utility to recover decommissioning costs from utility service area ratepayers. For other licensees, it is the NRC's position that the required amount of financial assurance for decommissioning must be available when operations commence. Revenues are not stable and predictable, and there is a possibility that the licensee could cease operations prior to the sinking fund being fully funded. To guard against this possibility, the full amount of financial assurance required to decommission a facility was required ''up front''.

The Commission further recognized this principle in the recent rulemaking on financial assurance for power reactor licensees (Financial Assurance Requirements for Decommissioning Nuclear Power Reactors—63 FR 50465; September 22, 1998). Under the new requirements, designed to address potential electric utility deregulation, when a reactor licensee loses its regulated monopoly status, it is no longer allowed to use a sinking fund, and must provide the full amount of financial assurance up front.

This does not mean that licensees not using a sinking fund cannot pay for financial assurance over a long time frame. Several financial assurance mechanisms permit this approach. A surety bond or letter of credit can be used to provide financial assurance; the cost of these mechanisms is on a yearly or multi-yearly basis. A licensee may use a sinking fund, in combination with a surety bond or another mechanism that covers the portion of required financial assurance not covered by accumulated funds in the sinking fund. Also, several financial assurance mechanisms—statement of intent, and parent and self guarantee—do not impose any direct costs on the licensee. However, it is true that these guarantee mechanisms are not likely to be available to most small business licensees.

EPA does allow a graduated trust to be used for financial assurance under several of its regulations applicable to solid waste management, hazardous waste management, and other types of facilities. For example, EPA's regulations at 40 CFR 264.143, ''Financial assurance for closure,'' allow financial assurance to be provided by annual payments into a trust fund over a period that is the shorter of (1) the term of the initial RCRA permit, or (2) the remaining life of the facility. However, these EPA financial assurance regulations generally apply to all regulated facilities, even the smallest. In contrast, NRC's financial assurance regulations apply only to the largest licensees; less than 15 percent of NRC materials licensees are required to provide financial assurance. NRC's financial assurance requirements thus pose less of a regulatory burden on smaller licensees.

The petitioner does not present sufficient information to warrant a change by NRC in its regulations.

5. *Issue—Financial Assurance for Orphan Sources.* The petitioner states that orphan waste (waste which has no disposal ''home'') should be exempted from financial assurance requirements because the DOE is responsible for disposal of this category of waste. A licensee that has this type of waste should not be required to calculate and fund its disposal when there is no disposal site that will accept it. An example cited by the petitioner where DOE has taken steps to implement the responsibility that the petitioner addresses, is americium-241. The DOE is compiling a list of unwanted or abandoned sources for the ultimate recovery of the americium-241.

Response: Orphan sources do pose a significant problem for a licensee. DOE, NRC, EPA, and State regulatory agencies are all working to address this issue, and ensure that proper disposition is provided for orphan sources. DOE has initiated a pilot program, working with NRC, to identify orphan sources. However, this program is in the pilot stage, and DOE does not now have a program in place to accept all orphan sources. Moreover, DOE is required by law to recover costs of any program that is established by charging a disposal fee to accept orphan sources.

Financial assurance is especially important for orphan sources. Many of these sources are accepted by waste brokers either for reuse or for storage. However, the cost of using these services can be very high. Using the example of americium-241, costs are significantly higher relative to other isotopes.

In addition to funding of disposal costs, there are other decommissioning cost concerns involved in this issue, as noted in the Nuclear Energy Institute comment. A damaged/leaking source could cause contamination at a licensee's facility, which would need remediation. Waste packaging would also require funding. Thus, the rationale for requiring financial assurance would remain, even if disposal were assured by DOE. It is premature to change NRC's financial assurance regulations until a national orphan source recovery program is fully implemented. At that time, a review of financial assurance amounts required for these types of sources may be warranted.

For reasons cited in this document, the NRC denies the petition.

Dated at Rockville, Maryland, this 28 day of March, 2001.

For the Nuclear Regulatory Commission.

William D. Travers,

Executive Director for Operations.

[FR Doc. 01–9731 Filed 4–18–01; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

RIN 3064–AC49

Being Engaged in the Business of Receiving Deposits Other Than Trust Funds

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: Under section 5 of the Federal Deposit Insurance Act, an applicant for deposit insurance must be ''engaged in the business of receiving deposits other than trust funds''. This requirement was interpreted in General Counsel Opinion No. 12, which was published by the FDIC in March of 2000.

The FDIC is proposing to replace General Counsel Opinion No. 12 with a regulation. The purpose of promulgating a regulation would be to clarify the requirement that an insured depository institution be ''engaged in the business of receiving deposits other than trust funds''. Under the proposed regulation, this requirement would be satisfied by the continuous maintenance of one or more non-trust deposit accounts in the aggregate amount of $500,000.

DATE: Written comments must be received on or before July 18, 2001.

ADDRESSES: Send written comments to Robert E. Feldman, Executive Secretary, Attention: Comments/OES, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429. Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. (facsimile number (202) 898–3838; Internet address: *comments@fdic.gov* <*mailto:comments@fdic.gov*>). Comments may be posted on the FDIC internet site at *http://www.fdic.gov/regulations/laws/federal/propose.html* and may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW, Washington, DC 20429, between 9 a.m. and 4:30 p.m. on business days.

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

SUPPLEMENTARY INFORMATION:

I. The Statute

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 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, under the FDI Act, 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 statutory 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).

The statute is ambiguous. For example, it 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, it 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, it does not specify whether a depository institution must accept non-trust deposits from the general public as opposed to accepting deposits only from one or more members of a particular group (such as the institution's trust customers or employees or affiliates).

One possible interpretation is that an insured depository institution must receive a continuing stream of non-trust deposits from the general public. This interpretation would be based upon the statute's use of the word ''receiving'' (suggesting repetition) and the plural word ''deposits''.

Another possible interpretation is that an insured depository institution may hold—and periodically renew—a limited number of deposit accounts or even a single deposit account. This interpretation would be based upon the fact that the statute defines ''deposit'' in such a way as to equate ''receiving'' and ''holding.'' See 12 U.S.C. 1813(l)(1). Also, the statute recognizes that a single deposit can be accepted or ''received'' many times through rollovers. See 12 U.S.C. 1831f(b). Indeed, the periodic accrual of interest on a single deposit represents the ''receiving'' of multiple new ''deposits''. Although the depositor might withdraw the interest regularly (rather than allowing the interest to be added to the principal), the accrued interest nonetheless would be a ''deposit'' until such withdrawal. See 12 CFR 330.3(i)(1) (for insurance purposes, a deposit consists of principal plus ascertainable interest as of the date of the depository institution's failure).

The ambiguity of the statute 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. These deposits, rollovers and accruals represent the ''receiving'' of ''deposits''.

In applying the statutory standard (''engaged in the business of receiving deposits other than trust funds''), the FDIC has approved applications from many institutions that did not intend to accept non-trust deposits from the general public. Also, the FDIC has approved applications from institutions that only intended to hold one type of deposit account (*e.g.,* certificates of deposit) or that did not intend to hold more than one or a few non-trust deposit accounts. The FDIC's long-standing practice of approving applications from such non-traditional depository institutions has not been sufficient to remove uncertainty as to the meaning of being ''engaged in the business of receiving deposits other than trust funds.'' In order to clarify its interpretation of the law, the FDIC published General Counsel Opinion No. 12. This opinion is discussed in greater detail below.

II. General Counsel Opinion No. 12

In March of 2000, the FDIC published General Counsel Opinion No. 12. See 65 FR 14568 (March 17, 2000). General Counsel Opinion No. 12 is attached as an appendix. In that opinion, the FDIC's General Counsel stated that the statutory requirement of being ''engaged in the business of receiving deposits other than trust funds'' can be satisfied by the continuous maintenance of one or more non-trust deposit accounts in the aggregate amount of $500,000.

General Counsel Opinion No. 12 is based upon a number of factors. First, the statute is ambiguous (as discussed above). Second, as discussed at length in General Counsel Opinion No. 12, the legislative history is inconclusive. See H.R. Rep. No. 2564, reprinted in 1950 U.S.C.C.A.N. 3765, 3768. Third, the FDIC has approved applications from many non-traditional depository institutions that did not intend to maintain more than one or a very limited number of non-trust deposit accounts (as mentioned above). This practice began at least as early as 1969 with Bessemer Trust Company (Bessemer) located in Newark, New Jersey. Bessemer offered checking accounts to its own trust customers but did not offer checking accounts or any other type of non-trust accounts to the general public. Despite this limitation on Bessemer's deposit-taking activities, the FDIC approved Bessemer's application for deposit insurance. The FDIC continued to approve such applications (i.e., applications from institutions with very limited deposit-taking activities) from the 1970s to the present. These non-traditional depository institutions have included trust companies, credit card banks and other specialized institutions. For example, one depository institution planned to hold no accounts except escrow accounts relating to mortgage loans. Another depository institution

planned to offer deposits to nobody except its affiliate's customers.

Fourth, the Bank Holding Company Act (BHCA) contemplates the existence of depository institutions that are insured by the FDIC even though they do not accept a continuing stream of non-trust deposits from the general public. See 12 U.S.C. 1841(c). 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 (without requiring) that an institution could be insured by the FDIC even though the institution does not accept non-trust deposits from the general public.

Fifth, the leading case indicates that a depository institution may be ''engaged in the business of receiving [non-trust] deposits'' even though the institution holds a very small amount of non-trust deposits. See Meriden Trust and Safe Deposit *Company* v. *FDIC,* 62 F.3d 449 (2d Cir. 1995). Indeed, this case indicates that an amount as small as $200,000 is a sufficient amount of non-trust deposits.

Sixth, some State banking statutes contemplate the existence of FDIC-insured depository institutions that are severely restricted in their ability to accept non-trust deposits from the general public. For example, 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.

Each of the factors above was discussed in detail in General Counsel Opinion No. 12. See 65 FR 14568 (May 17, 2000). The purpose of General Counsel Opinion No. 12 was to remove uncertainty as to the meaning of being ''engaged in the business of receiving deposits other than trust funds''. In fulfilling this purpose, the General Counsel opinion was unsuccessful. In a recent case known as *Heaton* v. *Monogram,* the statutory interpretation set forth in General Counsel Opinion No. 12 was rejected by a federal district court. See *Heaton* v. *Monogram Credit Card Bank of Georgia,* 2001 WL 15635 (E.D. La. January 5, 2001). In that case, the district court declared that the FDIC's interpretation ignores the statute because the statute refers to ''deposits'' in the plural. In the court's opinion, a depository institution cannot be ''engaged in the business of receiving deposits other than trust funds'' unless the institution maintains more than one deposit account.

As a result of the court's ruling, uncertainty continues to exist as to the meaning of being ''engaged in the business of receiving deposits other than trust funds''. Also, the court's ruling creates a situation with serious implications. The situation includes two components. First, the FDIC has extended federal deposit insurance to a particular financial institution on the basis that the financial institution is ''engaged in the business of receiving deposits other than trust funds''. Second, notwithstanding the action by the FDIC, the court has ruled that the financial institution is not ''engaged in the business of receiving deposits other than trust funds''. The implications of this situation (conflicting decisions by the FDIC and a court) are discussed below.

III. The Importance of Consistent Interpretations

The granting of an application for deposit insurance by the FDIC invests the depository institution with certain privileges. The FDIC does not extend these privileges as a matter of contract; rather, the privileges are statutory in nature. For example, the FDI Act provides that all deposits at an insured depository institution (i.e., an institution approved by the FDIC) are insured up to the $100,000 limit. See 12 U.S.C. 1815, 1816, 1821. This federal insurance will assist the depository institution in attracting depositors. Indeed, the depository institution often is required by its chartering authority to obtain federal deposit insurance as a condition to conducting business. See, e.g., Fla. Stat. 658.995(3); Va. Code 6.1–392.1.A.4.

Another example of a privilege or benefit is provided by section 27 of the Act, which enables State-chartered insured depository institutions to operate under a single State's interest rate laws rather than to operate under a separate set of laws for each State in which the institution conducts business. See 12 U.S.C. 1831d. As a result, an insured State nonmember bank is able to avoid certain State restrictions on fees and interest rates when operating outside the institution's State of incorporation.

The privileges and benefits arising under the Act are accompanied by certain responsibilities and restrictions. For example, insured depository institutions are subject to assessments by the FDIC. See 12 U.S.C. 1817. Also, insured depository institutions are required to operate in a safe and sound manner. See 12 U.S.C. 1818(b). Restrictions on lending are applicable. See 12 U.S.C. 1828(j). Another example of a restriction is provided by section 24 of the Act, which places limits on the activities of insured State banks. See 12 U.S.C. 1831a. In addition, insured State nonmember banks are subject to FDIC examinations. See 12 U.S.C. 1820(b). These include examinations for compliance with a number of Federal consumer laws. If violations of these laws are discovered, the bank is subject to enforcement actions. See, e.g., 12 U.S.C. 1818(b), 1818(e), 1818(i)(2).

Nothing in the FDI Act suggests that Congress intended depository institutions to enjoy the privileges arising under the Act without assuming the responsibilities. On the contrary, Congress created one broad scheme applicable to ''insured depository institutions''. Under this scheme, the deposits at a particular institution cannot be insured unless that institution is subject to assessments. Similarly, a State bank should not be able to avoid State fees and interest rates under section 27 of the Act unless the bank also is subject to the restrictions imposed by section 24. Conversely, a State bank should not be subject to the

restrictions imposed by section 24 unless the bank is able to enjoy the benefit of section 27.

For ''State banks'' (as opposed to federally chartered depository institutions), the benefits as well as the burdens provided by the Act rest upon the premise that the depository institution is ''engaged in the business of receiving deposits, other than trust funds.'' See 12 U.S.C. 1813(a)(2) (defining ''State bank'' in such a way as to include only those institutions ''engaged in the business of receiving deposits, other than trust funds''). For this reason, the phrase ''engaged in the business of receiving deposits other than trust funds'' should be interpreted consistently. It should not be interpreted one way under section 5 of the Act (involving applications for deposit insurance) and another way under section 24 (imposing restrictions on the activities of State banks) and yet another way under section 27 (enabling State banks to avoid certain restrictions on fees and interest rates). Similarly, a particular section of the Act incorporating the phrase (''engaged in the business,'' etc.) should not be interpreted one way by a court in one State but another way by a different court in another State. Inconsistent interpretations could lead to irrational results, e.g., the existence of a State bank insured by the FDIC (on the basis of a finding by the FDIC that the bank is ''engaged in the business of receiving deposits other than trust funds'') but free from the restrictions imposed by section 24 in one State (on the basis of a finding by a court in that State that the bank is not ''engaged in the business of receiving deposits other than trust funds'') but perhaps subject to such restrictions in another State (on the basis of a finding by a court in the second State that the bank is ''engaged in the business of receiving deposits other than trust funds'').

Arguably, the FDIC could create consistency by terminating the insured status of a depository institution whenever any court in any State determines that the institution is not ''engaged in the business of receiving deposits other than trust funds''. Perhaps the FDIC, at the same time, could terminate the insured status of all similar depository institutions. Such an approach would raise grave concerns for the owners and customers of the institutions. Also, such an approach would be unfair because the organizers of depository institutions should be able to rely on the FDIC's determination—in granting insurance—that the institutions are ''engaged in the business of receiving deposits other than trust funds.'' Finally, such an approach would ignore the fact that other courts in other States might view the same institutions as being ''engaged in the business of receiving deposits other than trust funds.''

Uniformity is needed. Both banks and the public need to know that the applicable Federal banking laws will be applied equally throughout the United States. Moreover, they need assurance that once the FDIC grants insurance to a bank or thrift, the deposits at that bank or thrift will remain insured.

At present, uniformity is threatened because the meaning of the statute is subject to doubt. Under the FDIC's interpretation as set forth in General Counsel Opinion No. 12, a depository institution is ''engaged in the business of receiving deposits other than trust funds'' if the institution holds one or more non-trust deposit accounts in the aggregate amount of $500,000. Under the interpretation adopted by the Heaton court, however, a depository institution cannot be ''engaged in the business of receiving deposits other than trust funds'' unless the institution holds some indeterminate number of deposit accounts greater than one.

The inconsistency between the FDIC's interpretation and a court's interpretation could produce irrational and harmful results. For this reason, the meaning of the statute must be clarified so that a uniform interpretation may be applied.

IV. The Petition

The promulgation of a regulation has been requested through a petition submitted to the FDIC's Board of Directors by the Conference of State Bank Supervisors (CSBS). This organization represents State officials responsible for chartering, regulating and supervising State-chartered banks.

An opposing letter has been submitted by the plaintiff in the *Heaton* v. *Monogram* litigation. In this opposing letter, the plaintiff has argued that the promulgation of a regulation at this time would represent an ''abuse of discretion'' and a ''conflict of interest''. The plaintiff believes that no regulation should be promulgated until the litigation is completed.

The FDIC does not agree that the initiation of the rulemaking process would constitute an ''abuse of discretion''. On the contrary, the FDIC believes that rulemaking is necessary in order to remove the existing uncertainty and confusion. See *Smiley* v. *Citibank, N.A.,* 517 U.S. 735, 116 S. Ct. 1730 (1996). Accordingly, the FDIC has decided to publish this notice of proposed rulemaking.

Of course, the publication of this notice does not mean that the FDIC necessarily will adopt the proposed rule as a final rule. The FDIC is interested in receiving comments from all interested members of the public—not just the plaintiff and the defendant in the Heaton litigation—because the final rule (if any) will be effective nationwide. The comments may address all aspects of the proposed rule.

Comments are requested to address all ambiguities in the statute. As previously mentioned, 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 deposits other than trust funds''. Similarly, the statute does not specify whether a depository institution must maintain a particular number of deposit accounts or accept a particular number of deposits within a particular period in order to be ''engaged in the business of receiving deposits other than trust funds''. Likewise, 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 trust customers or employees or affiliates).

Over the years, the FDIC has granted deposit insurance to banks that intended to accept only one or a limited number of deposits from its trust customers, its employees, or its affiliates. The court in the Heaton litigation questioned whether a single deposit is adequate. In its recent ruling, the court noted that the statute refers to ''deposits'' in the plural. On the basis of this word (''deposits''), the court found that the FDIC had ''ignored'' the statutory language in adopting the interpretation set forth in GC12. See *Heaton* v. *Monogram Credit Card Bank of Georgia,* 2001 WL 15635, *3 (E.D. La. January 5, 2001).

In fact, the FDIC in GC12 discussed the statutory language at length. See 65 FR 14568, 14569 (March 17, 2000). As explained in GC12, the statute 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.

In any event, the FDIC is interested in comments as to whether one deposit account should be considered enough. Also, the FDIC is interested in comments as to whether there should be a minimum amount of non-trust deposits. Commenters should explain the reasons supporting their opinions.

Under the proposed rule, a depository institution would be ''engaged in the business of receiving deposits other than trust funds'' if the institution maintains one or more non-trust deposit accounts in the aggregate amount of $500,000.

The figure of $500,000 is being proposed for several reasons. First, it is more than a nominal sum. Indeed, it is greater than the amount involved in the leading case of *Meriden Trust and Safe Deposit Company* v. *FDIC,* 62 F.3d 449 (2d Cir. 1995). In that case, the court found that only $200,000 of non-trust deposits was a sufficient amount. Second, the figure of $500,000 is not so great that it would prevent non-traditional depository institutions from obtaining FDIC insurance when necessary. As previously mentioned, the Bank Holding Company Act contemplates the existence of depository institutions that are insured by the FDIC even though they do not accept a continuing stream of non-trust deposits from the general public. See 12 U.S.C. 1841(c). Also, some State banking statutes contemplate the existence of FDIC-insured depository institutions that are severely restricted in their ability to accept non-trust deposits from the general public. See, e.g., Va. Code 6.1–392.1.A.4. Third, $500,000 is the amount of non-trust deposits allowed by the FDIC in recent years in connection with a number of applications for deposit insurance. Applications involving the precise amount of $500,000 can be traced as far back as 1991. This circumstance indicates that an understanding or expectation may have developed in the banking industry that the holding of $500,000 of non-trust deposits represents a reliable ''safe harbor.''

As previously explained, the purpose of the proposed regulation is to create uniformity and certainty. The choice of any specific dollar figure would serve this purpose. For the reasons set forth above, the FDIC has chosen $500,000. Commenters are free to suggest alternative amounts or alternative standards.

In summary, the FDIC is interested in comments as to whether the proposed $500,000 minimum level is appropriate or whether the minimum should be higher or lower and why. If a minimum level is to be established by regulation, the FDIC is interested in whether an exception should be made for a new depository institution (i.e., whether a new depository institution should be given a certain period of time to reach the minimum level).

The court in the Heaton litigation questioned the appropriateness of permitting a bank to accept deposits from its affiliates only as opposed to accepting deposits from the general public. The FDI Act does not specify whether deposits must originate from a particular source. In any event, the FDIC is interested in comments as to whether deposits must be accepted from the public at large or whether deposits may be limited to a particular group (such as the bank's trust customers or employees or affiliates).

Finally, the FDIC notes that banking has evolved over the years. The typical brick-and-mortar full-service bank is no longer the only type of institution offering banking services. Today, for example, Internet banks offer banking services through a medium never imagined when the FDIC was created. In light of these changes, the FDIC is interested in comments as to whether the adoption of a regulatory definition of being ''engaged in the business of receiving [non-trust] deposits'' might stifle innovation in the banking industry or stifle the development or evolution of new types of banks.

Request for Comments

The FDIC's Board of Directors (Board) is seeking comments on whether the agency should adopt a regulatory standard for determining whether a depository institution is ''engaged in the business of receiving deposits other than trust funds''. Under the proposed rule, a depository institution would be ''engaged in the business of receiving [non-trust] deposits'' if the institution maintains one or more non-trust deposit accounts in the amount of $500,000 or more.

Commenters are free to suggest different standards. Indeed, commenters are free to suggest that the FDIC at this time should adopt no standard. The Board invites comments on all of the following questions:

1. Should the FDIC adopt a regulatory standard for determining whether a depository institution is ''engaged in the business of receiving deposits other than trust funds''?

2. If so, should the standard be based on a particular number and/or amount of non-trust deposits? Or should the standard be based on other factors, such as the institution's legal authority to accept non-trust deposits or the institution's policies with respect to the acceptance of non-trust deposits?

3. Assuming a minimum amount of non-trust deposits is required, should the standard be based on a particular number of non-trust deposit accounts? If so, should that number be one? If not, what should be the minimum number of non-trust deposit accounts? Why?

4. Assuming that the standard should be based on a particular amount of non-trust deposits, should that amount be $500,000? If not, what should be the minimum amount of non-trust deposits? Why?

5. Should a depository institution be required to accept deposits from the public at large (as opposed to accepting deposits from a particular group such as the institution's trust customers or employees or affiliates) in order to be ''engaged in the business of receiving deposits other than trust funds''? If so, why?

6. Should a depository institution be required to offer a selection of different types of deposits (e.g., demand deposits, savings deposits, certificates of deposit) in order to be ''engaged in the business of receiving deposits other than trust funds''? If so, why?

7. Should the FDIC create any exceptions for special circumstances? For example, should a new institution be given a certain period of time to reach the minimum number of non-trust deposit accounts or to attain the minimum amount of non-trust deposits?

8. Should operating insured depository institutions be held to the same standard as applicants for deposit insurance? In other words, should the standard under section 8 of the FDI Act (involving terminations) be the same as the standard under section 5 (involving applications)? Should the FDIC terminate the insured status of any operating institution that does not meet the chosen standard? Should an operating insured institution be given a certain period of time to regain the level of $500,000 after falling below that level?

9. Should the same standard apply to the definition of ''State bank'' under section 3 of the FDI Act? If not, what standard should apply? Why?

Paperwork Reduction Act

The proposed rule would not involve any collections of information under the

Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

The proposed rule would not have a significant economic impact on a substantial number of small businesses within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed rule would apply to all FDIC-insured depository institutions and would impose no new reporting, recordkeeping or other compliance requirements. Although the proposed rule specifies that depository institutions must hold non-trust deposits in the amount of $500,000 or more in order to be ''engaged in the business of receiving deposits other than trust funds,'' the rule does not create a new requirement. Rather, the proposed rule clarifies an existing requirement. Moreover, the proposed rule is consistent with the standard already applied to depository institutions by the FDIC. Accordingly, the Act's requirements relating to an initial regulatory flexibility analysis are not applicable.

Impact on Families

The proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings associations.

The Board of Directors of the Federal Deposit Insurance Corporation hereby proposes to amend part 303 of title 12 of the Code of Federal Regulations as follows:

PART 303—FILING PROCEDURES AND DELEGATIONS OF AUTHORITY

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1835a, 3104, 3105, 3108, 3207; 15 U.S.C. 1601–1607.

2. Add new § 303.14 to read as follows:

§ 303.14 Being ''engaged in the business of receiving deposits other than trust funds''.

For all purposes of the Act, a depository institution shall be ''engaged in the business of receiving deposits other than trust funds'' if the institution maintains one or more non-trust deposit accounts in the aggregate amount of $500,000 or more.

By order of the Board of Directors.

Dated at Washington, DC, this 10th day of April, 2001.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

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 C.F.R. 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.

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BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–331–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to all Boeing Model 747 series airplanes, that currently requires repetitive inspections to detect cracking of the forward and aft inner chords and the splice fitting of the forward inner chord of the station 2598 bulkhead, and repair, if necessary. This proposal would add repetitive inspections of an expanded inspection area, which would end the inspections specified in the existing AD. This proposal also would limit the applicability of the existing AD. This proposal is prompted by reports indicating fatigue cracking was found on airplanes that had accumulated fewer total flight cycles than the threshold specified in the existing AD. The actions specified by the proposed AD are intended to detect and correct fatigue cracking of the forward and aft inner chords, the frame support, and the splice fitting of the forward inner chord of the upper corner of the station 2598 bulkhead, which could result in reduced structural capability of the bulkhead and the inability of the structure to carry horizontal stabilizer flight loads.

DATES: Comments must be received by June 4, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–331–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain ''Docket No. 2000–NM–331–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Rick Kawaguchi, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1153; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NM–331–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–331–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On April 19, 2000, the FAA issued AD 2000–08–21, amendment 39–11707 (65 FR 25281, May 1, 2000), applicable to all Boeing Model 747 series airplanes, to require repetitive inspections to detect cracking of the forward and aft inner chords and the splice fitting of the forward inner chord of the station 2598 bulkhead, and repair, if necessary. That action was prompted by reports of fatigue cracking found in those areas. The requirements of that AD are intended to detect and correct such cracking, which could result in reduced structural capability of the bulkhead and the inability of the structure to carry horizontal stabilizer flight loads.

Actions Since Issuance of Previous Rule

Since the issuance of AD 2000–08–21, the FAA has received reports indicating the detection of fatigue cracking on certain Boeing Model 747 series airplanes. Investigation revealed that on an airplane having 7,325 total flight cycles, a 2.8-inch-long crack was found on the inner chord of the station 2598 bulkhead; on another airplane having 5,845 total flight cycles, a 2.1-inch-long crack was found in the same area. Cracks also have been found on the frame support of the station 2598 bulkhead, which was not included in the inspection area specified in the existing AD.

Issuance of New Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 747–53A2427, Revision 2, dated October 5,