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Securities Act of 1933
Securities Exchange Act of 1934
Rule 3-10 of Regulation S-X
Rule 12h-5 under the Exchange Act

November 9, 2020

Via Electronic Transmission

Securities and Exchange Commission,
Division of Corporation Finance,
Office of Chief Counsel,
100 F Street, NE,
Washington, D.C. 20549.

Re: Rule 3-10 and Trust Preferred Securities

Ladies and Gentlemen:

We are writing to request that the staff of the Division of Corporation Finance (the "*Staff*") confirm that it will not recommend any enforcement action to the Securities and Exchange Commission (the "*Commission*") if registrants with outstanding trust preferred securities that were issued prior to March 2, 2020 (the "*Trust Preferred Securities*") for which the trust issuers are eligible to omit their separate financial statements pursuant to Rule 3-10 of Regulation S-X, as currently in effect, continue to omit separate financial statements following the effectiveness of the Commission's recent amendments to Rule 3-10 on January 4, 2021.[1] Rule 12h-5, as currently in effect and as amended effective January 4, 2021, provides an exemption from reporting requirements under Sections 13(a) and 15(d) of the Securities Exchange Act of 1934, as amended (the "*Exchange Act*"), for issuers of guaranteed securities that are permitted to omit separate financial statements under Rule 3-10. Accordingly, this request would apply with respect to trust issuers and Trust Preferred Securities for purposes of both Rule 3-10 and Rule 12h-5, but only where all the requirements of the amended version of Rule 3-10 would be satisfied except with respect to the consolidation of the trust issuer by the parent-company guarantor and registrant.

In our experience, Trust Preferred Securities were generally issued by bank holding companies following the 1996 announcement by the Board of Governors of

[1] *See* Commission Release No. 33-10762; 34-88307, *Financial Disclosures About Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities*, 85 Fed. Reg. 21940 (Apr. 20, 2020).

the Federal Reserve System (the "*Federal Reserve Board*") that it would recognize trust preferred securities as capital instruments.[2] Due to changes in law and regulation, specifically Section 171 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (codified at 12 U.S.C. § 5371) and the capital rules adopted by the Federal Reserve Board in 2013,[3] trust preferred securities issued on or after May 19, 2010 are no longer recognized as capital instruments[4] and, in our experience, are no longer issued by bank holding companies.

Trust Preferred Securities are issued by a special purpose entity, typically a statutory trust, created by the parent-company guarantor and registrant. The sole purpose of the trust issuer is to hold securities issued by the parent company, such as junior subordinated debt or preferred stock, and to issue Trust Preferred Securities that have payment terms that mirror the terms of the securities it holds. The trust issuers and the agreements relating to the Trust Preferred Securities historically have been structured so that the trust issuers would be eligible to omit their separate financial statements under the version of Rule 3-10 adopted in 2000[5] and currently in effect. The parent companies' obligations under the agreements relating to the Trust Preferred Securities and the trust issuers were designed to constitute "full and unconditional" guarantees of the trust issuers' obligations under their Trust Preferred Securities. Further, the trust issuers were designed to be "100% owned" "finance subsidiaries" for purposes of the current version of Rule 3-10,[6] in that all the common interests of the trust issuer were held directly or indirectly by the parent-company guarantor and registrant. Although a "100% owned" subsidiary for purposes of a Rule 3-10, a trust issuer is not consolidated by its parent-company guarantor and registrant under U.S. GAAP.[7]

The recent amendments to Rule 3-10 sought, in part, to expand the scope of Rule 3-10 by eliminating the "100% owned" condition and instead requiring that a

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2 *See* Federal Reserve Board, Press Release (Oct. 21, 1996), *available at* https://www.federalreserve.gov/boarddocs/press/bcreg/1996/19961021/default.htm.

3 *See* 12 C.F.R. Part 217.

4 If issued pursuant to the Emergency Economic Stabilization Act of 2008, Trust Preferred Securities issued prior to October 4, 2010 could qualify as capital instruments.

5 *See* Commission Release No. 33-7878; 34-43124, *Financial Statements and Periodic Reports for Related Issuers and Guarantors*, 65 Fed. Reg. 51692 (Aug. 24, 2000).

6 *See* 17 C.F.R. §§ 210.3-10(h)(1) and (7), as in effect on the date of this letter.

7 *See, e.g.*, Federal Reserve Board, *Risk-Based Capital Standards: Trust Preferred Securities and the Definition of Capital*, 70 Fed. Reg. 11827, 11828 (Mar. 10, 2005) ("In late December 2003, when FASB issued a revised version of [FASB Interpretation No. 46, *Consolidation of Variable Interest Entities*] (FIN 46R), the accounting authorities generally concluded that [trust issuers] must be deconsolidated from their [bank holding company] sponsors' financial statements under GAAP.").

subsidiary be consolidated by the parent-company guarantor to be eligible to omit its separate financial statements under Rule 3-10.[8] The new consolidation condition would prevent "100% owned" "finance subsidiary" trust issuers from omitting their separate financial statements pursuant to Rule 3-10 and, by extension, from qualifying for the exemption in Rule 12h-5 once the amended version of Rule 3-10 takes effect.

If trust issuers could not rely on Rule 3-10 and, by extension, Rule 12h-5, registrants with Trust Preferred Securities that are listed on a national securities exchange or subject to a market-making prospectus included, or deemed included, in a registration statement filed under the Securities Act of 1933, as amended ("*Securities Act*"), would be required to prepare separate financial statements for the trust issuers, including audited annual financial statements, and prepare and file current and periodic reports for the trust issuers. We do not believe such separate financial statements or reports would provide useful information to investors. Rather, we believe that the current and periodic reports of the parent-company guarantor and registrant, together with the disclosures specified in Rule 13-01 of Regulation S-X, would provide investors with all material information relating to the Trust Preferred Securities because the sole purpose of a trust issuer is to hold securities issued by its parent company and to issue Trust Preferred Securities that have payment terms that mirror the terms of the securities it holds. It would appear to us that a trust issuer required to file current and periodic reports under the Exchange Act would need to incorporate by reference the reports of the parent-company guarantor and registrant. We also note that Rule 13-01 requires disclosure of, among other things and to the extent material, a description of factors that may affect payments to holders of guaranteed securities, such as Trust Preferred Securities.

This request would apply to Trust Preferred Securities that satisfy the following conditions:

- No other subsidiary of the parent-company guarantor and registrant would guarantee the Trust Preferred Securities;

- The parent-company guarantor and registrant would have filed financial statements for the periods specified by Rule 3-01 and Rule 3-02 of Regulation S-X;

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[8] *See, e.g.*, 85 Fed. Reg. at 21985 ("Overall, these final amendments [including the change from 100%-owned to consolidation] should permit a broader scope of issuers and guarantors to be eligible to provide the Revised Alternative Disclosures in lieu of separate financial statements of each subsidiary issuer and guarantor than under existing Rule 3-10.").

- The Trust Preferred Securities would be outstanding, would have been initially[9] issued prior to March 2, 2020, the date on which the recent amendments to Rule 3-10 were adopted, and would have been offered and sold on a registered basis[10] prior to March 2, 2020;

- The trust issuer had been and would continue to be a "100% owned" "finance subsidiary" under the version of Rule 3-10 currently in effect; and

- All the conditions in paragraph (a)(1) and (2) of the amended version of Rule 3-10, to take effect January 4, 2021, would be satisfied, including the provision of the disclosures specified in Rule 13-01 of Regulation S-X, except for the condition in amended Rule 3-10 that the subsidiary issuer be a consolidated subsidiary of the parent-company guarantor and registrant.

As noted above, a number of registrants have Trust Preferred Securities that are listed on a national securities exchange or subject to a market-making prospectus included, or deemed included, in a registration statement filed under the Securities Act. For these registrants, even if the Trust Preferred Securities were issued many years ago, Rule 3-10 and Rule 12h-5 remain applicable because of the financial-statement disclosure and Exchange Act reporting obligations that would otherwise apply as a result of listing securities on a national securities exchange or engaging in purchases and resales pursuant to a registered market-making prospectus. We believe no-action relief with respect to these trust issuers and Trust Preferred Securities is necessary to avoid the possibility that registrants may take action in light of those obligations that would impair liquidity for Trust Preferred Securities, such as delisting listed Trust Preferred Securities or ceasing to engage in market-making activities with respect to the Trust Preferred Securities.

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9 For purposes of our request, purchases and resales of Trust Preferred Securities under market-making prospectuses would not be treated as "new issuances."

10 For purposes of our request, such offers and sales could be in connection with the initial issuance of the Trust Preferred Securities, a subsequent registered market-making transaction, or both.

If you have any questions about this request or would like any additional information, please contact Ben Weiner or Bob Reeder at 212-558-4000.

Sincerely,

Benjamin H. Weiner

Benjamin H. Weiner

cc: Robert W. Reeder