April 22, 2013

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW.
Washington, DC 20429
RIN 3064-AE00

Re: Deposit Insurance Regulations; Definition of Insured Deposit

Dear Mr. Feldman:

The Clearing House Association L.L.C. ("**The Clearing House**")[1] appreciates the opportunity to comment on the proposed rule (the "**Proposed Rule**")[2] issued by the Federal Deposit Insurance Corporation (the "**FDIC**") regarding the definition of "insured deposit" in the FDIC's deposit insurance regulations at 12 C.F.R. Part 330.

The Clearing House also appreciates the efforts of the FDIC to resolve, in the release accompanying the Proposed Rule (the "**Release**"), the potential serious issues related to the status of deposits in foreign branches of United States banks ("**foreign branch deposits**") under the so-called "depositor preference provisions" in Section 11(d)(11)[3] of the Federal Deposit Insurance Act (the "**FDIA**"), particularly in light of the recent consultation paper (the

[1] Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

[2] 78 Fed. Reg. 11,604 (February 19, 2013).

[3] 12 U.S.C. § 1821(d)(11).

"**Consultation Paper**") issued by the predecessor to the U.K. Prudential Regulatory Authority (the "**PRA**"). We submit, however, that the Proposed Rule and Release create significant new issues, and that there is a more effective alternative approach to accomplish the FDIC's policy objectives.

Specifically, The Clearing House strongly believes that, from both a legal and policy perspective, the best approach to address the status of foreign branch deposits is for the FDIC to issue its first formal interpretation of the term "deposit liability" in Section 11(d)(11) and conclude that this term includes foreign branch deposits (the "**Section 11 Approach**"). As further discussed below, the Section 11 Approach could be adopted alone, or the FDIC could adopt the Section 11 Approach and the Proposed Rule together.[4]

I. Background and Summary

The Proposed Rule itself directly addresses only the definition of "insured deposit", but the context of the Proposed Rule is the broader question of the status of foreign branch deposits in the event of a bank's failure and liquidation. Indeed, the Release acknowledges that the Proposed Rule was promulgated in reaction to the recent proposal in the Consultation Paper to require all U.S. banks with a branch in the U.K. to ensure that deposits booked at the bank's U.K. branches are *pari passu* with deposits in the bank's U.S. offices in the event of the bank's failure and liquidation. It is essential to address this issue because it goes to the core of international cooperation and parity in resolving banks with an international presence. The FDIC is concerned, however, that the most likely response to this issue—dual payability of foreign branch deposits—will create increased demands on the Deposit Insurance Fund (the "**DIF**").

The PRA's concern in the U.S. bank context apparently arises because an informal opinion by the acting general counsel of the FDIC in 1994[5] stated that foreign branch deposits are not entitled to benefit from the depositor preference provisions in the FDIA. Those provisions, found in Section 11(d)(11) of the FDIA, were added by the Omnibus Budget Reconciliation Act of 1993 (the "**1993 Budget Act**").[6] As discussed below, Section 11(d)(11) was enacted primarily for budgetary reasons based on projected cost savings to the FDIC, and there is no legislative history suggesting that Congress intended that provision to distinguish among depositors based on the location of their deposit. Nonetheless, the 1994 advisory opinion

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4 We also refer the FDIC to the comment letter by the ABA Securities Association, into which many of our members also had input, and which is generally consistent with the views presented in this letter.

5 FDIC Advisory Opinion, *"Deposit Liability" for Purposes of National Depositor Preference Includes Only Deposits Payable in U.S.*, FDIC 94-1 (February 28, 1994).

6 Pub. Law 103-66, 107 Stat. 312 (1993).

concluded, contrary, in our view, to the best reading of the statute, that the depositor preference provisions did distinguish between deposits in U.S. branches and deposits in foreign branches. Although the 1994 advisory opinion was not formally adopted by the FDIC Board of Directors, was not codified in the FDIC's regulations and was not subject to public comment, the PRA has understandably assumed that the 1994 advisory opinion represents the FDIC's official position.

The depositor preference provisions in Section 11(d)(11) of the FDIA give priority to any "deposit liability" of the bank over the claims of general unsecured creditors of the bank in liquidation. Under the 1994 advisory opinion, a foreign branch deposit that is payable only outside the United States is not a "deposit liability", and, consequently, would be subordinate to any "deposit liability" (*i.e.*, U.S. office uninsured deposits and the claims of the FDIC, as subrogee of the holders of insured deposits) in the event of the failure and liquidation of a U.S. bank. The immediate need to address the status of U.K. branch deposits has been triggered by the PRA's proposal, but other jurisdictions are likely to follow the PRA's approach, and even those that do not may implement practices, such as ring-fencing, to ensure the foreign branch depositors in a particular jurisdiction are not subordinate to U.S. branch depositors.

If one accepts the conclusion in the 1994 advisory opinion, the only feasible option available for U.S. banks to satisfy the requirements of the PRA's proposal is to make their U.K. branch deposits "dually payable", that is, payable at *both* the U.K. branch and at an office of the bank in the United States.[7] The Proposed Rule implicitly adopts this "dual payability approach" to address the status of foreign branch deposits in the liquidation of the bank and the concerns of the PRA (and, inevitably, other foreign bank regulators). Although the Proposed Rule would not explicitly classify dually payable deposits as deposit liabilities for purposes of priority in the liquidation of a bank or codify the 1994 advisory opinion, making foreign branch deposits dually payable was described in the Release as the mechanism for U.S. banks to avert subordination of foreign branch deposits under U.S. law.

Accordingly, the direct and immediate effect of the Proposed Rule and Release is to force U.S. banks to make their foreign branch deposits dually payable, initially in the U.K. to comply with the PRA's mandate, and, almost certainly over time, in other jurisdictions to meet the requirements of other countries and market demands.

The Clearing House appreciates the FDIC's efforts to address the serious issue of foreign branch deposit priority. Nonetheless, we are concerned that, rather than address the

[7] The option of "subsidiarization" (transforming the foreign branch into a subsidiary bank) would be so expensive on both an initial implementation and ongoing basis that it is not truly feasible. Subsidiarization would also take substantial time and in some countries may not be available. A legislative clarification of the status of foreign branch deposits is too problematic.

actual source of the concerns over these deposits—the assumption that foreign branch deposits are subordinated as a result of the 1994 advisory opinion—the Proposed Rule attempts to address merely one of its symptoms—the potential effect of dual payability on the liability exposure of the FDIC and DIF. As described below, we believe a superior approach, which both addresses the source of these concerns and avoids the serious adverse consequences that would arise if the Proposed Rule were adopted alone, is an FDIC rulemaking interpreting Section 11(d)(11) to confirm that foreign branch deposits are treated equally, for priority purposes, with U.S. domestic deposits. This will avoid forcing all foreign branch deposits into a dually payable structure. Also, this approach is not exclusive of the Proposed Rule and could be adopted in combination with it.

As discussed below, we believe that this proposed interpretation of Section 11(d)(11) of the FDIA (i) is the best legal interpretation, based on the plain meaning of the FDIA and accepted canons of statutory construction; (ii) is superior from a policy perspective to the dual payability approach that effectively would be implemented if the FDIC adopts the Proposed Rule alone; and (iii) eliminates or minimizes the concerns raised by the FDIC in the Release and other concerns, as discussed below, for the FDIC and U.S. banks that would persist or be created if the Proposed Rule were implemented alone.

II. The Proposed Rule

A. Legal Context of the Proposed Rule

The current text of Section 330.3(e) of the FDIC's regulations,[8] which implements Section 3(*l*) of the FDIA, states that an obligation of a U.S. bank which is payable *solely* at an office of the bank outside the United States and certain U.S. territories is not a "deposit", and therefore, not an "insured deposit", for purposes of Section 330.3 (the FDIC's deposit insurance regulation). This text reflects the plain language of the FDIA which states that foreign branch deposits are not "deposits" under the FDIA, unless "the contract evidencing the [foreign branch deposit] provides by express terms, and not by implication, for payment at an office of the [U.S. bank] located in any State."[9] Under the FDIA there is a long-standing equivalence between the term "deposit" and "insured deposit" because "insured deposit" is defined as the amount due to a depositor "for deposits" in an insured depository institution. Thus, under the FDIA, any "deposit" is also an "insured deposit" up to the applicable FDIC insurance limits.[10]

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[8] 12 C.F.R. § 330.3(e).

[9] 12 U.S.C. § 1813(*l*)(5)(A)(ii).

[10] As will be discussed below, however, this definition of "deposit" for purposes of Section 3(*l*) does not bear on the definition of a different term, "deposit liability", in Section 11(d)(11) of the FDIA.

Foreign branch deposits payable solely at a foreign branch are not "insured deposits" under Section 3(m) and are not eligible for deposit insurance because such deposits are not "deposits" under Section 3(*l*) of the FDIA. In the case of foreign branch deposits that are dually payable, however, they are, by definition, "insured deposits" under Section 3(m) and should be covered by deposit insurance because such deposits satisfy the definition of "deposit" under Section 3(*l*). Indeed, the FDIC has a clear mandate in the FDIA to "insure the deposits of all insured depository institutions…."[11]

The Proposed Rule would add a new Section 330.3(e)(2) to exclude all foreign branch deposits from the definition of "insured deposit" under the FDIC's regulations, even those foreign branch deposits that, by their express contractual terms, provide "for payment at an office of the [U.S. bank] located in any State."[12]

B. Policy Concerns

We do not have serious policy concerns with the Proposed Rule itself as narrowly considered. Rather, our concerns are with the FDIC's apparent related plan, as outlined in the Release, to implement the dual payability approach as the solution to the concerns of the PRA (and, presumably, other foreign regulators) with foreign branch deposit subordination. We have six major concerns.

First, The Clearing House and its members are deeply concerned that the dual payability approach could expose U.S. banks with foreign branches to a material risk with respect to sovereign risk, from which Congress intended to insulate them through Section 25C of the Federal Reserve Act.[13]

Following years of litigation in which a number of courts had held that a home office of a U.S. bank is responsible for repaying obligations of its foreign branches if the branch is precluded from repayment by the act of the sovereign, Congress enacted Section 25C. This statute provides that a bank is not required to repay foreign branch deposits at its offices in the United States if foreign government expropriation or *force majeure* prevents payment of those deposits at the foreign branch, unless the bank has expressly agreed in writing to repay the deposit "under those circumstances".

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[11] 12 U.S.C. § 1821(a)(1)(A).

[12] Obligations of Overseas Military Banking Facilities are expressly excluded from the Proposed Rule, and aspects of the Proposed Rule relating to such facilities will not be addressed in this Letter.

[13] 12 U.S.C. § 633(a).

The Release states that the FDIC's Proposed Rule is not intended to affect the application of Section 25C. Nonetheless, a bank that makes its foreign branch deposits expressly payable in the United States in order to satisfy foreign regulators' concerns regarding foreign branch depositor priority in liquidation will be exposed to almost certain re-litigation of the issues that Congress intended to foreclose by enacting Section 25C, irrespective of the legal merits of the claim because of the large amounts involved. In today's world (*e.g.*, global ring-fencing and the recent proposal for government-imposed losses on depositors in Cyprus), the likelihood of expropriation or similar government action is not as remote as it may seem.

Second, we believe that the Proposed Rule creates unnecessary risk to the DIF. This is of particular concern to The Clearing House members because they would pay the preponderance of the cost to restore any depletion of the DIF. We recognize that any plaintiff seeking to overturn the Proposed Rule, and assert that dually payable deposits are insured deposits, would be confronting a difficult challenge because the FDIC usually should be granted deference in its rulemaking process. Nonetheless, in view of the plain text of the FDIA, which provides for equivalence between the term "deposit" and "insured deposit" and the differing treatment of dually payable deposits for purposes of Sections 3(*l*) and 11(d)(11) as a result of the Proposed Rule, we are concerned that a reviewing court could determine that the Proposed Rule exceeds the FDIC's interpretive authority and vacate the Proposed Rule.

A successful judicial challenge not only would eliminate the policy benefits that the FDIC hopes to achieve, but would also create serious negative consequences, if the FDIC endorses the dual payability approach. If a judicial challenge to the rule were successful, the liabilities of the DIF would be immediately expanded because U.S. banks will have been forced to make a large portion, if not all, of their foreign branch deposits dually payable.[14] If, alternatively, the challenge to the rule were to occur in the context of the failure of a U.S. bank with foreign branches, the immediate pay out requirements could require a significant assessment on the banking industry to recoup the FDIC's losses. Furthermore, a judicial challenge is almost inevitable in the case of a failure because there will be a large, economically motivated class of plaintiffs that could seek to require the FDIC to make insurance payments to them up to the legal limits.

Third, by effectively adopting the 1994 advisory opinion, the Proposed Rule contravenes international resolution standards that have called for an end to discrimination against creditors on the basis of the jurisdiction where a claim is payable. For example, the

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[14] As noted in the Release, the majority of U.S. banks' foreign branch deposits are held in branches in the U.K. Additionally, as noted above, we expect that other jurisdictions will follow the U.K. in demanding that foreign branch deposits in their jurisdiction be afforded parity with U.S. domestic deposits, and, in any event, once dual payability is adopted for the U.K. branches, it may become market practice.

Financial Stability Board's "Key Attributes of Effective Resolution Regimes for Financial Institutions", in which the FDIC has been actively involved, states that:

> National laws and regulations should not discriminate against creditors on the basis of their nationality, the location of their claim or the jurisdiction where it is payable…. Recognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceeding.[15]

In contrast, under the dual payability approach and the Proposed Rule, discrimination against foreign branch depositors would be the general rule, subject only to U.S. banks' taking specific action to technically eliminate subordination. We are concerned that the Proposed Rule's failure to address subordination more directly may hamper the FDIC's efforts to gain international support for single-entry resolution.

Fourth, and relatedly, the Proposed Rule is also likely to result in substantial scrutiny by foreign regulators in order for them to be satisfied that dual payability will work, and some may not accept dual payability as a sufficient protection against foreign branch deposit subordination. They could be concerned that the FDIC's change in the commonly-accepted understanding of dual payability under Section 3(*l*) could be precedent for a subsequent similar change under Section 11(d)(11). Foreign regulators' perception of this risk may be significantly influenced by the fact that the FDIC has never formally adopted an interpretation that dually payable foreign branch deposits will be afforded parity with domestic deposits under the depositor preference provisions in Section 11(d)(11) (the informal 1994 advisory opinion only impliedly, and not directly, reached this conclusion).

Because of the substantial disadvantages of the dual payability approach for U.S. banks, they are likely only to convert deposits to be dually payable on a jurisdiction-by-jurisdiction basis and only when required to do so by a specific jurisdiction or market practice. Even if the PRA were prepared to recognize dual payability as a sufficient mechanism to eliminate foreign branch deposit subordination, other jurisdictions may not be or may impose significant obstacles to making deposits dually payable. Because any future concerns, objections or obstacles raised by foreign regulators will only be known well after banks have already moved at least some of their deposits (for example, in the U.K.) to dual payability, the potential for roadblocks that could render the dual payability approach unacceptable or unworkable in one or more jurisdictions should create a serious concern not only for U.S. banks, but also for the FDIC, from an international regulatory and resolution perspective.

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[15] Financial Stability Board, "Key Attributes of Effective Resolution Regimes for Financial Institutions", Key Attribute 7.4 (Oct. 2011).

Fifth, banks would be required to hold reserves against their foreign branch deposits, which are otherwise exempt from reserve requirements. The Release indicates that this concern should be minimal because the Board of Governors of the Federal Reserve System now pays interest on reserves and allows more flexibility with respect to reserve requirements. These developments, however, do not alleviate the burden of complying with the reserve requirements, and there is obviously no assurance that these relatively new policies will continue indefinitely. Moreover, aside from direct reserve costs, banks will need to build new systems to identify whether a foreign branch deposit is a demand or a time deposit and otherwise to ensure compliance with the reserve requirements.

Sixth, U.S. banks will be required to engage in an administratively challenging and costly process to make their existing foreign branch deposits dually payable, including restructuring of their foreign branch deposit agreements and making otherwise unnecessary operational and technological changes required by a dual payability regime. The process of repapering deposit agreements and obtaining any necessary customer consents will, at a minimum, create confusion and concern in the marketplace.

Furthering this confusion is the fact that, because of the negative consequences to U.S. banks that result from dually payable deposits, U.S. banks are likely to make their foreign branch deposits dually payable only when forced to do so by a foreign regulator, or by market demands, to eliminate foreign branch depositor subordination. This will result in inconsistent treatment of foreign branch deposits across multiple jurisdictions.

Our members also expect that in order to implement dual payability on a broad scale, significant modifications to internal systems would be required, for example, to implement protections against double payment of deposits and to address payment of deposits in multiple currencies.

As will now be discussed, we believe there is a superior alternative to the dual payability approach, which would not create the above concerns or require any actions on the part of U.S. banks or their foreign branch customers.

III. Alternative Proposal

A. The Section 11 Approach

Under Section 11(d)(11), any "deposit liability" of a bank will be given priority over the claims of general unsecured creditors. The term "deposit liability" is not defined in the FDIA or in the FDIC's regulations. The 1994 advisory opinion concluded that the term "deposit liability" under Section 11(d)(11) "is defined with reference to other provisions of United States law" and should be interpreted coterminously with a different term—the FDIA's definition of "deposit". Because foreign branch deposits payable solely at the foreign branch are not

deposits under Section 3(*l*) of the FDIA, the result of the 1994 advisory opinion is to render a foreign branch deposit not a "deposit liability" for purposes of Section 11(d)(11) and, therefore, subordinate to domestic depositors who receive the benefit of the depositor preference provisions. It is critical to note that the 1994 advisory opinion does not provide any statutory language citation, explanation or analysis to support its conclusion. Furthermore, by interpreting the two different statutory terms "deposit" and "deposit liability" coterminously, the 1994 advisory opinion contravenes the presumption in statutory interpretation that, absent a clearly expressed intent otherwise, when Congress uses two different words in the same statute, two different meanings were intended.[16]

The Clearing House strongly believes that the conclusion reached in the 1994 advisory opinion is not the appropriate interpretation of the law. Particularly in view of the policy considerations raised above and the changes in the international regulatory landscape since 1994, the FDIC would clearly be entitled to reach a different legal conclusion today.

As explained below, we believe that the best interpretation of the term "deposit liability" in Section 11(d)(11) is one that includes foreign branch deposits. This interpretation would result in foreign branch deposits' being included within the depositor preference provisions in the FDIA. An interpretation that results in foreign branch deposits' being eligible for the depositor preference provisions would address the PRA's and other jurisdictions' concerns regarding foreign branch deposits, would be self-executing (*i.e.*, banks would not need to amend their deposit agreements) and ultimately would eliminate any incentive for banks to move to dual payability, thus reducing the FDIC's concern regarding the worldwide expansion of FDIC-insured foreign branch deposits.

Therefore, The Clearing House urges that the FDIC issue a formal rulemaking, adopted by the FDIC Board of Directors, that interprets the term "deposit liability" in Section 11(d)(11) as including foreign branch deposits.[17]

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[16] Moreover, there is no basis in statute or legislative history to define the terms "deposit" and "deposit liability" identically. Contrast, for example, the statutory silence on the relationship between "deposit" and "deposit liability" with the statutorily-defined equivalence between the terms "deposit" and "insured deposit", discussed above. This contrast makes it especially clear that the presumption of different meanings when different terms are used in a statute should apply to the terms "deposit" and "deposit liability".

[17] We note that the Section 11 Approach is consistent with the proposal by three law firms who previously provided a memorandum, dated January 2, 2013, to the FDIC on the topic of foreign branch deposit subordination. The Release did not dispute the analysis in that memorandum.

B. Legal Basis for the Section 11 Approach

The Section 11 Approach is consistent with the plain meaning of the term "deposit liability" in Section 11(d)(11), the usage of this term elsewhere in the FDIA and the legislative history of the depositor preference provisions. Our proposed interpretation, although implicitly reversing the 1994 advisory opinion, advances the FDIC's policy objectives discussed above while avoiding negative consequences to the FDIC and to U.S. banks.

1. Statutory Interpretation

Based on the plain meaning of the term and accepted canons of statutory construction, the term "deposit liability" in Section 11(d)(11) should include foreign branch deposits.

The term "deposit liability", which is not otherwise defined in the FDIA or the FDIC's regulations, has no inherent geographic limitation in the statute. There is no inclusion of, and no reference to, the geographic limitation in the definition of "deposit" in Section 3(*l*), which excludes foreign branch deposits payable solely outside the United States. Moreover, under a basic canon of statutory construction adopted by the Supreme Court, "deposit liability" could not be limited by the scope of the different term "deposit" in the FDIA because different terms used in the same statute should have different meanings.[18] Furthermore, if "deposit liability" were interpreted to mean "deposit", the word "liability" in "deposit liability" would be an unnecessary and meaningless word, in violation of another "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[19] Congress chose to use the term "deposit liability" in Section 11(d)(11) rather than the term "deposit" and, in interpreting the FDIA, the FDIC should seek to give utmost effect to this differentiation in

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[18] The Supreme Court has affirmed that "the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004) (citing 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000)). *See also Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702, 1708 (2012) ("We generally seek to respect Congress' decision to use different terms to describe different categories of people or things.") (citing *Sosa* at 711 n. 14 (2004)).

[19] *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). *See also U.S.* v. *Menasche*, 348 U.S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair* v. *Ramsdell*, 107 U.S. 147 (1883)); *U.S.* v. *Nordic Village Inc.*, 503 U.S. 30, 36, (1992) (describing the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect.") (citing *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989)).

terms that Congress chose to employ. If "deposit liability" were interpreted to be conterminous with "deposit", Congress's decision to use the term "deposit liability" would not be given effect. At the very least, the use of a different term creates ambiguity, and the FDIC has clear regulatory authority to resolve this ambiguity by defining the two terms differently.

Another tenet of statutory construction is that the same word used in one place in a statute should be construed consistently with its use in other places in the statute, unless there is a clear indication that Congress intended otherwise.[20] "Deposit liability" or "deposit liabilities" (or the term "liability" in the context of deposit liabilities) is used in multiple sections of the FDIA. In all cases, the usage of the term "liability" suggests a plain-meaning definition more expansive than the geographically-limited definition of "deposit" in Section 3(*l*). For example, the section of the FDIA that authorizes the FDIC to obtain call reports from banks provides that the reports of condition must include "deposit liabilities".[21] The FDIC and other federal banking agencies have long interpreted this reference to "deposit liabilities" as including foreign branch deposits. Indeed, the general instructions for Schedule RC-E to the call report refer to both domestic deposits and foreign branch deposits as "deposit liabilities".[22] Other uses in the FDIA provide similar evidence that "deposit liability" is a different term from the term "deposit".[23]

Some confusion may arise because the term "deposit liabilities" is also used in the definition of "deposit" itself in Section 3(*l*)(5) of the FDIA ("such other obligations…as the [FDIC]…shall find and prescribe to be deposit liabilities by general usage"). Its use in this context, however, strongly suggests that "deposit liabilities" is a broader category of obligations,

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[20] "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *U.S.*, 286 U.S. 427, 433 (1932).

[21] 12 U.S.C. §§ 1817(a)(1) and 1817(a)(2)(A).

[22] "Part I [of the instructions] covers the deposit liabilities of the domestic offices of the consolidated bank. Part II covers the deposit liabilities of the foreign offices...of the consolidated bank." FFIEC: Reports of Condition and Income Instructions, Schedule RC-E, *Deposit Liabilities* (last updated September 2012).

[23] *E.g.*, 12 U.S.C. §§ 1828(a)(4)(A) and (B) (prohibiting false advertising regarding FDIC insurance and misrepresentation of insured status with respect to any "deposit liability"); 12 U.S.C. § 1823(c)(4)(E)(iii) (purchase and assumption transaction may include "uninsured deposit liabilities"); and 12 U.S.C. § 1828(c)(1)(B) (transactions involving the assumption of "liability to pay any deposits (including [foreign branch deposits])" of a bank require approval under the Bank Merger Act; in this provision, Congress made clear that foreign branch deposits are included in the term "liability to pay any deposits").

from which the FDIC may designate some as part of the statutory definition of "deposit".[24] Indeed, the legislative history of this part of Section 3(*l*)(5) demonstrates that Congress intended to give the FDIC "some leeway" to define deposits "because it would be extremely difficult to put all of the definition into an act of this sort."[25] If "deposit liabilities" in Section 3(*l*)(5) were coterminous with "deposit", Section 3(*l*)(5) would give the FDIC the authority to designate any "obligation" as a "deposit", which would not comport with the notion that Congress was giving the FDIC "some leeway".

The 1994 advisory opinion did not address any of these statutory interpretation points.

2. Legislative History

As noted above, the depositor preference provisions in Section 11(d)(11) of the FDIA were part of the 1993 Budget Act. They were enacted to produce projected cost savings to the FDIC for budgeting purposes, rather than as part of a proposal requested by the FDIC.[26] There was no Congressional debate and limited legislative history with respect to these provisions.

We have examined the legislative history that is available and are not aware of any legislative history that suggests that "deposit liability" is limited to the term "deposit" or its use in Section 11(d)(11) was intended to exclude foreign branch deposits or otherwise to distinguish treatment of depositors based on geography. To the contrary, we believe that the relevant committee reports strongly support the notion that "deposit liability" was intended and understood by Congress to be a broad term. For example, the House Budget Committee

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[24] Congress did not use "deposit liabilities" in Section 3(*l*)(5) as a way of saying the FDIC has broad authority to define obligations of a bank to be Section 3(*l*)(5) deposits. In other words, Section 3(*l*)(5) does not say: "deposit" means such other obligations of a bank that the FDIC prescribes to be a "deposit". If it did, there would be no need for the immediately following phrase "by general usage". Section 3(*l*)(5) means the FDIC can define other obligations of a bank to be deposits, only if they are considered deposit liabilities by general usage. The term "deposit liabilities", therefore, by definition should be broader than the term "deposit".

[25] *A Bill to Provide for the Sound, Effective, and Uninterrupted Operation of the Banking System, and for Other Purposes: Hearing on H.R. 5357 Before the H. Comm. on Banking and Currency*, 74th Cong. 55 (1935) (Statement of J. L. E. Birdzell, General Counsel of the FDIC).

[26] Although the FDIC had previously advocated for a national priority standard for distributing the assets of a failed bank, by 1993, the FDIC was no longer advocating such an approach. By that time, the FDIC had other methods to address the concerns that prompted its earlier calls for a depositor preference statute.

Report to Congress stated in the section entitled "Explanation of the Legislation" that the depositor preference provisions "amend[ ] the [FDIA] to require receivers of failed insured depository institutions to give priority to depositors over general creditors when distributing assets of failed banks and thrifts." (emphasis added). The report continued with language that explicitly refers to "all" depositors:

> This means that proceeds from the sales of assets in the future would first go to all depositors—the FDIC or RTC (in place or [sic] insured depositors) and uninsured depositors. Only when all depositors have recovered 100 percent of losses would general creditors recover anything.... As a result of this depositor preference, creditors who are not depositors are unlikely to recover any of their claims on failed institutions." (emphasis added).[27]

There was no suggestion whatsoever of a geographic limitation in any of the legislative history of the 1993 Budget Act. If Congress had intended to exclude foreign branch deposits from the term "deposit liability", it is almost inconceivable that there would have been no mention whatsoever of that intent in the committee reports or Congressional debates on the 1993 Budget Act. Additionally, Congress's approach, since the Banking Act of 1933, has been to exclude foreign branch deposits from a term explicitly, when it actually intends to do so. For example, as discussed above, the definition of "deposit" in Section 3(*l*)(5) of the FDIA, and thus the definition of "insured deposit" in Section 3(m), clearly and explicitly excludes foreign branch deposits that are solely payable outside the United States. The fact that there is no such express exclusion with respect to the term "deposit liability" in Section 11(d)(11) lends further strong support to the notion that Congress would not have been silent if it had intended to subordinate foreign branch deposits to domestic deposits in liquidation.

Moreover, the legislative record is clear that Congress intended to endorse, on a national scale, the practice of 29 states at that time that had depositor preference regimes in place.[28] Of the 29 states with depositor preference statutes at the time the depositor preference provisions were added to the FDIA in 1993, the depositor preference statute of the one state with a number of banks that had foreign branch deposits, California, expressly

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[27] Id. at 95. The report of the House and Senate Conference Committee used similarly broad and general language to describe the preference for depositors under FDIA's depositor preference provisions: "This provision amends the [FDIA] to give depositors a preference over general and subordinated creditors and shareholders when a receiver distributes assets from failed banks and thrifts." Conference Report, HR 103-213, at 436–7 (August 4, 1993).

[28] "Mr. Speaker, the Committee on Banking, Housing and Urban Affairs met its over $3 billion in budget savings through a variety of measures. On the banking side, the committee endorsed the practice of 29 States by adopting a Federal deposit preference scheme." (emphasis added) 103 Cong. Rec. H6150 (August 5, 1993).

included foreign branch deposits in the preference for depositors, even though California borrowed part of the Section 3(*l*) definition of "deposit" in the FDIA.[29] The depositor preference statutes in 26 of the remaining 28 states gave no indication that foreign branch deposits were intended to be excluded from the benefit of priority because they employed broad, general language to describe the class of depositors that would benefit from priority. Indeed, in one of these states, New Hampshire, the statute was quite clear that the term deposit was not limited to the definition of "deposit" in Section 3(*l*) of the FDIA. Two of the 29 states, Florida and Rhode Island, gave priority to "deposits" and defined deposits by reference to Section 3(*l*), without anything further. It is unclear whether these two states intentionally decided to exclude foreign branch deposits of banks or simply chose a readily available definition of a term that is difficult to define.

The 1994 advisory opinion did not engage in any analysis of the legislative history of the 1993 Budget Act.

C. Policy Basis for the Section 11 Approach

As outlined in Section II.B numerous serious policy concerns arise if banks are forced by the Proposed Rule to make U.K. branch deposits dually payable to satisfy the PRA's requirement that U.K. branch deposits be given parity with U.S. domestic deposits in liquidation. None of these concerns would arise, however, if the FDIC adopted the Section 11 Approach. Foreign branch deposits that are solely payable in the foreign branch would receive the same treatment, other than under the FDIC's informal interpretation of Section 11(d)(11), as they do today, and the complications and adverse consequences that accompany a conversion to dual payability would not arise. The only difference is that they would definitively be on parity with U.S. domestic deposits in the event of liquidation. Specifically, the Section 11 Approach would eliminate the potential subordination of foreign branch deposits, as well as (i) preserve the existing protections under Section 25C of the Federal Reserve Act for U.S. banks with respect to sovereign risk associated with foreign branch deposits, (ii) mitigate risks of a judicial challenge of the FDIC's action, including minimizing the policy and financial risks associated with a successful challenge, (iii) allow the FDIC to demonstrate its leadership on issues of cross-border resolution by resolving the source of potential foreign branch depositor subordination, rather than relying on U.S. banks to implement an *ad hoc* fix, thereby aligning the FDIC's policies with international resolution principles, (iv) avoid foreign regulator confusion, and potentially divergent application of dual payability in different jurisdictions globally, by addressing the source of potential foreign branch depositor subordination, (v) preserve the existing treatment

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[29] Westlaw Annotated CA Financial Code, Section 3119.5(a)(3) (1993) ("claims for 'deposits,' as that term is defined in 12 U.S.C. Section 1813(l), but including obligations of the type described in 12 U.S.C. Section 1813(l)(5)(A) and (B)").

of foreign branch deposits with respect to reserve requirements and (vi) avoid costly, complex and confusing changes to depositor account agreements and bank systems.

D. The Section 11 Approach as a Supplement to the Proposed Rule

The primary policy objective of the Proposed Rule is to minimize the exposure of the DIF if banks create dually payable deposit accounts. This DIF exposure is a product of two factors: (i) the potential that banks will create dually payable deposits; and (ii) the fact that under Sections 3(*l*) and 3(m) of the FDIA, foreign branch deposits that are dually payable will be insured. The Proposed Rule is directed solely to the second of those factors, and it exacerbates the first. Indeed, adoption of the Proposed Rule alone will effectively force U.S. banks to make their foreign branch deposits dually payable, because, in light of the 1994 advisory opinion, dual payability will be the only feasible approach to address the issue of subordination of foreign branch deposits in liquidation.

Absent dual payability as the only feasible approach to address the subordination issue, it appears unlikely that dually payable deposits would be created. U.S. banks have not implemented the dual payability approach for foreign branch depositors, even after enactment of the 1993 Budget Act, because the banks see the same risks associated with dual payability discussed above, such as insurance, Section 25C risk and reserve requirements. Moreover, there has not been any significant market demand for dually payable deposits in the 20 years since enactment of the 1993 Budget Act, notwithstanding the 2008 financial crisis and the multiple subsequent crises in Europe. If the Section 11 Approach were adopted, dual payability would not be the only feasible approach to address the subordination issue, because the Section 11 Approach addresses the source of the potential subordination of foreign branch deposits without requiring that foreign branch deposits be made dually payable.

Adoption of the Section 11 Approach, in conjunction with the Proposed Rule, therefore, would eliminate the motivation for dually payable deposits without compromising the FDIC's efforts to deal with the potential exposure of the DIF if foreign branch deposits were made dually payable, and thus, insured. For this reason alone, the combination of the Section 11 Approach and the Proposed Rule would sharply reduce the DIF exposure in comparison to the Proposed Rule alone. Moreover, we believe that this combined approach would strengthen the FDIC's legal position because dually payable deposits would not be treated differently under Sections 3(*l*) and 11(d)(11). The Section 11 Approach would avoid the need for U.S. banks to create dually payable deposits to satisfy the PRA, but, if U.S. banks were forced into a dual payability approach for other reasons, such dually payable deposits would still not be insured deposits under the Proposed Rule.

E. Reconsideration of the 1994 Advisory Opinion

We can think of no reason why the FDIC would not adopt the Section 11 Approach (or the Section 11 Approach as a supplement to the Proposed Rule) other than it

would be inconsistent with the 1994 advisory opinion. We do not believe that allegiance to the 1994 advisory opinion is a valid reason to proceed only with the Proposed Rule, such that banks are forced to adopt dual payability to satisfy the PRA, when the result clearly creates adverse negative consequences for the FDIC and U.S. banks and when a simpler and more effective alternative approach, the Section 11 Approach, is available. The 1994 advisory opinion could be replaced either because it was never the best reading of the statute or because conditions have changed.

First, as discussed above, there is no real legal basis for the asserted conclusion reached in the 1994 advisory opinion. No explanation was offered, either with respect to the rationale for the opinion or what other options were considered (if any were considered at all). The maxims of statutory interpretation and the legislative history discussed above were apparently not considered. Indeed, the limited explanatory statements made appear to be incorrect. The 1994 advisory opinion states that the term "deposit liability" in Section 11(d)(11) "is defined with reference to other provisions of United States law" when, in fact, there is no reference in Section 11(d)(11), implicit or explicit, to "United States law", much less to the definition of "deposit" in Section 3(*l*). The 1994 advisory opinion also apparently assumed that its interpretation would not negatively affect the FDIC's ability to resolve an insured bank with cross-border operations on a "single entity" basis, which is not accurate because an interpretation of "deposit liability" that excludes foreign branch deposits provides foreign regulators with a powerful incentive to interfere with, rather than cooperate with and facilitate, the FDIC's resolution of an insured bank with foreign branches—a concern that the 1994 advisory opinion appears not to have considered.[30]

Second, the 1994 advisory opinion was an informal opinion by an Acting General Counsel nearly 20 years ago. It was not adopted by the FDIC's Board of Directors and is not one of the FDIC's formal numbered General Counsel opinions. Notwithstanding its significance to the FDIC, U.S. banks and international resolution, it was not subject to a public comment period. Its informality and the passage of time since it was written provide the FDIC with the flexibility to revisit its conclusions and adopt the Section 11 Approach. Indeed, we submit that the FDIC should adopt the Section 11 Approach as the FDIC's first binding interpretation of the term "deposit liability" in Section 11(d)(11) and thereby reverse the 1994 advisory opinion *sub silentio*.

[30] The 1994 advisory opinion stated: "The adoption of a national depositor preference scheme for the distribution of the assets of a failed insured depository institution does not necessitate a change in the use of the single entity approach in a multinational liquidation….The adoption of national depositor preference, however, would affect the priority and payment of the claims of creditors of the receivership estate once the assets of the estate have been marshalled under the doctrine and liquidated."

Third, based on the 1994 advisory opinion's informality, lack of reasoning, incorrect assumptions and failure to consider both the relevant tools of statutory interpretation and other options, we believe the 1994 advisory opinion would not be afforded judicial deference if challenged.[31]

Fourth, we believe the FDIC would be less exposed to legal and financial risk from a revision of the 1994 advisory opinion, in light of both the inherent flaws in the opinion and the subsequent change in circumstances, than from a reinterpretation of whether a dually payable deposit is an "insured deposit", particularly given the strong economic incentives for plaintiffs to challenge the Proposed Rule in the event of a liquidation if the dual payability approach is implemented.

F. Deference

We believe that the FDIC's adoption of the Section 11 Approach clearly would be entitled to *Chevron* deference if it were challenged.[32] The Supreme Court has upheld agencies' ability to revise even their formal prior actions and opinions when there is a reasoned basis supporting the agency's revision. Because the 1994 advisory opinion was never formally adopted by the FDIC and contains no supporting reasoning, its reversal by the FDIC should be of especially little concern. In these circumstances, the FDIC's reversal of the 1994 advisory opinion by adopting the Section 11 Approach would not alter the strength of the deference that should be afforded the FDIC.[33] Indeed, the *Chevron* court expected agencies to continually review and reconsider the wisdom of their prior policies: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[34]

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[31] *See*, *e.g*., *Petroleum Communications, Inc*. v. *F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action.").

[32] See *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[33] "[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" *Nat. Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967, 981 (2005) (quoting *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).

[34] *Chevron* 467 U.S. at 863–864.

In conclusion, The Clearing House appreciates the FDIC's attention to the issue of foreign branch deposit priority. As discussed above, however, we do have serious concerns with the Proposed Rule's silence on the question of depositor preference under Section 11(d)(11), which thereby has the effect of forcing U.S. banks to convert their foreign branch deposits to be dually payable, initially in the U.K. and likely in other jurisdictions over time. We urge the FDIC to consider the Section 11 Approach, either by itself or as a supplement to the Proposed Rule. We believe the FDIC should adopt an approach that accomplishes its policy goals and minimizes cost, complexity and the risk of loss to the FDIC and the U.S. banking system. Unlike the Proposed Rule alone, we believe the Section 11 Approach meets this test. The 1994 advisory opinion should not prevent the FDIC from taking a strong, proactive stance to resolve a serious issue for the DIF, U.S. banks and for international regulatory cooperation.

If you have any questions or need further information, please contact me at (202) 649-4628 or at John.Court@theclearinghouse.org.

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