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

December 13, 2005

Re: Proposed Rule: Interstate Banking; Federal Interest Rate Authority - RIN 3064-AC95

Dear Mr. Feldman:

The Financial Services Roundtable[1] (the "Roundtable") very much appreciates the opportunity to comment on the FDIC proposed rule (the "Proposal") implementing a portion of the Petition for Rulemaking (the "Petition") filed by the Roundtable on March 4, 2005. *See* 70 Fed. Reg. 60019 (October 14, 2005). We strongly commend the Federal Deposit Insurance Corporation ("FDIC") and its staff for the thoughtful, diligent, and thorough consideration of the requests made in the Petition with respect to interstate lending and the law applicable to state banks with branches in host states. We urge the FDIC without delay to adopt this proposed rule with the modifications we suggest below.

With equal urgency we again ask the FDIC to provide state banks with clear and authoritative guidance with respect to the law applicable to state banks when they engage in activities in states where they do not maintain a branch. The adoption of a final rule in this rulemaking will be an important first step, but the task of providing meaningful parity will be unfinished until the FDIC provides guidance on all the matters in the Roundtable Petition.

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[1] The Financial Services Roundtable unifies the leadership of large integrated financial services companies. Its membership includes nearly 100 firms from the banking, securities, investment and insurance sectors. In addition to communicating the benefits of integrated financial services to the American public, the Roundtable is a forum in which financial services industry leaders address critical public policy issues.

I. Introduction

This Proposal is timely and critical for the future of the dual banking system and for restoring the competitive balance between state and national banks. The dual banking system is at an historic crossroads. The key feature of that system, the availability for all banks of a meaningful choice between competitively equivalent federal and state charters, is now in doubt. With over two-thirds of banking assets now in the national system, it is apparent that the Congressional policy to maintain state-national parity and statutes already enacted have not been enough in themselves to achieve the goal. The FDIC has clear authority and responsibility to implement existing law, and this rulemaking is an important first step and should receive immediate action.

If a final rule in this rulemaking is not adopted, that inaction would constitute a choice to ratify the end of the unique American federal system of bank regulation as we have known it for 140 years. What will survive will be a split-level banking system in which only community banks and a few niche institutions will opt for the state charter and regulation at the federal level by the FDIC or Federal Reserve.

The principle of fundamental competitive parity has been woven by Congress and the courts into the very fabric of the dual banking system. Beginning with the enactment of Section 27 of the Federal Deposit Insurance ("FDI") Act ("Section 27"), 12 U.S.C. 1831d(a), Congress has taken bold and historic action on more than one occasion to preempt a wide range of state laws so that state banks can operate on a par with national banks in the multistate financial services marketplace that has come into existence in recent decades. The broad sweep of what Congress intended to accomplish is evident in the terms and legislative history of both the Riegle-Neal Amendments Act of 1997, Pub. L. 105-24 (1997) (amending FDI Act Section 24(j), 12 U.S.C. § 1831a(j)) (“Riegle-Neal II”)[2] and Section 104(d) of the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6701(d). Those statutes further the decades-old principle of competitive equality embodied in federal law and repeatedly recognized by the courts and the FDIC.[3]

Time is of the essence. The clear statements of the members of Congress closest to this issue in 1997 were profoundly prophetic. We are now experiencing exactly the dynamic that Riegle-Neal II was enacted to prevent. The direction from Congress to preserve the dual banking system is clear. Yet the goals of its actions remain unfulfilled. In the Roundtable’s judgment, any delay in adopting a final rule will risk long-term adverse systemic consequences and impose unnecessary costs and burdens on state and national banks, as well as the customers they serve.

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[2] The 1997 amendment to the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal I”), Pub. L. 103-328, 108 Stat. 238.

[3] *See* First Nat’l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966); First Nat’l Bank in Plant City v. Dickinson, 396 U.S. 122 (1969); FDIC Advisory Letter 00-5.

Moreover, as we have repeatedly emphasized, this rulemaking should be beneficial to consumers in many ways, not least by helping maintain the vitality of state bank regulation and the regulatory roles of the FDIC and Federal Reserve System. The Roundtable strongly supports appropriate federal statutes and rules that protect consumers nationwide and provide standards to eradicate predatory practices.

We want to stress this corollary point. A parity framework – like a regime of federal preemption – must not be, or be perceived as, a device to avoid appropriate and necessary regulation. The Roundtable fully recognizes and appreciates the concerns about FDIC action to adopt parity rules expressed in the May hearing and summarized in the Proposal preamble. The framework sought by the Roundtable must not, for example, be a mechanism to avoid the eradication of predatory practices. We are fully committed to working with the FDIC in the process of creating a framework that preserves the dual banking system and fully protects the public interest. We also urge the federal banking agencies to make aggressive use of their considerable authority to advance uniformity at combating these intolerable practices. Further, the Roundtable will continue its efforts to obtain federal legislation creating a uniform national standard with respect to predatory lending.

This letter has six parts following this introduction and overview of comments. In Part II, we discuss the need for this rulemaking to fulfill the Congressional promise of parity for state banks and to maintain a meaningful option for banks to be able to choose between competitively comparable national and state charters. Parts III and IV review pertinent legislative history and the statutory authority of the FDIC to adopt the rules proposed by the FDIC and sought in the Roundtable Petition. Parts V and VI contain our comments on proposed Part 331 and § 362.19, respectively. These comments are summarized in the next part of the Introduction. Finally, Part VII addresses in detail the authority the FDIC already has to address current statutory provisions, particularly Section 104(d), that preempt state laws that burden or restrict the activities of state banks in states where they have no branches. The full parity provided in federal law and needed to maintain a strong dual banking system will not be achieved until the FDIC completes its task by addressing what state law applies to state banks in states where they have no branch.

<u>Overview of Comments</u>

In general, we believe the rules proposed in this rulemaking provide parity for state banks by closely paralleling the rules adopted by the Comptroller of the Currency ("OCC" or "Comptroller") for national banks. Adoption of final rules without delay is essential. This letter sets forth a number of suggestions that we urge the FDIC to incorporate in its final rules:

- **Codification of GC-11.** Proposed § 331.4(c), as drafted, does not achieve its stated purpose of codifying General Counsel Opinion No. 11 ("GC-11") and should be revised to cover as clearly as GC-11 the complete range of scenarios for multistate lending. In particular, proposed section 331.4(c)(2) & (3) should be revised to provide that a multistate bank may use its home state rate if any non-ministerial function is performed or administered in its home state, to clarify that a bank must apply a host state rate only when all of the non-ministerial functions are performed in that state, and to state clearly that when non-ministerial functions are performed in more than one state, the bank may opt which state's rate to apply.

- **Rate disclosure.** We believe that banks should disclose what state's interest rate applies to an interstate lending transaction, but banks should have flexibility how to do so.

- **Internet lending.** The final rule should state clearly that the Internet lending activities of multistate banks are governed by Part 331 and the codification of GC 11.

- **Scope of Section 27 preemption.** To achieve parity for state banks, it is essential that the final rule provide that Section 27 preempts any state law that would prevent a state bank from charging its home state rate in accordance with Part 331 by regulating directly or indirectly how the bank conducts its interstate lending, such as by regulating ministerial functions performed by, or on behalf of, the lending bank in a state other than its home state.

- **State Opt-Out.** Proposed § 331.5 is appropriate, but the Proposal preamble incorrectly stated that certain states, such as Wisconsin, continue to be an "opt-out state," when it is our understanding that the statutory opt-out in Wisconsin has been reversed. The preamble to the final rule should correct that erroneous statement.

- **Interstate branching rule of construction.** The text and history of Riegle-Neal II and the FDIC interpretation of Section 27 in Part 331 support the addition of a rule of construction to new § 362.19 providing that state law will apply to a state bank with a branch in a host state only when a state law applies to a national bank with a branch in that host state under 12 U.S.C. § 36(f) ("§ 36(f)"). As with § 331.1 (c), such a rule of construction would provide a clear reference point for determining how to apply Riegle-Neal II.

- **"Activities conducted at a branch."** The proposed FDIC definition of "activities conducted at a branch," would require that there be "substantial" involvement of a host state branch in an activity before the Riegle-Neal II applicable law rule would apply. OCC rules concerning national bank branches contain no provision parallel to the proposed definition of "activities conducted at a branch" and do not implement § 36(f) with respect to the law applicable to national bank activities in a host state to take into account the extent to which an activity involves the national bank's host state branch. Therefore, as proposed and as described in the preamble, the Proposal's "substantial" involvement requirement has no parallel for national banks and creates a hurdle applicable only to state banks. The Proposal thus provides less than full parity. Accordingly, this "substantial involvement" provision should be revised or construed so as to provide full parity.

- **Determining preempted host state laws.** The Proposal recognizes the goal of providing greater certainty for determining when a host state law does not apply to interstate national banks, and thus when it does not apply to interstate state banks. Incorporating language proposed by the Comptroller, the Proposal states that a host state law will not apply to a state bank when the OCC has "determined in writing" that a "particular" host state law does not apply to a national bank. In view of the OCC's adoption of preemption rules that broadly preempt categories of state law, rather than "particular" state laws, and the fact that the OCC now rarely makes written determinations addressing a specific state law or rule, we believe this provision as proposed would be unworkable and may substantially frustrate the clear Congressional purpose to provide full parity. In view of the parallel language in Riegle-Neal II and § 36(f), this proposed language might be read to mean that a similar requirement of a written interpretation addressing particular state laws should also be applied to national banks. The present OCC approach to § 36(f) is appropriate. Accordingly, we recommend, as our first and preferred, alternative to the Proposal, that § 362.19(c) be revised to simply restate the statutory language and that the final rule or preamble should provide that in general state banks can determine for themselves when they are authorized to apply home state law in a host state based upon their own analysis of the case law, OCC rules, and OCC interpretations. As a second alternative, § 362.19(c) could be revised to take into account fully the existing guidance with respect to preemption provided by the OCC and the courts. In connection with this revision, we believe that the FDIC should reconsider the use of the words "determined in writing" and "particular," which we believe would most likely result in state banks operating in host states with less than full parity.

II. Need for Adoption of the Rule and for Further Rulemaking

Over the last decade, the federal charters for national banks and federal thrifts have been correctly interpreted by the OCC and OTS, with the repeated support of the federal courts, to provide broad federal preemption of state laws that might appear to apply to the activities or operations of a banking institution in that state. The result is that, in general, national banks and federal thrifts now can do business across the country under a single set of federal rules. This framework is appropriate for these federal entities in a national financial marketplace. At the same time, in this marketplace a uniform national bank system based on preemption and interstate banking undoubtedly presents a major challenge to the dual banking system and state banks.

In contrast to the general certainty enjoyed by federal institutions, there is widespread confusion and uncertainty with respect to applicable law governing state banks engaged in interstate banking activities. The current uncertainty governing the interstate activities of state banks has had, and will continue to have, several significant adverse effects. Uncertainty carries the potential for litigation and enforcement actions arising from disagreements between regulators, or between a host state regulator and a state bank engaged in interstate activity. Regulatory uncertainty deters state banks from pursuing profitable business opportunities. When a state bank converts to a national charter to gain greater legal certainty, it incurs substantial expense. Each of these consequences has economic significance for state banks and direct implications for the FDIC's enforcement and safety-and-soundness responsibilities.

Moreover, a series of recent major merger and conversion transactions has resulted in an unprecedented migration of assets to the national banking system. It is now apparent that, absent a more certain federal regulatory environment, the state charter will continue to be perceived as less competitive than a national bank charter. This perception was undoubtedly reinforced by several recent court decisions in major cases that again affirmed the broad national bank preemption and the fact that state law does not apply to the activities of national banks. In real and practical terms, the disparity destabilizing the dual banking system will continue until the FDIC adopts rules implementing the full parity provided by the federal statutes discussed in the Petition.

This is the very result that Congress intended to prevent.[4] In 1994, 1997 and 1999 Congress took bold and historic actions to provide uniform federal rules to govern all

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[4] The statement by Rep. LaFalce before final House passage of the 1997 amendments captures the purpose to redress the negative effects of the 1994 Riegle-Neal applicable provision for state banks: "Why [must we act now]? Well, it is due to the fact that the national bank regulator has the authority to permit national banks to conduct operations in all the states with some level of consistency. In contrast, under the existing interstate legislation, state banks branching outside their home state must comply with a multitude of different state banking laws in each and every state in which they operate." 143 Cong. Rec. H3094 (daily ed. May 27, 1997). See the discussion of the legislative history in the next section.

interstate banking and to ensure that individual state laws could not disfavor any type of depository institution in the multistate financial services marketplace. It is now apparent that the express terms of these statutes have not on their own force been able to ensure, as Congress intended in enacting Riegle-Neal II, that state banks can participate in interstate banking business on a par with national banks and that state banks face significant state law obstacles when they seek to do business outside their home state. As a consequence, the state banking system as we have known it is fundamentally threatened.

In the national financial services marketplace, consumers and providers benefit when banks can provide products and services under a single legal framework applicable across state lines. At the same time, bank customers and the economy also benefit from the diversity, innovation and checks provided by a strong and dynamic dual banking system involving large and small banks. From the perspective of all parties — consumers, financial institutions, and regulators — further development of a framework of state bank regulation and supervision that is effective, efficient, and seamless across state lines is the right goal. In today's multistate system, that is an essential goal.

Unless the FDIC adopts a regime which implements the needed parity rules, state bank regulation will become irrelevant for the vast preponderance of those institutions which operate on an interstate basis. Without these institutions, state banking regulation will largely be the province of those institutions which have no interest in interstate operations and activities. Moreover, across the country, if the asset base of institutions paying fees to support a particular state agency shrinks and state legislators do not provide increased appropriations, a growing number of states may be faced with hard choices and pressure on resources to provide the necessary quality of regulation.

Equally important, this effect is not limited to the states. The role of the Federal Reserve System and the FDIC in bank regulation is dependent on the existence of state banks. Moreover, the population of banks which participate in interstate banking are those of greatest systemic importance. Certainly, elimination of the direct role of the Federal Reserve in the regulation and supervision of these banks would be a radical departure in the functioning of our banking system.

We recognize that many of those who have questioned the need for this rulemaking believe that FDIC parity rules will further undermine the role of the states in protecting their consumers. The fact is that FDIC *inaction* will be more likely to reduce effective state consumer protection because inaction will allow the unabated migration of all interstate institutions to a federal charter. By preserving, and we hope strengthening, the dual banking system, the FDIC rules sought by the Roundtable will maintain a strong state regulatory role in banking.

Moreover, we believe that consumers will benefit significantly in a number of ways from adoption of a final rule by the FDIC and completion of the parity framework in a further rulemaking along the lines contemplated by the Roundtable Petition. First, in the long run, consumers, banking institutions and the financial system will, in our view, be poorly served if state banking departments, the FDIC and the Federal Reserve System are largely irrelevant to the regulation and supervision of interstate banking. As indicated already, that outcome is certain if action is not taken. Second, consumers and banking institutions alike will benefit from the clarity, certainty and efficiency when a provider can operate under a uniform and integrated framework of law, regulation and supervision. Third, consumers benefit from diversity. Consumers in a host state will be able to choose among multiple frameworks of consumer protection: that of the OCC, that of the host state or that of the home state (with a federal overlay). Failure to implement a comprehensive framework for interstate state banks will assure there is but a single choice for those who do business with interstate banks – the federal rules of the OCC or OTS.

We do not know of other mechanisms which simultaneously serve the goals of maintaining choice, assuring a nearly seamless web of law, regulation and supervision, and offering the opportunity for effective consumer protection. Rules permitting institutions to have uniform interstate operations can only be effected at the federal level. *Multi*state state cooperative agreements are highly constructive, but are not truly *inter*state. In our federal system under the Commerce Clause, interstate rules are necessarily federal rules. Paradoxically, the federal rules sought by the Petition are necessary to preserve the most expansive state role possible in the regulation of banks. That is precisely why Congress has used the parity mechanism in the evolution of banking law.

The FDIC and the Federal Reserve play major roles in the oversight of state banks and have very considerable power and resources that are available to fill any particular gaps in consumer protection and to assure that implementation of the parity framework for state banks serves the public interest. Further, as a distinct goal, we strongly encourage the banking agencies to explore the development of standards to eradicate predatory practices of all sorts. The concerns expressed by those who have concerns about this rulemaking should provide helpful guidance concerning the development of necessary safeguards which can and should be implemented by the FDIC.

Finally, in particular areas, there may be a need for Congressionally enacted uniform national standards. For example, the Roundtable has strongly supported the enactment of such standards in the case of predatory lending. The need for legislative action is this area, however, should provide no excuse not to implement full parity for state banks under existing statutes.

III. The Congressional Policy of Parity

The problem of disparity addressed in this rulemaking is the very problem that Congress identified and addressed in 1997. Congress sought to prevent an exodus of state banks out of the state system because of preemption advantages enjoyed by interstate national banks. As set forth in the Proposal preamble, the legislative history of Section 27 and Riegle-Neal II makes clear that Congress' goal was to facilitate a broad parity regime for state banks and national banks in interstate banking. The goal of parity was repeatedly expressed in the enactment of Riegle-Neal II. The sponsors of the bill expressed the intent to provide parity, not narrowly in terms of competition between state and national bank branches, but broadly in terms of the ability of state banks to match national banks in doing business across the country.

The Proposal preamble correctly points out that in 1997 Congress recognized that the Riegle-Neal I state bank applicable law provision was placing state banks at a substantial disadvantage and was undermining the state system: "The problem then, as understood by Congress as well as the banking industry . . .was that State banks operated at a disadvantage to national banks when they operated outside their home states. The reason is that when state banks operated in host states, they were subject to all of the laws of each host state in which they operated. National banks, however, operate in host states largely free of host state law because many host state laws are preempted for national banks." 70 Fed. Reg. at 60024. Congress acted swiftly to redress the state-national bank balance in Riegle-Neal II. The specific drafting approach, the underlying policy and the express purpose of that 1997 statute all sought to ensure that state banks would operate under a uniform interstate "applicable law" regime based on home state law parallel to the national bank regime. The preamble aptly summarizes Congressional intent:

> [L]egislative history indicates that the purpose of Riegle-Neal II is to provide state banks parity with national banks with regard to interstate branches to the maximum extent possible.
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> Moreover, the very nature of Riegle-Neal II as remedial legislation supports a broad interpretation. It is a recognized canon of statutory construction that remedial legislation should be interpreted broadly to effectuate its purposes.

Id.

Parity with national banks in the dynamic interstate banking environment is indeed the overriding Congressional principle, and the modifications suggested below advance that principle. We further submit that the FDIC should implement the principle of interstate parity by completing this rulemaking and then begin to address immediately the other disparities discussed in the Petition.

IV. FDIC Authority to Adopt Parity Rules

The FDIC has ample rulemaking authority to address each of the Roundtable's requests, authority that is at least as broad as any other banking agency.[5] Section 9 of the

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[5] There is no reason that a rulemaking by the FDIC similar to ones conducted by the OCC should be analyzed any differently. The National Bank Act does not expressly address the law applicable to a national bank outside states where it has branches. Prior to the adoption of the OCC rules, a number of courts determined that national banks were subject to state laws that did not conflict with the

FDI Act vests the FDIC with broad authority to adopt rules "it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing." 12 U.S.C. 1819.[6] Section 10 of the FDI Act further provides that the FDIC may "(1) prescribe regulations to carry out this Act; and (2) by regulation define terms as necessary to carry out this Act." 12 U.S.C. § 1820(g).

The FDIC is vested with responsibility for administering Sections 24 and 27 of the FDI Act to accomplish what Congress intended. Section 9's "generally conferred authority" makes it apparent "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead*, 533 U.S. 218, 229 (2001) (quoting *Chevron*, 467 U.S. at 845).

Riegle-Neal I and II fundamentally changed federal law for state and national banks by authorizing banks to engage fully in banking transactions in other states through interstate branching.[7] As a corollary, Riegle-Neal I provided federal "applicable law" statutes to govern the new interstate banking regime. As originally enacted, the respective applicable law provisions treated national and state banks differently. Riegle-Neal II sought to redress that disparity and provided substantively the same rule for state banks as was originally provided for national banks.[8] The FDIC plainly has authority to implement Riegle-Neal II.[9]

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provisions of the National Bank Act. These OCC rules have generally received *Chevron* deference. See National State Bank v. Long, 630 F.2d 981 (3d Cir. 1980); Perdue v. Crocker National Bank, 702 P.2d 503 (Cal. 1985); Best v. U.S. National Bank, 739 P.2d 554 (Or. 1987). Nonetheless, the courts have upheld the OCC rules and determinations that make clear that national banks and their operating subsidiaries are governed by the National Bank Act wherever they do business. See, e.g., NationsBank of N.C. v. VALIC, 513 U.S. 251 (1995); Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 33 (1996); Wachovia Bank, N.A. v. Watters, 334 F. Supp. 2d, 957, 963-65 (W.D. Mich. 2004); Wachovia v. Burke, 319 F. Supp. 2d 275 (D. Conn. 2004).

6 The FDIC's rulemaking authority parallels the OCC's authority. *See* 12 U.S.C. § 93(a) ("the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"). The statutory provision authorizing the OCC to issue rules is directly analogous to Section 9 of the FDI Act. *Compare* 12 U.S.C. §1819 (FDIC vested with authority "to prescribe . . . such rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing . . .").

7 Prior to enactment of Riegle-Neal, neither state nor national banks could establish branches outside their home state. Moreover, except with respect to interest charges under 12 U.S.C. § 85 and 12 U.S.C. § 1831d, federal law did not provide guidance to either state banks or national banks regarding the law applicable to transactions that banks made with customers outside their home states.

8 See generally Section 24(j):
(j) ACTIVITIES OF BRANCHES OF OUT-OF-STATE BANKS.--
(1) APPLICATION OF HOST STATE LAW.--The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches,

A statutory gap, or a clarification of a statute to effect Congressional intent, can be – and should be – addressed by an agency rule. Where, as here, a statute is ambiguous regarding its application to "a particular result" (*Mead*, 533 U.S. at 229), courts have long recognized that agencies with rule-making authority must be permitted to address the statutory gap as "necessary for the orderly conduct of its business." *United States v. Storer Broadcasting Co*., 351 U.S. 192, 202-03 (1956) (finding also that the statute "must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation"), *National Petroleum Refiners Ass'n*, 482 F.2d at 681. ("[T]here is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate."). Courts have consistently applied these administrative law principles to rules and regulations issued by the FDIC under its broad rulemaking authority.[10] There can be little doubt that Section 9 of the FDI Act vests the

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shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of State national bank. To the extent host State law is inapplicable to a branch of an out-of- State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.

(2) ACTIVITIES OF BRANCHES.--An insured State bank that establishes a branch in a host State may conduct any activity at such branch that is permissible under the laws of the home State of such bank, to the extent such activity is permissible either for a bank chartered by the host State (subject to the restrictions in this section) or for a branch in the host State of an out-of-State national bank.

(3) SAVINGS PROVISION.--No provision of this subsection shall be construed as affecting the applicability of--

(A) any State law of any home State under subsection (b), (c), or (d) of section 44; or

(B) Federal law to State banks and State bank branches in the home State or the host State.

(4) DEFINITIONS.--The terms "host State", "home State", and "out-of-State bank" have the same meanings as in section 44(f). 12 U.S.C. 1831a(j).

[9] The FDIC also has the authority to implement the nondiscrimination provisions of Section 104(d) insofar as the GLB Act addresses state insured depository institutions and to construe and provide guidance with respect to scope and effects of the express preemption of discriminatory state law provided in Section 104(d). Section 9 vests the FDIC with authority to promulgate rules to carry out any statute the FDIC is responsible for administering or enforcing. Under Section 8, the FDIC has responsibility for ensuring that insured state banks operate in compliance with all applicable law, whether state or federal. Determinations concerning the extent to which the provisions of Section 104(d) of the GLB Act preempt state law applicable to state depository institutions are plainly within the FDIC's Section 8 authority and this may be addressed by rule under Sections 9 and 10.

[10] *See, e.g*., National Council of Savings Institutions v. FDIC, 664 F.Supp. 572 (D. D.C. 1987) (sustaining FDIC regulation governing the proper relationship between FDIC-insured banks and their securities-dealing "subsidiaries" or "affiliates") *See also* Wells Fargo Bank, N.A. v. FDIC, 310 F.3d 202, 208 (D.C. Cir. 2002) (affording *Chevron* deference to FDIC rule for "second generation" transactions, because statute was silent as to treatment of these transactions and rule would "implement Congressional intent because it prevents financial institutions from manipulating the system"); America's Community Bankers v. FDIC, 200 F.3d 822, 834 (D.C. Cir. 2000) (upholding FDIC denial of refund assessment under *Chevron*, where statute merely stated that FDIC could utilize

FDIC with authority to address the extent to which host state law is applicable to the activities of an out-of-state state bank that has branched into that host state. Moreover, under basic principles of administrative law, agency rules that fill or address a statutory gap generally are afforded considerable deference by courts. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

V. Proposal to Add Part 331—Federal Interest Rate Authority

Because parity with national banks is the statutory requirement, we believe it appropriate for Part 331 to parallel as closely as practically possible the rules implementing 12 U.S.C. § 85 adopted by the OCC. Meaningful parity is tested by the ability of state and national banks to compete on equivalent terms in the marketplace. Accordingly, we believe that the FDIC rules should ensure that Section 27 preemption applies to all aspects of an interstate lending transaction and must preempt both direct and indirect means that a state outside a state bank's home state may use to limit a state bank's ability to charge its home state interest rates to customers in another state. Our comments in this section generally follow the order of the items covered in proposed Part 331 and the discussion in the preamble.

A. Proposed Rule of Construction

Section 27 provides for broad parity of state and national banks in multistate lending. We theretofore support the inclusion of the express rule of construction set forth in proposed § 331.1(c): "To maintain parity with national banks under section 85 of the National Bank Act, the FDIC will construe section 27 of the FDI Act and the regulations in this Part in the same manner as section 85 and its implementing regulations are construed by the Office of the Comptroller of the Currency." 70 Fed. Reg. at 60030. As stated in the preamble, in view of "the commonalities in the design of section 27 with section 85, the use of the identical language in the two sections, and the Congressional objective of providing insured state banks parity with national banks regarding interest rates," *id.* at 60027, sections 27 and 85 have been construed by the FDIC and the courts as *in pari materia* and these considerations make this rule of construction appropriate. We support the "practical benefits" of this approach and the ability of state banks to take advantage of the OCC's written interpretations and other guidance on the meaning of "interest" and the application of 12 U.S.C. §§ 85 and 86. We believe that the rule of construction set forth in § 331.1(c) properly implements Congressional intent.

B. Interstate Lending by Operating Subsidiaries

The preamble discussion of Part 331 states: "To provide parity, this provision will allow section 27 to be utilized by insured state bank subsidiaries to the same extent as

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"any other factors" to "set" the assessment amount and thus was "facially ambiguous"); Federal Deposit Ins. Corp. v. Sumner Financial Corp., 451 F.2d 898, 902-903 (5th Cir. 1971) (affording "great deference" to FDIC interpretation of FDI Act through regulation concerning advertising by regulated banks).

section 85 can be utilized by subsidiaries of national banks (i.e., to the extent the insured state bank subsidiaries are majority-owned by the insured state bank, subject to supervision of the state banking authority, and can only engage in activities that the bank could engage in directly)." Id. at 60027. We believe that allowing operating subsidiaries ("OpSubs") to benefit from Section 27 appropriately implements the parity principle enacted by Congress.

The parallel OCC determinations concerning operating subsidiaries are reasonable. The concept of an operating subsidiary -- a direct subsidiary of a depository institution that can be regulated on precisely the same terms, rules, and conditions as the bank itself because it is limited to activities permitted to the bank itself -- has been well established in federal banking law for many decades. The ability of national bank OpSubs to operate under the same federal preemption as the bank itself has been specifically sustained by the courts. We note that the OCC rules concerning operating subsidiaries were adopted without the existence of any express provision in the National Bank Act, and subsequently were validated by Congress in the GLB Act. The FDIC's statement that state bank OpSubs can operate under Section 27 in the same manner and to the same extent as the parent bank is a reasonable construction of this provision.

The preamble discussion of new § 362.19 is silent with respect to the ability of a state bank OpSub to operate in a host state where the state bank has a branch. The logic and analysis that correctly led the FDIC to state explicitly that a state bank OpSub can operate under Section 27 and Part 331 support a parallel express statement with respect to the ability of a state bank OpSub to operate in a host state under Riegle-Neal II and § 362.19.[11] We request such an express statement concerning OpSubs when the final Part 362 amendment is adopted.

C. Internet Banking

Proposed § 331.3 provides that a state bank that "does not maintain interstate branches or operates exclusively through the Internet" is located, for purposes of applying 12 U.S.C. 1831d, in the state that issued the charter. While we believe that this provision is appropriate for non-interstate banks, we are concerned that the reference to Internet banking in this provision, but not in the context of banks that have both interstate branches and Internet banking may cause confusion. We believe the FDIC's intent is to apply its Section 27 rules uniformly to all state banks. Consistent with General Counsel's Opinion No. 11 and this rulemaking, we believe that when adopting the final rule the FDIC should state that an interstate bank that engages in Internet lending may apply the rates of its home state or any state where it has a branch under the standards applicable to interstate lending conducted through a home state or host state office.

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[11] This position is consistent with FDIC Advisory Letter 99-5.

D. Codification of General Counsel Opinions 10 and 11

We support the intent of the proposal to codify the positions and analysis expressed in FDIC General Counsel Opinions No. 10 and 11. The codification of GC-11 is implemented in proposed § 331.4, which addresses the question of where a state bank is "located" for purposes of Section 27 as follows:

> (b) Location. An interstate state bank is located, for purposes of applying 12 U.S.C. 1831d, in the home state of the state bank and in each host state where the state bank maintains a branch.
>
> (c) Location in more than one state. If a state bank is located in more than one state, the appropriate interest rate:
>
> (1) Will be determined by reference to the laws of the state where all of the non-ministerial functions occur;
>
> (2) May be determined by reference to the laws of the home state of the state bank, where the non-ministerial functions occur in branches located in different host states or any of the non-ministerial functions occur in a state where the state bank does not maintain a branch; or
>
> (3) May be determined by reference to the laws of a host state where a non-ministerial function occurs if, based on an assessment of all of the relevant facts and circumstances, the loan has a clear nexus to that host state.

Id. at 60030.

We suggest that proposed § 331.4 be modified to codify GC 11 more clearly and usefully. As proposed, and contrary to its intended purpose, § 331.4 would have the effect of depriving multistate state banks under certain scenarios of the opportunity to export home state interest rates to host states, an opportunity which multistate state banks presently have under the guidance of GC-11.

Consider the scenario of a bank having its home state in State A with a branch in State B. With regard to the three non-ministerial functions outlined in GC-11 and in the proposed rule, the bank makes a loan to a customer who is a resident in State B and (1) makes final approval of the loan at its home office in State A; (2) disburses the loan at its branch in State B from which the loan was originated; and (3) communicates final approval of the loan to the customer from the branch in State B from which the loan was originated.

Section 331.4(c) as proposed would provide that the controlling interest rate law:

(1) will be the law of the state where all of the non-ministerial functions occur (not scenario described above);

(2) may be the law of the home state if the non-ministerial functions occur in branches in different host states or in any state where the bank does not maintain a branch (not the scenario described above); or

(3) may be the law of the host state where a non-ministerial function occurs there and loan has a clear nexus to that state (this probably would apply to the scenario described above, but the permissive "may" does not provide what the other alternatives might be).

Subsection 331.4(c)(3) of the proposed rule correctly states the rules set forth in GC-11, but subsections (c)(1) and (c)(2) appear to cut back on what is set forth in GC-11.

GC-11 states that if all non-ministerial functions are performed in a single host state, but at least one non-ministerial function is performed in a back office (or anywhere other than the branch), then the bank has the option to apply its home state rate. We request that Subsection (c)(1) of the proposed rule be modified to have the same scope as GC-11.

While the opinion letter mentions the two circumstances described in subsection (c)(2), GC-11's discussion of scenarios where non-ministerial functions occur in multiple states is not intended as an exhaustive illustration of the multistate occurrence possibilities, yet the proposed rule does not allow for other such possibilities.

Referring to the multistate scenarios now described in § 331.4(c)(2), GC-11 says "[i]n these and *similar situations*, the OCC concluded that home state rates may be used" (63 Fed. Reg. at 27285, emphasis added). GC-11 thus allows, without defining them, that there are other multistate non-ministerial function situations where the home state rates can control, but the proposed rule is not flexible enough to allow for such other situations. Referring to the clear nexus test now incorporated into § 331.4(c)(3), GC-11 continues, "*Alternatively*, in those situations [*i.e.*, the § 331.4(c)(2) situations and similar situations] the interest rates permitted by the host state where a non-ministerial function occurs may be applied, if based on an assessment of all of the facts and circumstances, the loan has a clear nexus to the host state" (*Id.*, emphasis added). The alternative to application of the host state law is, of course, application of the home state law.

In the scenario described above, GC-11 would permit the bank to export to State B the interest rate under the laws of its home state, State A. However, this result is precluded under the proposed rule, and to that extent the proposed rule is inconsistent with GC-11. In its explanation of the proposed rule, the FDIC states that GC-11 observed: "that the Interstate Banking Statutes did not address other situations that could occur in the interstate context, *such as where the three non-ministerial functions occur in different states* or where some of the non-ministerial functions occur in an office that is not considered to be the home office or a branch of the bank. In these instances, as reflected in GC-11 and in paragraph (c)(2) of the proposed rule, *home state rates may be used*." 70 Fed. Reg. 60028-29 (emphasis added). Nevertheless, this explanation, which is consistent with GC-11, is not borne out in the text of the rule itself. This problem could be remedied by amending the language of § 331.4(c)(2) to provide "May be determined by reference to the laws of the home state of the state bank, where the non-ministerial functions occur in branches located in different host states, or any of the non-ministerial functions occur in the home state of the state bank, or any of the non-ministerial functions occur in a state where the state bank does not maintain a branch."

Another difficulty with the proposed rule lies in the permissive "may" used in subsections (c)(2) and (3) of § 331.4. Those sections provide for different results as to which law governs, yet the rule does not provide a way to determine which of the two permitted options will control. From the context of GC-11, it appears that where the situation would warrant the application of either the home state law or the host state law, the bank has the option of which to apply. *See, e.g.*, the remarks in GC-11 about the bank's disclosure of which law applies. 63 Fed. Reg. at 27286. This issue could be clarified by beginning subsections (c)(2) and (3) with "May, at the option of the bank, be determined . . ." Without such a clarification, the proposed rule invites controversy: a bank which fits squarely under (c)(2) may want to apply its home state rate, but a host state customer whose state's rate law may be more favorable to the customer (and may have severe penalties for violation) may be able to show a "clear nexus" to the host state. The rule must provide clarity on that point so as to dispel controversy and to provide certainty at the inception of the loan, not during the collection process, regarding which state's rate will control. (See comments below on disclosure.)

A similar issue may be raised by the proposed rule's use of the phrase "by reference to the laws" in § 331.4(c)(1), (2) and (3). This may suggest a need for express reference to a particular state's interest rate law in the promissory note itself. Such express reference in a promissory note should not be required. For example, where a note provides that it will governed by "the laws of State C and by federal law, including, but not limited to, federal law governing the maximum rate of interest," such should be sufficient to permit the application of the interest rate law of a state other than State C where allowed by GC-11. The words "reference to" should be omitted from § 331.4(c)(1), (2) and (3).

Accordingly, we suggest § 331.4 be modified as follows (new language in italics; deleted language in brackets):

> (b) Location. An interstate state bank is located, for purposes of applying 12 U.S.C. 1831d, in the home state of the state bank and in each host state where the state bank maintains a branch.
>
> (c) Location in more than one state. *A state bank located in more than one state always can elect to implement home state interest charges unless all three non-ministerial functions are performed and administered entirely in one or more branch offices located in a single host state*. If a state bank is located in more than one state, the appropriate interest rate:
>
> (1) Will be determined by [reference to] the laws of the state where all of

the non-ministerial functions occur *(and no non-ministerial function is administered in any other state)*;

(2) May, *at the option of the bank,* be determined by [reference to] the laws of the home state of the state bank, where the non-ministerial functions occur in branches located in different host states, *or any of the non-ministerial functions occur in the home state of the state bank,* or any of the non-ministerial functions occur in a state where the state bank does not maintain a branch; or

(3) May, *at the option of the bank,* be determined by [reference to] the laws of a host state where a non-ministerial function occurs, *or* if, based on an assessment of all of the relevant facts and circumstances, the loan has a clear nexus to that host state.

E. Request for Comment on Interest Rate Disclosure

These two issues discussed above — use of the permissive “may” and the referencing of particular states’ laws in proposed § 331.4— underscore the need to disclose to the borrower which state’s interest rate law will apply. This disclosure could be made in the promissory note, but banks should be given the flexibility to make such a disclosure in a separate document. Separate disclosure, provided that it is meaningfully made according to reasonable “clear and conspicuous” standards, would better inform the borrower and, especially where the disclosure is signed by the borrower, would further dispel the possibility of controversy concerning which interest rate law applies.

E. Scope of Section 27 Preemption

For parity under Section 27 to be meaningful, a state bank must have the same flexibility as a national bank to be able to charge and collect its home state interest rates regardless of the structure it chooses to employ to engage in interstate lending. The importance of flexibility in the delivery of financial products and services and the impediments and costs that can arise from conflicting local laws has been discussed by the OCC, *e.g.,* 61 Fed. Reg. 4849, 4851-52 (Feb. 9, 1996). The definition of "interest" as incorporated into Part 331 appropriately addresses the importance of a uniform federal definition of this key term in Section 27.

Proposed § 331.2 states: "If state law permits different interest charges on specified classes of loans, an insured state bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest." We believe that this language would permit a state bank to "export" all the laws of the state of location related to the particular type of loan transaction and would preempt any law of any other state (e.g., the borrower's state, if different from the state of location). We request discussion in the final rule preamble supporting and making this point clear.

We believe the final rule should also take into account the ability of state rules to defeat Section 27 indirectly, by regulating how ministerial functions may be performed by a bank or its agents or by declaring that a loan to a resident of that state will be voidable or void if certain state conditions are not met. Compare the discussion of the scope of Section 27 in the majority and dissenting opinions in *Bankwest v. Baker*, 411 F3d 1289, 1305-5, 1314-19 (11th Cir. 2005). We believe that the dissent more accurately construed the scope and intent of Section 27 when it states: "Preemption would be a meaningless doctrine if states could effectively rewrite federal statutes by adding conditions or limitations." Id. Accordingly, we believe that the FDIC rules should provide that Section 27 governs "any loan" made by a state bank regardless of the way its may choose to have ministerial functions associated with that loan performed, whether by a bank office or subsidiary, third party, or other means.

F. Opt-out states

We support the proposed § 331.5 concerning states exercising their opt-out option (or reversing their exercise of that option). Allowing the FDIC rule to operate seamlessly as states exercise the opt-out option, or repeal such an exercise, is important for the ability of a state-chartered bank to benefit from the uniform lending platform provided by Section 27.

We note that the preamble to the Proposal states that Wisconsin has not repealed its exercise of its opt-out under Section 27, as enacted in Wisconsin Act, ch. 45, section 50, 1981 Wis. Laws 586 (not codified). *See* 70 Fed. Reg. 60029. This statement with respect to Wisconsin appears to be incorrect. Wisconsin repealed its exercise of the opt-out in 1997. Wisconsin Act 142. *See* http://www.legis.state.wi.us/1997/data/acts/97Act142.pdf. It is our understanding that Wisconsin has not again exercised its opt-out right since 1997 and accordingly, unless the FDIC has a basis for concluding otherwise, we request that the preamble to the final rule correct the erroneous statement concerning Wisconsin made in the preamble of the Proposal.

VI. Proposal Concerning Parity for State Banks with Interstate Branches

The evident adverse effects on the dual banking system from the disparate 1994 applicable law provisions for state and national banks led Congress in 1997 to amend Riegle-Neal to adopt an applicable law provision for state banks that closely tracked the national bank provision in Section 36(f) of the National Bank Act.[12] The purpose of the 1997 amendment, which was stated repeatedly by its sponsors, was to provide parity between state banks and national banks with respect to interstate banking.[13] By “parity,” they plainly meant the ability of state banks to do business interstate under a uniform law

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12 *Compare* 12 U.S.C. § 1831a(j) *with* 12 U.S.C. § 36(f).

13 As stated by the lead sponsor in the House, Rep. Roukema: “The essence of this legislation is to provide parity between state-chartered banks and national banks.” 143 Cong. Rec. H3088 (daily ed, May 24, 1997).

(home state law), to the same extent as national banks were authorized by Riegle-Neal I to operate under the National Bank Act.[14]

We believe that in adopting its final rule in this rulemaking the FDIC should closely follow the approach taken by the OCC to implementation of the parallel applicable law provision for national banks with interstate branches, 12 U.S.C. § 36(f). Riegle-Neal II was explicitly patterned after § 36(f), and like Section 27, should be viewed as *in pari materia* and applied so that interstate state banks have actual parity with interstate national banks.

As indicated more fully below, we believe that the OCC has correctly taken the approach that Riegle-Neal I authorized *the bank* to engage in any or all of its permitted activities in the host state once it has a single branch there and to apply its charter law. In 1996 when the OCC implemented Riegle-Neal, including § 36(f), it did not implement the § 36(f) applicable law provision to focus separately on branch-related activities, but applied the same rules uniformly to national banks' host state activities. The parity question under Riegle-Neal II is whether Congress in 1997 intended interstate state banks to apply an applicable law rule different from national bank rules, that is, whether a different law would apply depending on the means used by the state bank to conduct its permitted business in the host state or the structure of the transaction (that is, whether use of home state law as the applicable law depends on some actual branch involvement in the bank's transaction).[15] The legislative purpose as discussed in the Proposal preamble is clear: Congress was focused on the bank's interstate activities, not the means used by the bank. In adopting its final rule implementing Riegle-Neal II, the FDIC should be guided by the OCC's approach in order to achieve the parity result Congress intended.

A. Applicable Law for National Banks with Interstate Branches

Riegle-Neal I included the following applicable law provision for national banks that establish interstate branches, 12 U.S.C. § 36(f):

(f) Law applicable to interstate branching operations
 (1) Law applicable to national bank branches

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[14] *See, e.g.*, statements by the principal sponsors of the 1997 Amendment, Rep. Roukema (". . . we have . . . with this action, protected the dual banking system while at the same time gaining the advantages of interstate banking"), 143 Cong. Rec. H4231 (daily ed. June 24, 1997), and Chairman D'Amato ("Enactment of H.R. 1306 also would bolster efforts of New York and other states to make sure that State[-]chartered banks have the powers they need to compete efficiently and effectively in an interstate environment"), 143 Cong. Rec. S5637 (daily ed. June 12, 1997).

[15] For example, although the statutory text directly addresses the law applicable to a Tennessee bank with a branch in Oklahoma that makes a loan to an Oklahoma resident through its Oklahoma branch (Tennessee law applies), the text does not speak directly to the governing law applicable to the identical loan originated by the Tennessee bank from its home office in Tennessee (or through an operating subsidiary).

> (A) In general. The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except -
> (i) when Federal law preempts the application of such State laws to a national bank; or
> (ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.

The applicable law parity provision of Riegle-Neal II is closely patterned after § 36(f):

> (j) ACTIVITIES OF BRANCHES OF OUT-OF-STATE BANKS.--
> (1) APPLICATION OF HOST STATE LAW.--The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of State national bank. To the extent host State law is inapplicable to a branch of an out-of- State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch. 12 U.S.C. § 1831a(j)(1).

In 1996, the OCC conducted a comprehensive rulemaking on corporate activities that included revision of all its rules governing branches, taking into account the enactment of Riegle-Neal I. Neither these rules nor the accompanying preamble discussion includes specific reference to § 36(f), and they in no way suggest that Riegle-Neal I or § 36(f) required an analysis of the state law applicable to a national bank branch in a host state any different than for the bank as a whole. We submit that the OCC took that approach because it would be inconsistent with modern banking to artificially single out a "branch" from the rest of the bank and that the OCC's approach reflects its contemporaneous understanding of how the interstate branch applicable law regime was intended to be effected. That approach provides the appropriate reference point for determining what parity enacted in Riegle-Neal II should mean for interstate state banks.

At the time the OCC was developing its rules implementing Riegle-Neal, its chief counsel co-authored a lengthy article on modern banking, which we believe provides the appropriate context for considering the implementation of Riegle-Neal by the OCC:

> Banking firms today face myriad competitive challenges. Their capacity to meet these challenges will depend first on the extent to which a bank's charter accommodates change, flexibility, and innovation, and second, on the vision and skill of managers in exploiting this potential.

> The scope of the task is formidable. Competition in banking today is operating asymmetrically. In other words, banking can be invaded from outside more easily than banks have been able to diversify out of finance. Many potential bank competitors also have strong brand positions and national presences and can take advantage of those positions by expanding the range of their product offerings. These non-bank players generally have a lower delivery cost structure than banks, in part because they do not have the investment in bricks and mortar that banks do. These "sunk costs" were once the backbone of bank delivery systems. Data indicate, however, that almost seventy percent of all current financial services interactions are now conducted at *outside* branches and ATMs. Of the remaining thirty percent, almost half are interactions with ATMs, which can be distant from a branch, with no face-to-face contact. Thus, banks' traditional branch delivery infrastructures threaten to become increasingly obsolete unless that infrastructure can be used more efficiently as a channel for a broader range of products and services. [footnotes omitted]

Julie L. Williams and Mark P. Jacobsen, *The Business of Banking: Looking to the Future,* 50 Bus. Law 783 (May 1995).

The OCC has implemented the Riegle-Neal interstate banking and branching regime, including the applicable law provision in § 36(f) on which § 24(j) is based, with reference to what the national bank can do in states where it operates branches. It is a seamless framework that addresses uniformly the extent to which host state law may be applicable to the national bank's activities in the host state, however conducted—that is, the OCC rules do not distinguish whether there is involvement by the host state branch, or not. We believe that the OCC has correctly interpreted and implemented Riegle-Neal, including § 36(f). The parity provided through § 24(j), and thus under the FDIC's implementing rule, should allow state banks to operate under a parallel framework. That is what Congress intended.

As discussed below, the FDIC Proposal implementing § 24(j) appears to add a requirement not found in the OCC rules–that host state law does not apply, and home state law does apply, only when there is "substantial" branch involvement. This requirement not only amounts in practice to something less than full parity, but also might suggest that the OCC should modify its rules to implement § 36(f) with a "substantial involvement" requirement. We believe the current OCC approach appropriately implements § 36(f) and accordingly believe that the FDIC should modify its final rule to provide full parity.

B. Recommended Rule of Construction

We believe that the rationale provided for the Proposal's rule of construction for Section 27 applies equally to Section 24(j) and accordingly that a similar rule of construction should be included in the final rule. Given the substantial adoption of identical language in Section 24(j) and § 36(f), Section 24(j) should be given *in pari materia* interpretation. We ask the FDIC to include a rule of construction in new § 362.19 providing that host state law will apply to a state bank with a branch in a host state only when a host state law applies under § 36(f) to a national bank with a branch in that host state.

The comparison of Sections 27 and 85 by the court in *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992) seems to apply equally to the comparison of § 36(f) and Section 24(j):

> The historical record clearly requires a court to read the parallel provisions of [DIDMCA] and the [NBA] in pari materia. It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way. [citations omitted]. So here. What is more, when borrowing of this sort occurs, the borrowed phrases do not shed their skins like so many reinvigorated reptiles. Rather, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." [citation omitted]. Because we think it is perfectly plain that this portable soil includes prior judicial interpretations of the transplanted language, [citations omitted], [NBA] precedents must inform our interpretation of words and phrases that were lifted from the [NBA] and inserted into [DIDMCA]'s text.[16]

We urge the FDIC to include a rule of construction providing parallel parity in its final rule amending Part 362.

C. "Activities Conducted at a Branch"

Proposed § 362.19(b) & (c) would provide that home state law would apply to any "activity conducted at a branch" to the same extent that the National Bank Act applies to an activity conducted by a national bank branch in the same host state. An "activity conducted at a branch" is defined in § 362.19(a)(4) to mean "an activity of, by, through, in, from, or substantially involving, a branch." 70 C.F.R. at 60031. While we recognize that this portion of the FDIC proposal is attempting to take account of the use of the word "branch" in section 24(j),[17] we believe that in comparison with the OCC implementation

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16 *See* General Counsel Op. No. 10.

17 As stated in the preamble: "The statute itself does not provide an explanation of what Congress meant by the phrase "apply to a branch." Clearly Congress was addressing the activities and operations of a branch in the host state, but it is not clear from the statutory text what threshold level of involvement by the branch will trigger the operation of the statute. The range of potential involvements by the branch might, under a broad interpretation, run from a very minimal involvement in the activity to, under a very narrow interpretation, performance of the entire activity at the branch by branch personnel. The proposed rules would clarify that host state law is subject to preemption when an

of § 36(f), the Proposal gives undue, talismanic weight to the word "branch" and in doing so undercuts the achievement of the parity intended by Congress.

The preamble states that this language "is designed to give effect to Congress' intent to grant state banks full parity with national banks with respect to interstate branches." Id. at 60027. At a minimum, the use of the word "substantially" in the definition of "activities conducted at a branch" imposes a limitation to which national banks are not subject. We request the FDIC either to omit "substantially" from its final rule or, at a minimum, add discussion indicating that the "substantially involving" means any formal involvement or role of the branch, any involvement of a branch employee, any use of systems or facilities serving the branch, or any other type of contact with the branch.

D. Determining When Host State Law Is Preempted for Interstate Banks

Riegle-Neal II provides preemption for interstate state banks whenever the National Bank Act preempts host state law for an interstate national bank in that host state. The OCC has provided considerable clarity for national banks, through regulations,[18] interpretations, and guidance and thus also has provided a substantial basis on which state banks can make determinations under Riegle-Neal II.

The Proposal addresses the question of determining when a host state law does not apply to national banks in proposed § 362.19(c), which includes language offered by the Comptroller. This section states:

> (c) 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. If a particular host State law does

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activity is conducted at a branch of the out-of-state state bank, and would define ``activity conducted at a branch" to mean an activity of, by, through, in, from, or substantially involving, a branch. This approach is within the range of interpretations permitted by the statutory language, but the statute itself does not indicate whether this interpretation is the most appropriate one. Since the language of this provision is susceptible to multiple meanings and presents important questions about how it is to be applied, the statute is ambiguous." 70 Fed. Reg. at 60023-24. Given the ambiguity and the OCC approach under § 36(f), the FDIC also has discretion to adopt a less restrictive construction that closely parallels OCC construction and application of § 36(f).

[18] *See* 12 C.F.R. §§ 7.4007-.4009. We note that the OCC Preemption Rule includes a catchall provision, § 7.4009, which restates the general OCC view: "(b) Applicability of state law. Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks."

> not apply to such activity of an out-of-State, State bank because of the preceding sentence, the home State law of the out-of-State, State bank applies.

70 Fed. Reg. at 60031. We believe this provision does not provide parity and we suggest two alternative means for improving it.

Our first, and preferred alternative, directly implements Congressional intent and provides full parity. We recommend that § 362.19(c) be revised to simply restate the statutory language and that the final rule or preamble should provide that in general state banks can determine for themselves when they are authorized to apply home state law in a host state based upon their own analysis of the case law, OCC rules, and OCC interpretations, as well as their observation of national bank practices in the marketplace. Genuine parity means that state banks should have the same flexibility as national banks to determine applicable law, with appropriate consultation with the FDIC, other federal regulators, and state banking departments.

We appreciate the intent of the Comptroller to provide clear guidance on when host state law does not apply and believe that appropriate results can occur from coordination between state banks and the FDIC, with consultation with the OCC. We note that the Proposal preamble states: "In order to determine if host state law applies to a branch of an out-of-state, national bank, the FDIC expects to consult with the OCC. This approach is similar to the consultations that the FDIC engages in currently when making determinations regarding the permissible activities of a national bank under section 24(a) of the FDI Act, 12 U.S.C. 1831a(a)." Such consultation is appropriate in order for the parity enacted by Congress to be practically effective.

With this cooperative spirit in mind, we believe that the final rule and its accompanying preamble might set forth options for determining when a host state law does not apply. In general, in light of the very large number of instances in which a given host state law would be plainly preempted under the terms of the OCC preemption rules, the final rule or preamble should state that a state bank can proceed based on its understanding of the OCC rules and how they are applied by the OCC.

We recognize that the application of case law, the OCC rules, and OCC interpretations and actions will be uncertain in particular instances. It would therefore be helpful for the FDIC to provide a procedure for such situations (which we would expect to be relatively few in number, in light of the properly expansive scope of the OCC rules). The final rule might give state banks the option of submitting a letter to the FDIC with a simultaneous copy to the OCC providing analysis that a given host state law does not apply to a national bank under OCC rules and interpretations and might provide that if neither the FDIC nor OCC responds within 10 calendar days stating a substantive objection to that submission, the bank will be entitled to apply its home state law in accordance with the submission. (If either agency submits a substantive objection with 10 days of the submission, the rule might state that the agency would have another 20 calendar days to state in writing its own analysis and conclusion; that period should not be subject to any extension unless the agency states in writing that the issue involves novel and substantial issues of law or policy, in which case an additional 30 days might be allowed.)

As an alternative, § 362.19(c) could be revised to take into account fully the existing guidance with respect to preemption provided by the OCC and the courts. In connection with this revision, we believe that the FDIC should reconsider the use of the words "determined in writing" and "particular," which we believe would most likely result in state banks operating in host states with less than full parity. We believe use of this language is inconsistent with Congressional intent, raises interpretive issues not in the statutory text, and will prove unworkable for state banks, state bank regulators, the FDIC, and the OCC. Indeed, because this language was proposed by the Comptroller and because of the statutory parity purpose of Riegle-Neal II, this provision as currently proposed might be read to suggest a narrower scope of the parallel provision in § 36(f) than is currently the case. Parity is a two-way street.

Riegle-Neal II was enacted because Congress understood that the broad preemption available to interstate national banks was adversely affecting state banks and the dual banking system. As remedial legislation, Riegle-Neal II should be broadly construed to achieve its purposes, and the use of "determined in writing" and "particular" in the proposed rule suggests just the opposite.[19]

We recommend that if the FDIC determines to follow this alternative approach, it substitute the following for the proposed § 362.19(c):

> (c) A host State law does not apply to an activity conducted in the host State by an out-of-State, State bank to the same extent that:
>
> > (1) a Federal or State court has determined that the host State law does not apply to an activity conducted in the host State of an out-of-State, national bank, or
> >
> > (2) the Office of the Comptroller of the Currency by regulation, written interpretation, or other action has provided that host State law is preempted or does not apply to an activity conducted in the host State of an out-of-State, national bank.
>
> If a host State law does not apply to such activity of an out-of-State, State bank because of the preceding sentence, the home State law of the out-of-State, State bank applies.

[19] If Congress had intended to enact a high threshold for interstate state banks, it knows how to do so. See, e.g., 12 U.S.C. § 1842(d) (the "Douglas Amendment"), which was repealed by Riegle-Neal I.

There will not be parity if the final rule either presents new interpretive issues for state banks that are not presented by the language of Riegle-Neal II or mandates procedures that constrain state bank flexibility to compete on equal terms with national banks. We believe that the Proposal in § 362.19(c) presents serious interpretive and practical obstacles and that the final rule should provide useful guidance on how state banks can make, or when needed receive, determinations concerning applicable law on which they can rely. To implement the Congressional purpose, the final rule should ensure that state banks have efficient and effective means for making applicable law determinations on which they can rely when making and implementing business decisions. We would underscore the importance of making this portion of the final rule practically effective so that state banks will be able to operate with the competitive parity intended by Congress.

VII. Unfinished Business: Parity for State Banks in Nonbranch States

Although the FDIC in this rulemaking chose not to publish proposals addressing all the issues and requests discussed in the Petition, we urge the FDIC to complete this rulemaking promptly and then turn immediately to the remaining Petition matters. As discussed therein, the express preemption provided in Section 104(d) of the GLB Act is national in scope, but remains poorly understood and largely unused. We believe that the FDIC does not necessarily need to resolve the question of whether it can adopt a rule directly implementing Section 104(d) because it plainly has authority under Section 8 of the FDI Act to provide insured banks with definitive guidance with respect to compliance with law. The provisions of Section 104 by their terms apply to insured banks, and accordingly the FDIC can give them guidance concerning how Section 104 affects the law applicable to their operations and activities nationwide. Moreover, the parity principles that are embodied in the McFadden Act, Section 27 and Riegle-Neal, among others, plainly reflect Congressional policy concerning banking and are parallel to those underlying Section 104. These considerations support the requested action.

During the 1990s, Congress re-examined the fundamental rules governing the delivery of banking and other financial services in interstate commerce, that is, in the largely national marketplace for banking and financial services that had developed in the preceding decades. The Riegle-Neal and GLB legislation confirmed the existence of a robust interstate marketplace for financial services and provided a federal legal framework for the conduct of this interstate commerce. The GLB Act, including Section 104, specifically represents an exercise of Congressional authority to regulate *interstate* commerce engaged in by financial services companies, including depository institutions. The preemption expressed in Section 104(d) lies at the heart of federal interstate commerce regulation by expressly limiting the ability of any state to interfere with, burden, restrict or discriminate against any depository institution, affiliate, or associated person, engaging in financial services activities, including providing banking products and services, in interstate commerce.

In adopting Section 104, Congress understood the need in today's national financial services marketplace for competitors to operate on equal terms and the need to remove state impediments. The terms of Section 104 plainly apply to banking, and Congress does not need to have specifically addressed state laws discriminating among banking competitors for the FDIC to reasonably implement Section 104 for the state banks that are the portion of the financial services universe subject to its authority. A rulemaking will be the occasion for definitive interpretation of a complex set of statutory provisions that can be confusing. We believe the scope and meaning of these provisions are clear and that it is precisely the role of an administrative agency to adopt rules "unpacking" dense and complex language and laying out their scope and application.

Under Section 8 of the FDI Act, an insured bank may be subject to an enforcement action of the FDIC if "in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation." 12 U.S.C. § 1818(b)(1). The FDIC has authority to adopt rules with respect to legal compliance by insured banks that provide guidance to those banks and agency staff charged with making supervisory, enforcement and examination decisions. That can be accomplished by using authority under Section 9 to address issues of compliance with state law, including the meaning and scope of Section 104.[20]

The GLB Act addressed the entire financial services marketplace and, like Riegle-Neal I and II, adopted broad federal rules to implement the goal of a "level playing field." In Section 104(d) Congress plainly addressed the need for financial services providers, including insured depository institutions, that operate across state lines to do so under uniform rules and not to be subject to individual host state rules or actions that would disadvantage some or all depository institutions vis-à-vis their competitors.

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[20] The FDIC previously has engaged in a rulemaking in comparable circumstances. In 1982, the FDIC adopted a Statement of Policy addressing the applicability of the Glass-Steagall Act to securities activities of subsidiaries of insured nonmember banks. 47 Fed. Reg. 38984, September 3, 1982. That Statement of Policy construed Section 20 of the Glass-Steagall Act and concluded that the restrictions in that section on securities affiliates of insured banks did not prevent insured nonmember banks subject to the FDIC's regulation and supervision from having "bona fide" securities affiliates or subsidiaries. The provisions of Glass-Steagall construed in the Statement of Policy (like the provisions of GLB at issue here) were not part of the FDI Act, but the FDIC issued a rule to provide clear guidance to insured state banks, and the exercise of the FDIC's rulemaking authority in that case was upheld. See National Council of Savings Institutions v. FDIC, 664 F.Supp. 572 (D. D.C. 1987). Issuing guidance to state insured banks concerning the scope of Section 104 of the GLB Act is a necessary and appropriate exercise of the FDIC's authority to carry out its regulatory mandate.

When a state bank seeks to provide products or services outside its home state in a state where it does not have a branch, it is often confronted with requirements or legal risks to which a similarly situated national bank or federal thrift are not subject. For example, many states require licenses to engage in any lending activity in that state, but provide exemptions for banks and nondepository lenders chartered by that state and for national banks and federal thrifts. But an out-of-state state bank often is not granted such an exemption, even though it is also an institution chartered and regulated by a state banking agency and subject to thoroughgoing regulation, supervision, and examination by a federal banking agency under the same framework of federal rules and standards to which state banks chartered by a host state, national banks, and federal thrifts are subject.

The example of a state licensing law illustrates this issue. As discussed in the Petition and below, Section 104(d)(4)(D)(i) provides an express federal law basis for the out-of-state state bank to conclude that the host state licensing requirement is preempted. Nevertheless in absence of rules providing guidance, a state bank faces a difficult practical choice. Its choice is (1) not to get a license, thereby enhancing its competitiveness vis-à-vis its other depository institution competitors that are exempted for the license requirement, but also risking the possibility of a state enforcement action or sanctions under state law for unlicensed lenders (including possible voiding of loans made), which may also have negative reputational effects and adverse consequences in its next state or federal banking examination or (2) to apply for the license, pay required fees, await any licensing determination, and meet other requirements to which such licensees may be subject.

Faced with the Hobson's choice that this example illustrates, state banks have generally chosen to take the legally less risky course of complying with host state requirements, even though it clearly affects the out-of-state state bank adversely in terms of flexibility, responsiveness and the costs of doing business in that state. These are the very discriminatory burdens addressed in Section 104(d)(4)(D).

The requested rule would implement the terms and policies of Section 104(d) and the parity policies of Riegle-Neal II and address gaps in existing law. Like the parallel OCC rules, the requested rules would reduce legal risk, guide legal compliance by insured banks, and aid the FDIC in making enforcement decisions under Section 8 of the FDI Act. Further, by promoting operating efficiency and competitiveness in interstate banking and by reducing the real costs arising from legal uncertainty and risk, the proposed rule would contribute to the safe and sound operation of state banks. The policy of Section 104 has a goal similar to that of Riegle-Neal II, but plainly addresses a different aspect of the same problem -- discriminatory state laws that disadvantage depository institutions, including state banks, which compete against banks as well as nonbanks in interstate financial service markets.

Given Section 104(d) and the FDIC's authority to address compliance with law under FDI Act Section 8, the FDIC can exercise its Section 9 authority to adopt a rule consistent with the logic and policy of Riegle-Neal II that will provide state banks greater competitive equality in every state so that no insured state bank will be required to comply with a state law unless a national bank also would be subject to that law. For the record, we will discuss in greater detail the intent and appropriate construction of Section 104(d).

<u>1. Statutory Background.</u>

Section 104(d)(4) was added in the House Commerce Committee in June 1999. See H.R. Rept. 106-74. Pt. 3, at 140. Its language tracks closely the language in Sec. 104(e), which had been included in the 1998 Senate Banking Committee bill for the purpose of providing standards for determining when state laws governing insurance activities discriminate against a depository institution, or any affiliate, engaging in insurance activities and would be preempted. That preemption sought to advance the bill's goal of financial diversification in actual practice in the critical area of insurance. The language later added in the House Commerce Committee and enacted in Sec. 104(d)(4)[21] was included to provide standards for determining when state law governing "any financial activity *other than insurance* and securities activities" would be preempted. H.R. Rept. 106-74. Pt. 3, at 140. (emphasis added). This Sec. 104(d)(4) language was not changed in the enacted bill.[22]

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[21] In the House Commerce Committee version, this provision was Sec. 104(b)(4).

[22] The pertinent portions of Section 104(d) are as follows:
(d) Activities.
(1) In General. Except as provided in paragraph (3), and except with respect to insurance sales, solicitation, and cross marketing activities, which shall be governed by paragraph (2), no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in any activity authorized or permitted under this Act and the amendments made by this Act.

* * *

(4) Financial Activities Other Than Insurance. No State statute, regulation, order, interpretation, or other action shall be preempted under paragraph (1) to the extent that –
(A) it does not relate to, and is not issued and adopted, or enacted for the purpose of regulating, directly or indirectly, insurance sales, solicitations, or cross marketing activities covered under paragraph (2);
(B) it does not relate to, and is not issued and adopted, or enacted for the purpose of regulating, directly or indirectly, the business of insurance activities other than sales, solicitations, or cross marketing activities, covered under paragraph (3);
(C) it does not relate to securities investigations or enforcement actions referred to in subsection (f); and
(D) it –
(i) does not distinguish by its terms between depository institutions, and affiliates thereof, engaged in the activity at issue and other persons engaged in the same activity in a manner that is in any way adverse with respect to the conduct of the activity by any such depository institution or affiliate engaged in the activity at issue;
(ii) as interpreted or applied, does not have, and will not have, an impact on depository

2. A depository institution's banking activities are "financial" activities protected from discriminatory state action under Sec. 104. Sec. 104(d)(4) must be read in conjunction with Sec. 104(d)(1). The very broad express pre-emptive language of (d)(1) reaches any state "statute, regulation, order, interpretation, or other action" (herein, "rule or action") that "restrict[s]" a "depository institution" from engaging in "any activity authorized or permitted under this Act [GLB Act] and the amendments made by this Act [GLB Act]."

The activity language by its terms includes all banking activities engaged in by a depository institution. That banking activities are "permitted under this Act and the amendments made by this Act" is evident from at least three provisions in GLB Act section 103, which added new subsection 4(k) to the Bank Holding Company Act. The list of "financial" activities set forth in new paragraph 4(k)(4) include:

- (4)(G)(ii): activities "the Board has determined, under regulations prescribed or interpretations issued pursuant to subsection (c)(13) . . . to be usual in connection with the transaction of banking or other financial operations abroad "; this provision expressly references Regulation K, which includes "[c]ommercial and other banking activities" (12 C.F.R. § 211.10(a)(1) (2005)).

- (4)(F): all "closely related to banking" activities under Regulation Y, which include, *inter alia*, operating a "savings association."[23] A savings association can engage in all the deposit and lending activities of a bank and thus operating a savings association is functionally the same as banking;

- (4)(A): "lending, . . . or safeguarding money;" "safeguarding" is not otherwise defined and would appear broad enough to encompass taking and holding deposits.

3. Section 104(d)(4) by its terms reaches state laws that treat one type of depository institution adversely vis-à-vis other depository institutions. A state law or action subject to preemption under (d)(1) because it restricts a depository institution

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institutions, or affiliates thereof, engaged in the activity at issue, or any person who has an association with any such depository institution or affiliate, that is substantially more adverse than its impact on other persons engaged in the same activity that are not depository institutions or affiliates thereof, or persons who do not have an association with any such depository institution or affiliate;

(iii) does not effectively prevent a depository institution or affiliate thereof from engaging in activities authorized or permitted by this Act or any other provision of Federal law; and

(iv) does not conflict with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law.

15 U.S.C. § 6701(d).

[23] Regulation Y, 12 C.F.R. § 225.28(b)(4)(ii).

nevertheless will be spared from preemption under Sec. 104(d)(4) if it meets all four of the nondiscrimination tests in (d)(4), which provides—"No State statute, regulation, order, interpretation, or other action shall be preempted under paragraph (1) to the extent that" it does not fall within any of the provisions of (d)(4)(D)(i)-(iv). The "and" between (iii) and (iv) makes it plain that this list is cumulative and that a state law or action must satisfy all four subparagraphs if it is to escape preemption.

Moreover, the language used to describe impermissible state rules or actions in (i)-(iv) provides a guide to the scope of state rules or actions that "restrict" under (d)(1). A state rule or action that fails any element of (i)-(iv) must be viewed as restricting under (d)(1), as well as (d)(4).

The textual terms of (i), read in conjunction with (ii), demonstrate that that a state rule or action is preempted if it treats one category of depository institution adversely compared to another category of depository institution. Both provisions deal with rules or actions that deal with depository institutions or affiliates, on the one hand, and "other persons"[24], on the other. The interpretive question, which is answered in the text, is what type(s) of entity are such "other persons." Following is a side-by-side comparison of the text of (i) and (ii):

(i) does not distinguish by its terms between *depository institutions, and affiliates thereof, engaged in the activity at issue* and **other persons engaged in the same activity** in a manner that is in any way adverse with respect to the conduct of the activity by any such depository institution or affiliate engaged in the activity at issue;	(ii) as interpreted or applied, does not have, and will not have, an impact on *depository institutions, or affiliates thereof, engaged in the activity at issue*, or any person who has an association with any such depository institution or affiliate, that is substantially more adverse than its impact on **other persons engaged in the same activity that are not depository institutions or affiliates thereof**, or persons who do not have an association with any such depository institution or affiliate

As indicated by the italicized language in both, the first category in each is the same – "*depository institutions, and affiliates thereof, engaged in the activity at issue"* [*i.e.*, any "financial" activity, which includes any banking activity]. The boldface language describes the other category: in (i), any "**other persons engaged in the same activity**"; and in (ii), any "**other persons engaged in the same activity that are not depository institutions or affiliates thereof**".

[24] "Person" is not defined for purposes of section 104, and thus should be read to include any type of natural or corporate person.

It is a standard rule of statutory construction that when "Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[25] These two subparagraphs evidence just such a statutory intent: under (ii), the second category is limited to <u>non-depository institution</u> "persons engaged in the same activity," while (i) contains no limitation at all, and thus by its terms it includes *any* "other persons engaged in the same activity".

For purposes of (i), it is self-evident that when an out-of-state state bank (or its subsidiary) is among the "*depository institutions, and affiliates thereof, engaged in the activity at issue,"* a national bank, host state state bank, or a subsidiary of either is a "person engaged in the same activity." Accordingly, a state statute, rule, order, interpretation or other action that treats the former more adversely than the latter fails the (i) test and is preempted under Section 104(d).

Accordingly, the nonbranch state parity rules sought in the Petition are wholly consistent with the terms and purposes of Section 104(d) and would carry forward the express Congressional parity policy underlying Riegle-Neal II. Under Section 8 of the FDI Act, the FDIC has clear authority to adopt rules providing definitive guidance to insured banks on the scope and meaning of statutory preemption provisions enacted for their benefit. Adoption of such rules would provide the full parity needed to preserve and reinvigorate the dual banking system.

* * *

The Financial Services Roundtable appreciates the opportunity provided by the FDIC to comment on this Proposal. If you have any questions or comments about these matters, please feel free to contact Lisa McGreevy or me at 202.289.4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting

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[25] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)(finding Congressional intent when one provision of a section of a statute uses the term "jurisdiction" while other provisions of the same section use "jurisdiction to render judgment,"). *See also, Bates v. United States,* 522 U.S. 23, 29 (1997) (knowing misapplication of student loan funds under § 1097(a) of the Higher Education Act does not include an "intent to defraud" state of mind requirement, because § 1097(d) includes an express intent to defraud element: the latter intent requirement should not be read into § 1097(a) when Congress omitted it.).