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December 13, 2005

VIA EMAIL

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Notice of Proposed Rulemaking: Interstate Banking; Federal Interest Rate Authority -- RIN 3064-AC95

Dear Mr. Feldman:

We are pleased to have the opportunity to submit this letter to the Federal Deposit Insurance Corporation ("FDIC") on behalf of a state chartered bank ("Bank") to comment on the Notice of Proposed Rulemaking ("Notice") relating to the preemption of certain state laws, with the purpose of establishing parity between national banks and state chartered banks in interstate activities and operations. Specifically, the Notice addresses the provisions of Sections 24(j) and 27 of the Federal Deposit Insurance Act ("FDIA"), and proposes regulations that would implement those provisions in a manner that would allow state-chartered banks to adopt their home state law with respect to its interstate branch banking activities, and confirm the long-standing position of the FDIC that, except in certain opt-out states, state-chartered banks may adopt the interest rate of the most-favored lender in its home state and export that interest rate and fees to borrowers located outside of its home state.

As a general matter, the Bank supports the proposed regulations set forth in the Notice, and the efforts of the FDIC to adopt rules that would achieve parity between state and national banks with respect to interstate banking operations, including lending, deposit-taking and other banking activities. We believe that these efforts are more important in light of the regulations adopted by the Office of the Comptroller of the Currency ("OCC") in 2004 that confirmed the broad preemptive authority of the National Bank Act as applied to the interstate banking activities of national banks.

The Bank, however, wishes to comment on certain proposed sections of the proposed regulations contained in the Notice, in the order addressed in the proposed rule: (1) proposed Part 331, implementing Section 27 of the FDIA, and (2) amendments to Part 362, implementing Section 24(j) of the FDIA. These comments are set forth below.

A. Comments on Part 331: Federal Interest Rate Authority.

The Bank agrees with the overall approach of the proposed new Part 331, formally implementing Section 27 of the FDIA by adopting the position of the FDIC set forth in General Counsel Opinions Numbers 10 and 11, and setting them forth in a regulation. While we believe that Section 27 of the FDIA and its legislative history is clear in its intent to provide interest rate parity between state and national banks, the FDIC's proposal to "codify" the General Counsel opinions will further solidify the intent of the law that state banks have the same most favored lender and exportation rights as national banks.

We believe that the proposed regulations can be written to be even clearer in their intent. For example, while language in the Notice indicates that the most favored lender and exportation rights should extend to operating subsidiaries of state banks to the same extent that they extend to operating subsidiaries of national banks, *see* 70 F.R. 60019, 60027, that language is not in the actual proposed 12 C.F.R. § 331.1, creating an ambiguity that could lead to differing interpretations. This position should be stated directly in the regulation.

Similarly, the FDIC adopts essentially the identical language of 12 C.F.R. § 7.4001 of the OCC's regulation in 12 C.F.R. § 331.2. However, as the FDIC notes in the preamble to the Notice, since that regulation was adopted, the OCC has issued letters defining interest to also include prepayment penalties. We believe that the FDIC should accordingly issue its regulation with a list that includes a more expansive list of what is considered "interest" under federal law, and furthermore, add a phrase that would make clear that the term may be amended over time to include other items, as may be determined by the OCC or the FDIC.

Thirdly, we note that the Notice adopts the view from FDIC General Counsel Opinion Number 11 ("GC-11") and OCC Interpretive Letter Number 822 that the appropriate interest rate on a loan involving an interstate bank should be determined by reference to the laws of the state where all of the non-ministerial functions associated with making a loan occur -- the decision to extend credit, the physical disbursement of

the loan proceeds, and the communication of final loan approval. We recognize that this analysis was adopted in large part from reference to the legislative history of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. However, since 1998, when these interpretive letters were issued, the loan processes at most banks have changed. For example, most loan approvals are made based on risk-based pricing strategies using credit and other scores at back-office facilities, rather than by an underwriter making a nuance judgment about a loan at a branch office. Similarly, loan disbursal and communicating the first approval of the extension of credit are often completed electronically from a back-office facility, again not necessarily in the same state as a branch. This often makes it difficult to tell in which state the non-ministerial activities are taking place because activities could take place in one place and then documents electronically transferred to another place in a matter of seconds. For example, a branch in West Virginia could work closely via email and telephone with a back office in South Carolina to make a loan. Although technically the extension of credit, disbursal, and approval occurs in West Virginia, much of the legwork regarding these functions occurs in South Carolina. Given the material developments that have occurred in the lending process since 1998, we suggest that the FDIC clarify the definitions of the non-ministerial functions and how current practice may fit into the categories as set forth in the Notice.

Finally, we believe it would be useful to notify state chartered banks as to which states have opted out of the most favored lender and exportation provisions of Section 27 of the FDIA, since in our view, some banks are ignorant of the opt-out provision or confused as to its scope. We suggest that one way to provide effective notification would be to publish annually in the Federal Register a list of such states, similar to the manner in which the Board of Governors annually publishes the dollar threshold to determine the required reserve for transaction accounts. Alternatively, the FDIC could periodically issue a Financial Institutions Letter listing the states that have opted out.

B. Additions to Part 362: New Subpart F: Preemption

The Bank generally agrees with the approach taken by the FDIC in the new Subpart F of Part 362, specifically, 12 C.F.R. § 362.19, and that it captures the intent of Congress in enacting Section 24(j) of the FDIA in Riegle-Neal Amendments Act of

1997.[1] However, the Bank believes that the FDIC has too narrowly construed when host state law would not apply to an activity conducted at a branch in the host state of an out-of-state bank in subsection (c) of 362.19. Specifically, the Bank has an issue with the language in subsection (c) which states that: "[a] host State law does not apply to an activity conducted at a branch in the host State of an out-of-State, State bank to the same extent that *a Federal court or the Office of the Comptroller of the Currency has determined in writing that the particular host State law does not apply to an activity* conducted at a branch in the host State of an out-of-State, national bank." First, the Bank is concerned that under the proposed regulation a Federal court must be the court to determine that a host state law does not apply to a branch. In many instances, decisions relating to the activities of a national bank have been made by state courts. *See, e.g.*, *Gonzales v. Bank One Texas, National Association*, No. 04-03-00409-CV, 2004 WL 57052 (Tex. App. Jan. 14, 2004); *Nat'l Commercial Banking Corp of Austl. v. Harris*, 125 Ill. 2d 448 (1988). Thus, we believe that decisions by both state and federal courts should be used to determine if a host state law applies to a branch.

The other ground for allowing a state bank to use its home state law rather than a host state law under subsection (c) is if the OCC determines *in writing that a particular host State law* does not apply to an activity conducted at a branch in the host state of an out-of-state national bank. We note, however, that it is not normal practice at the OCC to issue separate letters to address the applicability of each state's law to a particular banking practice. Rather, once the OCC has issued a letter interpreting the activities of a national bank in one state, national banks in other states rely on the reasoning underlying that letter to determine if those activities can be conducted in other states under the same conditions. It would be unlikely that the OCC would issue separate letters for each of the fifty states stating that the same activity is permissible under federal law in that state. Thus, the Bank would suggest revising the language to allow state-chartered banks to rely on any letter that the OCC has issued and use the reasoning underlying that letter to determine if an activity they are conducting in a host state would be allowed in accordance with the home state laws for a branch of an out-of-state bank.

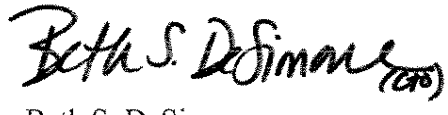
Finally, the Bank believes it would be useful if the FDIC clarified that, despite the foregoing, a state chartered institution operating a branch in a host state could choose to

[1] Although it is not specifically mentioned in the Notice, the Bank believes that Section 362.19 should also be applicable to operating subsidiaries of state chartered banks similar to the way the OCC has applied host state law to operating subsidiaries of national banks.

adopt the host state's law rather than its home state's law, to conduct a particular banking activity in that state. This would be consistent with GC-11 and the practice allowed by the OCC with respect to national banks, where despite authority to preempt a particular host state law, a national bank can voluntarily decide to comply with it.

Thank you for the opportunity to provide comments on the Notice. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



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