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December 14, 2009

Michael Bradfield
General Counsel
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: Recent Amendments to the FDIC's International Banking
Regulations (the "Part 347 Amendments")

Dear Mr. Bradfield:

This letter responds to the questions raised in your October 30th letter regarding the Part 347 Amendments¹ and expands upon the discussion of the Amendments in my September 25th letter Chairman Bair, a copy of which is attached for your reference. As an initial matter, I would like to express our appreciation for the consideration given our views and the provision of a 90-day "grace period" during which FDIC staff will not recommend that the Part 347 Amendments be enforced.

We also appreciate the opportunity to discuss further the reasons supporting our conclusions that (i) an increase in the standard maximum deposit insurance amount (the "SMDIA") from \$100,000 to \$250,000 (or to any other amount) does not automatically require a corresponding (or any) increase in the limit imposed on uninsured branches of international banks in the United States under Section 6 of the International Banking Act of 1978 (the "IBA")² to ensure that they do not engage in "domestic deposit retail activities requiring deposit insurance" (as in our September 25th letter, this limit hereinafter is referred to as the "Minimum Wholesale Requirement"), and (ii) in general, \$100,000 remains the appropriate measurement for distinguishing between "wholesale" and "retail" deposits for purpose of the FDIC's Part 347 Regulations.

The discussion in this letter addresses the questions raised in your October 30th letter by focusing on the following key issues:

¹ See 74 Fed. Reg. 47711, 47718 (Sept. 17, 2009).

² 12 U.S.C. § 3104.



- Whether an increase in the SMDIA – whether from \$100,000 to \$250,000 or in connection with an inflation adjustment made in accordance with Section 11(a)(1)(F) of the Federal Deposit Insurance Act (the “FDIA”)³ or otherwise – in and of itself necessitates a corresponding (or any) increase in the Minimum Wholesale Requirement.
- The authority of the FDIC under Section 6 of the IBA to set the Minimum Wholesale Requirement at an amount less than the SMDIA.
- Taking into account the objective and requirements of Section 6 of the IBA, whether the Minimum Wholesale Requirement should remain at \$100,000, notwithstanding the temporary increase in the SMDIA to \$250,000.

As discussed below, we conclude that (i) an increase in the SMDIA does not automatically require a corresponding (or any) increase in the Minimum Wholesale Requirement; (ii) as a statutory matter under Section 6 of the IBA, the FDIC has ample authority to set the Minimum Wholesale Requirement at an amount less than the SMDIA and to maintain it at \$100,000; and (iii) as a policy matter, there is no need to increase, and there would be no benefit to increasing, the Wholesale Minimum Requirement to \$250,000 (or to any amount greater than \$100,000) inasmuch as uninsured branches of international banks are fundamentally wholesale in nature, they do not seek to compete with FDIC-insured banks for domestic retail deposits and, even if they did, they would be effectively precluded from doing so owing to their ineligibility for FDIC insurance and the restrictions imposed on their ability to solicit such deposits. We believe that \$100,000 remains a reasonable demarcation between “wholesale” and “retail” activities for purposes of Section 6 of the IBA.

A. There Is No Necessary Relationship Between the Amount of the SMDIA and the Amount of the Minimum Wholesale Requirement Such That an Increase in the SMDIA Automatically Triggers a Corresponding (or Any) Increase in the Minimum Wholesale Requirement

Of particular significance, at the time the IBA was enacted in 1978 and the Minimum Wholesale Requirement was established by the statute at \$100,000, the SMDIA was \$40,000. Thus, from the outset the Minimum Wholesale Requirement was not linked to the SMDIA, but rather was viewed as an appropriate measure of what constitutes permissible “wholesale” deposit taking activity not requiring deposit insurance, as opposed to “retail” deposit-taking activities that would require deposit insurance. The establishment of the Minimum Wholesale Requirement in an amount different from the SMDIA is the most direct, and perhaps the best, evidence that Congress did not intend the Minimum Wholesale Requirement to be dependent on the

³ See 12 U.S.C. § 1821(a)(1)(F).



SMDIA such that a change in the latter would automatically result in a corresponding change in the former.

The increase in the SMDIA to \$100,000 in 1980 resulted in an equivalence between the SMDIA and the Minimum Wholesale Requirement until 2008, when enactment of the Emergency Economic Stabilization Act temporarily increased the SMDIA to \$250,000 until December 31, 2009⁴ (this temporary increase was extended to December 31, 2013 by the Helping Families Save Their Homes Act of 2009⁵). With one exception relating to what we in our discussions with you and your colleagues have referred to as the “statutory wholesale limit” (discussed below in note 7), there is no indication that Congress at any time since 1978 has intended to revise the Minimum Wholesale Requirement in connection with changes to the SMDIA. As discussed at pages 2-4 of our September 25th letter to Chairman Bair, nothing in the text or the legislative history of the amendments made with respect to the SMDIA in 2006, 2008 and 2009 suggests that, in adopting those amendments, Congress was in any way concerned with the Minimum Wholesale Requirement, and there is in particular no indication that Congress intended that the increase in the SMDIA would automatically trigger a corresponding increase in the Minimum Wholesale Requirement (or even gave any consideration to whether any such linkage exists).

Crucially, each time Congress has addressed questions regarding the SMDIA, it has left intact the provisions of the IBA which provide the FDIC authority to determine by order or regulation that an uninsured branch of an international bank “is not engaged in domestic retail deposit activities requiring deposit insurance protection, taking account of the size and nature of depositors and deposit accounts” (quoting Section 6(c)(1) of the IBA).

B. The FDIC Has Ample Authority under Section 6 of the IBA To Maintain the Minimum Wholesale Requirement at \$100,000, Notwithstanding the Temporary Increase in the SMDIA from \$100,000 to \$250,000

Section 6 of the IBA takes into account the fact that international banks have always conducted a significant portion of their wholesale banking activities in the United States through branches and reflects the determination by Congress that deposit insurance protection need not – and, indeed, since the amendment of Section 6 of the IBA in 1991, cannot – be provided to the customers of these branches. Further, Section 6 focuses on whether the ability of international banks to operate in the United States through uninsured branches provides them any unfair competitive advantage over domestic banks (which are required to be FDIC-insured) with respect to U.S. retail customers.

⁴ See Pub. L. 110-343, 122 Stat. 376.

⁵ See Pub. L. 111-22, 123 Stat. 1632.



Section 6 sets forth the following statutory scheme to address these considerations, as applied to state-licensed branches:

- Section 6(c)(1) of the IBA provides that an international bank may not establish or maintain a state-licensed branch unless:⁶
 - the branch is an insured branch; *or*
 - the branch does not accept deposits in an initial amount equal to less than the SMDIA (we refer to this provision as the “Statutory Wholesale Limit”); *or*
 - 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” (in our discussions with you and your colleagues we have referred to this provision as the “regulatory wholesale limit” and hereinafter will refer to it as the “Regulatory Wholesale Exception”).

Thus, the Statutory Wholesale Limit is specifically tied to the SMDIA, but the Regulatory Wholesale Exception is not.⁷ **The failure to incorporate an express reference to the SMDIA into the Regulatory Wholesale Exception is strong evidence of Congress’ intention that the FDIC and OCC need not be bound by the SMDIA in implementing its provisions.**

The statutory scheme as described above has been in place since enactment of the IBA in 1978, and soon thereafter the FDIC exercised its authority under the Regulatory Wholesale Exception to prescribe by regulation deposit-taking activities of uninsured branches that do not constitute “domestic retail deposit activities requiring deposit insurance protection.”⁸ The parameters of what is

⁶ The deposit-taking activities of federal branches are addressed in Section 6(b) of the IBA, which prevents a federal branch from receiving deposits in an initial amount of less than the SMDIA unless (i) it is an insured branch or (ii) the Office of the Comptroller of the Currency (“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.” Thus, like the FDIC with respect to state-licensed branches, the OCC has the regulatory authority to provide for exceptions to the general prohibition against uninsured branches’ receipt of deposits in initial amounts less than the SMDIA.

⁷ “The Statutory Wholesale Limit is the single instance under Section 6 where Congress has indicated an intention to impose the SMDIA as an absolute limit on an uninsured branch’s deposit-taking activities. Based on our discussions with Institute member banks, we believe that uninsured branches operating in accordance with the Statutory Wholesale Limit account for not more than 1% of total deposits held by uninsured branches.

⁸ See 44 Fed. Reg. 4005640061 (July 9, 1979) (FDIC). The Regulatory Wholesale Exception is currently codified at 12 C.F.R. § 347.215 (FDIC) and 12 C.F.R. § 28.16 (OCC).



covered by these regulations have been revised over the years, but the FDIC (like the OCC) has always recognized the appropriateness of permitting uninsured branches to receive certain types of deposits that otherwise would be prohibited. **From the outset, the analysis of where to draw the line under these regulations has been informed by the understanding that the controlling question is not what level of deposit insurance protection is provided under the FDIA, but rather how to distinguish between “wholesale” and “retail” deposits.**⁹ There is nothing in the statutory revisions prompting adoption of the Part 347 Amendments that require or suggest the FDIC should approach this question any differently.

- Section 6(d) of the IBA requires international banks to establish one or more U.S., FDIC-insured bank subsidiaries in order to accept or maintain (other than through a “grandfathered” insured branch) “domestic retail deposit accounts having balances of less than an amount equal to the [SMDIA], and requiring deposit insurance protection” (emphasis added).
- The amendments adding these provisions to the IBA left wholly intact the statutory scheme provided for under Section 6(b) and 6(c)(1) as described above, including the Regulatory Wholesale Exception.¹⁰ We have found nothing to indicate that Congress at that time, or in connection with its subsequent amendments to Section 6 (see pages 2-3 above), intended to modify that scheme, link it to the SMDIA or override the determinations made by the FDIC and OCC under the Regulatory Wholesale Exception.¹¹
 - In our view, therefore, deposit accounts established and maintained in accordance with the provisions of the Regulatory Wholesale Exception, whose parameters the statute leaves to the discretion of the FDIC, should

⁹ Thus, when it first proposed implementing regulations under the IBA, the FDIC described the scope of Section 6 as follows:

Basically, branches engaged in a ‘retail’ deposit activity must be insured while branches engaged in a ‘wholesale’ deposit activity do not have to be insured.

44 Fed. Reg. 23869, 23870 (April 23, 1979). Consistent with the lack of correspondence between FDIC deposit insurance coverage limits and the provisions of the IBA at that time (see page 2 above), there was no indication in the FDIC’s rulemaking that consideration of the amount of deposit insurance coverage provided FDIC-insured banks was relevant to implementing the Regulatory Wholesale Exception.

¹⁰ See Pub. L. 102-242, 105 Stat. 2236; and Pub. L. 102-558 106 Stat. 4198.

¹¹ Section 107(b) of the Section 107 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Pub. L. 103-328, 108 Stat. 2358) called upon the FDIC and OCC to review their regulations under the Regulatory Wholesale Exception to ensure they do not enable international banks to gain an unfair competitive advantage over FDIC-insured banks and listed factors that the agencies should consider in connection with that review, but the final determination on this question was left to the discretion of the FDIC and OCC.



not be considered to be “domestic retail deposit accounts . . . requiring deposit insurance” within the meaning of Section 6(d).

- **The controlling factor under Section 6(d) is not the amount of the SMDIA, but rather whether a deposit account is of a type that requires deposit insurance protection.**¹² Accordingly, we believe that, as a matter of statutory construction, it is within the authority of the FDIC under Section 6 to maintain the Minimum Wholesale Requirement at \$100,000 – an amount that is “less than an amount equal to the SMDIA” – for purposes of applying the Regulatory Wholesale Exception, notwithstanding the temporary increase in the SMDIA to \$250,000.
- Section 6(a) of the IBA describes the objective of limiting international banks’ deposit-taking activities in the United States as follows:

In implementing this section, [the OCC and the FDIC] shall each, by affording equal competitive opportunities to foreign and United States banking organizations in their United States operations, ensure that foreign banking organizations do not receive an unfair competitive advantage over United States banking organizations.

- **In light of this objective, we believe the fundamental question to be addressed in considering whether to maintain the Minimum Wholesale Requirement at \$100,000 is whether doing so would provide international banks, acting through their uninsured branches in the United States, an unfair competitive advantage over FDIC-insured banks, or whether it is necessary to increase the Minimum Wholesale Requirement to \$250,000 as a matter of competitive equity.**

As discussed below, we believe that \$100,000 is still the appropriate amount for distinguishing between “wholesale” and “retail” deposit-taking activities for purposes of Section 6 and that maintaining that amount as the Minimum Wholesale Requirement would not provide international banks any competitive advantage vis-à-vis FDIC-insured domestic banks. Indeed, we believe it is self-evident that **FDIC insurance is essential to competing for domestic retail deposits in the United States, and the ineligibility of uninsured branches for such coverage effectively precludes them from**

¹² Further underscoring this point, as originally enacted in 1991, the provisions of Section 6(d) referred only to the acceptance or maintenance of deposits having balances of less than \$100,000. See Section 214(a)(3) of the Foreign Bank Supervision Enhancement Act of 1991. Less than one year later, these provisions were amended to specify that the prohibition applies only to “domestic retail” deposits . . . requiring deposit insurance protection.” See Section 302 of the Defense Production Act Amendments of 1992. These amendments, which were described as a “technical correction”, were made retroactively effective to the same date as the original provisions of Section 6(d). See H.R. Conf. Rep. 102-1028 (Oct. 5, 1992) at 49.



that market. Our discussions with Institute member banks have confirmed that (i) international banks do not seek to compete for domestic retail deposits with FDIC-insured banks through their uninsured branches (they do so instead through either grandfathered insured branches or FDIC-insured bank subsidiaries); and (ii) if they did seek to compete for domestic retail deposits through their uninsured branches, the absence of FDIC-insurance, coupled with the limitations imposed on their ability to solicit such deposits under the FDIC’s regulations,¹³ would place them at a significant, and likely prohibitive, competitive disadvantage. We have found no evidence that the limited deposit-taking activities that are permitted pursuant to the Regulatory Wholesale Exception have enabled uninsured branches of international banks to gain any type of competitive foothold in the United States with respect to domestic retail deposits.

C. As a Policy Matter, There Is No Need To Increase, and There Would Be No Benefit To Increasing, the Minimum Wholesale Requirement To \$250,000 (or To Any Amount Greater Than \$100,000)

A Minimum Wholesale Requirement in the amount of \$100,000 has proved to be an effective means to help limit international banks’ ability to compete with FDIC-insured banks for domestic retail deposits in the United States, and there is no reason to believe that maintaining the requirement at that level would enhance international banks’ competitive position with respect to retail domestic deposits vis-à-vis FDIC-insured banks or that increasing the requirement to \$250,000 (or any other amount greater than \$100,000) would have any material impact on this competitive balance one way or the other.

Our discussions with Institute member banks confirm that the overwhelming preponderance of deposits received through their uninsured branches are wholesale in nature, with many institutions reporting that their uninsured branches have no or only very few customers who are individuals (whether or not they are citizens or residents of the United States) and none indicating that deposits from U.S. citizens or residents and small businesses (*i.e.*, those that are not “large businesses” as defined in Section 347.202(p) of the FDIC’s regulations) comprise more than a minimal part of their total deposits – indeed, many of the “small business” customers are U.S. subsidiaries of companies that are customers of the bank outside the United States. In addition, we have found nothing to suggest that uninsured branches hold any meaningful amount of deposits of between \$100,000 and \$250,000 for domestic retail customers.

We are confident that the foregoing characterization of uninsured branches’ deposit-taking activities would be confirmed by reviewing available aggregate data, and we strongly urge the FDIC, as it did in connection with its rulemaking under Section 107

¹³ See 12 C.F.R. § 347.215(a)(7)(ii)(D).



of the Riegle-Neal Act, to consult with the Federal Reserve and OCC regarding their views on whether uninsured branches of international banks as a group compete with FDIC-insured banks for retail deposits.¹⁴ That review found that “as a group, uninsured U.S. branches of foreign banks do not compete with United States banking organizations for retail deposits.”¹⁵ There is no reason to think that anything has changed in the nature of uninsured branches’ deposit-taking activities since that time that would justify reaching a different conclusion.

Increasing the Minimum Wholesale Requirement to \$250,000 (or any other amount greater than \$100,000) would require uninsured branches that operate in accordance with the Regulatory Wholesale Exception to revise their documentation, systems, operations, banking practices, compliance controls, audit procedures and training to conform to this change. In addition, there is the prospect that they would have to reverse the process when the temporary increase in the SMDIA expires at the end of 2013. In any case, uninsured branches face the prospect of periodically having to undertake such measures in connection with any changes in the SMDIA that result from inflation-adjusted revisions to the SMDIA mandated under Section 11(a)(1)(F) of the FDIA. We respectfully submit that imposing these requirements on uninsured branches will not promote the objectives of Section 6 of the IBA, which are already sufficiently met by the \$100,000 Minimum Wholesale Requirement, and instead will result only in the needless deployment of time, effort and resources that otherwise could be utilized for more productive purposes.

D. Conclusion

Based on the foregoing, we conclude that it is well within the discretion of the FDIC, acting pursuant to the Regulatory Wholesale Exception, to maintain the Minimum Wholesale Requirement at \$100,000, notwithstanding the temporary increase in the SMDIA to \$250,000.

The Regulatory Wholesale Exception calls for consideration of the size and nature of depositors and deposit accounts in determining whether an uninsured branch is engaged in “domestic retail deposit activities requiring deposit insurance.” Uninsured branches of international banks do not compete with FDIC-insured banks for retail deposits, and there is nothing about the nature of uninsured branches’ depositors or the deposit accounts they maintain that would merit increasing the Minimum Wholesale Requirement. Maintaining the Minimum Wholesale Requirement at \$100,000 is entirely

¹⁴ See 60 Fed. Reg. 36074, 36075 (July 12, 1995). We also urge the FDIC to consult with appropriate state banking authorities. For example, increasing the Minimum Wholesale Requirement from \$100,000 to \$250,000 would conflict with the provisions of Section 202-a of the New York Banking Law, which permits New York-licensed agencies to issue certificates of deposit in minimum amounts in excess of \$100,000 to corporations and other types of non-retail investors.

¹⁵ Id.



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consistent with the objective of Section 6 of the IBA and would not conflict with the provisions of Section 6(d), the controlling consideration under which is (as discussed above at page 6) whether a deposit account is of a type that requires deposit insurance protection. We believe that \$100,000 remains an appropriate measurement for distinguishing between “wholesale” and “retail” deposit-taking activities in accordance with the requirements of Section 6.

As discussed above in note 7, the single exception to maintaining the Minimum Wholesale Requirement at \$100,000 is the Statutory Wholesale Limit, which is based on the SMDIA and does not provide for any variation. Consequently, we conclude that the provisions of Section 347.213(a)(1) of the FDIC’s regulations, which implement the Statutory Wholesale Limit, should be revised to reflect the increase in the SMDIA to \$250,000 (and the definition of “SMDIA” thus also should be added as Section 347.202(v) in connection with this revision), but none of the other revisions made by the Part 347 Amendments are necessary. With respect to those provisions, it would be appropriate to restore references to \$100,000 in place of the SMDIA.

Should the FDIC decide to retain the Part 347 Amendments, we would request confirmation that the revisions are prospective only and do not apply to time deposits received prior to the issuance of the Part 347 Amendments. In addition, it would be appropriate, and consistent with past FDIC practice,¹⁶ to provide uninsured branches a transition period to enable them to bring their operations into compliance with the regulatory changes.

* * *

We appreciate your consideration of our views on this issue and would welcome the opportunity to meet with you and your colleagues to discuss them further if you think that would be helpful. 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, flowing style.

Lawrence R. Uhlick
Chief Executive Officer

cc: Joseph DiNuzzo
Daniel Lonergan
Rodney Ray

¹⁶ See, e.g., 61 Fed. Reg. 5671, 5673 (Feb. 14, 1996) (regulations implementing Section 107 of the Riegle-Neal Act).