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Report of the State of New York Banking Department Superintendent's Advisory Committee on Transnational Banking Institutions - Summary of Recommendations

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Report of the State of New York Banking Department Superintendent's Advisory Committee on Transnational Banking Institutions—Summary of Recommendations**

I. General Recommendations

The U.S. regulatory system should permit foreign banks engaged in wholesale banking to continue to do business in the branch/agency form rather than requiring that they establish subsidiaries.

Home and host country supervisors of transnational banks should exchange information more systematically in order to better coordinate their supervision.

The New York Banking Department should continue to play an important role as a regulator and supervisor of transnational banks.

States which license significant numbers of offices of foreign banks, the Office of the Comptroller of the Currency, and the Federal Reserve System should coordinate their efforts to achieve efficiency as well as sound regulation.

The Conference of State Bank Supervisors should coordinate the activities of the states which have significant numbers of offices of foreign banks.

II. Criteria for Entry

The criteria for entry that New York currently uses are basically appropriate. In addition, the Superintendent should require consolidated and comprehensive supervision by a responsible home country regulator who should commit to cooperate with New York authorities.

*Chair of the Committee.

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“Consolidated” supervision should include supervision of all branches, wherever located, of all bank investments, including subsidiaries, wherever located, but not necessarily supervision of companies which control banks or are under common control with them. Home country supervision of a holding company should be required if it is necessary to provide consolidated supervision of a banking group or if transactions between a supervised bank and its holding company or affiliates are not regulated.

“Comprehensive” supervision should require that the home country supervisor have processes and procedures that are designed reasonably to assure that the supervisor know the bank’s financial condition, including capital position and asset quality, and the bank’s management capability on a current basis.

New York should enact a statute to accord other regulators’ confidential documents the same degree of confidentiality as documents generated by the Banking Department.

The Banking Department should make its reports on foreign bank offices available to home country supervisors on a confidential basis.

Encourage home country regulators to provide information to the Banking Department on a confidential basis.

The Banking Department should supplement information from home country supervisors by continuing and expanding its use of banking sources as a means of monitoring the financial strength of foreign banks with licensed offices in New York.

The Banking Department should require all foreign banks with branches or agencies in New York to adhere to BIS capital standards.

Continue to investigate banks’ controlling owners as an important part of the application process.

Require foreign banks establishing offices in New York to be able to make information available to law enforcement authorities in New York at least as freely as Swiss banks.

Require banks that establish branches or agencies in New York to affirm that their worldwide capital stands behind the liabilities of the New York office.

Continue to admit well-managed, well-capitalized banks to do business in New York even if their home countries have financial instability if the Superintendent is satisfied that restrictions placed on them will protect those who deal with them.

Apply less stringent standards to representative office applications than to branch and agency applications, provided that the applying bank has a sound business plan that does not include soliciting retail deposits and a reputation for integrity. Home country supervision of representative offices need not meet all entry criteria for branches and agencies.

Not all entry criteria should be established by statute. The Banking Board should be enabled to promulgate regulations regarding criteria.

Over an unspecified period of time, existing offices gradually should be brought into compliance with new entry standards.

III. Forms of Organization Available

Branch powers presently exercised are appropriate and are not significantly changed by FDICIA. Branches should continue to be able to hold nonretail deposit accounts that fall below \$100,000.

Require agencies to adhere to the same loans-to-one-borrower rules and 5 percent asset pledge as branches; if agencies then have no different functions from branches, they should be phased out and converted into branches without a new application.

In order to assure that all branches or agencies have a minimum asset pledge amount, modify the pledge requirement to the greater of (i) 5 percent of deposits not including IBF deposits, (ii) 1 percent of deposits including IBF deposits, or (iii) \$1 million.

Subject all representative offices to licensure, examination and supervision.

Permit representative offices to engage in loan-related activities that are wholesale in nature as defined by the Superintendent, provided that they take no deposits or cash for any purpose, advance no cash, issue no letters of credit or other obligations, and solicit no retail deposits.

Prohibit representative offices from soliciting retail deposits, and make violation of this prohibition a criminal offense.

Prohibit representative offices from occupying ground floor space or space near a money transmitter, except with the approval of the Superintendent.

The Superintendent should continue to license banking-type article XII investment companies.

The Banking Department should supervise banking-type article XII companies like banks and should continue to maintain capital standards, to regulate transactions with affiliates in a manner that prevents abuse and to apply diversification and loans-to-one-borrower standards.

Article XII companies should be permitted to have nondepository fiduciary powers.

Change the name of article XII companies from "investment companies" to a name that would be less confusing.

IV. Regulation of Owners

Foreign banks with unincorporated offices in New York should be required to obtain approval for 25 percent-or-greater changes in control. Permit them to make application for change in control approval either before or after the change.

Change in control approval should not be required if either (i) the servicing bank already is licensed to do business in New York, or (ii) the transaction has been approved by the bank's home country supervisor under procedures that are acceptable to the Superintendent.

Require parties applying for change in control approval to submit to the jurisdiction of the state for purposes of enforcing laws related to the ownership of the bank.

V. Offshore Branches

Clarify the definition of a New York branch liability by means of a specific documentary test, as outlined in the Liquidation section below. Under this test, the branch designated to carry the transaction on its books should be the determinative factor.

Records should be required to be kept in New York for all transactions effected by New York personnel.

No retail deposits of U.S. persons (as defined by the Superintendent) should be taken or solicited for offshore branches in New York.

New York activities of offshore branches should be subject to New York examination and supervision.

VI. Examination Issues

The Banking Department should seek to use and evaluate the work of others where appropriate and should coordinate its examinations with federal authorities.

The Banking Department should have a professional staff that specializes in examining foreign banks.

The Banking Department should continue to accept filings on federal forms, where possible, to avoid duplication.

The Banking Department should continue to require each foreign bank to maintain appropriate internal controls for off-balance-sheet transactions and should consider requiring outside auditors to opine on the adequacy of such controls.

The Banking Department should assure itself that appropriate internal controls are in place at any office which has a large payments volume in relation to its asset size.

VII. Supervision of Branches/Agencies to Protect New York Creditors

When foreign banks doing business in New York show signs of financial weakness or other instability or their home country shows such signs, the Banking Department should implement a program that promotes asset diversification, restricts due-from-home-office accounts, protects against netting agreements, and imposes an asset maintenance regime. Off-balance-sheet obligations should be taken into account in administering asset maintenance.

Branches and agencies should not be required to maintain their own loan loss reserves unless they are subject to asset maintenance or the Banking Department is not satisfied that the bank as a whole maintains adequate reserves.

The law should permit netting agreements and no change in New York law on setoff is proposed, except that weak banks or banks from weak countries should be required to maintain accounts that are not subject to netting agreements.

Prohibit banks subject to asset maintenance from engaging in detrimental non-arm's-length transactions with home office or affiliates.

VIII. License Termination

Expand the grounds for license termination to include such entry standards as the Banking Board may designate.

A hearing should be required before license termination.

The Superintendent should be empowered to supervise and continue to examine the withdrawal of any terminated licensee.

IX. Liquidation Issues

New York creditors should continue to have a preference with respect to New York assets.

Amend New York law to provide that the Superintendent shall pay excess assets first to liquidators in other U.S. jurisdictions which have reciprocal arrangements, second to liquidators in other U.S. jurisdictions, in each case in proportion to any shortfall that they experience, and then any remainder to home country liquidators. The IBA should be amended to change the existing rule that if there is a federal branch of a failed bank, then all U.S. offices are to be liquidated under the federal rules.

The definition of New York creditors should be amended to establish a clear test for liquidations under which the place a transaction is booked is presumed to be correct. The law should require written or electronic advices in all liability transactions, and this advice should be required to designate the office for whose account the transaction is performed. The advice, if genuine, not clearly a mistake, and not promptly objected to, would be conclusive.

Foreign exchange, interest rate, and commodities transactions should be governed by similar rules defined by the Banking Board.

Damage of a tortious or fraudulent nature caused by New York personnel should be a New York liability in New York office liquidations.

No change is required in the definition of New York assets.

The Superintendent, as liquidator under the Banking Law, should have the benefit of a rule similar in substance to the federal rules under the *D'Oench Duhme* case.

The Superintendent should have explicit power to disaffirm executory contracts for real estate, goods, services or employment with no claim for future obligations accruing after the date of disaffirmance.

Qualified executory financial contracts (QFCs), which include futures, forward, swap, and similar contracts, should be deemed terminated at the time the Superintendent takes possession and damages should be deemed terminated at the time the Superintendent takes possession and damages should be assessed to either side based on market profit or loss at that time.

The liability side of a QFC should govern whether the transaction is deemed a New York transaction for liquidation purposes.

The Bankruptcy Act should be clarified to make clear that New York law governs the liquidation of assets defined as assets of a New York branch under New York law.

The law should be made clear that the Superintendent is entitled to the appointment of a single judge to handle a liquidation.

The Superintendent's power to compromise claims should be increased from \$250 to \$25,000.

The Superintendent should be allowed sixty days rather than thirty days to rule on claims.

There should be an automatic stay of pending litigation against a branch or agency after the Superintendent has taken possession.

Contracts with service providers entered into by the Superintendent as liquidator should not require approval of the State Comptroller.

X. Banking Department Funding

The Banking Department should have independent budgetary authority so that it can pay salaries necessary to attract and retain the personnel necessary to supervise foreign banks and so that it can incur the necessary costs attendant to playing an important role in the supervision of transnational banks.