

FDIC

Federal Deposit Insurance Corporation
550 17th Street NW, Washington, D.C. 20429-9990

Legal Division

August 17, 2004

Mr. Robert A. Singer
Brooks, Pierce, McLendon, Humphrey, & Leonard, L.L.P.
P.O. Box 26000
Greensboro, North Carolina 27420

Subject: Finistar, Inc.

Dear Mr. Singer:

Thank you for your letter dated August 5, 2004, requesting confirmation of your legal conclusions concerning deposit insurance coverage under 12 C.F.R. 330 for public unit accounts belonging to a state, county, municipality or political subdivision established using the proposed Finistar program.

In your letter you indicated Finistar would enter into a Custodial Agreement with an insured bank duly qualified to receive deposits exceeding FDIC insurance limits ("Fiscal Agent"), and a public unit ("Public Depositor"). Under that agreement, the Fiscal Agent as fiduciary and custodian for Public Depositor, would receive funds from the Public Depositor and place them in a custodial account ("Custodial Account") maintained by the Fiscal Agent in the name of the Public Depositor. Both Fiscal Agent and Finistar would maintain deposit account records for this account. The Custodial Account of each Public Depositor may be a subaccount of a master Custodial Account maintained by the Fiscal Agent.

Finistar, as agent for the Public Depositor, and the Fiscal Agent, acting as fiduciary, custodian and agent for the Public Depositor, would open negotiable order of withdrawal accounts ("Master NOW Account") in the name of the Fiscal Agent and for the benefit of the Public Depositor at selected FDIC-insured banks ("Participating Banks"). Finistar would also enter into agreements with each Participating Bank in which the Participating Bank would agree to accept Public Depositor deposits from the Fiscal Agent and Finistar would act as third-party recordkeeper for the Participating Bank in connection with these accounts.

Fiscal Agent would disburse Public Depositor funds to Master NOW Accounts at Participating Banks as directed by Finistar. Less than \$100,000 of the Public Depositor funds would be deposited in each Master NOW Account. The Master NOW Account may be a subaccount of a Master NOW Account.

A Public Depositor may authorize Finistar to direct the Fiscal Agent to make transactions of Public Deposit funds held in the Master NOW Account, such as withdrawals, transfers, continue deposit

accounts beyond the initial term, or other action.

Finistar would act as third party record-keeper of deposit account records for the Master NOW Accounts and will keep records on the Custodial Account. The Fiscal Agent would maintain records for the Custodial Account. Such records will be regularly reconciled.

The Fiscal Agent is described in your letter as a fiduciary or custodian. We understand, however, that the Fiscal Agent will not be handling the funds at issue through a trust department. For this reason, the Fiscal Agent may be an ordinary depository institution with respect to the funds and not a true fiduciary. In any event, we agree with you that the funds held by the Fiscal Agent will be insured to each Public Depositor under 12 C.F.R. 330.15 provided that the FDIC's disclosure requirements (as described below) are satisfied. One method of satisfying these requirements is simply to open an account at the Fiscal Agent in the name of each Public Depositor (such as "Public Depositor" or "Finistar as Custodian for Public Depositor"); another method is to open an account designated as an agency or custodial account for multiple "Public Depositors" (such as "Custodial Account for Public Depositors" or "Finistar as Custodian for Public Depositors"). Assuming that Finistar maintains records reflecting the amount of funds owned by each Public Depositor, such funds will be insured to each Public Depositor up to the \$100,000 limit (in aggregation with any other deposits held by the same Public Depositor at Fiscal Agent). See 12 C.F.R. 330.7; 12 C.F.R. 330.15.

We note that Finistar will be engaged in facilitating the placement of deposits with insured depository institutions. As such, Finistar will be a deposit broker. See 12 U.S.C. § 1831f(g); 12 C.F.R. 337.6(a)(5). You have advised us that the institutions participating in your program will be well capitalized. An insured institution may not accept brokered deposits if 1) it is undercapitalized; or 2) is adequately capitalized and has not obtained a waiver to accept brokered deposits. See 12 U.S.C. § 1831f(a); 12 C.F.R. 337.6(b).

Based on the facts as we understand them, we agree that the Public Depositor funds would satisfy the definitional requirements of 12 C.F.R. § 330.15 and would be separately insured as public unit accounts. An account may be insured to a person other than the named account holder, but only if the insured bank's deposit account records expressly disclose, using specific references, that the account is held by someone other than the actual owner of the funds pursuant to a fiduciary relationship. Opening the Custodial account in the name of the Public Depositor would satisfy the requirements of 12 C.F.R. 330.5

As you noted in your letter, 12 C.F.R. 330.5(b) recognizes a claim for deposit insurance coverage based on a fiduciary relationship only if that relationship is expressly disclosed, by specific references, in the insured bank's deposit account records. The details of the relationship and the interests of other parties must be ascertainable either from the deposit account records of the insured institution or from records maintained in good faith by the depositor or the depositor's agent. No claim for insurance based on fiduciary relationship will be recognized in the absence of disclosure in the deposit account records.

The FDIC may determine, in its sole discretion, that the deposit account and the underlying account records sufficiently indicate such a relationship, such as where the account is held by a company whose business is to hold deposits and securities for others. Also, where multi-tiered

fiduciary relationships exist, the regulation provides two alternative methods of satisfying these disclosure requirements: 1) expressly indicate in the deposit account records the existence of each and every level of fiduciary relationships and disclose at each level the names and interests of the person(s) on whose behalf the party at that level is acting; or 2) expressly indicate in the deposit account records that multiple levels of fiduciary relationships exist, disclose the existence of additional levels in records maintained in good faith in the regular course of business by parties at subsequent levels, and disclose at each level, the names and interests of the person(s) on whose behalf the party at that level is acting.

Based on the information provided in your letter, the Finistar accounts would be insured based on a fiduciary relationship, provided that the banks' deposit account records contain the disclosures required by 12 C.F.R. 330.5(b). Under 330.5(a)(2), the interest of each beneficial owner may be determined on a fractional or percentage basis. Under 330.5(a)(1), however, if the FDIC has reason to believe the deposit account records misrepresent the actual ownership of deposited funds, the FDIC may consider all available evidence and pay claims for insured deposits based on the actual rather than any misrepresented ownership.

If you have additional questions regarding this matter, please do not hesitate to contact me at (202)898-7400, or by e-mail at mborzillo@fdic.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle M. Borzillo". The signature is fluid and cursive, with the first name being the most prominent.

Michelle M. Borzillo
Counsel
Supervision and Legislation Section