards are also empowered to issue shares in series and to determine the relative voting, dividend and other preferential rights of such series. In short, general principles of corporate law leave the decisions relating to a corporation's stock to the board of directors and have established commonly understood means by which a board can meet its fiduciary duties with respect to such decisions. The Board should recognize such principles and leave to the board of directors of

each MHC to determine whether a dividend waiver is consistent with its fiduciary duties to members.

We believe that Congress was well aware of the past position of the Board with respect to dividend waivers. Nonetheless, the language used by Congress in Section 625 is virtually identical to the former regulation of the OTS, found at 12 C.F.R. § 575.11(d) and set forth below, with respect to the standards by which a dividend waiver may be approved. This shows the clear intent of Congress to maintain those same standards established by the OTS, which will now be enforced by the Board due to the elimination of the OTS. If Congress had desired to adopt a different standard from that used by the OTS, it would not have copied the language from the former OTS regulation.

2. Congress Addressed the Distinction Between Grandfathered and Nongrandfathered MHCs Through the Valuation Provision

The DFA provides that any waived dividends must be considered by the regulatory authorities in determining the appropriate exchange ratio in the event of a full stock conversion. The DFA, however, exempts from such provision and prohibits an agency from considering waived dividends, with respect to grandfathered MHCs. This means that for nongrandfathered MHCs, any waived dividends will dilute the relative ownership of the public stockholders if and when the MHC undertakes a full conversion. In this manner, Congress set the “leveling conditions” for public shareholders of nongrandfathered MHCs receiving the benefit of a waived dividend. Congress did not intend, and gave the Board no authority, to tilt the balance so as to make a dividend waiver a practical impossibility by adding on the burden and expense of a member vote.

3. Regulation MM Elevates the Inchoate Rights of MHC Members

Giving members the right to vote on a dividend waiver elevates the interest of members beyond what is generally recognized as an inchoate interest in the institution. That is, a member does not have the same ownership rights as a stockholder. The member’s interest does not give him or her an interest in the net earnings or equity of the institution, except in the extremely unlikely event of a solvent liquidation of the institution. A member’s interest cannot be purchased, sold or otherwise transferred, as in the case of stock. Further, a member has no expectation in the ownership of the institution beyond his or her FDIC-insured deposit and the interest paid thereon.

The issue of member ownership rights in a mutual institution has been well settled for many years. In the early 1970’s when the Federal Home Loan Bank Board (“FHLBB”) was considering the manner in which a mutual may convert to stock form, the FHLBB considered all the potential ramifications that such a conversion would have on the ownership interests of a

member. The FHLBB, in deciding that depositors had nothing more than an inchoate right to the institution, cited a long-standing U.S. Supreme Court decision that held:

The asserted interest of the depositors is in the surplus of the bank which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest.

Society for Savings in the City of Cleveland v. Bowers, 349 U.S. 143, 150, 75 S. Ct. 607, 99 L. Ed. 950 (1955).

In short, case law and long-standing regulatory policies have recognized that the interest of a mutual member is nothing more than a contingent interest with virtually no value. Requiring a member vote to approve a dividend waiver would raise a member's interest to a level that is much greater than merely the contingent interest that a member has in an MHC.

4. Congress Gave the Board No Power to Determine Or Impose Voting Rights in MHCs

MHCs are chartered by either the OCC, as the successor to the OTS, or by the states. The Federal Reserve is not the primary Federal regulatory authority for MHCs. Those authorities alone have the ability to require member voting rights. Nonetheless, the Board seeks to impose its will on MHCs by requiring member voting rights with respect to dividend waivers. This total usurpation of authority does not take into account the rules of corporate governance adopted by the OTS (now the OCC) and the states as to the relative rights and obligations of a board of directors and members. Even more striking is the total disregard for the voting rights that are granted to members by the MHCs organizational documents and by either Federal or state law. For instance, Federally chartered MHCs provide members with one vote per one hundred dollars on deposit, up to 1,000 votes. This well-established provision of mutual corporate law enables larger depositors to have more votes than smaller depositors. The Board, however in Regulation MM, requires the dividend waiver vote to be "approved by a majority of members." Does this mean then that a depositor with a maximum of 1,000 votes is now reduced to one vote for dividend waivers in spite of the MHC's governing charter and bylaws and Federal law?

Although the impact on Federally chartered MHCs would be significant, a more egregious result would occur to state chartered MHCs. Many states do not provide any voting rights for members and leave all corporate decisions to the board of directors. Other states require that incorporators alone vote upon certain transactions such as a mutual to stock conversion. Regulation MM takes none of these instances into account. Regulation MM does not state who are members in such

cases, who will be permitted to vote, the number of votes permitted and how the votes will be counted. Rather, Regulation MM preempts the statutory authority of the states and the OCC with respect to member voting rights. We do not believe that the Board has the ability to impose voting rights where none exist under law or disturb the delicate governance relationship with respect to members rights under state law.

5. There is a Developed History of MHC's Waiving Dividends and Members are Cognizant of the Potential for Dividend Waivers

There is a long history of dividends waivers which has been accepted and expected by members since the creation of the MHC form of organization. Indeed, since the OTS first adopted regulations to permit the reorganization to an MHC form in 1993, the regulations permitted the board of directors of the MHC to waive dividends. The provisions of the OTS regulations at 12 C.F.R. 575.11(d) are strikingly similar to the language used by Congress in drafting Section 625. The OTS' regulations provided that

Restriction on waiver of dividends. No mutual holding company may waive its right to receive any dividend declared by a subsidiary unless either:

- (1) No insider of the mutual holding company, or associate of an insider, or tax-qualified or non-tax qualified employee stock benefit plan of the mutual holding company holds any share of stock in the class of stock to which the waiver would apply; or
- (2) The mutual holding company provides the OTS with a notice of intent to waive its right to receive dividends 30 days prior to the proposed date of payment of the dividend, and the OTS does not object. The OTS shall not object to a notice of intent to waive dividends if: (i) the waiver would not be detrimental to the safe and sound operation of the savings association; and (ii) the board of directors of the mutual holding company expressly determines that waiver of the dividend the mutual holding company is consistent with the directors' fiduciary duties to the mutual members of such company. A dividend waiver notice shall include a copy of the resolution of the board of directors of the mutual holding company, in form and substance satisfactory to the OTS, together with any supporting materials relied upon by the board concluding that the proposed dividend waiver is consistent with the board's fiduciary duties to the mutual members of the mutual holding company.

Members are well aware of the potential change to the corporate structure resulting from an MHC reorganization and the potential for a waiver of dividends by the MHC. It should be remembered that the members of the mutual must first vote to approve a reorganization into the MHC form. Members are provided proxy statements which should include a disclosure that the

MHC may waive dividends paid by the stock subsidiary. Thus, if members approve the MHC formation with full knowledge that the MHC may waive dividends in the future, there would hardly be a reason to require the MHC to go through the time and expense of conducting annual meetings to reapprove a dividend waiver.

6. Stockholders Relied on the Established Dividend Waiver Process in Making their Investment Decisions.

Over the years, the market has come to rely on the dividend waiver process as part of an MHC reorganization. Investors, as well as members, understand the impact that the dividend waiver will have on the institution and the marketability of the shares sold in the process. Stockholders understand that the stock subsidiary may pay a slightly higher dividend rate in exchange for their taking a minority ownership position in an institution that is controlled by the MHC. Indeed, this reliance was based on comprehensive disclosure which was reviewed and tacitly approved by the government. Similarly, members understand that the MHC reorganization will result in a stronger bank with no diminution in membership rights. As a result, the MHC form is a win-win for members and stockholders and has resulted in substantial equity being raised by these institutions. Over the past 20 years, institutions have raised a total of \$5.9 billion in the formation of MHCs.¹ In this regard, the MHC form is also a “win” for the FDIC as the capital raised has created an additional cushion for the deposit insurance fund.

7. The Current MHC Structure Has Resulted in Significant New Capital to the Banking Industry

The 5.9 billion in new capital raised by MHCs is capital that not only allows the institution to grow and prosper, but protects the FDIC fund from losses. The consensus, however, among members of the MHC industry and market experts is that Regulation MM will severely impair the on-going viability of the MHC form and thus eliminate the ability of MHCs to raise additional capital. This would be particularly unfortunate at this time when the banking industry needs additional capital. The DFA as well as Basel III will result in higher capital requirements for all banking institutions. Moreover, if the Board does not apply its Small Bank Capital Policy to savings institutions, savings institutions with assets less than \$500 million may have to raise additional capital, putting them at a significant disadvantage compared to similarly situated commercial banks. At this time then, the Board should not take actions that would discourage capital raising, but rather should encourage capital formation by giving the market a signal that prior processes and standards with respect to MHCs will be continued.

¹ Source: SNL Financial LC

8. Paying Dividends to Stockholders Only Reflects the Relative Risks by the Owners of the Stock Subsidiary

The waiver of dividends by the MHC means that only the public shareholders will benefit from the payment of dividends, if and when declared by the board. This dedication of the bank's earnings stream is no different than the payment by the bank of dividends or interest on trust preferred securities or debt securities. In each case, the investors in the bank, those that have contributed real capital to the institution, have the right to a return on their investment. Providing a mechanism in which only the investor receives a return is consistent with general investment principles. The members, however, are not investors. They have no real ownership rights and have no expectation beyond the interest paid on their deposits. In the event of the failure of the bank, the depositors are protected by the FDIC deposit insurance and typically suffer no loss. Conversely, in the event of failure of the bank, the shareholders of the stock company will be the first to incur a loss. Thus, it is appropriate for those shareholders to reap the benefits of any dividend paid.

9. A Member Vote Would Result In Significant Expense To The MHC

Our members have informed us that requiring a member vote would be cost prohibitive for many MHCs. An annual vote would require the preparation of a proxy statement and together with the printing and mailing costs, as well as the costs associated with holding an annual meeting, could in some cases exceed the amount of the dividend to be paid. For even the smallest institutions, we estimate that the costs would be at least \$125,000, an amount that such institutions can ill afford and would be better used to serve the community.

For those institutions that could not afford a member vote, but still decided to pay a dividend (i.e., paid the dividend to the public shareholders as well as the MHC), the MHCs would have to pay a tax on the dividends that are received. In this case, the tax paid would lessen substantially any benefit that would tangentially accrue to the depositors.

10. Regulation MM Fails to Take Into Account the Full Costs Associated with a Member Vote

While we understand the burdensome timelines imposed on the Board by the DFA to issue implementing regulations, we do not believe that the staff adequately performed its duties in assessing the costs and burdens that would be imposed as a result of the member vote requirement. In order to comply with this requirement, the Board must first make a determination of the costs and burdens associated with its regulations. In this regard, the staff failed to consider the economic consequences of the rule. For instance, the regulation fails to assess the potential direct costs to MHCs resulting from requiring a member vote. These costs would include the legal and administrative costs associated with preparing a proxy statement for a member vote, the costs associated with printing and mailing the proxy statements and the costs of holding a member meeting, including hiring a proxy solicitor and vote tabulator. Conversely, the regulation fails to assess the tax costs that would be imposed if an MHC determined not to waive a dividend. The regulation also fails to assess the indirect costs of the regulation, including the impact to the stock price from the inability to pay a dividend if a waiver would not be obtained, or the reduction in the viability of the MHC form, which would reduce the potential capital that can be raised by mutual institutions that cannot otherwise undertake a full stock conversion. The Board also failed to assess any special issues that could arise by imposing voting rights on companies whose governance regulatory oversight is reserved to the states and the OCC and by granting voting rights to depositors of state chartered institutions that do not provide for voting rights under state law.

Similarly, the regulation fails to analyze any benefits that may be obtained by the rule. The members have no right to a dividend and therefore, the members' approval, if obtained, would not provide any benefit to this group. The community would not benefit either, as the costs involved would only result in less capital and therefore, less ability to serve the community. The FDIC would not benefit as, again, the reduction in capital from the increased costs would only serve to lessen the capital buffer that protects the FDIC insurance fund.

The Board made no attempt to assess, estimate and quantify the costs to be imposed by the Rule. The Board did not attempt to determine the costs through surveys, studies or through empirical evidence. Instead of quantifying the costs companies would incur or the predicted benefits from the Rule, the Rule merely states that the hourly burden estimates associated with each information collection are not expected to change materially as the information to be collected is substantively similar to that which is currently collected from MHCs and those managing these entities. This can hardly be the case as there currently are no member voting requirements with respect to a dividend waiver and the costs associated with the same will be substantial.

Jennifer Johnson
Board of Governors of the Federal Reserve System
November 1, 2011
Page 9

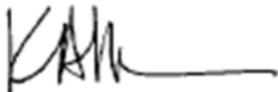
The Board's failure to adequately assess, estimate and quantify the costs involved renders the Rule arbitrary and capricious. In this regard then, AMHC requests that the Board suspend the voting requirement and instruct the staff to adequately assess the economic effects of the member vote requirement by conducting a full analysis of the direct and indirect costs and benefits of the rule.

11. Regulations MM Should Require A Board to Meet Its Fiduciary Duty in a Manner Consistent with General Corporate Law and MHC Precedent

AMHC recognizes the potential conflict that may arise between an MHC's members and stockholders. However, that conflict was addressed by former OTS regulations, the language of which has been mirrored in Section 625, which merely required the board to demonstrate that the dividend waiver is consistent with the board's fiduciary duty to members. The board should be able to meet such duty in a manner consistent with general principles of corporate law and OTS precedent. As the OTS recognized in the past, a board could meet its duty by finding that the waived dividend resulted in more capital retained at the bank, less risk to the FDIC, expansion of services to the depositors and borrowers and greater potential to meet the needs of the community.

America's Mutual Holding Companies appreciates this opportunity to provide the above comments to the Board. If you have any questions, please do not hesitate to contact me at 914-684-2500 or Douglas Faucette at 202-220-6961.

Best Regards,



Kenneth Martinek
Chairman
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