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Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

**Re: Docket No. R-1741
RIN R-7100-AG11**

**AMENDMENT TO THE CAPITAL RULE TO FACILITATE THE EMERGENCY
CAPITAL INVESTMENT PROGRAM**

America's Mutual Banks ("AMB") welcomes the opportunity to comment on the captioned interim final rules ("the rules") published in the Federal Register on March 22, 2021 by the Federal Reserve Board ("FRB").

AMB is an unincorporated association whose membership consists of banking institutions organized under the mutual form of ownership whether mutual banks or mutual holding companies. AMB's membership consists entirely of community based institutions dedicated to serving and fostering the economic growth of their communities. Community based, mutual form institutions are a historically vital part of the fabric of many communities and their future viability must be protected and enhanced. A number of our members are minority deposit institutions or have community development financial institution status.

The rules amend the FRBs capital rules in order to support and facilitate the timely implementation and acceptance of the Congressionally authorized Emergency Capital Investment Program (ECIP) pursuant to the Section 104A to the Community Development Banking and Financial Institutions Act of 1994 (the Act). Under Section 104A(d)(5)(B) of the Act, if the Secretary of the Treasury determines that an eligible banking organization cannot feasibly issue preferred stock, such as a bank organized as a mutual banking organization, Treasury can acquire subordinated debt instruments (Subordinated Debt) from such an eligible banking organization.

The preamble to the regulation explains:

Under the terms of Senior Preferred Stock, participating eligible banking organizations will not be required to pay dividends until two years after issuance of the Senior Preferred Stock, and then will be subject to a noncumulative dividend with a rate not to exceed 2 percent that may fluctuate based on certain lending growth criteria applied to the issuer. A participating eligible banking organization is prohibited from paying dividends under certain circumstances, including if the participating eligible banking organization interest payments on the Subordinated Debt would be subject to determinants and constraints similar to those described above, but the interest payments would be cumulative and deferrable.

Under the rule ECIP preferred stock is treated as tier 1 capital but Subordinated Debt is treated as tier 2 capital. Moreover, the rule makes no attempt to qualify mutual bank alternative instruments such as mutual capital certificates or pledged accounts as acceptable Tier 1 capital Treasury investments under the ECIP. The disparate treatment of ECIP Subordinate Debt as secondary capital is historically inconsistent in that it is contrary to the actions taken by the Federal Reserve Board to amend Reg Y to facilitate the recapitalization of banks during the last crisis. During that time the Federal Reserve Board treated TARP subordinated debt issued to the Treasury as Tier 1 capital. 74 Fed. Reg. 26077, June 1, 2009. Moreover, the treatment of Subordinated Debt as equivalent to preferred stock, in so far as the terms of Subordinated Debt governing rate, maturity and priority will be substantially similar to the ECIP preferred, fails to appreciate the legal, tax and investment distinction between debt and equity. As a debt instrument with a fixed maturity date and fixed interest payments, at least it should have a lower rate than the preferred. Ironically, this equivalence is not consistent with the capital treatment. Mutuals can be said to receive the worst of both worlds higher cost and limited capital utility. That is, while the rate, term and ancillary provisions are the similar to the preferred, the most important feature—eligibility as tier 1 capital is excluded.

The treatment of mutual bank issued Subordinated Debt as tier 2 capital fails to recognize the legal impediment under federal and state law inherent in the mutual form of organization to issuing capital stock of any kind. Mutual banks cannot issue additional Tier 1 capital instruments such as common stock in order to increase the amount of Tier 2 capital which will be includible. In making this exclusionary distinction, coupled with the failure to entertain mutual capital certificates and pledged accounts, historically mutual tier 1 capital instruments, the regulation fails to recognize the fundamental limitation on the powers of a mutual bank or holding company which prevent them from issuing capital stock. Further, the inadequacies of Reg. MM frustrate the issuance of ECIP preferred at the mid-tier holding company level even if Treasury were to accept an issuance by that entity. Indeed, mutual holding companies are the only institutions that would be required to obtain agency preapproval before issuing an ECIP capital instrument to Treasury.

In contrast, the NCUA an agency fully apprised with the limitations on mutuality and capital stock permits mutual community credit unions to include the Subordinated Debt in net worth. In failing to accommodate the peculiar legal structure of mutual banks, the regulation undermines the intent of Congress in diminishing significantly the attractiveness of the program to mutual MDIs. Moreover, it eliminates the primary purpose of the program, which is to allow MDIs to leverage the ECIP capital to support expanded lending in the minority community. The rule will not facilitate the timely implementation and acceptance of ECIP by mutual MDIs and CDFIs. Surely, this is not a result contemplated by Congress or the agencies.

Section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") as amended by the Dodd Frank Act requires the Federal Reserve Board to consult with the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) on the best methods for achieving the following goals:

- 1 Preserving the number MDIs;
2. Preserving their minority character in cases involving mergers or acquisition of an MDI by using certain general preference guidelines;
- 3 Providing technical assistance to prevent insolvency of currently solvent MDIs;
- 4 Providing training, technical assistance, and educational programs; and
- 5. Promoting and encouraging the creation of new MDIs (emphasis supplied).**

We believe that the disparate status of Subordinated Debt is in conflict with the intent of Congress and the specific language of Section 308 of FIRREA. The denial of Tier 1 capital eligibility will do nothing to preserve the number of mutual MDIs. Moreover, the failure to facilitate the use of the Treasury funds as Tier 1 capital by qualifying Subordinated Debt or other alternative capital instruments such as MCCs or pledged deposits as Tier 1 capital discourages and frustrates the deposit insurance of de novo mutual MDIs by the FDIC, a result directly in contravention with Section 308 of FIRREA.

We are concerned the short deadline for adopting a regulation implementing the Emergency Capital Investment Program may have contributed to the serious oversight of denying mutual MDIs and mutual banks with CDFI affiliates from issuing Tier 1 capital eligible instruments. We urge the Federal Reserve Board to use the comment period to correct and repair this deficiency.

Very truly yours,



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