July 16, 2001

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance
Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attn: Comments/OES

Re: Being Engaged in the Business of Receiving Deposits Other Than Trust Funds, 66 *Federal Register* 20102, April 19, 2001

Dear Mr. Feldman:

The American Bankers Association ("ABA") is responding to the request for comments from the Federal Deposit Insurance Corporation ("FDIC") concerning its proposal to replace- General Counsel Opinion No. 12 with a regulation to clarify the statutory 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 amount of $500,000. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country.

At the outset, ABA supports the proposal. As discussed more fully below, ABA agrees that a regulation is appropriate to alleviate the existing uncertainty concerning the finality of FDIC's determination that an institution is "engaged in the business of receiving deposits other than trust funds."

Background

In determining whether to approve deposit insurance applications, the FDIC considers the seven factors set forth in the Federal Deposit Insurance Act (FDI Act).[1] However, 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. . ."[2] Applicants that do not satisfy this threshold requirement are ineligible for deposit insurance.

FDIC considers a number of factors when determining whether a depository institution is "engaged in the business of receiving deposits other than trust funds." These factors are:

- **the statutory language;**
- **the legislative history;**
- **the practices of the FDIC and the Office of the Comptroller of the Currency ("OCC");**
- **construction with other federal banking law;**
- **the relevant case law; and**
- **state banking statutes.**

To provide certainty with respect to when an institution is satisfying the statutory criteria, FDIC issued General Counsel Opinion No. 12 in March 2000. This opinion concluded that FDIC may determine that a depository institution is "engaged in the business of receiving deposits other than trust funds" if the institution holds one or more non-trust deposits in the aggregate amount of $500,000 and that such a finding applies to all provisions of the FDIC where the term comes into play.[3] The opinion was based on an exhaustive review of the above six factors, including the consistent practices of both FDIC and OCC.[4]

The opinion discussed the determination that the word "deposits" in the statute could be satisfied by a single account because an account holder could make more than one deposit into a single account. The opinion also clearly stated that the interpretation was not intended to suggest that a depository institution is not "in the business" if it holds less that $500,000 in the requisite deposits.

1 12 U.S.C. §1816. The FDIC applies the seven statutory factors in accordance with a "Statement of Policy on Applications for Deposit Insurance" which 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."

2 12 U.S.C. § 1815(x)(1).

3 The term is relevant in FDIA section 3 (definition of state bank), section 5 (insurance of deposits), section 24 (limitations on activities of state banks) and section 27 (most favored lender status).

4 OCC had statutory authority to determine when a national bank was engaged in the business of receiving deposits other than trust funds until 1991.

In **January 2001,** the federal district court in *Heaton v. Monogram Credit Card Bank of Georgia*[5] rejected General Counsel Opinion No. 12. That court held that FDIC had ignored the statutory language of "deposits" because clearly more than one deposit account was intended. FDIC has undertaken this rulemaking because of the uncertainty that exists as a result of this court's ruling.

Discussion

Failure to provide consistency in interpreting the term "engaged in the business of receiving deposits" has far-reaching consequences. If FDIC's decision that a state bank is engaged in the business of receiving deposits and thus is eligible for federal deposit insurance can be attacked by third parties in private litigation, then financial institutions operating in more than one state could find themselves subject to differing interpretations as to which provisions of the FDIA apply to them. Importantly, financial institutions would not be able to rely on FDIC's insurance determinations to avail themselves of "most favored lender status," given the onerous penalties for violations of usury laws.

Nor could the public rely on FDIC's determinations of insurance eligibility if the courts can ignore those decisions. Moreover, failure to provide deference to FDIC with respect to determinations of key statutory provisions may open the door to allegations of improper agency determinations on other issues.

For these reasons, ABA supports FDIC's proposal to adopt a regulatory standard for determining whether a depository institution is "engaged in the business of receiving deposits other than trust funds." ABA agrees that the standard may be based on a particular number and amount of non-trust deposits, and that the standard should apply to all relevant sections of the FDIA.

With respect to the nature of the deposit, ABA believes that a single non-trust deposit from an affiliate or other party would be an appropriate standard. Depository institutions should *not* be required to offer more than one type of deposit account nor be required to accept deposits from the general public in order to satisfy the statutory criteria.

With respect to the amount of the deposit, ABA agrees that in most circumstances a deposit of $500,000 would likely be appropriate. However, as was the case in General Counsel Opinion No. 12, the regulation should clearly indicate that there is no inference that an institution with a non-trust deposit of less than that amount would not be eligible for federal deposit insurance. Rather, FDIC would review the particulars of the application. FDIC should also expressly retain the authority to make exceptions to this general rule as warranted by the facts and circumstances.

5 2001 %L 15635 (E.D. La.).

Conclusion

In conclusion, ABA supports FDIC's proposal to replace General Counsel Opinion No. 12 with a regulation. If you have any questions concerning this matter, please do not hesitate to call me.

Sincerely,

Cristeena G. Naser