VIA THE INTERNET

July 18, 2001

Robert E. Feldman
Executive Secretary
Attn: Comments/OES
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Proposed Regulation 12 C.F.R. § 303.14
"Being Engaged in the Business of Receiving Deposits"
RIN 3064-AC49

Dear Mr. Feldman:

On behalf of its low-income clients, the National Consumer Law Center,[1] and the Consumer Federation of America,[2] Consumers Union,[3] U.S. Public Interest Research Group,[4]

1 The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eleven practice treatises and annual supplements on consumer credit laws, including Truth In Lending, (4th ed. 1999) and Cost of Credit (2d ed. 2000) as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers.

2 The Consumer Federation of America is a nonprofit association of some 250 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

3 Consumers Union, the nonprofit publisher of Consumer Reports, is a nonprofit membership organization chartered to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life of consumers.

4 U.S. Public Interest Research Group serves as the national lobbying office for state Public Interest Research Groups. PIRGs are non-profit, non-partisan research and advocacy groups with offices around the country.

and the National Association of Consumer Advocates[5] submit the following comments regarding the proposed regulation defining what it means for state chartered bank to be engaged in the business of receiving deposits for purposes of eligibility for FDIC insurance.

Consumers have an interest in this matter for several reasons. First, the integrity of the regulatory process will be undermined if an agency involved in ongoing litigation can promulgate a regulation to affect the outcome of that litigation. Second, where a regulation conflicts with a statute, it should have no legal effect. If the FDIC continues to pursue this course of action, the resulting regulation will only generate more litigation, since it is at odds with the plain language of the Federal Deposit Insurance Act (FDIA). Third, the public at large will be harmed if the FDIC continues to grant insurance to institutions in violation of the Act, since that status has significant consequences. One such result is that the insured entity can preempt certain state laws intended to protect consumers. These concerns will be addressed more fully below.

I. The Integrity of the Regulatory Process Will be Undermined

The history of the litigation known as *Heaton v. Monogram Credit Card Bank of Georgia* reveals a role taken by the FDIC that can, at best, be described as questionable and, at worst, sordid. Consumers sued Monogram, a state bank chartered in Georgia, in Louisiana state court alleging that Monogram had violated Louisiana law by charging excessive credit card late fees and interest. One of the defenses raised by Monogram is that it is an FDIC-insured state bank and entitled to preempt or avoid the applicability of Louisiana law. On that basis, Monogram removed the case to federal court.

In the course of the litigation, the FDIC "issued" a letter supporting Monogram's argument. However, evidence presented by the consumer's attorney showed that Monogram participated in drafting the contents of the FDIC letter. A federal court refused to give any deference to a letter created in that obviously partisan manner. Next, the FDIC issued General Counsel's Opinion No. 12 (GCO-12), an expanded version of the letter rejected by the Court. The same judge was not persuaded by GCO-12 for two reasons. First, it was merely an opinion letter, not a fully dressed regulation. Second, the letter ignored the clear language of the FDIA that requires the bank to be engaged in the business of receiving "deposits."[6] Now, the FDIC is attempting to promulgate a regulation whose genesis was a letter drafted, at least in part, by the very bank who is trying to find a defense to its behavior.

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5 The National Association of Consumer Advocates is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers.

6 *Heaton v. Monogram Credit Card Bank of Georgia*, 2001 U.S. Dist. LEXIS 325 (E.D. La. Jan. 8, 2001).

The federal district court remanded the case to state court in 1999.[7] Monogram appealed that decision to the Fifth Circuit Court of Appeals. The appellate court dismissed the appeal, sending the case back down to the district court.[8] The FDIC then moved to intervene in the litigation and to appeal the court's most recent remand order entered on January 5, 2001.[9] The federal court was disturbed by this attempt since the FDIC had shunned involvement in earlier stages of the case. At a hearing on December 20, 2000, the Court stated:

> To me I can only draw one logical conclusion from all of this. This is simply a maneuver to avoid remand of the case, pure and simple....I'm very disturbed I will say this about the actions of the FDIC in this entire matter, and I thought the FDIC was there to protect the public frankly and consumers and not to protect Monogram Bank and similar companies. I thought they were to regulate these companies and not to protect them and to the extent of even defending them in private litigation.[10]

This case has attracted some interesting press. One article reported that the FDIC worked intimately with GE Capital, Monogram's parent, to help the credit company "circumvent state consumer protection laws."[11]

This history seriously undermines the integrity of the current rulemaking process.[12] At this point, the FDIC should bow out of the judicial and regulatory process and let the courts apply the statute.

II. The Proposed Regulation Conflicts with the Federal Deposit Insurance Act

The FDIC's proposal defines the "business of receiving deposits" as maintaining "one or more non-trust deposit accounts in the aggregate amount of $500,000 or more."[13] The agency argues that the statutory language is vague and that the court's decision in the *Heaton* case

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7 1999 U.S. Dist. LEXIS 21282 (E.D. La. Nov. 23, 1999).
8 231 F.3d 994 (5th Cir. 2000).
9 2001 U.S. Dist. LEXIS 325 (E.D. La. Jan. 8, 2001).
10 *Heaton v. Monogram Credit Card Bank of Georgia*,, No. 98-1823-"J" (E.D. La.), Transcript of 12/20/00 hearing, pp. 31-32.
11 Roger Furman, *Friends in High Places*, U.S. Banker, March 2000 at 30.
12 The FDIC should not claim comfort by comparing itself to the OCC when it promulgated the regulation at issue in *Smiley v. Citibank, N.A.*, 517 U.S. 735 (1996). Though the OCC promulgated a regulation during the litigation that eliminated the consumer's claim in that case, the OCC never attempted to intervene in the case nor was a party to any other related litigation. Further, there was no evidence presented to show that the bank defendant's assisted in the drafting of the regulation or any earlier opinions letters. The OCC simply filed an amicus brief in the case.
13 66 Fed. Reg. 20102, 20107 (April 19, 2001).

creates inconsistency. Thus, the agency says, it needs to step in and fix the situation. Our response to this is threefold.

First, Congress said that state banks must engage in the *business* of receiving deposits.[14] The word "business" means: "a commercial enterprise carried on for profit."[15] Thus, for a state bank to qualify for insurance it must be a commercial enterprise that carries on the activity of receiving deposits. The statutory language mandates ongoing activity and the receipt of deposits. Where Congress is clear, the FDIC has no authority to change the plain language of the law.

Second, the problem that has arisen is one of the FDIC's own making. In the Supplementary Information, the agency defends its actions by stating that it has issued insurance to single deposit banks since 1969. It is interesting that the agency did not issue an opinion letter or enact a regulation then, such as it is now proposing, to provide support for its actions. Arguably, the FDIC has exceeded its authority for 32 years and is now blaming the decision in the *Heaton* case for what it has wrought.

Third, the agency relies upon *Meriden Trust & Safe Deposit Co. v. FDIC*,[16] as support for its actions. The FDIC could not have relied upon this case to guide its behavior in granting insurance to single-deposit banks in 1969. The case was decided in 1995. More importantly, Meriden bank was granted insurance when it was an active commercial depository, accepting deposits on a regular basis. Thus, the FDIC properly insured the bank at the outset. In contrast to the concerns raised by the FDIC in this rulemaking process, the issue in *Meriden* was whether the bank maintained its status of a state bank for purposes of allowing the FDIC to attach its assets when a related bank became insolvent. Meriden Bank had transferred most of its assets to this sister bank before that bank became insolvent. However, Meriden maintained two deposits, one of which was received after its sister bank went under. Meriden argued that it was no longer a state bank in the business of receiving deposits. Therefore, its assets could not be used to offset the losses of its sister. The court disagreed, finding the bank maintained one deposit for several years and accepted another after it transferred its assets to its sister bank. The ruling was driven by the court's perception that Meriden:

> ...sought both to maintain its insured status, thereby protecting its two deposits and its future ability to re-enter the commercial banking market, and to avoid any liability for a commonly owned bank. To interpret the cross-guarantee provision as Meriden Trust urges would allow institutions to change their status on their own volition, thereby permitting a bank (or its holding company) to transfer its liabilities to an affiliated bank and then (if things go

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14 12 U.S.C. § 1813(a)(2).
15 Black's Law Dictionary (7th ed. 1999).
16 62 F.3d 449 (2d Cir. 1995).

> sour) to avoid the cross-guarantee provision of responsibility for the loss.[17]

In contrast, the *Heaton* court squarely dealt with the issue of what constitutes engaging in the business of receiving deposits when a bank is created to conduct a credit card operation. Monogram Bank has never been in the business of receiving deposits. Based on the plain language of the FDIA, the court easily found that Monogram was not engaged in the business of receiving deposits.

III. Harm to the Public

We agree that the marketplace and the public need to rely upon consistent interpretations of the laws affecting banking. However, the inconsistency that concerns the FDIC was created by the FDIC, not by the courts. The FDIC chose to insure single-deposit state-chartered banks, starting in 1969, despite the clear language of the FDIA. The proposed regulation is subject to legal attack because it conflicts with the statute. The litigation that the FDIC seeks to avoid will be *triggered* by enacting the regulation in its present form.

In addition, the benefits of FDIC insurance to a bank are enormous. The insurance itself attracts depositors by assuring the public that its funds will be available upon demand. Further, a state bank with FDIC insurance is entitled to preempt the interest rate and other fee caps embodied in consumer protection usury laws of states, other than the state in which the bank is chartered. This means that banks can pick a state with no usury caps, charter in that state, and charge any interest rate and certain fees without limit even when it does business in another state.

Chartering banks that do not meet the prerequisites set out in the FDIA expands the number of banks that can ignore the law of 49 other states when it does business with the citizens of those states. This harms consumers because we cannot rely upon the FDIC to grant this special status only to banks intended by Congress to receive it. Providing this status to unintended beneficiaries gives those entities a superior competitive advantage over other lenders. The authority of states to protect their citizens through consumer protections laws, such as usury statutes, is further eroded. Finally, the sensitive balance between federal and state regulation of state chartered banks is destroyed.

17 *Id.* at 453.

IV. Conclusion

We urge the FDIC to withdraw the proposed regulation. Further, the agency should withdraw from pursuing its appeal in the Fifth Circuit in the Heaton case. The FDIC should not grant insurance to any single-deposit banks that are not engaging in the business of receiving deposits. Any such banks presently insured should retain their insured status for all deposits currently held. However, banks presently operating in violation of the FDIA should be allowed to comply within an appropriate period of time or risk losing FDIC insurance if they fail to do so.

Sincerely,

Elizabeth Renuart