

Marshall & Ilsley Corporation

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Randall J. Erickson/Senior Vice President, General Counsel and Corporate Secretary

December 13, 2005

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

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

Dear Mr. Feldman,

Marshall & Ilsley Corporation (M&I) very much appreciates the opportunity to comment on the above-captioned Federal Deposit Insurance Corporation (“FDIC”) notice of proposed rulemaking published in the Federal Register on October 14, 2005 (“Proposed Rule”).¹ The Proposed Rule serves as the FDIC’s response to a petition filed by the Financial Services Roundtable on March 4, 2005 (“Petition”). M&I testified at, and provided written testimony in connection with, a hearing prompted by the Petition that took place on May 24, 2005. M&I strongly supports the Proposed Rule but urges the FDIC to finalize the rule pursuant to modifications and comments discussed below.

M&I is a diversified national financial services company with over \$44 billion in assets, headquartered in Milwaukee, and M&I Marshall & Ilsley Bank (“M&I Bank”) is M&I’s lead bank. M&I Bank has assets of approximately \$38 billion and is the largest bank headquartered in Wisconsin. The bank operates approximately 55 interstate branches in Minnesota and Arizona, and delivers business and consumer banking products and services to customers on a nationwide basis.

M&I Bank’s history dates back almost 160 years to its organization in 1847 as a private bank, the year before Wisconsin was admitted to the Union. M&I Bank started being regulated as a Wisconsin state-chartered bank in 1888. The bank has continued as a state-chartered bank since that time, and has been regulated during this period by the Wisconsin Department of Financial Institutions and its predecessor agencies. The bank has had, and continues to have, excellent relationships with its state regulator.

Stated generally, the Proposed Rule clarifies that a state-chartered bank’s activities of, by through, in, from, or substantially involving a branch of the bank located

¹ See 70 Fed. Reg. 60019 (October 14, 2005).

in a state other than the bank's home state are subject to the host state's laws only to the extent such laws apply to a national bank's branch activity. The Proposed Rule also provides that state-chartered banks have interest rate authority parallel to the interest rate authority of national banks under 12 U.S.C. § 85 of the National Bank Act. Stated simply, under this provision a state-chartered bank may charge any interest rate permitted to be charged by a national bank, including any rate or related power permitted in regulations and interpretation letters issued by the Office of the Comptroller of the Currency (OCC) on behalf of national banks. These powers include parallel interest rate authority for operating subsidiaries of the banks, and are clarified by a non-exclusive list of charges that do and do not constitute "interest".²

M&I believes strongly that the FDIC should adopt the Proposed Rule and act expeditiously in order to prevent the further migration of larger banking organizations out of the state system and into the national banking system. However, we urge the FDIC to additionally consider certain modifications to the rule. First, the Petition called for parity for state-chartered banks with national banks. The Proposed Rule does not address state-chartered banks' ability to compete on equal footing in states where the state-chartered bank does not have a branch, nor does it address the powers of state-chartered banks' operating subsidiaries (outside of the interest rate authority described above). This means that state-chartered banks will not, in fact, have complete parity with national banks.

As stated in our testimony on the Petition, if the FDIC fails to act to give state banks like M&I Bank the interstate competitive parity that we need to compete with national banks, it is an alarming but real consequence that the dual banking system, as it has existed for more than a century, simply will not survive. Instead, the present system of bank regulation stands at risk of being forever altered, with smaller community and intrastate banks dominating the state system, and money center, regional and banks with multi-state operations being regulated almost exclusively by the OCC.

M&I Bank is an excellent example of how the marketplace for the delivery of financial services has changed since Congress passed the Riegle-Neal Interstate Banking Act in 1994. Our bank's growth in the delivery of interstate products and services over the last decade illustrates why the clarification of authority and rulemaking requested in the Petition has such importance for state banks.

When Riegle-Neal was passed in 1994, M&I Bank operated branches only in Wisconsin. Today, in addition to our almost 200 branches in Wisconsin, M&I Bank also operates approximately 55 branches in Arizona and Minnesota. Less than half of our Corporation's revenues in the first quarter of 2005 stemmed from Wisconsin banking operations, compared with over 70% four years ago. Our bank is evolving into a multi-state financial services delivery unit, but we are often unable as a result of state laws to deliver or integrate these products and services on a consistent, uniform platform. National banks and federal thrifts do not share this structural impediment because of federal preemption of state laws.

² See 70 Fed. Reg. 60027.

To compete fairly with federally-chartered banks, state banks like M&I Bank must be able to better integrate their product offerings by using a uniform platform that does not have to change for every state. While this effort will be greatly assisted by the FDIC's clarification of state laws applicable to state-chartered bank branches, state-chartered bank will still face an unequal playing field in states where they do not have branches. In addition, outside of the interest rate exportation authority discussed above, state-chartered banks' operating subsidiary powers have not been clarified to the extent national banks' operating subsidiary powers have been clarified by the OCC, namely that state law applies to a national bank operating subsidiary to the same extent state law would apply to the national bank itself in all cases.³

The continuance of the dual system of banking regulation bears great importance. Over the past century state legislators and state banking regulators have often been at the forefront of important innovations in the delivery of banking services, and in the enactment of strong consumer protection laws. Without continuing a system of dual banking regulation where banks with interstate operations have a real, viable choice to remain as a state charter, it is likely in our opinion that these successful state experiments and innovations in financial services will decrease dramatically. What will remain is a banking system in the United States where innovation and change will become almost exclusively the province of the federal banking regulators, and the role traditionally played by the states will be diminished or lost.

One example of these state-driven innovations was the authorization of banks to pay interest on NOW Accounts, a key development in the banking industry in the 1970's and an important new checking product for customers at the time. The State of Massachusetts first authorized NOW Accounts for banks.

Another example comes from our state, Wisconsin, which in the early 1970's adopted the nation's most comprehensive consumer credit protection statute—the Wisconsin Consumer Act. Wisconsin continues to be the only state in the country where, because of the Consumer Act, an auto loan creditor is unable to repossess a car after default, but must instead first proceed to court to obtain a repossession order. No other state protects consumers in this way, nor has the OCC ever enacted a similar consumer protection measure to be followed by national banks. State legislative actions affecting financial services under the dual banking system have often directly benefited consumers.

As a state chartered bank, M&I Bank must operate with less efficiency and uniformity than a comparably situated national bank. M&I Bank, through a subsidiary, operates an indirect automobile finance business through approximately 2,200 auto dealers, located in 18 states. Because this business is not structured as a national bank or an operating subsidiary of one, we must comply with different licensing, filing, and examination requirements in each of the states where we have operations. In addition, we must spend considerable cost and effort, on a regular and continuous basis, determining applicable state credit and disclosure requirements in order to remain in compliance with these separate state laws. None of these same costs, tasks, or program inefficiencies are

³ See 12 C.F.R. § 7.4006, 12 C.F.R. 5.34.

required for a national bank or a federal thrift offering the same financial product as we do in these markets. Finalization of the Proposed Rule will greatly mitigate these issues in states where M&I Bank has a branch, and for this reason M&I strongly supports the rule. However, unless the Proposed Rule is expanded pursuant to the reasoning provided in the Petition or otherwise, none of these inefficiencies are addressed in states where M&I Bank does not have a branch and are also not addressed in the absence of clarification of the applicability of state law to state chartered banks' operating subsidiaries.

As set forth in detail in the Petition, we believe existing law provides sufficient authority for the FDIC to promulgate the rules originally proposed in the Petition. The legislative history behind the 1997 amendment to Riegle-Neal also underscores that Congress intended the legislation to preserve the existing dual banking system.

Representative Roukema, who introduced the 1997 amendments, stated on the House floor that “[t]he essence of this legislation is to provide parity between State-chartered banks and national banks. . . . This legislation is critical to the survival of the dual banking system. . . . [A] strong State banking system is necessary for the economic well-being of the individual States and for innovation in financial institutions.” Similarly, Representative LaFalce from New York noted about the 1997 Riegle-Neal Act amendments that “[the bill’s] passage is vital to maintain the dual banking system. It is the dual banking system that . . . has helped to ensure that our U.S. banking industry has remained strong and competitive.” These comments by Representative LaFalce echo those made at the time by a number of other Senators and Representatives, from both political parties.

Second, in connection with the provisions on interest rate authority, a state-chartered bank will benefit from a uniform lending platform unless the loan is made by a bank chartered in a state that has opted out of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) or by a branch of a bank located in such a state. The preamble of the Proposed Rule states that Wisconsin has not repealed its opt-out of DIDMCA, which opt-out appears in Act, ch. 45, section 50, 1981 Wis. Laws 586 (not codified).⁴ However, this appears to be incorrect. Wisconsin repealed this opt-out in 1997 Wisconsin Act 142.⁵ Unless the FDIC finds that Wisconsin subsequently opted out following the 1997 Act, please address and correct the erroneous statement made in the preamble of the Proposed Rule.

In connection with the interest rate authority provisions, the FDIC also requested specific comments on whether the “opt-out” states should be listed in the regulations, and if so, how the FDIC might assure that the list remains accurate as states pass new opt-out laws or repeal old ones. M&I believes it would be useful to have a published list of “opt-out” states, but is very concerned about the accuracy of such list. M&I’s preference would be for the FDIC to confer with the state banking agency or department of each state prior to any listing of a state as an “opt-out” state. Following the publication of a

⁴ See 70 Fed. Reg. 60029.

⁵ See <http://www.legis.state.wi.us/1997/data/acts/97Act142.pdf>.

list, the FDIC should confer on a regular basis with the state banking agency or department about the status of the state's opt-out, and also provide the public with information on contacting the FDIC about a change in the status of a state's opt-out. When the FDIC becomes aware of a change in the opt-out status of a state, the FDIC should publish the corresponding amendment to its list in the Federal Register. The FDIC should also consider maintaining a parallel list on its website, which likely would be the most expedient way to notify the public of the change.

In conclusion, M&I fully supports the Proposed Rule. We urge the FDIC to move quickly in finalizing the rule, to improve competition in financial services, and to maintain the present quality and dynamic balance of our country's dual banking system. However, we also urge the FDIC to consider expansion of the Proposed Rule to address the applicability of state laws in states where a state-chartered bank does not have a branch, and to fully address the applicability of state laws to state-chartered bank operating subsidiaries. In addition, please issue a correction of the statement in the preamble of the Proposed Rule indicating that Wisconsin has not repealed its opt-out of DIDMCA, and consider the other modifications and comments discussed above.

Thank you for the opportunity to present the views of M&I on this subject.

Sincerely,



Randall J. Erickson
Senior Vice President, General Counsel, and Corporate Secretary
Marshall & Ilsley Corporation