



INSTITUTE OF INTERNATIONAL BANKERS

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September 25, 2009

The Honorable Sheila C. Bair
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Dear Chairman Bair:

I am writing with reference to the recently announced amendments to Part 347 of the FDIC's regulations¹ to discuss our concerns regarding the adverse impact they will have on internationally headquartered banking institutions ("international banks") that maintain and operate uninsured U.S. branches. We also respectfully would like to express our concerns that the Part 347 Amendments were adopted without the opportunity for public comment.

SUMMARY

As further discussed below, the amended provisions of Part 347 implement statutory provisions that are intended to restrict the deposit-taking activities of uninsured U.S. branches of international banks to wholesale deposits and prevent them from gaining an unfair competitive advantage over U.S. banks with respect to retail deposits. These statutory provisions date to 1978, and since that time \$100,000 has been the demarcation point between "wholesale" and "retail" deposit taking activities for these purposes (the "Minimum Wholesale Requirement"). There is no definitive connection between the Minimum Wholesale Requirement and the standard maximum deposit insurance amount (the "SMDIA") such that a change in the SMDIA in and of itself necessitates a change in the Minimum Wholesale Requirement – indeed, when the \$100,000 Wholesale Minimum Requirement was first adopted in 1978 the SMDIA was \$40,000 – and increasing the Minimum Wholesale Requirement will significantly complicate international banks' compliance burdens as they will need to revise their systems, operations, banking practices, compliance controls and training to conform to these revised requirements.

¹ See 74 Fed. Reg. 47711, 47718 (Sept. 17, 2009) (the "Part 347 Amendments").



We believe that retaining the \$100,000 limit would not provide uninsured U.S. branches of international banks any competitive advantage over U.S. banks with respect to retail deposit-taking activities. Accordingly, there is no need to increase the Minimum Wholesale Requirement, notwithstanding the temporary increase in the SMDIA. At a minimum, and in particular in consideration of the centrality of the Minimum Wholesale Requirement to international banks' uninsured U.S. operations, a decision to increase the Minimum Wholesale Requirement should only have been taken with a full vetting of the issues in accordance with the notice and comment provisions of the Administrative Procedure Act (the "APA").

As the Part 347 Amendments are scheduled to become effective on October 19, 2009, we urge that this matter be given prompt attention and would be grateful for the opportunity to discuss further our concerns and how they can be most effectively addressed. As set forth in this letter, we believe there are compelling statutory and policy justifications for reconsidering the requirements imposed by the Part 347 Amendments on the U.S. deposit-taking activities of international banks. We believe therefore that it would be appropriate to suspend their application at least until the necessity of the Part 347 Amendments and their potential impact on international banks are further analyzed.

DISCUSSION

The Legislative Background of the SMDIA and Its Implications for The Minimum Wholesale Requirement

The Part 347 Amendments have been adopted in response to the temporary increase in the SMDIA from \$100,000 to \$250,000, which occurred in two separate statutes, and are characterized in the adopting release as "technical, conforming" amendments necessitated by yet a third federal statute, the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 ("FDIRCA").²

We believe that a review of the history of the legislative changes in this area demonstrates that Congress did not intend the result that would be effected by the Part 347 Amendments on the U.S. deposit-taking activities of international banks. In February 2006, Congress passed the Federal Deposit Insurance Reform Act of 2005 ("FDIRA"). FDIRA, *inter alia*, provided for upward adjustments in the amount of a bank's deposits that are FDIC-insured to take account of inflation. Specifically, FDIRA replaced the reference to "\$100,000" as the FDIC deposit insurance limit for most purposes in Section 11(a)(1) of the Federal Deposit Insurance Act with a cross-reference to a new term, the SMDIA.³ A week later, as part of FDIRCA's "technical and conforming amendments necessary to implement the [FDIRA]," Congress amended a number of sections of federal law that had contained references to the old \$100,000 FDIC

² See *id.* at 47715; Pub. L. 109-173, 119 Stat. 3601.

³ See preamble to FDIRCA; Pub. L. 109-171, 120 Stat. 4.



deposit insurance limit and replaced those references with references to the SMDIA. One of those provisions was Section 6 of the International Banking Act of 1978, as amended (the “IBA”). Then, two and a half years later, in October 2008, Congress temporarily increased the SMDIA from \$100,000 to \$250,000 as part of the Emergency Economic Stabilization Act of 2008 (“EESA”), which, of course, dealt with many other subjects. EESA raised the SMDIA to \$250,000 only through December 31, 2009. Finally, in May 2009, Congress extended the increase in the SMDIA through December 31, 2013 as part of the Helping Families Save Their Homes Act of 2009 (“HFSH”).⁴

We note that, at the time of the enactment of FDIRA and FDIRCA, none of the changes implemented by either of those acts affected either the FDIC deposit insurance limit generally or the U.S. deposit-taking activities of international banks, because the SMDIA was defined by FDIRA to mean \$100,000, subject to future inflation adjustments. FDIRA itself makes no mention of international banks’ U.S. deposit-taking activities and left the IBA completely unaffected. The change to the IBA came in the later conforming amendments, which contained no suggestion of a Congressional intent to change the rules applicable to international banks. The more recent temporary increase to the SMDIA was made by Congress in an entirely different set of circumstances than those surrounding the enactment of FDIRA and FDIRCA. Crucially, Congress gave no indication in enacting EESA or HFSH that, in temporarily raising the SMDIA to \$250,000, it intended to change the Minimum Wholesale Requirement.

Of critical importance, the FDIC did not provide prior notice of its intention to adopt the Part 347 Amendments or an opportunity for public comment because of the view that the amendments are merely technical and conforming in nature. However, given the subject matter of the Part 347 Amendments, the absence of any indication that Congress intended under any of FDIRA, FDIRCA, EESA or HFSH to raise the Minimum Wholesale Requirement so suddenly and drastically, and the centrality of the Minimum Wholesale Requirement to international banks’ uninsured U.S. operations – failure to comply with the Minimum Wholesale Requirement can result in an international bank having to establish a separately incorporated, FDIC-insured U.S. bank subsidiary⁵ – we believe a notice and comment rulemaking procedure under the APA would have been the required means to increase the Minimum Wholesale Requirement, especially in view of the key role the FDIC’s regulations play in implementing the statutory restrictions on deposit-taking activities of uninsured U.S. branches of international banks.

We believe therefore that the issues surrounding an increase in the Minimum Wholesale Requirement are more complex than suggested in the adopting release, and in our view such an increase is not warranted, notwithstanding the temporary increase in the

⁴ Pub. L. 110-343, 122 Stat. 3765; Pub. L. 111-22, 123 Stat. 1632.

⁵ See 12 U.S.C. § 3104(d)(1). The Part 347 Amendments do not adversely affect the few remaining “grandfathered” insured branches of international banks, whose deposits, like those of U.S. insured depository institutions, are insured by the FDIC in an amount equal to the SMDIA.



SMDIA. In particular, we believe the FDIC has sufficient authority under Section 6 of the IBA to retain \$100,000 as the Minimum Wholesale Requirement, notwithstanding the temporary increase in the SMDIA. Accordingly, we do not believe there is any definitive connection between the Minimum Wholesale Requirement and the SMDIA, such that changes in the SMDIA would automatically trigger changes in the Minimum Wholesale Requirement.

Section 6 of the IBA

The essential purpose of Section 6 of the IBA is to limit the deposit-taking activities of uninsured U.S. branches of international banks to wholesale deposits and prohibit the establishment of new insured branches. It accomplishes these goals by requiring that international banks (other than those few that still have “grandfathered” insured branches) establish separately incorporated, FDIC-insured bank subsidiaries in order to accept retail deposits in the United States, subject to certain limited regulatory exceptions. The statute refers to the SMDIA as a limit on international banks’ deposit activities in the United States, but it also gives the FDIC and the Office of the Comptroller of the Currency (the “OCC”) the authority to determine “by order or regulation” that a state-licensed or OCC-licensed branch, as the case may be, is not engaged in “domestic retail deposit activities requiring deposit insurance protection.”⁶ Accordingly, the statute itself contemplates that the SMDIA is not necessarily the controlling limitation on international banks’ deposit activities in the United States and invites the FDIC and the OCC to determine when to de-link such activities from the SMDIA as not indicative of the demarcation for “domestic retail deposit activities requiring deposit insurance protection.”

The statute directs the FDIC and OCC to take into account “the size of deposits and nature of depositors and deposit accounts” when determining whether international banks should be viewed as engaged in domestic retail deposit activities requiring deposit insurance protection. In addition, Section 6(a) of the IBA, which is captioned “Objective”, provides that actions by the FDIC and OCC under Section 6 are to be taken with a view to “affording equal competitive opportunities to foreign and United States banking organizations in their United States operations” in order to “ensure that foreign

⁶ See 12 U.S.C. § 3104(b) (OCC-licensed branches) and 12 U.S.C. § 3104(c)(1). Specifically, Section 6(c)(1) of the IBA provides that an international bank may not establish or operate a state-licensed branch unless (i) the branch is an insured branch, (ii) the branch “does not accept deposits of less than an amount equal to the [SMDIA]” or (iii) the FDIC “determines by order or regulation that the branch is not engaged in domestic retail deposit activities requiring deposit insurance protection, taking account of the size and nature of depositors and deposit accounts.”

Section 6(b) of the IBA provides that an international bank may not establish or operate an OCC-licensed branch which receives deposits of less than an amount equal to the SMDIA unless (i) the branch is an insured branch or (ii) the OCC “determines by order or regulation that the branch is not engaged in domestic retail deposit activities requiring deposit insurance protection, taking account of the size and nature of depositors and deposit accounts.”



banking organizations do not receive an unfair competitive advantage over United States banking organizations.”⁷

Consistent with these statutory requirements, in the past, when considering revisions to its implementing regulations under Section 6 of the IBA, the FDIC has undertaken a careful review of the deposit activities of uninsured U.S. branches of international banks to help assess the competitive balance between such branches and U.S. banking organizations. For example, in proposing implementing regulations under Section 107 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994⁸ the FDIC consulted with the Federal Reserve and OCC and reviewed data relating to uninsured branches’ deposit-taking activities. On the basis of that review the FDIC concluded that “as a group, uninsured U.S. branches of foreign banks do not compete with United States banking organizations for retail deposits.”⁹ We believe the same conclusion applies to uninsured U.S. branches’ current deposit-taking activities, and accordingly there is no need to modify (especially without prior notice and the opportunity to comment) the Minimum Wholesale Requirement.

Indeed, historically there has been no definitive connection between the Minimum Wholesale Requirement applicable to international banks’ uninsured U.S. branches and the amount of deposit insurance coverage afforded to insured depository institutions. As originally enacted in 1978, Section 6 established the \$100,000 limit as the “retail-wholesale” border for international banks’ U.S. deposit taking activities. The fact that the maximum amount of deposit insurance coverage in effect at that time was \$40,000 underscores the absence of any definitive linkage between the SMDIA and the deposit-taking activities of uninsured U.S. branches. Likewise, we find nothing in any of the Congressional actions, beginning with FDIRA and FDIRCA in 2006, continuing with the temporary increase in the SMDIA to \$250,000 in EESA in 2008 and culminating with the extension of that increase through December 31, 2013 in HFSH in 2009 that compels a corresponding, automatic increase in the longstanding Minimum Wholesale Requirement – the provisions of Section 6 of the IBA permitting the FDIC to prescribe when an uninsured state-licensed branch of an international bank is engaged in “domestic retail deposit activities requiring deposit insurance protection, taking account of the size and nature of depositors and deposit accounts” remain unchanged.

Accordingly, we believe it is well within the FDIC’s authority under Section 6 of the IBA to retain \$100,000 as the Minimum Wholesale Requirement, notwithstanding the

⁷ 12 U.S.C. § 3104(a).

⁸ Pub. L. 103-328, 108 Stat. 2358.

⁹ See 60 Fed. Reg. 36074, 36075 (July 13, 1995). The OCC reached a similar conclusion in proposing revisions to its regulations implementing the Riegle-Neal Act amendments to Section 6 of the IBA (12 U.S.C. § 28.16). See 60 Fed. Reg. 34907, 34912 (July 5, 1995) (“All available data relating to [uninsured U.S. branches’] deposits suggest that, as a group, uninsured United States offices of foreign banks do not compete for retail deposits.”).



temporary increase in the SMDIA to \$250,000. More generally, we believe it would be appropriate, and consistent with the purposes of the statute, to recognize that the Minimum Wholesale Requirement and the SMDIA address different considerations and that, accordingly, a change in the SMDIA does not automatically result in a change in the Minimum Wholesale Requirement.

Practical and Policy Considerations

As a practical matter, a principal concern with linking limits on uninsured U.S. branches' deposit-taking activities to the SMDIA is that the SMDIA itself is not a fixed amount, but rather is subject to a periodic inflation adjustment.¹⁰ Fluctuations in the Minimum Wholesale Requirement that are tied to the SMDIA – whether in connection with the adoption of the Part 347 Amendments or the statutorily prescribed reduction in the SMDIA to \$100,000 after December 31, 2013, or as a result of periodic inflation adjustments thereafter – will significantly complicate international banks' compliance burdens as they will need to revise their systems, operations, banking practices, compliance controls and training to conform to these changing requirements. We do not believe that such avoidable burdens are justified or necessary in the absence of evidence that international banks would gain a competitive advantage over U.S. banks with respect to retail deposit-taking activities in the United States if \$100,000 were retained as the Minimum Wholesale Requirement.

We are further concerned that the changes effected by the Part 347 Amendments may be read to suggest that the rule has a retroactive effect—that international banks that have accepted initial deposits below \$250,000 since October 3rd, 2008 (the effective date of the EESA) have, since that time, been in violation of the statute. This lack of clarity and its potential retroactive impact on international banks' regulatory compliance provides additional support for the conclusion that these changes are not warranted and should only have been taken pursuant to a notice and comment rulemaking procedure.

We believe the inquiry should focus on what the minimum amount of an initial deposit should be in order to classify the entity accepting the deposit as engaged in “wholesale” as opposed to “retail” deposit-taking activity for purposes of applying the requirements of Section 6 of the IBA, since we believe it is clear as a statutory matter that an increase in the SMDIA does not automatically trigger a corresponding increase in the Minimum Wholesale Requirement. Reference to the SMDIA may be a potentially relevant consideration, but it is not the exclusive factor in determining what the appropriate Minimum Wholesale Requirement should be.

In addition, due regard should be given to the objective of Section 6 of the IBA (as articulated in the provisions of Section 6(a) quoted above in the text accompanying footnote 7). That is to say, notwithstanding the temporary increase in the SMDIA to \$250,000, we do not believe there is evidence that retaining \$100,000 as the Minimum

¹⁰ See 12 U.S.C. § 1821(a)(1)(F).



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Wholesale Requirement would give international banks any type of competitive advantage over U.S. banks in the retail banking area. Furthermore, we have found nothing to suggest that Congress, at any time during the more than three-year period over which it enacted FDIRA, FDIRCA, EESA and HFSH, contemplated an increase in the Minimum Wholesale Requirement.

In any event, we believe that, at a minimum, a decision on this question should be taken only with a full vetting of the issues, including consultation with the Federal Reserve and appropriate state banking regulators, as well as coordination with the OCC¹¹ (as was the case in connection with implementing the Riegle-Neal Act amendments), and only after public notice and opportunity for comment. Such consultation and coordination is especially appropriate regarding regulatory changes that in the current market environment could have an adverse impact on a bank's funding and liquidity.

* * *

We have had preliminary discussions with Legal Division staff regarding the Part 347 Amendments and are seeking to arrange a conference call with the General Counsel and his colleagues to explain further our concerns and discuss how they can be most effectively addressed.

We appreciate your consideration of our views on this issue. Please contact the undersigned or the Institute's General Counsel Richard Coffman (rcoffman@iib.org) at 212-421-1611 if we can provide any further information or assistance.

Very truly yours,

A handwritten signature in black ink that reads "Lawrence R. Uhlick". The signature is written in a cursive style with a large, prominent 'L' and 'U'.

Lawrence R. Uhlick
Chief Executive Officer

cc: Michael Bradfield
Joseph DiNuzzo
Daniel Lonergan
Rodney Ray

¹¹ The OCC's regulations under Section 6 of the IBA appropriately are still based on the \$100,000 Minimum Wholesale Requirement, thereby creating a disparity between uninsured state- and OCC-licensed branches upon the effective date of the Part 347 Amendments. This disparity is at odds with the statutory purpose under Section 6 of the IBA.