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April 15, 2008

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Attn: Comments

Re: RIN 3064-AD26: Processing of Deposit Accounts and Large-Bank Deposit Insurance Modernization

Dear Mr. Feldman:

The Clearing House Association L.L.C. ("The Clearing House"), an association of major commercial banks,[1] appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (the "FDIC") notice of proposed rulemaking that would (i) establish the FDIC's practice for determining account balances at a failed insured depository institution and (ii) require the largest depository institutions to adopt procedures that would, in the event of the institution's failure, provide the FDIC with standard deposit account and customer information and allow the FDIC to place and release holds on liability accounts (the "Proposal"). 73 Fed. Reg. 2364 (January 14, 2008).

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[1] The members of The Clearing House are: ABN AMRO Bank, N.V.; Bank of America, National Association; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. Ten of our eleven members would be "covered institutions" as defined in the Proposal.

The Clearing House appreciates the substantial effort that the FDIC has undertaken to improve the Proposal relative to its earlier proposals,[2] and we agree with the basic objectives identified by the FDIC as guiding this effort—affording a timely deposit insurance determination, a prompt release of funds to depositors, and the least costly resolution of a failed depository institution. We also agree with the FDIC's general approach in the Proposal for determining deposit account balances on the day an institution fails based on its end-of-day ledger after the institution performs its normal end-of-day processes. As we discuss below, however, we are concerned that certain aspects of the Proposal would produce negative effects on our members, including substantial costs of committing both financial and personnel resources, that could be ameliorated without compromising these objectives.

Accordingly, we urge the FDIC to consider our discussions and recommendations below when adopting the final rule so that the guiding principles of the Proposal will be more effectively realized and adverse effects avoided.

I. Cost and Burden

Although enhancement of the process of handling a failed bank is a laudable objective, the FDIC must balance whatever gains it believes could be achieved against the very real costs that would be imposed on the covered institutions by the Proposal. These costs are not inconsequential. Indeed, even small changes to information systems require hundreds of person hours both in programming and testing to ensure proper functionality and avoid disruption with ongoing operations. Several of our member banks estimate that the cost per institution of the initial implementation and testing of the Proposal's requirements is likely to exceed $10 million and involve thousands of hours of labor. As institutions begin the implementation process, based on prior experience, these costs could increase beyond these initial estimates, perhaps substantially. Moreover, significant additional costs will be incurred to maintain and test these processes in the future. Many of our member banks have established ongoing project teams to

[2] Advance Notice of Proposed Rulemaking, 71 Fed. Reg. 2364 (Dec. 13, 2006); Advance Notice of Proposed Rulemaking, 70 Fed. Reg. 73652 (Dec. 13, 2005).

assess the potential impact of the Proposal, and this undertaking in and of itself has involved thousands of hours of labor on the part of bank employees and consultants.

We appreciate that the FDIC is seeking to "limit costs and burdens as much as possible;"[3] however, we continue to be concerned that the FDIC still has not reached a reasonable balance. Accordingly, The Clearing House strongly urges the FDIC in the final rule to continue to streamline requirements for systems development and provide flexibility to rely on existing systems and processes, such as an institution's own cutoff time. In addition, we recommend that the FDIC exempt from the definition of "covered institution" in the final rule any institution that satisfies certain objective and measurable criteria of safety and soundness, such as risk-based capital ratios, composite CAMELS ratings, or minimum long-term debt ratings. Our member banks would welcome the opportunity to work with the FDIC to develop such an alternative solution to address the FDIC's concerns regarding the resolution of the insolvency of a large depository institution.

II. FDIC "Cutoff Point"

The Clearing House fully agrees with the FDIC's key objective of making a timely deposit insurance determination to allow customers prompt access to insured deposits in the event of an institution's failure. See 73 Fed. Reg. at 2366. We are concerned, however, that the FDIC has relegated to itself the authority to determine a single arbitrary cutoff time—the FDIC Cutoff Point—for determining deposit insurance balances on the day of failure.

The FDIC would have total discretion to establish its "FDIC Cutoff Point" based on the facts and circumstances at the time the institution is declared insolvent. If an institution's normal cutoff time for any particular type of transaction precedes the FDIC Cutoff Point, the institution's time would apply. Otherwise, the FDIC Cutoff Point would apply.

This approach creates uncertainty and the potential for inconsistency among institutions. It also creates a regime that deviates significantly from the approach of the banking community in establishing separate cutoff times based on product and geography. As the FDIC

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[3] 73 Fed. Reg. at 2370.

recognizes, "[m]any institutions have different cutoff times for different kinds of transactions, such as check clearing, Fed wire, ATM and teller transactions." Id. at 2365. In addition, our member banks are global in nature, with multiple start-of-day and end-of-day hours of operations for overseas branches and offices.

Accordingly, we believe that the FDIC should revise the definition of FDIC Cutoff Point to incorporate an institution's own cutoff times, subject, perhaps, to some limited guidelines. Deviation from an institution's standard processes could have serious repercussions for on-going operations and customers. For instance, in the Proposal the FDIC provides the example of establishing a 5 p.m. (Eastern Time) FDIC Cutoff Point for an institution with branches on both the east and west coasts. In that scenario, as the FDIC recognizes, if a customer enters a west coast branch in the middle of the business day, but after the FDIC Cutoff Point, its deposit would not be counted in its account balance for insurance purposes. This practice contradicts what our member banks have communicated to their respective customers in banking centers or customer agreements and could lead to customer confusion. Further, an arbitrary FDIC Cutoff Point designed in the United States that applies globally creates even more disruption to operations and customers in our member banks' overseas locations.

Accordingly, The Clearing House respectfully recommends that the FDIC should delete the concept of the FDIC Cutoff Point entirely from the final rule subject to guidelines. For example, the Proposal could honor the depository institution's own cutoff times if they are consistent with normal banking practice and the institution's ordinary course of business. If the FDIC believes it must retain discretion to set a cutoff time, it should limit that discretion to exceptional circumstances only and remain flexible to establishing multiple cutoff times that apply to different systems or regions to minimize the impact on the institution's usual operations and customers.

Finally, we strongly support the suggestion in the Proposal that institutions are not required to have in place computer systems capable of applying the FDIC Cutoff Point. Our member banks' respective systems are not equipped to be easily manipulated on short notice and do not have the technical ability to switch from ordinary cutoff times to the FDIC Cutoff Point.

Implementation of any such systems would significantly increase the estimated expenses and hours referenced above.

III. Treatment of Sweep Accounts

The Clearing House's greatest concerns relate to the FDIC's extensive new proposals relating to the treatment of sweep products. Sweep transactions have been an extensively used business practice for decades, enabling banks to secure substantial funding at reasonable costs and their customers to achieve their financial objectives. Any proposal that disrupts the existing treatment and expectations of institutions and their customers vis-à-vis sweeps would potentially impair the viability of sweeps with very serious and unpredictable consequences.

We strongly recommend that all proposals relating to sweeps be removed from the Proposal and dealt with in a separate rulemaking process because of the complexities of the issues as outlined below. That process would include consultation with other banking and securities regulators, as well as the financial institutions that are key providers of these products, before finalizing a rule on sweep transactions. Our member banks believe that the Proposal not only could create significant technical, operational, and systems issues but also could have a major ripple effect on other laws and regulations that rely on the definition of "deposit" from the Federal Deposit Insurance Act (such as Regulation D, Regulation Q, and deposit insurance assessments), the consequences of which are not fully understood and warrant further study and consideration.

The Clearing House appreciates the FDIC's interest in articulating a formal policy for treatment of sweeps in the event of a bank failure, particularly in light of the decision in Adagio.[4] In addition, we agree in principle with the Proposal's approach of codifying the FDIC's longstanding practice that all prearranged automated sweeps would be given effect in determining end-of-day ledger balances in the event of a bank failure. If the FDIC proceeds with this rulemaking regarding sweeps at all, we believe that this proposed approach alone is

[4] Adagio Inv. Holding Ltd. v. FDIC, 338 F. Supp. 2d 71 (D.D.C. 2004).

sufficient to address the concerns raised by Adagio. The final rule should explicitly provide that outgoing prearranged automated sweeps will be recognized as part of the day's business and reflected in end-of-day ledger balances, regardless of when the institution's internal systems process the transaction in the ordinary course of business. In other words, it should not make a difference if automated systems process the transactions before or after the FDIC Cutoff Point.

The remaining sweep-related proposals, however, are overly complicated and unnecessary. Our member banks offer a variety of sweep products, each of which may employ different mechanisms and which will vary by bank, even between similar products. For example, sweeps to money market mutual funds may be on a "one-day" basis, in which case the sweep cycle is completed at the start of the business day following the initiation of the sweep process, or on a "two-day" basis, in which case the sweep cycle is completed at the start of the second business day following the initiation of the sweep process. Money market sweeps can also differ as to the timing of the initiation of the sweep and the mechanism of funds transfer. In some cases, the sweep may be initiated and funds transferred during the business day and in some cases after the close of business, and, in either case, may make use of any of several mechanisms (or combinations thereof): wire transfers, book transfers in the name of the sweep account holder, or book transfers to omnibus accounts, which may be held in the name of the institution at which the sweep account is located.

Each of these mechanisms, taken together with the particular arrangements between the banks and the money market mutual fund, may result in different types of interests and obligations being created—money market shares may be held either directly by the sweep account holder or by the bank on behalf of the account holder, and the account holder will not necessarily be shown on the books of the transfer agent or money market fund company.

As a further complication that applies to both money market and other types of sweeps, the arrangements used to determine the amounts to be swept in and out of all types of sweep accounts vary from bank to bank and product to product. Sweep account holders may have an agreement with the bank to hold all monies outside the sweep account only to be swept

in as needed to meet demands, while some sweep account agreements provide for only a portion of swept funds to be swept back into the account in any given cycle.

In each case, the particular mechanism and contractual arrangement may result in different interests existing at the same point in time for otherwise similar products and would therefore result in different (and, to a certain degree, arbitrary) treatment under the Proposal. Our member banks have great concern as to these potential disparities that could result, in some cases from nothing more than differences in the mechanisms used to execute and arrange sweep transactions.

Nonetheless, all these products have one common element—once swept from a deposit account, and until returned to a deposit account, none of the bank's obligations meets the definition of a "deposit" under the Federal Deposit Insurance Act and are therefore not covered by deposit insurance in the event of the bank's insolvency. This characterization of sweeps is consistent with the long-standing practices of virtually every financial institution and has been the widely accepted practice by banking regulators for decades.

We believe that the FDIC's attempt to distinguish among sweep products based on processing methodology will result in disparate treatment among different banks for what is essentially the same product. For example, the Proposal distinguishes "internal" sweeps (transfers from one account within the institution to another, such as a Eurodollar account) versus "external" sweeps (transfers from an account within the institution to third-party accounts outside the institution). The Proposal contains yet another distinction in the holds procedures for "Class A" versus "Class B" sweeps. We urge the FDIC to eliminate these unnecessary distinctions, to the extent that the FDIC proceeds with rulemaking around sweeps at all, and treat similar sweep products the same, despite different methods used by banks for processing the necessary transfers and posting the relevant accounts.

Finally, the FDIC has asked a number of technical questions in its sweeps proposal. These issues should be removed from this rulemaking and should be addressed in a separate proposed rule after input from industry and other regulators.

IV. Provisional Holds

The Clearing House's first principal concern with the Proposal's provisions relating to provisional holds relates to additional disclosure. We appreciate that the disclosure requirements under the Proposal would be applicable only upon a bank's failure. In these times of financial stress and uncertainty and customer anxiety, any such disclosure requirements applicable prior to failure could well create concerns about an institution's solvency and even a "run on the banks."

Moreover, if a large bank were to fail, we believe that affected customers will be sufficiently notified through the FDIC's communications to the public about the situation and the resolution process and that they will be informed about whom they should call for information or with concerns. There would also be significant development and implementation costs associated with implementing such a disclosure mechanism.

Accordingly, we urge the FDIC not to impose on institutions the risk of unnecessary disclosure or the additional costs to develop special systems that automatically generate disclosures about holds.

The Clearing House's other principal concern is the enormous burden the Proposal would impose on our member banks to undertake significant system development. We fully appreciate the FDIC's efforts to reduce the potential burden by providing flexibility for institutions to meet the hold requirements in a variety of ways, and we encourage the FDIC to maintain in the final rule these various provisional hold options. Nonetheless, the Proposal has made broad assumptions about how holds are implemented that do not comport with the reality of institutions' current systems. Our member banks simply do not have the processes in place for calculating, placing, and removing provisional holds in the manner the Proposal requests, and to develop systems to do so would require very substantial financial and staff resources. Much of the estimated cost and hours of labor referenced above will be necessitated by the provisional holds requirement.

For instance, the Proposal requires that institutions have the ability to place holds on the system of record into which non-deposit account funds are swept for "internal sweeps." Although The Clearing House agrees with the FDIC's goal of preventing customers from being paid amounts that are potentially deposits in excess of the insured amount while resolution is pending, we respectfully submit that this requirement is both burdensome and unnecessary.

In fact, most of the systems or processes that our member banks use for booking swept products (such as securities repos, money market mutual funds, or fed funds) are not similar to a deposit system, which usually allow banks to place holds on accounts. In many cases, there are not even "accounts" that equate to a deposit account. We recommend that the FDIC provide flexibility to institutions to achieve the intended goal by using existing capabilities. Due to the structure, timing, and automated processes of sweeps, there is no practical ability of a customer to obtain payment of the amount swept until the incoming side of that sweep transaction is processed and the amount swept recredited to the U.S. deposit account. Therefore, institutions could prevent premature payment of the amount swept by (i) placing a hold on the domestic deposit account or (ii) crediting the amount swept to an alternative suspense account. Doing so would allow the FDIC to control these funds until it releases them to the customer without the additional burden and cost of process and technology development.

We also have two significant concerns with the FDIC's proposal relating to holds on an institution's foreign deposits. First, the Proposal allows the FDIC to assign different hold percentages and thresholds on a country-by-country basis. This could present additional operational problems based on existing systems' functionality and require material development and costs. Second, the requirement of foreign holds raises potential conflicts with local laws that are not addressed or discussed in the Proposal. Indeed, without establishing clear guidelines on how an institution should proceed if it receives conflicting instructions from its local regulator, compliance with the proposed regulations could expose our member banks and their employees to unacceptable legal risk. Accordingly, we respectfully recommend that the FDIC should either exclude foreign deposits held outside of the United States from the provisional holds requirement or expressly provide that such holds are required only to the extent permitted by and as are

consistent with applicable local law. If the FDIC requires holds on foreign deposits at all, we submit that one threshold consistently be applied globally.

The Clearing House acknowledges the FDIC's accommodation that allows institutions to use manual hold processes in lieu of automation on systems with small accounts. 73 Fed. Reg. at 2375. We respectfully suggest that the FDIC should extend this approach and exclude from these requirements altogether systems that house deposits that represent a de minimis part of an institution's overall deposits or accounts (e.g., 5%). In addition, we recommend that the FDIC also exempt special purpose bank charters that are not primarily in the business of deposit taking, but may have deposits incidental to their business (e.g., limited purpose credit card banks or bankers' banks). We submit that the benefit to the FDIC in covering these small systems is outweighed by the burden and cost to implement, test, and maintain the processes associated with them. For the same reason, we believe that systems that are targeted for sunset within a reasonable period of time (e.g., 18 months) should be exempted from the requirements on the condition that the institution commits that it is transitioning to an enhanced system that will satisfy the applicable requirements. Otherwise, institutions have to expend considerable time and money upgrading systems that will exist only for a short period of time.

V. Implementation Timeline

The Clearing House appreciates the FDIC's recognition that the one-year implementation timeline suggested in its earlier proposals was insufficient, but it strongly urges the FDIC to provide even more time for covered institutions to implement fully the requirements set forth in the Proposal. As we mention above, our member banks have discussed the Proposal with their respective technical staffs, and to make any substantial changes over multiple systems required by the Proposal, and their subsequent testing, is a multi-year project at considerable expense. As the FDIC explicitly recognizes, larger institutions function on several platforms, often in different locations and across time zones and borders. For this reason, our member banks will need to program and test each system individually, as well as connect them by some means so that all required data can be gathered in the requested form. The Clearing House recommends at a minimum 36 months for implementation. In addition, The Clearing House

suggests that additional time be granted in the case of mergers and acquisitions, regardless of whether the merging institutions were, prior to the transaction, covered institutions subject to this regulation.

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Thank you for considering the views expressed in this letter. If you would like additional information regarding this letter, or if it would be helpful to meet with representatives of our member banks, please contact Norman R. Nelson, General Counsel of The Clearing House, at (212) 612-9205.

Sincerely,