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Thomas M. Stevens, CRB, CRS, GRI
President

December 13, 2005

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

[Transmitted by E-mail to comments@fdic.gov.]

RE: Interstate Banking; Federal Interest Rate Authority (RIN 3064-AC95)

Dear Mr. Feldman:

On behalf on the more than 1.2 million members of the National Association of REALTORS® (NAR), I am pleased to provide comments to the Federal Deposit Insurance Corporation (FDIC) regarding the proposed rule on *Interstate Banking; Federal Interest Rate Authority,* published in the Federal Register on October 14, 2005. The National Association of REALTORS®[1], "The Voice for Real Estate," is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,700 local associations or boards and 54 state and territory associations of REALTORS®.

The proposed rule concerns preemption of various state laws with respect to (1) activities of out-of-state branches of state banks, and (2) exporting of interest rates by state banks. The genesis of this rule was the March 2005 Financial Services Roundtable petition asking the FDIC to (1) issue regulations preempting state law to give state banks parity with national banks with respect to their activities across the board and (2) codify by regulation the rules related to

[1]REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

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exporting interest rates. The Roundtable asked to have the law of a state bank's home state apply to the state bank's activities in other states (host states), whether it carried out the activities through a branch, through an operating subsidiary, or otherwise. After holding a public hearing on May 24, 2005, and considering written comments, the FDIC Board decided on July 19, 2005, not to ask the public for comment on options related to the petition. Instead, it directed the FDIC staff to prepare a rule to implement existing law. As a result of that process, the Board decided to publish the proposed rule.

The proposed rule, of course, was not the subject of the FDIC's May hearing. Consequently, the hearing witnesses were not in a position to discuss with FDIC officials the specific language that is now being proposed by the FDIC. Indeed, a review of the hearing transcript suggests that the hearing focused primarily on principles and concepts raised by the petition rather than on the proposal now under consideration. **Because the FDIC's proposal was not available at the time of the hearing, and in view of the importance of this matter to all concerned, NAR requests that the FDIC conduct a public hearing before deciding whether to proceed further with this rulemaking.**

Preemption for Activities of Out-of-State Branches of State Banks

Under section 24(j)(1) of the Federal Deposit Insurance Act (FDIA), the laws of a host state apply to a branch in the host state of an out-of-state state bank to the same extent as they apply to a branch of an out-of-state national bank. If the host state laws don't apply to the branch of state bank, the bank's home state law applies. Section 24(j)(2) of the FDIA provides that a state bank may conduct any activity at a branch operating in a host state that is permitted by the laws of the home state of the state bank, but only if the activity is permitted for a bank chartered by the host state or for a branch in the host state of an out-of-state national bank.[2]

NAR believes that the proposed rule would significantly expand the scope of preemption beyond that provided by the statute, which limits the scope of the preemption to activities conducted at branches of state banks. The proposed rule would define "activity conducted at a branch" to mean "an activity of, by, through, in, from, or substantially involving, a branch." The proposed rule, if adopted, would result in an unprecedented and unwarranted expansion of activities that a state bank could conduct in a host state without regard to host state law. The plain and unmistakable language enacted by Congress requires that the out-of-state bank's activities be conducted at the branch. An activity that merely "touches" the branch is not sufficient to meet the statutory requirement, for such activity is not conducted at the branch but rather is conducted elsewhere. Accordingly, NAR urges the FDIC not to adopt the proposed definition.

The proposed rule is so broad that as long as a state bank has a branch in a host state involved in an activity, in almost any way imaginable, the state bank can carry out activities in the host state without regard to the law of the host state. If the proposed rule becomes final, state banks interested in operating in other states could easily structure their activities to avoid the laws of the host state and thwart the clear language enacted by Congress. For example, once it

[2] 12 U.S.C. 1831a(j)(1) and (2).

established a single branch in a host state, a state bank could avoid the laws of the host state simply by documenting the activity "through" the computer server at the branch, conducting some minor aspect of the transaction at a conference room "in" the branch, or carrying out the transaction pursuant to directions from the home office of the bank that are transmitted "from" the branch. Given the vagueness of the language, even activities "substantially involving" a branch could be carried out almost entirely outside of the branch except for a single element, such as approval or disbursement of a loan.

Moreover, contrary to the FDIC's statement, the proposed language does not clarify the phrase "activity conducted at a branch." Instead, the FDIC simply shifts the focus of the discussion to the issue of what constitutes "of, by, through, in, from, or substantially involving, a branch." NAR believes that there is no need for the FDIC to inject controversy and ambiguity into this area. Indeed, the FDIC does not point to any concrete instance in which the statutory language has resulted in problems or uncertainty for state banks.

NAR continues to believe that to the extent the FDIC believes that state banks are being disadvantaged,[3] the solution is for Congress to reconsider the scope of the preemption and, after full and open debate, decide whether to expand the law to cover all operations of state banks. By its own terms, the statute only preempts the application of state law to "any branch in the host state of an out-of state state bank." (Emphasis added.) The statute is not ambiguous in this regard, so statements on the House and Senate floor about the general goal of providing "parity" between state and national banks cannot be relied upon to expand the scope of preemption.

Operating Subsidiary Preemption Is Unlawful

NAR is particularly troubled that the proposed rule is structured to extend preemption to operating subsidiaries of state banks. The FDIC's proposal expressly states its intention to authorize subsidiaries of state banks to enjoy the advantages of the interest rate provisions of section 27 of the FDIA. See 70 Fed. Reg. at 60027 (October 14, 2005). The proposal also apparently extends preemption under section 24(j) to activities conducted by subsidiaries of state banks, so long as the activity involves a branch (see discussion, above). In any event, we believe that there is nothing in the FDIA that authorizes the FDIC to treat subsidiaries of state banks in the same manner as state banks for purposes of either section 24(j) or 27.

Section 24(j) of the FDIA establishes the framework applicable to activities conducted by a state bank at its branch established in a host state. Section 24(j) makes reference only to insured state banks and their branches. Similarly, section 27 of the FDIA refers only to insured state banks and insured branches of foreign branches. No mention is made in either section 24(j) or 27 of "subsidiaries," nor is there any indication that the authorities under these sections apply to any entity other than insured state banks (and insured branches of foreign banks). A subsidiary of a state bank is not the bank itself. It is a separate entity with a separate legal

[3] While there has been general reference to disadvantage, NAR is not aware of concrete evidence of specific instances in which state banks are being adversely affected by the alleged lack of parity with national banks. In the absence of specific support for the allegations, there is no reason for the FDIC to act.

existence.[4] Operating subsidiaries of state banks are chartered as nonbank corporations. In no way can they be construed as banks.

Congress recognizes the distinction between a bank and a subsidiary. Indeed, in enacting section 3 of the FDIA, Congress distinguished the terms "state bank" and "subsidiary."[5] It is a well-settled rule of statutory construction that the use of different terms within a statute indicates that different meanings are intended. See Norman J. Singer, Statutes and Statutory Construction § 46:06 (2000). White v. Lambert, 370 F.3d 1002, 1011 (9th Cir. 2004) ("It is axiomatic that when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning."). Legacy Emanuel Hospital and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996) (Use of different language by Congress creates a presumption that it intended the terms to have different meanings.). Since the FDIA itself distinguishes between a state bank and a subsidiary, it is difficult to conceive how the FDIC can apply section 24(j) or 27 to subsidiaries of state banks. Accordingly, permitting subsidiaries of state banks to ignore host state law is inconsistent with the language and framework established by sections 24(j) and 27, and is contrary to law. Authorizing subsidiaries to ignore local law would undermine the fundamental authority of a state to regulate and supervise corporate entities doing business in the state.

Exporting Interest Rates

The proposed rule would also implement, by regulation, federal law permitting a state bank to "export" interest rate rules from one state to another. NAR does not object to this portion of the proposed rule, other than its application to operating subsidiaries, as discussed above, but does want to raise a red flag. Use of this authority by state banks to avoid state laws related to interest that are designed to protect consumers could be part of a pattern of making such loans. We urge state regulators and the FDIC to be especially vigilant in preventing the state banking system from being contaminated by those who abuse the trust of borrowers and make predatory or unsuitable loans. We share the growing concern of the federal banking regulators that some banks are making too many non-traditional loans, such as interest-only and option payment adjustable rate mortgages, and that this may result in very high rates of defaults and foreclosures when borrowers must face markedly higher monthly payments. While these nontraditional mortgages are a good alternative for many borrowers, regulators and lenders must take care that they are carefully underwritten and that borrowers fully understand the risks as well as the benefits.

Finally, the FDIC has invited public comment on whether the rule should require a state bank to disclose to its borrowers when it exports interest rates and applies the law from another state. NAR believes that borrowers should understand which law applies to their loans. Since a state bank is not likely to make frequent changes in the law that it applies to its loans, disclosure does not appear to be a significant burden, especially when taken in the context of the many other disclosures required in connection with lending. NAR supports disclosure.

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[4] 12 U.S.C. § 1813(w)(4) ("subsidiary" means a company which is owned or controlled directly or indirectly by another company); § 1831a(c)(2) (state bank may acquire an equity investment in a subsidiary).
[5] 12 U.S.C. § 1813(a)(2) and (w).

Conclusion

With respect to preemption of host state law for activities conducted by branches of out-of-state state banks, NAR urges the FDIC to withdraw or narrow the rule so it does not go beyond the clear and plain language of the statute that preempts host state law only with respect to branch activities. And before taking any further action, we urge you to conduct a public hearing on the issues raised by the proposal.

The FDIC has, in effect, acknowledged the limits of the law by requiring that a branch be involved in the activity for the preemption to apply. But NAR believes the proposed rule goes too far and reaches an illogical result. It is illogical to propose a rule that assumes that Congress preempted host state law when a state bank carries out an activity in a host state through an office in the home state or an operating subsidiary with only a modicum of involvement by a branch, but not when the state bank does not have a branch in the host state. In section 24(j), Congress drew a specific line preempting host state law only for certain activities conducted at a branch in the host state of an out-of-state state bank. If the FDIC wishes to change where the line is drawn, it should seek legislation to amend section 24(j), not seek to expand the meaning of the statute by regulation.

Many of the concerns described in NAR's written statement submitted in connection with the FDIC's May 24, 2005, *Hearing on the Petition for Rulemaking to Preempt Certain State Laws*, apply equally to the proposed rule. Although the proposed rule does not grant everything the Roundtable requested, since it is limited to activities where there is some involvement by an out-of-state branch, it still goes much too far. Accordingly, many of the concerns raised in our written statement continue to apply. We believe that the proposed rule will undermine state consumer protections, result in undue concentration of resources and fewer consumer choices, contribute to the erosion of the national policy against mixing banking and commerce, promote competition in laxity among states seeking to attract more state bank charters, and conflict with and undermine (not enhance) the dual banking system. I refer you to NAR's written statement for a detailed discussion of these concerns.

Thank you for the opportunity to comment on the proposal rule.

Sincerely,

Thomas M. Stevens, GRI, CRB, CRS
President
National Association of REALTORS®