Mellon

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Mellon Financial Corporation

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Special Counsel to the Chairman

August 16, 2006

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

RE: Notice of Proposed Rulemaking: One-Time Assessment Credit; RIN 3064-AD08

Dear Mr. Feldman:

Mellon Financial Corporation, a bank holding company headquartered in Pittsburgh, Pennsylvania ("Mellon"), is pleased to submit the following comments in response to the referenced notice of proposed rulemaking ("Proposal") published by the Federal Deposit Insurance Corporation ("FDIC") in the May 18, 2006 edition of the *Federal Register*. Our comment on the Proposal is limited to the definition of "successor."

We support the FDIC's proposed definition of "successor" as an institution that acquired, through merger or consolidation, an existing insured chartered depository institution that had paid a deposit insurance assessment. The Federal Deposit Insurance Reform Act of 2005 (the "Act") provides, "The Corporation shall define the term 'successor' for purposes of this paragraph, by regulation, and may consider any factors as the Board may deem appropriate." 12 USC § 1817(e)(3)(F). For the reasons set forth herein, we believe the FDIC's proposed definition should be adopted because it best fulfills the purpose of the one-time credit, is most consistent with the legal definition of successor, is the most operationally viable solution and leads to the most equitable allocation of the credit.

I. The FDIC's proposed definition best fulfills the purpose of the credit

As noted in the Proposal, the clear purpose of the one-time credit is to recognize the contributions that certain insured depository institutions made from 1989 through 1996 to capitalize the deposit insurance funds in the 1990s. The text of the statute itself is focused on the payment of the assessment, for it defines eligible insured depository institutions in large part as those which "have paid a deposit insurance assessment" prior to December 31, 1996, or is a successor to such an institution. During this assessment period, bank subsidiaries of Mellon paid in to the FDIC over $300 million in deposit insurance assessments.

This understanding of the credit's purpose finds support in the Act's legislative history. As the Committee on Financial Services stated in the House Report section-by-section analysis, 12 U.S.C. § 1817(e) "provides for refunds or credits of any assessment payment that was made by an insured depository institution in excess of the amount due the FDIC." 109 H.Rep. 67, at 32 (2005). Of the one-time credit, the Committee stated, "H.R. 1185 would require the FDIC to provide certain banks and thrifts with one-time credits against future premiums, based on the amount of their payments to the B[ank Insurance Fund] or S[avings Association Insurance Fund] prior to 1997." 109 H. Rep. 67, at 28. In a statement before the House, one of the cosponsors of the legislation stated, "The bill includes a mechanism for determining *credits for past contributions to the insurance funds. . . . This is a very, very important provision as a matter of fairness to institutions that recapitalized the funds*." Statement of Rep. Maloney, 151 Cong. Rec. H. 2919, at 8-9 (2005) (emphasis added). Thus, the clear emphasis in the legislative history is on refunding past excess payments made by depository institutions, and not on offsetting future assessments to be paid on deposits. *Cf.* Proposal, at 11.

The FDIC's proposed definition best fulfills this purpose. By providing the credit to depository institutions that actually paid the assessments or the institution resulting from their merger or consolidation into another entity, the proposal ensures that funds are returned to the entity that bore the financial burden of recapitalizing the funds, either by directly paying into the funds or purchasing or otherwise assuming the financial liabilities and assets of the institution which did.

Contrary to the contention of some, Congress's broad delegation of authority to the FDIC to define "successor" does not constitute an "intent" to expand the group of qualified institutions beyond those which acquired stock through mergers. [1] The most that can be claimed is that Congress wanted to insure that the FDIC considered the full range of facts and circumstances in developing a definition of successor.

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[1] To the contrary, the only specificity included in prior versions of the bill suggests that Congress primarily considered successors to be those institutions resulting from acquisition or merger. Earlier versions of the bill used the term "predecessor" rather than "successor" in two of the operative clauses, and defined "predecessor" in lieu of "successor" as follows: "the term 'predecessor', when used with respect to any insurance depository institution, includes any other insured depository institution acquired by or merged with such insured depository institution." H.R. 1185, § 7(a)(3)(A)(vi). This definition, though later replaced in the Senate with the present day delegation of authority to the FDIC to define "successor," suggests that Congress was primarily considering chartered institutions which were the results of mergers or acquisitions.

II. The FDIC's proposed definition is consistent with general corporate law

The commonly accepted understanding of the result of a merger or consolidation in general corporate law supports the FDIC's proposed definition. From this vantage point, the technical successor of an institution is the resulting corporation in a merger or consolidation. Most state corporate law statutes, the National Bank Merger and Consolidation Act, and model corporate law statutes, embrace the principle that the resulting corporation in a merger or consolidation receives the rights, privileges, interests, and liabilities of the merging or consolidating corporations. *See* 12 U.S.C. §§ 215(b) & (e); 215a(e); *see, e.g.,* 8 Del. GCL § 259; NY CLS Bus/ Corp. § 906; 15 Pa.C.S. § 1929. Generally, the separate existence of all corporations which are parties to the merger or consolidation cease, except that of the surviving corporation. *See, e.g.,* 8 Del. GCL § 259; 15 Pa.C.S. § 1929. Simply because an institution has subsequently acquired deposits from another institution does not make it a technical successor to the selling institution. Indeed, the law consistently distinguishes such a sale in the regular course of business from a sale of "substantially all of a corporation's assets." Whereas a sale of "substantially all of a corporation's assets" might be treated as having the same effect as a merger and thereby triggering certain corporate protections, *see, e.g.,* Del. GCL § 271(a); NY CLS Bank § 601-c; Revised Model Business Corporation Act of 1984 § 12.02; a sale of assets in the regular course of business is not. *See, e.g.,* Model Business Code Act § 12.01. For this reason, a narrowly crafted *de facto* merger exception might be an appropriate rule, but a follow-the-deposits rule, where the sale of deposits did not constitute a sale of substantially all of an institution's assets, would not.

The experience of Mellon is instructive in this respect. At the end of 1996, Mellon held domestic deposits of approximately $24.6 billion. In December 2001, Mellon sold $14.4 billion of $21.8 billion in deposits held by Mellon's bank subsidiaries to Citizens Financial Group. This transaction was not a sale of any bank or of Mellon's deposit business, nor did any bank or other depository institution cease to exist on account of this transaction. Mellon continues to exist and its bank subsidiaries remain very large depository institutions in the United States with deposits of approximately $7.2 billion within an extensive branch network. This type of transaction can hardly be characterized as one in which the purchaser was a "successor to any ... institution." A follow-the-deposits definition of successor therefore would contradict the well-established understanding of successor in the general corporate law.

III. The FDIC's proposed definition is most operationally viable and results in the most equitable outcome

The understood meaning of successor in general corporate law also is consistent with the most operationally viable solution and equitable outcome. As the Proposal notes, the proposed rule is the most operationally viable because it relies principally on existing data maintained with the FDIC. The follow-the-deposits approach would be significantly more complicated and burdensome. The data regarding sale of deposits outside the merger and consolidation context is less reliable, runs the risk of disadvantaging parties who may not have kept records and would require the FDIC to undertake a new collection, validation and maintenance of data going back almost a decade.

Even if it were relatively simple to obtain information on the purchase of deposits through such other transactions, the follow-the-deposits approach assumes without basis that the financial cost of recapitalizing the insurance funds were passed on to the purchaser of an institution's deposits, either in whole or in part. Splitting the credits associated with a deposit transfer would risk imposing extraneous material economic terms onto the original purchase contract. In order for such an approach to be conducted fairly, the FDIC would be required to assume the role of arbiter and interpret the terms of contracts for purchasing deposits. Such a task is daunting given the array of other factors which go into the calculation of the contractually agreed upon purchase price, the most significant likely being the contemporary market value of the deposits, rather than the seller's previously incurred costs of contributions to recapitalize the deposit insurance funds in the 1990s. The FDIC would therefore be placed in the position of imaginative interpretation of what the parties might have intended had they taken into account the potential for assessment credits. The follow-the-deposits approach risks providing a windfall to newer institutions that never paid the assessments and experienced the majority of their growth, both organically and through purchases, in the period following the end of the assessments, while withholding the benefit from the institutions that actually did bear the costs of recapitalization. By contrast, the assumption inherent in the proposed definition - that the surviving entity of a merger or consolidation is the entity that bore the cost of the assessment, is wholly sustainable and leads to the more equitable outcome.

Finally, the FDIC's definition of successor in this rulemaking has implications for its separate rulemaking (RIN-3064-AD07) to implement the dividend requirements under the Act. Under 12 U.S.C. § 1817(e)(2), the FDIC must determine each insured depository institution's relative contribution to the Deposit Insurance Fund by taking into account, in part, "the ratio of the assessment base of an insured depository institution (including any predecessor) on December 31, 1996, to the assessment base of all eligible insured depository institutions on that date." While the FDIC is not granted specific authority to define "predecessor," for consistency, the FDIC should apply the same concept of successor to the determination of the allocation of dividends. To the extent the FDIC chooses to adopt in the present rulemaking a definition of successor that is more complicated to administer and inconsistent with general corporate principles, its rulemaking with respect to the dividend requirements will face further complications.

We thank the FDIC for this opportunity to comment on the Proposal. If you have any questions about our comments, please do not hesitate to contact me at 412-234-1537.

Yours sincerely,

Michael E. Bleier

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