CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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August 6, 2012

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

Re: Supplemental Notice of Proposed Rulemaking Regarding Definition of Predominantly Engaged in Activities That Are Financial in Nature or Incidental Thereto, FDIC RIN 3064 – AD73.

Dear Mr. Feldman:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in the 21st Century economy.

The CCMC has serious concerns that the Federal Deposit Insurance Corporation ("FDIC") has improperly interpreted the law in constructing the Supplemental Notice of Proposed Rulemaking Regarding Definition of Predominantly Engaged in Activities That Are Financial in Nature or Incidental Thereto ("Supplemental Notice") issued on June 18, 2012. Accordingly, the CCMC believes that the FDIC should immediately withdraw the Supplemental Notice.

The Supplemental Notice parallels the Board of Governors of the Federal Reserve System's (the "Board") Notice of Proposed Rulemaking issued February 11, 2011, concerning the definition of "predominantly engaged in financial activities" and its Supplemental Notice of Proposed Rulemaking regarding the definition of "Predominantly Engaged in Financial Activities" issued April 10, 2012 ("NPRM" or

"proposed rule").[1] The CCMC submitted comments in response to the Board's rule also requesting a withdrawal based on a number of concerns.

The CCMC strongly objected to the Board's NPRM's definition for Title I of activities that are "financial in nature as defined by section 4(k) of the Bank Holding Company Act."[2] This objection is grounded in the fact that the Board's "clarification" exceeds its statutory authority under Title I of the Dodd-Frank Act. In developing the clarification, the Board ignored Congress' clear, unambiguous statutory directive, as embodied in the passage of the Pryor-Vitter Amendment, that, for purposes of defining whether a company is "predominantly engaged" in "activities that are financial in nature" under Title I, it must accept that term exactly "as defined in Section 4(k)" of the Bank Holding Company Act.[3]

We have attached our comments on the Board's NPRM and ask that it be considered as part of the substantive comment record the FDIC considers in evaluating the Supplemental Notice and the definition of "financial in nature" under Title II. The CCMC believes that the Board improperly altered a Congressional directive defining activities that are financial in nature under Title I. By logical extension, the FDIC should not use the Board's flawed NPRM as the foundational standard upon which the Supplemental Notice is built. We are disappointed that the FDIC is doing just that and is engaged in regulatory overreach similar to the Board's NPRM. By ignoring a legislative directive and using faulty reasoning, the FDIC may be in danger of issuing rules that are arbitrary and capricious.

The rationalization used in constructing the Supplemental Notice is that in Title I, the key to defining "predominantly engaged in financial activities" is grounded in the activities that are "*financial in nature as defined by section 4(k) of the BHC Act.*"[4] The FDIC goes on to observe that the range of entities covered by Title II relates to Title I insofar as Section 201(a)(11)(c) defines a "financial company" subject to the FDIC's

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[1]Definition of "Predominantly Engaged in Financial Activities," Supplemental Notice of Proposed Rulemaking and Request for Comment, 77 Fed. Reg. 21494 (proposed April 10, 2012).
[2] Section 102(a)(6) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203.
[3] *Id*.
[4] Definition of "Predominantly Engaged in Activities That Are Financial in Nature or Incidental Thereto," Supplemental Notice of Proposed Rulemaking and Request for Comment, 77 Fed. Reg. 36194, 36195 (proposed June 18, 2012) (emphasis added).

orderly liquidation authority to include "any company that is predominantly engaged in activities that the Board of Governors has determined are *financial in nature or incidental thereto*." Based on these "commonalities" the FDIC concludes that for purposes of Title II, it should adopt the Board's assertion that "activities that are financial in nature" should be considered financial activity "without regard to the conditions and limitations imposed by section 4(k) and Regulation Y" if the Board, not the FDIC, feels such conditions "do not define the activity itself."[5]

This is a faulty chain of reasoning because, as noted in our comments on the Board's NPRM, Congress did not give the Board the legal authority to selectively disregard by regulation the conditions or any other verbiage in section 4(k) defining the activities in which bank holding companies may permissibly engage. As our comments to the Board recount, Congress purposely restricted the Board to adopting verbatim the definition of activities that are financial in nature under section 4(k). Neither the policy arguments nor the implied intentions of Congress that the Board put forward in its "clarification" of the proposed rule or those that the FDIC posits in this Supplemental Notice can overcome this clear and unambiguous statutory command. Simply put, the FDIC cannot rely on the definition of "financial in nature" that the Board arrogates to itself for Title I in contravention of legislative directive.

We find it significant that, in adopting the content of the Board's Title I criteria into its Title II criteria, the FDIC is expressly ignoring the different language in Titles I and II resulting from the passage of the Pryor-Vitter amendment.[6] This amendment eliminated the parallel structure between Titles I and II that would support reading them to be identical. Specifically, the Pryor-Vitter amendment deprived the Board of any definitional discretion by limiting it to considering financial activity to be only activities that are "financial in nature as defined in section 4(k)," while also precluding the Board from considering activities that are "incidental thereto."

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[5] *Supra* note 4, at 36195.

[6] The FDIC is very clear on this point. It says that "[t]he only effect of this difference is that this NPR includes finder activities as 'financial activities' in addition to the activities listed as financial-in-nature." *Supra* note 4, at 36196 n.14.

The FDIC's broad, vague and inaccurate assertions of the "Congressional intent regarding Title II" combined with its view of the "goals of Title I"[7]cannot obfuscate the clear and fundamental differences the Pryor-Vitter Amendment imposed on the operative sections of Title I and Title II. The CCMC finds misguided the FDIC's concern that by failing to adopt the Board's definition of "financial in nature" in Title I it "could frustrate the Congressional intent regarding Title II."[8] This ignores the fact that the Board's definition disregards and eviscerates the actual language Congress chose to use in the amendment it made to Title I.

Like other agencies, the FDIC must proffer rules that fulfill Congressional intent and are based on statutory authority. An agency must not misuse discretion or otherwise fail to accord with the law. We believe that the FDIC has failed to meet this deferential standard. The FDIC, in using the Board's rulemaking as the basis for constructing the Supplemental Notice, has engaged in overreach rather than using the FDIC's own, distinct legal authority under Title II. In addition, the FDIC's rationale for the course it has chosen does not rest on arguments that are persuasive insofar as they violate accepted cannons of statutory construction. The FDIC's supplemental rule lacks any substantive support.

Therefore, we respectfully request that the FDIC withdraw the proposed Supplemental Notice to the extent it expressly relies on the Board's assertion of regulatory authority it simply does not possess under the Dodd-Frank Act.

Sincerely,

Tom Quaadman

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[7] *Supra* note 4, at 36196. We note that the FDIC does not provide a single citation to the legislative history of the Dodd-Frank Act to support its assertions about "the Congressional intent regarding Title II" or the "goals of Title I" that it claims as justification for mimicking the Board's position.

[8] *Supra* note 4, at 36196.