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May 16, 2005

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, N.W., Room 3060
Washington, D.C. 20429

Re: Limited-Appearance Statement
Petition for Rulemaking on Parity in Interstate Banking Activities
70 *Federal Register* 13413, March 21, 2005

Dear Mr. Feldman:

The American Bankers Association ("ABA")[1] is submitting this limited-appearance statement in response to the request of the Federal Deposit Insurance Corporation ("FDIC") for comment on the petition for rulemaking to establish parity between state-chartered banks and national banks in interstate activities and operations.

If there are questions on the issues raised in this statement, please contact the undersigned.

Sincerely,

James D. McLaughlin

[1] The American Bankers Association, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—make ABA the largest banking trade association in the country.

STATEMENT OF THE

AMERICAN BANKERS ASSOCIATION

The American Bankers Association ("ABA") is submitting this statement in response to the request of the Federal Deposit Insurance Corporation ("FDIC") for comment on the petition for rulemaking to establish parity between state-chartered banks and national banks in interstate activities and operations. The American Bankers Association, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—make ABA the largest banking trade association in the country.

At the outset, ABA believes the petition raises fundamental issues concerning existing competitive inequalities in the dual banking system in the United States that we believe must be addressed. However, before adopting new rules, we believe the wiser course for FDIC and the industry would be to undertake a broad, in-depth study of the current state of the dual banking system, analyzing its strengths and weaknesses. That review should include a range of possible remedies and their likely outcomes.

Background

The petitioner argues that it is both necessary and timely for the FDIC to adopt rules that clarify the ability of state banks operating interstate to be

governed by a single framework of law and regulation to the same extent as national banks. According to the petitioner, over the last decade the federal charters for national banks and federal thrifts have been interpreted by the Office of the Comptroller of the Currency and the Office of Thrift Supervision to provide broad federal preemption of state laws that might otherwise apply to the activities or operations of federally chartered banking institutions within a state, and the courts have consistently upheld those determinations. The result, it asserts, is that national banks and federal savings associations now can do business across the country under a single framework of laws and regulations. The petitioner believes that without a parallel uniform statutory framework for interstate state banks, such banks will convert to national charters. The result—a dual banking system in which most large interstate banks choose a federal charter, leaving only the smaller local institutions in the state system—raises concerns about the viability of this important and unique system of regulation.

The dual banking system has remained viable throughout its history because in the long run there has been relative competitive parity between the two types of charters.[2] Indeed, the history of the dual banking system can be likened to the action of a pendulum. When the competitive balance has tipped too far in one direction, Congress or the states have stepped in to restore that balance.

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1. The dual banking system is a simple, yet powerful concept. It consists of a state chartering and supervisory system for state banks and a federal chartering and supervisory system for national banks. Each relies on state or federal legislation to determine the activities of and regulatory policies for the respective charters. Certainly, many common features are shared by both charters. A significant benefit of the national charter is the single nationwide regulatory scheme under which national banks operate. State-chartered banks, on the other hand, have long been considered the laboratories for new product innovation. Moreover, because state regulators are intimately familiar with their states' economies and demographic characteristics, they are far more able to tailor rules and solutions appropriate to their own states.

The competitive parity, without which the dual system cannot function, requires *both* a strong state system *and* a strong national system of chartering and regulation. However, as banks have expanded their activities geographically, the competitive balance can now be seen tilting toward the national charter with its uniform system of regulation.

The historic passage of the Riegle-Neal Interstate Banking and Branching Act in 1994 ("Riegle-Neal I")[3] changed fundamentally the regulatory scheme for banking in the United States by permitting all banks to expand (through acquisitions or branches) in states other than their home state.[4]

Since the adoption of Riegle-Neal I along with the advent of the Internet and the explosion of electronic commerce, banks market their products and services wherever their business plans dictate—locally, regionally or nationally. As a result, far more banks now operate across state lines. With that expansion has come the increased costs of offering products that must comply with the laws of more than one state. When the differences between state laws are significant, it simply becomes more expensive to serve customers across state lines. Not surprisingly, as interstate banking has expanded, institutions have converted from state charters to national charters to take advantage of the uniformity provided by a federal regulatory scheme.

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[3] Pub. L. 103-328, 108 Stat. 2338 (1994).

[4] Because interstate branching was largely prohibited before Riegle-Neal I was enacted, banks could only offer services outside their home states through entities that did not constitute "branches" under federal or state banking law. Increasingly, banks have provided services in other states through offices and other operations that were not considered "branches."

Details of the Petition

The petitioner asks FDIC to promulgate rules that would define and clarify the law that applies to interstate activities of state banks to restore parity between state and national banks. A gap currently exists because while Riegle-Neal I and its subsequent amendment (Riegle-Neal II[5]) provide that host state laws apply to *branches* of interstate state banks operating in host states, the statute does not speak to non-branch activities of such interstate state banks, including those conducted in operating subsidiaries, loan production offices, *etc*. The petitioner believes that without a parallel uniform statutory framework for interstate state banks, such banks will convert to national charters.

- The petitioner asks FDIC to adopt a rule applying the existing provisions of Riegle-Neal II to all activities conducted by an interstate bank in a state in which it has a branch, *i.e.*, that when the host state's law has been preempted by OCC for national banks, that host state law is also preempted for branches and all other activities of the state bank in the host state. Home state law, if any, would apply.
- The petitioner asks FDIC to use its authority to fill in statutory gaps to adopt a rule extending the provisions of Riegle-Neal I and II to all the activities of an interstate bank in a state in which it has no branch—*i.e.*, the bank operates through a loan office, or by any other lawful means. If there is no home state law comparable to a preempted host state law, the home state regulator (possibly subject to coordination with FDIC) would determine what the applicable law would be.

[5] Riegle-Neal Amendments Act of 1997, Pub. L. 105-24 (1997).

- The petitioner asks FDIC to expressly extend to operating subsidiaries of interstate banks the provisions of Riegle-Neal I and II. The only type of operating subsidiaries covered would be the same type that OCC has determined qualify for federal preemption, *i.e.*, they only do the same things the bank itself may do.
- The petitioner requests FDIC to implement through rulemaking Section 104(d) of the Gramm-Leach Bliley Act,[6] Operation of State Law, to make clear that a state law or action is expressly preempted under Section 104(d) when it imposes a requirement, limitation, or burden on a state bank, or its affiliate, that does not also apply to an out-of-state national bank or in-state bank.
- The petitioner asks FDIC to adopt a rule implementing Section 27 of the Federal Deposit Insurance Act[7] that preempts state usury laws to permit a state-chartered institution to charge interest rates allowed by the state in which the institution is located. The petitioner further asks FDIC to pattern its rule on those of OCC and OTS which further define the types of charges that constitute "interest" and are therefore preempted, and well as certain applicable state law limitations.

ABA Recommendation

ABA strongly believes that it is imperative for the continued viability of the dual banking system, that *both* the state and national banking systems be robust. Individual banks should have the option to choose a regulator familiar

[6] Section 104 of Pub. L. 106-102, codified at 15 U.S.C. § 6701.
[7] 12 U.S.C. § 1831d.

with its local economy rather than a federal regulator concerned with the national economy. However, because a critical mass of state-chartered institutions is necessary to fund and sustain the operation of state banking systems, the continuing shift by individual banks to a national charter could pose real threats to the state banking system.

There are two ways to restore balance to the dual banking system: take away the advantage of the stronger system, or strengthen the weaker system. ABA believes it is far better to strengthen today's weaker state system so that both charters will be positioned to thrive in the rapidly changing market for financial products and services.

The petitioner requests that FDIC take a number of actions that may serve to enable interstate state banks to retain their state charters as they continue to expand their operations. These actions may not, however, be the exclusive means to revitalize the state banking system. The goal of any actions to address these concerns must be far-sighted, to include the potential impact of further technology and market changes, so that "quick fixes" do not lead to unanticipated negative consequences beyond the near future. Moreover, banks of all sizes must have the opportunity to fully consider and understand the ramifications of going forward with all or part of the petition or retaining the *status quo.*

Thus, given the complexity and breadth of the issues raised by the petitioner, ABA believes that the wisest course for FDIC and the industry would be to undertake a broad study of the current status of the dual banking system, including current trends, and an in-depth analysis of its strengths and weaknesses. Supervisory concerns should be a key part of the study. Finally, the study should review a range of possible remedies and make recommendations.

ABA looks forward to working closely with FDIC to develop a solution to the issues raised by the petitioner.