unless exempted from the notice requirement by Treasury Department regulation.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's requests to OMB for renewal of this collection. All comments will become a matter of public record.

Dated at Washington, D.C., this 10th day of March, 2000.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 00–6710 Filed 3–16–00; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

General Counsel's Opinion No. 12, Engaged in the Business of Receiving Deposits Other Than Trust Funds

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of General Counsel's Opinion No. 12.

SUMMARY: Section 5 of the Federal Deposit Insurance Act provides that an applicant for deposit insurance must be ''engaged in the business of receiving deposits other than trust funds.'' The statute has included this phrase since 1950. During the past half century the FDIC has construed the phrase so as to accommodate the evolving nature of banking. The phrase has been interpreted on a case-by-case basis to encompass non-traditional banks that do not accept unlimited non-trust deposits from the general public.

This long-standing interpretation is confirmed in this General Counsel's opinion. As set out in this opinion, the statutory requirement of being ''engaged in the business of receiving deposits other than trust funds'' is satisfied by the continuous maintenance of one or more non-trust deposits in the aggregate amount of $500,000.

FOR FURTHER INFORMATION CONTACT: Christopher L. Hencke, Counsel, Legal Division, (202) 898–8839, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

Text of General Counsel's Opinion

General Counsel's Opinion No. 12, Engaged in the Business of Receiving Deposits Other Than Trust Funds

By William F. Kroener, III, General Counsel

Introduction

The FDIC is authorized to approve or disapprove applications for federal deposit insurance. See 12 U.S.C. 1815. In determining whether to approve deposit insurance applications, the FDIC considers the seven factors set forth in the Federal Deposit Insurance Act (FDI Act). These factors are (1) the financial history and condition of the depository institution; (2) the adequacy of the institution's capital structure; (3) the future earnings prospects of the institution; (4) the general character and fitness of the management of the institution; (5) the risk presented by the institution to the Bank Insurance Fund or the Savings Association Insurance Fund; (6) the convenience and needs of the community to be served by the institution; and (7) whether the institution's corporate powers are consistent with the purposes of the FDI Act. 12 U.S.C. 1816. Also, the FDIC must determine as a threshold matter that an applicant is a ''depository institution which is engaged in the business of receiving deposits other than trust funds * * *.'' 12 U.S.C. 1815(a)(1). Applicants that do not satisfy this threshold requirement are ineligible for deposit insurance.

The FDIC applies the seven statutory factors in accordance with a ''Statement of Policy on Applications for Deposit Insurance.'' See 63 FR 44752 (August 20, 1998). The Statement of Policy discusses each of the factors at length; however, it does not address the threshold requirement that an applicant be ''engaged in the business of receiving deposits other than trust funds.''

The threshold requirement for obtaining federal deposit insurance is set forth in section 5 of the FDI Act. See 12 U.S.C. 1815(a)(1). The language used by section 5 (''engaged in the business of receiving deposits other than trust funds'') also appears in section 8 and section 3 of the FDI Act. Under section 8, the FDIC is obligated to terminate the insured status of any depository institution ''not engaged in the business of receiving deposits, other than trust funds * * *.'' 12 U.S.C. 1818(p). In section 3, the term ''State bank'' is defined in such a way as to include only those State banking institutions ''engaged in the business of receiving deposits, other than trust funds * * * .'' 12 U.S.C. 1813(a)(2). This definition is significant because the term ''State bank'' appears in a number of sections of the FDI Act.

For many years the FDIC has applied the statutory phrase on a case-by-case basis. In applying the phrase, the FDIC has approved applications from institutions that did not intend to accept non-trust deposits from the general public. The FDIC has thus found that the acceptance of non-trust deposits from the public at large is not a necessary component of being ''engaged in the business of receiving [non-trust] deposits.'' The acceptance of non-trust deposits from a particular group (such as affiliates or trust customers) has been deemed by the FDIC to be sufficient.

Prior to 1991 the Office of the Comptroller of the Currency (OCC) was responsible for determining whether new national banks would be ''engaged in the business of receiving [non-trust] deposits.'' See 12 U.S.C. 1814(b) (1980). The OCC similarly never adopted an interpretation that would require new national banks to accept non-trust deposits from the general public.

The long-standing practices of the FDIC and the OCC have not been sufficient to remove all questions as to the proper interpretation of being ''engaged in the business of receiving deposits other than trust funds.'' Questions have arisen from time to time about the application of the agencies' long-standing interpretation in the context of certain non-traditional depository institutions, such as credit card banks and trust companies.

The purpose of this General Counsel's opinion is to clarify the Legal Division's interpretation of being ''engaged in the business of receiving deposits other than trust funds.'' Although the primary purpose of this opinion is to provide guidance to applicants for deposit insurance under section 5 of the FDI Act, the interpretation in this opinion also applies to section 8 (dealing with terminations) and section 3 (definition of ''State bank'').

Factors

A number of factors must be considered in determining whether a depository institution should be regarded by the FDIC as ''engaged in the business of receiving deposits other than trust funds.'' These factors are (1) the statutory language; (2) the legislative history; (3) the practices of the FDIC and the OCC; (4) construction with other federal banking law; (5) the relevant case law; and (6) State banking statutes. Below, each of these factors is considered in interpreting the statutory phrase in the FDI Act.

Statutory Language

Under section 5 of the FDI Act an applicant cannot obtain federal deposit insurance unless it is ''engaged in the business of receiving deposits other than trust funds.'' 12 U.S.C. 1815(a)(1). The Act does not define ''engaged in the business of receiving deposits other than trust funds''; however, it defines ''deposit'' and ''trust funds.'' See 12 U.S.C. 1813(l); 12 U.S.C. 1813(p). The former term (''deposit'') includes but is not limited to the latter term (''trust funds''). See 12 U.S.C. 1813(l)(2). The latter term is defined as funds held by an insured depository institution in a fiduciary capacity, including funds held as trustee, executor, administrator, guardian or agent. See 12 U.S.C. 1813(p).

An applicant cannot be insured by the FDIC if it receives ''trust funds'' alone. Under section 5, it also must be engaged in the business of receiving non-trust or non-fiduciary deposits. Generally, the FDI Act defines ''deposit'' as the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness or other such certificate. See 12 U.S.C. 1813(l)(1).

The corollary to section 5 of the FDI Act is section 8. Under the latter section the FDIC must terminate the insured status of any depository institution ''not engaged in the business of receiving deposits, other than trust funds * * *.'' 12 U.S.C. 1818(p). Significantly, section 8 does not provide for any judicial determination of whether a depository institution is ''not engaged in the business of receiving [non-trust] deposits'' or judicial review of the FDIC's finding on this issue. Rather, section 8 provides that the FDIC's finding is ''conclusive.'' See *id.*

The statutory phrase (''engaged in the business of receiving deposits, other than trust funds'') also appears in section 3. In that section, the term ''State bank'' is defined in such a way as to include only those State banking institutions ''engaged in the business of receiving deposits, other than trust funds * * *.'' 12 U.S.C. 1813(a)(2).

The statutory language is not unambiguous but requires interpretation by the FDIC in a number of respects. The statute does not specify whether a depository institution must hold a particular dollar amount of deposits in order to be ''engaged in the business of receiving [non-trust] deposits.'' Similarly, the statute does not specify whether a depository institution must accept a particular number of deposits within a particular period in order to be ''engaged in the business of receiving [non-trust] deposits.'' In addition, the statute does not specify whether a depository institution must accept non-trust deposits from the general public as opposed to accepting deposits from one or more members of a particular group (such as affiliates or trust customers). All these questions are unanswered and left to the FDIC for consideration and determination.

One possible interpretation is that an insured depository institution must receive a continuing stream of non-trust deposits from the general public. The statute refers to the ''receiving'' of ''deposits''; however, the statute also defines ''deposit'' in such a way as to equate ''receiving'' and ''holding.'' See 12 U.S.C. 1813(l)(1). Moreover, the statute recognizes that a single deposit can be accepted or ''received'' many times through rollovers. See 12 U.S.C. 1831f(b) (dealing with the acceptance of brokered deposits). Thus, the word ''receiving'' in the statute can be reconciled with the holding—and periodic renewal or rollover—of a single certificate of deposit. Similarly, the plural word ''deposits'' is not inconsistent with the holding of a single deposit account because multiple deposits of funds can be made into a single account. A depositor might, for example, make a deposit of funds every month into the same account. The accrual of interest would represent an additional deposit into the same account. In the case of a certificate of deposit, the deposit would be replaced with a new deposit at maturity.

The ambiguity of the statutory language results from the nature of the banking business. The opening of a deposit account does not represent a completed, isolated transaction. Rather, the opening of an account initiates a continuing business relationship with periodic withdrawals, deposits, rollovers and the accrual of interest. For this reason the statutory phrase (''engaged in the business of receiving deposits other than trust funds'') can be interpreted as encompassing the holding of one or few non-trust deposit accounts. Nothing in the statute specifies that an institution must receive a continuing stream of non-trust deposits from the general public.

Legislative History

The phrase ''engaged in the business of receiving deposits'' can be traced to the Banking Act of 1935 (Pub. L. 74–305). In that Act the term ''State bank'' was defined as any bank, banking association, trust company, savings bank or other banking institution ''which is engaged in the business of receiving deposits.'' This qualification has been retained in the FDI Act, which also defines ''State bank'' in such a manner as to include only those institutions ''engaged in the business of receiving deposits, other than trust funds.'' 12 U.S.C. 1813(a)(2).

The qualification relating to ''trust funds'' can be traced to the Banking Act of 1950 (Pub. L. 81–797). In the applicable House Report the purpose of this qualification is explained as follows: ''The term 'State bank' is redefined to exclude banking institutions (certain trust companies) which do not receive deposits other than trust funds. There appears to be no necessity for such institutions being insured, as they place most of their uninvested funds on deposit in insured banks, retaining only nominal amounts, if any, in their own institutions.'' H.R. Rep. No. 2564, reprinted in 1950 U.S.C.C.A.N. 3765, 3768. The term ''nominal amounts'' refers to uninvested trust funds held by the institution; it does not apply to non-trust deposits.

The House Report indicates that a trust company cannot obtain insurance if it does not receive any non-trust deposits. It provides no guidance, however, as to whether a trust company can be insured if it accepts a small amount of non-trust deposits from a particular group (such as affiliates or trust customers) as opposed to a large amount or continuing stream of non-trust deposits from the general public. In essence, the House Report simply paraphrases the statutory language that an insured depository institution must be ''engaged in the business of receiving deposits other than trust funds.''

A more useful reflection of Congressional intent may be found in legislation enacted after the FDIC and

the OCC had begun to interpret the statutory language. As discussed below, this subsequent legislation indicates that Congress neither modified nor indicated any disagreement with the broader construction given to the statutory phrase by the FDIC and the OCC.

Practices of the FDIC and the OCC

The FDIC has acted on a case-by-case basis in determining whether depository institutions are ''engaged in the business of receiving deposits other than trust funds.'' The FDIC has never adopted a formal interpretation or set of guidelines. Under section 5 the FDIC for many years has approved applications for deposit insurance from non-traditional depository institutions with few non-trust deposits. This practice began at least as early as 1969 with Bessemer Trust Company (Bessemer) located in Newark, New Jersey. Originally, Bessemer was an uninsured trust company that accepted no deposits except deposits related to its trust business. In 1969 Bessemer decided to offer non-trust checking accounts to its trust customers. Bessemer did not offer non-trust deposit accounts to the general public. Notwithstanding this fact, the FDIC approved Bessemer's application for deposit insurance.

In the 1970s the FDIC approved more applications from banks that intended to serve limited groups of customers. Again, the FDIC did not object to the fact that the banks did not intend to accept non-trust deposits from the general public. Some of these banks were ''Regulation Y'' trust companies under the Bank Holding Company Act (BHCA). See 12 U.S.C. 1843(c); 12 CFR Part 225. The FDIC took the position that the statutory language (''engaged in the business of receiving [non-trust] deposits'') should be construed very broadly so as to promote public confidence in the greatest number of institutions.

In the 1980s the FDIC staff reviewed the meaning of being ''engaged in the business of receiving [non-trust] deposits.'' The staff noted questions about the insurance of ''Regulation Y'' trust companies; the staff also noted questions as to whether the acceptance of funds from a single non-trust depositor would represent a sufficient level of non-trust deposit-taking. Notwithstanding these continuing questions, the FDIC did not adopt a strict interpretation (or any formal interpretation) of the statutory phrase. Instead, the FDIC during this period continued to approve applications from depository institutions with very limited deposit-taking activities. For example, in 1984 the FDIC's Board of Directors approved an application from Bear Stearns Trust Company located in Trenton, New Jersey, even though the institution planned to accept non-trust deposits only from employees and affiliates. The institution did not intend to accept non-trust deposits from the general public.

Because the FDIC has never adopted a formal interpretation or guidelines, the FDIC's interpretation has been subject to questions from time to time. In 1991 the FDIC contemplated whether the insured status of certain national trust companies should be terminated under section 8 of the FDI Act because the trust companies held few or no non-trust deposits. The issue was not resolved because the institutions terminated their insurance voluntarily.

The practices of the OCC also are relevant. Prior to 1991 the OCC was responsible for determining whether national banks satisfied the threshold statutory requirements for obtaining deposit insurance. See 12 U.S.C. 1814(b) (1980). In exercising this authority the OCC chartered a number of national banks with limited deposit-taking functions on the basis that such banks were ''engaged in the business of receiving deposits other than trust funds.''

A significant statutory change occurred in 1991. At that time Congress provided that all applicants for deposit insurance must apply directly to the FDIC. See 12 U.S.C. 1815(a). Congress thus authorized the FDIC to make the requisite determination as to whether any applicant for deposit insurance would be ''engaged in the business of receiving deposits other than trust funds.'' In making this change, Congress made no objection to the practices of the FDIC and the OCC in extending insurance to institutions with limited deposit-taking activities. Thus, Congress accepted this practice. See *Lorillard* v. *Pons,* 434 U.S. 575 (1978). In addition, Congress accepted this practice through the enactment of certain provisions in the Bank Holding Company Act (discussed in the next section).

Since 1991 the FDIC has approved applications for deposit insurance from more than 70 non-traditional depository institutions holding one or a very limited number of non-trust deposits. Some of these institutions have been credit card banks; others have been trust companies. Over the last two years the FDIC has received approximately 20 applications from limited purpose federal savings associations operating as trust companies and chartered by the Office of Thrift Supervision (OTS). Approximately 15 of these applications already have been approved. In granting insurance to some of these institutions, the FDIC has required the holding of at least one non-trust deposit (generally owned by a parent or affiliate) in the amount of $500,000.

The practices of the FDIC and the OCC support a broad, flexible interpretation of being ''engaged in the business of receiving deposits other than trust funds.'' The agencies have approved applications from institutions that did not intend to accept deposits from the general public. Neither agency has ever specifically adopted the position that an insured depository institution must accept non-trust deposits from the general public.

The Bank Holding Company Act

The FDI Act also must be reconciled with the Bank Holding Company Act of 1956 (BHCA) as amended by the Competitive Equality Banking Act of 1987, Pub. L. No. 100–86 (CEBA). In the BHCA the definition of ''bank'' includes banks insured by the FDIC. See 12 U.S.C. 1841(c)(1). A list of exceptions includes institutions functioning solely in a trust or fiduciary capacity if several conditions are satisfied. The conditions related to deposit-taking are: (1) All or substantially all of the deposits of the institution must be trust funds; (2) insured deposits of the institution must not be offered through an affiliate; and (3) the institution must not accept demand deposits or deposits that the depositor may withdraw by check or similar means. See 12 U.S.C. 1841(c)(2)(D)(i)–(iii). The significant conditions are (1) and (2). The first condition provides that all or substantially all of the deposits of the institution must be trust funds; the second condition involves ''insured deposits.'' Thus, the statute contemplates that a trust company—functioning solely as a trust company and holding no deposits (or substantially no deposits) except trust deposits—could hold ''insured deposits.'' In other words, the BHCA contemplates that an institution could be insured by the FDIC even though the institution does not accept non-trust deposits from the general public.

The BHCA is difficult to reconcile fully with the FDI Act, which mandates that all FDIC-insured institutions must be ''engaged in the business of receiving [non-trust] deposits.'' The appropriate way to reconcile the BHCA with the FDI Act is for the FDIC to construe the threshold requirement of being ''engaged in the business of receiving deposits other than trust funds'' in a flexible and broad way. The FDIC has done so by allowing depository

institutions to satisfy the statutory requirement by receiving very limited non-trust deposits.

Court Decisions

The courts have offered few interpretations of being engaged in the specific ''business of receiving deposits other than trust funds.'' The leading case is *Meriden Trust and Safe Deposit Company* v. *FDIC,* 62 F.3d 449 (2d Cir. 1995). In that case, a bank holding company acquired two State-chartered banks insured by the FDIC. One of these banks was Meriden Trust; the other was Central Bank. After making the acquisitions, the holding company transferred most of the assets and liabilities of Meriden Trust to Central Bank. Nothing was retained by Meriden Trust except the assets and liabilities relating to its trust business. Also, Meriden Trust held two non-trust deposits in the aggregate amount of $200,000. One of the non-trust deposits was owned by the holding company; the other was owned by Central Bank. In order to maintain the ability to function as a full-service bank, Meriden Trust did not seek to terminate its insurance from the FDIC.

Later, Central Bank failed. Meriden Trust then informed the FDIC that it no longer considered itself an ''insured depository institution'' because it had stopped accepting non-trust deposits. By taking this position, Meriden Trust hoped to avoid liability under section 5(e) of the FDI Act. Section 5(e) provides that an ''insured depository institution'' shall be liable for any loss incurred by the FDIC in connection with the failure of a commonly controlled insured depository institution. See 12 U.S.C. 1815(e).

The FDIC did not agree with Meriden Trust. In court, the issue was whether Meriden Trust was an ''insured depository institution.'' Under the FDI Act, the term ''insured depository institution'' includes any bank insured by the FDIC including a ''State bank.'' See 12 U.S.C. 1813(c)(2). In turn, ''State bank'' includes any State-chartered bank or trust company ''engaged in the business of receiving deposits, other than trust funds.'' 12 U.S.C. 1813(a)(2)(A). Again, Meriden Trust argued that it was not ''engaged in the business of receiving deposits, other than trust funds'' because it had stopped accepting non-trust deposits from the general public.

The position taken by Meriden Trust was rejected by the federal district court as well as the United States Court of Appeals for the Second Circuit. The Court of Appeals relied upon the fact that Meriden Trust held two non-trust deposits (in the aggregate amount of only $200,000). Also, the court relied upon the fact that Meriden Trust never obtained a termination of its status as an ''insured depository institution'' in the manner prescribed by the FDI Act. Under the Act, termination of this status requires the involvement or consent of the FDIC. See 12 U.S.C. 1818; 12 U.S.C. 1828(i)(3).

Another noteworthy case is *United States* v. *Jenkins,* 943 F.2d 167 (2d Cir.), cert. denied, 502 U.S. 1014 (1991). In that case the court found that the defendant had violated the Glass-Steagall Act by engaging ''in the business of receiving deposits'' without proper State or federal authorization. See 12 U.S.C. 378(a). The case is noteworthy because the defendant was convicted for receiving a single deposit in the amount of only $150,000.

A recent case is *Heaton* v. *Monogram Credit Card Bank of Georgia,* Civil Action No. 98–1823 (E.D. La.). In that case credit card holders in Louisiana have brought suit against an insured State-chartered credit card bank in Georgia. The cardholders have charged the bank with violating Louisiana restrictions on fees and interest rates. In its defense the Georgia bank has cited section 27 of the FDI Act. Under that section, a ''State bank'' may avoid certain State restrictions on fees and interest rates when operating outside its State of incorporation. See 12 U.S.C. 1831d. The key issue in the litigation is whether the Georgia bank—holding a fixed and limited number of deposits—qualifies as a ''State bank'' entitled to protection under section 27.

The Georgia bank in Heaton holds only two deposits and both are from affiliates. As a non-party in the litigation, the FDIC informed the court that it deemed the bank to be a ''State bank'' under the FDI Act despite the bank's limited number of deposits. The court disagreed. On November 22, 1999, the federal district court ruled on a preliminary jurisdictional motion that the Georgia bank was not a ''State bank'' because it was not ''engaged in the business of receiving deposits, other than trust funds.'' The Georgia bank appealed the court's ruling to the United States Court of Appeals for the Fifth Circuit. The case is pending before the Court of Appeals.

Meriden and Jenkins are more persuasive than the district court's decision in Heaton. As discussed above, the Court of Appeals in Meriden found that a trust company was ''engaged in the business of receiving [non-trust] deposits'' even though it held only two non-trust deposits in the aggregate amount of only $200,000. In part the court relied upon the fact that the insured status of the trust company never was terminated in the manner prescribed by the FDI Act. This reliance was appropriate in light of the FDIC's ''conclusive'' authority under section 8 to determine whether an insured depository institution is ''not engaged in the business of receiving deposits, other than trust funds.'' 12 U.S.C. 1818(p).

In contrast, the Heaton court disregarded the fact that the FDIC has never terminated the insured status of the Georgia credit card bank. The implication of the Heaton decision is that a bank may remain insured by the FDIC under the FDI Act even though it ceases to exist as a ''State bank'' under the FDI Act. This interpretation is irrational. It would lead to the existence of State depository institutions that are insured by the FDIC but unregulated by every section of the FDI Act that regulates ''State banks.'' See, *e.g.,* 12 U.S.C. 1831a (regulating the activities of insured ''State banks'').

Meriden and Jenkins support a broad interpretation of being ''engaged in the business of receiving deposits other than trust funds.'' These cases involved and are directly relevant to banks. There are cases outside the banking field that suggest that being ''engaged in a business'' implies regularity of participation or involvement in multiple transactions. See, *e.g., McCoach* v. *Minehill & Schuylkill Haven Railroad Co.,* 228 U.S. 295, 302 (1913); *United States* v. *Scavo,* 593 F.2d 837, 843 (8th Cir. 1979); *United States* v. *Tarr,* 589 F.2d 55, 59 (1st Cir. 1978). It is inappropriate to apply such cases (rather than Meriden and Jenkins) in the banking business because, as previously explained, the opening of a single deposit account initiates a continuing business relationship with periodic withdrawals, deposits, rollovers and the accrual of interest.

State Banking Statutes

Some State banking statutes impose significant restrictions on the ability of some depository institutions to accept non-trust deposits. For example, a Florida statute provides that a ''credit card bank'' (1) may not accept deposits at multiple locations; (2) may not accept demand deposits; and (3) may not accept savings or time deposits of less than $100,000. At the same time, the statute provides that the bank must obtain insurance from the FDIC. See Fla. Stat. 658.995(3). Thus, the statute contemplates that a bank may be ''engaged in the business of receiving [non-trust] deposits'' (a necessary condition for obtaining insurance from the FDIC) even though the bank may not

accept deposits on an unrestricted basis from the general public. Indeed, the statute contemplates that a bank may be insured by the FDIC even though the bank's business consists solely of making credit card loans and conducting such activities as may be incidental to the making of credit card loans. See Fla. Stat. 658.995(3)(f).

Similarly, a Virginia statute provides that a general business corporation may acquire the voting shares of a ''credit card bank'' only if certain conditions are satisfied. See Va. Code 6.1–392.1.A. These conditions comprise the definition of a ''credit card bank.'' See Va. Code 6.1–391. These conditions include the following: (1) The bank may not accept demand deposits; and (2) the bank may not accept savings or time deposits of less than $100,000. Indeed, the statute provides that a ''credit card bank'' may accept savings or time deposits (in amounts in excess of $100,000) only from affiliates of the bank having their principal place of business outside the State. See Va. Code 6.1–392.1.A.3–4. In other words, the Virginia statute prohibits the acceptance of any deposits from the general public. At the same time, the statute requires the deposits of the bank to be federally insured. See Va. Code 6.1–392.1.A.4.

A third example is the Georgia Credit Card Bank Act. Prior to a recent amendment, this statute provided that a credit card bank could take deposits only from affiliated parties. In other words, the Georgia statute was similar to the current Virginia statute in prohibiting a credit card bank from accepting deposits from the general public. See Ga. Code Ann. 7–5–3(7) (1997). At the same time, Georgia law required such banks to be ''authorized to engage in the business of receiving deposits.'' Ga. Code Ann. 7–1–4(7) (1997). Thus, Georgia law (consistent with the current Virginia law) was based on the premise that the receipt of deposits from the general public is not a necessary element of being ''engaged in the business of receiving deposits.'' The receipt of deposits from affiliated parties was deemed sufficient. (Under the current Georgia law, a credit card bank may accept savings or time deposits in amounts of $100,000 or more from anyone. See Ga. Code 7–5–3(7).)

These State laws contemplate a broad and flexible interpretation of being ''engaged in the business of receiving deposits other than trust funds.'' Of course, the FDIC in applying the FDI Act cannot be controlled by State law but the FDIC should be cognizant of the evolving nature of banking as reflected by State laws.

Confirmation of the FDIC'S Interpretation

For more than 30 years the FDIC has approved applications for deposit insurance from non-traditional depository institutions. During this period the FDIC has not required the acceptance of deposits from the general public in determining that applicants are ''engaged in the business of receiving deposits other than trust funds.'' On the contrary, the FDIC has approved applications from many institutions (such as trust companies and credit card banks) that did not intend to solicit deposits from the general public. Indeed, some of these institutions planned to accept no more than one non-trust deposit from a parent or affiliate.

The FDIC's consistent practice represents an interpretation of being ''engaged in the business of receiving deposits other than trust funds.'' This long-standing broad interpretation is consistent with the protective purposes of deposit insurance generally and is well within the FDIC's discretion in light of the ambiguity of the statutory phrase. The FDIC's long-standing interpretation also is supported by (1) the practices of the OCC; (2) the acceptance by Congress of the practices of the FDIC and the OCC; (3) the Bank Holding Company Act; (4) the relevant case law; and (5) State banking statutes. On the basis of the foregoing, I conclude that the statutory requirement of being ''engaged in the business of receiving deposits other than trust funds'' is satisfied by the continuous maintenance of one or more non-trust deposits in the aggregate amount of $500,000 (the amount specified in a number of recent applications).

Some discussion is warranted regarding the most limited forms of being ''engaged in the business of receiving deposits other than trust funds.'' It could be argued that a difference exists between allowing depository institutions to decline non-trust deposits from the general public and allowing depository institutions to decline all non-trust deposits from all potential depositors with the exception of a single deposit from a parent or affiliate. Perhaps an argument also could be made that the minimum number of non-trust depositors or the minimum number of non-trust deposit accounts should be greater than one. The problem with this argument is that a single deposit account can be divided into portions. Moreover, if the FDIC required the existence of a particular number of depositors or the periodic acceptance of a particular number of non-trust deposits, institutions holding one deposit account would simply arrange for the prescribed number of depositors to hold the funds in the prescribed number of accounts. At periodic intervals, funds would be withdrawn and redeposited. The FDIC should not and need not interpret the minimum threshold requirement of the statute so as to require such stratagems.

In summary, the Legal Division believes and the General Counsel is of the opinion that the FDIC may determine that a depository institution is ''engaged in the business of receiving deposits other than trust funds'' as required by section 5 of the FDI Act if the institution holds one or more non-trust deposits in the aggregate amount of $500,000. This interpretation is not intended to suggest that a depository institution will necessarily not be ''engaged in the business of receiving [non-trust] deposits'' if it holds such deposits in the aggregate amount of less than $500,000. Rather, the Legal Division is merely adopting the opinion that the amount of $500,000 is sufficient for purposes of section 5 as well as section 8 (terminations) and section 3 (definition of ''State bank''). If an applicant for deposit insurance proposes to hold non-trust deposits in a lesser amount (based on projected deposit levels), the FDIC would need to determine in that particular case whether the applicant would be ''engaged in the business of receiving [non-trust] deposits.'' Similarly, under section 8 or section 3, the FDIC will determine on a case-by-case basis whether the holding of non-trust deposits in an amount less than $500,000 constitutes being ''engaged in the business of receiving [non-trust] deposits.''

Conclusion

Section 5 of the FDI Act provides that an applicant for deposit insurance must be ''engaged in the business of receiving deposits other than trust funds.'' In the opinion of the General Counsel, on the basis of the foregoing, the holding by a depository institution of one or more non-trust deposits in the aggregate amount of $500,000 is sufficient to satisfy this threshold requirement for obtaining deposit insurance.

By Order of the Board of Directors.

Dated at Washington, D.C., this 9th day of March, 2000.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 00–6548 Filed 3–16–00; 8:45 am]

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