ARNOLD & PORTER

July 18, 2001

VIA HAND DELIVERY

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

Re: Notice of Proposed Rulemaking: Being Engaged in the Business of Receiving Deposits Other than Trust Funds

Dear Mr. Feldman:

We are submitting this letter in support of the FDIC's proposed rule to clarify the requirement that an insured depository institution be "engaged in the business of receiving deposits other than trust funds." This clarification, proposed to be included in the FDIC's regulations as 12 C.F.R. § 303.14, would define a depository institution as being "engaged in the business of receiving deposits other than trust funds" for purposes of all federal law "if the institution maintains one or more non-trust deposit accounts in the aggregate amount of $500,000 or more." Notice of Proposed Rulemaking, 66 Fed. Reg. 20102 (April 19, 2001).

Arnold & Porter represents numerous financial institutions, including financial holding companies, bank holding companies, savings and loan holding companies, and specialized financial services companies that control and operate a wide variety of financial institutions charters. The proposal is reasonable and well-supported for several reasons. First, the proposed rule is consistent with the applicable provisions of the Federal Deposit Insurance Act ("FDIA"), including the requirement in Section 5 of the FDIA that to be insured, an applicant must be "depository institution which is engaged in the business of receiving deposits other than trust funds," the Congressional intent behind these provisions, as expressed in the legislative history, and prior case law interpreting these provisions.' In this connection, we concur with the FDIC's position that federal

' 12 U.S.C. § 1815(a)(1). The same phrase is also used in Section 3 of the FDIA, 12 U.S.C. § 1813(a)(2), to define what is considered a "state bank," and in Section 8 of the FDIC, 12 U.S.C. § 1818(p), which requires the FDIC to terminate an institution's deposit insurance if it is "not engaged in the business of receiving deposits."

law does not dictate a particular source, or number or amount of deposits, in order for an institution to be "engaged in the business of receiving deposits." Thus, the FDIC is free to interpret what is "engaging the business of receiving deposits" in a manner that is consistent with the statute, past precedent, and at the same time clear, reasonable, and flexible to meet the changing needs of the financial services industry. In this connection, we also agree with the FDIC that the phrase should be interpreted in the same way regardless of where it is used in the statute, since the intent behind each use of the phrase - whether in Section 3, Section 5 or Section 8 of the FDIA - is the same: to impose a threshold requirement on the type of institutions that should be insured, and in the case of state banks, regulated by the FDIC.

Second, as noted, the proposed rule is consistent with long-standing (i.e., more than 30-year) FDIC policy on what constitutes being "engaged in the business of receiving deposits." Historically, the FDIC has granted deposit insurance to a variety of financial institutions that accept one or a few deposits from affiliates (or others) so that such institutions could fulfill a specialized financial services need - whether it is to issue credit cards, engage in private banking, or provide trust services, wholesale banking services or other specialized financial services.[2] These financial institutions, relying upon the FDIC's policy, as expressed in General Counsel Opinion No. 12, have become an important segment of the financial services industry, serving consumers in ways that many retail banks do not. Many of these institutions do not accept retail deposits because of restrictions placed on them by federal law (i.e., Section 2(c) of the Bank Holding Company Act) or state law. We do not believe that there is any reason to deviate from the FDIC's statutorily supported historic approach, in light of the success of the policy to date in allowing innovation within safe and sound parameters of existing law. In fact, to propose a rule that is inconsistent with the FDIC's long-standing policy in this area could very well disrupt the operations of specialized institutions, which could result in increased costs and/or decreased availability of services to consumers.

Third, the rule, by not being too rigid in requiring a certain amount or type of deposits, maintains needed flexibility to allow financial institutions to further innovate over time to meet future challenges and opportunities. For example, as noted, the FDIC's policy in the past allowed for the creation of such specialized institutions as the credit

2 The FDIC also acts to terminate deposit insurance where an institution ceases to accept any deposits.

card bank, which has revolutionized the payment habits of consumers. Continued flexibility in this area would prevent the stifling of new charter options that may develop in response to new banking needs as they arise.

Finally, the specific provisions of the proposed rule overall are reasonable and supported by past practice. For example, we agree that specifying minimum deposits of $500,000 in the aggregate is reasonable and consistent with the FDIC's long standing policy in this area. We also agree that maintaining only one account should be sufficient, and that any type of time deposit would be acceptable. However, we do not believe that requiring deposits from the public-at-large is necessary or desirable, as such a requirement would go beyond what the statute requires, may be inconsistent with certain state laws, and may itself be subject to interpretation as to who is the public and how many deposits would be enough.

In short, we support the FDIC's proposed issuance of clear, simple regulatory guidelines on what constitutes "engaging in the business of receiving deposits," consistent with the FDIC's long-standing policy in this area. The proposed regulation - as well as the existing policy, as expressed in General Counsel Opinion No. 12 - is fully consistent with the applicable provisions of Sections 3, 5 and 8 of the FDIA.

Thank you for your consideration of these comments.

Very truly yours,

A. Patrick Doyle

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