LAW OFFICES
Ballard Spahr Andrews & Ingersoll, LLP
1735 MARKET STREET, 51ST FLOOR
PHILADELPHIA, PENNSYLVANIA 19103-7599
215-665-8500
FAX: 215-864-8999
LAWYERS@BALLARDSPAHR.COM

BALTIMORE, MD
CAMDEN, NJ
DENVER, CO
SALT LAKE CITY, UT
VOORHEES, NJ
WASHINGTON, DC

JEREMY T. ROSENBLUM
DIRECT DIAL: (215) 864-8505
PERSONAL FAX: (215) 864-9062
E-MAIL: ROSENBLUM@BALLARDSPAHR.COM

July 18, 2001

BY E-MAIL, FAX AND NEXT DAY DELIVERY

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attn.: Mr. Robert E. Feldman, Executive Secretary
Comments/OES

Re: Notice of Proposed Rulemaking Regarding Being Engaged in the Business of Receiving Deposits Other Than Trust Funds

Ladies and Gentlemen:

We are counsel to Monogram Credit Card Bank of Georgia ("Monogram"), the defendant in *Heaton v. Monogram Credit Card Bank of Georgia.* We strongly support the FDIC's proposal to replace General Counsel's Opinion No. 12, *Engaged in the Business of Receiving Deposits Other Than Trust Funds* (the "Opinion"), with a formal regulation, since recent conflicting decisions of the federal and Louisiana trial courts in *Heaton* have created a great deal of uncertainty as to whether the banking industry, regulators, depositors and the public are safe in relying upon the core FDIC determination that an institution qualifies for FDIC deposit insurance.

The Opinion notes that, prior to *Heaton*, the FDIC and the Office of the Comptroller of the Currency (the "OCC") repeatedly approved for deposit insurance institutions proposing to engage in limited deposit-taking activities.[1] In 1995, the Second Circuit concluded in *Meriden Trust and Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995), that an institution holding two $100,000 deposits from affiliates was a "state bank" "engaged in the business of receiving deposits." Consistent with this administrative practice and judicial authority, the initial federal district court judge assigned to *Heaton*, Judge Thomas Porteous, concluded that Monogram was a "state bank" engaged in the business of receiving deposits. Shortly after his assignment to the case, Judge Carl Barbier concluded that Heaton had failed to show any reason

1 In 1991, the FDIC assumed the OCC's then-existing role of granting deposit insurance for newly chartered national banks.

to disturb this conclusion. Subsequently, however, Judge Barbier changed course and concluded, on a jurisdictional motion, that Monogram was not a "state bank" "engaged in the business of receiving deposits." Most recently, a state court trial judge declined to decide the issue and instead held that factual determinations by a jury were required. As a result, *Heaton* has generated unnecessary uncertainty and confusion concerning the meaning of the statutory phrase "engaged in the business of receiving deposits other than trust funds."

Need for Regulation: Under Section 5(a)(1) of the Federal Deposit Insurance Act (the "Act"), 12 U.S.C. § 1815(a)(1), the FDIC may only insure the deposits of institutions "engaged in the business of receiving deposits other than trust funds." By the same token, under Section 3(a)(2)(A) of the Act, 12 U.S.C. § 1813(a)(2)(A), an institution must be "engaged in the business of receiving deposits other than trust funds" in order to qualify as a "state bank." Thus, the rights and responsibilities of state-chartered banking institutions under the Act (including the right to charge and export interest under Section 27 of the Act, 12 U.S.C. § 1831d ("Section 27"), and the obligation to comply with FDIC enforcement orders under Section 8 of the Act, 12 U.S.C. §1818), depend upon a finding by the FDIC that the bank is engaged in the requisite deposit-taking business.[2]

In the Opinion and the preamble to the proposed regulation, the FDIC has properly recognized that fundamental problems are created when courts overturn FDIC deposit insurance determinations after the fact. *First*, there is the threat, as in *Heaton*, that insured depository institutions will be unfairly divested of statutory rights under the Act, including their interest authority under Section 27, years after the FDIC's initial insurance determination and while the FDIC adheres to its determination. *Second*, there is the risk, as in *Meriden Trust*, that insured institutions and their institution affiliated parties will seek to shirk their duties under the Act, including duties under Section 8 of the Act, 12 U.S.C. § 1818.[3] *Third*, there is the prospect that similarly situated institutions, or even the same institution, will be treated as insured depository institutions in some jurisdictions but not in others, leading to rampant confusion over their status.[4] *Fourth*, as the Conference of State Bank Supervisors warned in an *amicus curiae*

---

2 We think there is no basis whatsoever for drawing a distinction between the meaning of the statutory phrase depending upon whether it is used in Section 3(a)(2)(A), Section 5(a)(1) or Section 8(p) of the Act.

3 We think it clear that Congress intended the privileges and responsibilities of insured depository institution status to go hand in hand. The idea that a state-chartered bank could be subject to federal banking agency supervision and regulation and need to pay deposit insurance assessments but not have the right to charge and export interest rates under Section 27, or that such an institution would have these interest exportation rights but not be subject to agency supervision, regulation and assessment, is nonsensical. Under the plain language of the Act, ***all*** provisions applicable to "state banks" must apply to a given institution or none may apply.

4 In *Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), the Supreme Court emphasized the importance of avoiding confusion with respect to the application of federal banking laws in an interstate environment. It said: "If

brief submitted in *Heaton*, these types of decisions "threaten[] to destroy, with respect to state-chartered credit card banks, the competitive equality that Congress has established between State banks and national banks in the charging of interest rates on loans" and to "disrupt the carefully balanced system of federal and state regulation for such banks." *Finally*, there is the possibility that the FDIC will need to create uniform treatment for insured institutions in accordance with judicial dictates in one jurisdiction or another by terminating insured status for unsuccessful litigants and/or similarly situated institutions, even though the FDIC believes these institutions are entitled to FDIC insurance.

All of these problems could be avoided through appropriate judicial recognition of the authority conferred on the FDIC to make binding determinations in this regulatory sphere. As the FDIC has pointed out, Section 8(p) of the Act, 12 U.S.C. § 1818(p), confers upon the FDIC the authority to make a finding that an insured depository institution is not engaged in the business of receiving deposits other than trust funds and provides that this "finding . . . shall be conclusive." Similarly, Section 8(i) of the Act, 12 U.S.C. § 1818(i), expressly provides that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order" under specified sections of the Act, including Section 8. A judicial determination that a particular institution is not a "state bank" because it is not engaged in the business of receiving deposits would preclude the FDIC from issuing any order against the institution or its affiliated parties under Section 8 of the Act. Thus, Section 8(i) of the Act also makes clear that determinations concerning whether institutions are engaged in the business of receiving deposits other than trust funds are wholly outside the province of the courts.[5]

---

the location of the bank were to depend on the whereabouts of each credit card transaction, the meaning of the term 'located' would be so stretched as to throw into confusion the complex system of modern interstate banking. . . . We do not choose to invite these difficulties . . . ." 439 U.S. at 312.

5 Further support for the proposition that Congress did not intend the courts to become involved in determining whether an institution is "engaged in the business of receiving deposits other than trust funds" comes from a comparison of Section 27 and the virtually identical interest exportation authority for state and federal savings associations set forth in Section 4(g) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1463(g). Significantly, Section 4(g) applies to state savings associations so long as they are ***actually*** insured by the FDIC, regardless of whether or not a court would agree that the FDIC was correct in granting deposit insurance. Under Section 4(g), interest exportation rights identical to those created under Section 27 are afforded to any "savings association." In turn, Section 3(4) of HOLA, 12 U.S.C. § 1462(4), defines "savings association" as any savings association, as defined in Section 3 of the Act, "the deposits of which are insured by the [FDIC]." (It does ***not*** say, of course, any savings association the deposits of which ***should be*** insured by the FDIC.) Finally, Section 3(b) of the Act, 12 U.S.C. § 1813(b), defines the term "savings association" without reference to the deposit-taking activities of the institution. Thus, Congress has granted interest exportation rights to any savings association that the FDIC has insured. We submit that there is no conceivable basis for allowing state savings associations to export interest

Not only is there compelling statutory support for courts to decline review of FDIC deposit insurance determinations, in *Meriden Trust*, the leading case addressing the meaning of the phrase "engaged in the business of receiving deposits other than trust funds," the Second Circuit expressly deferred to the FDIC's expertise on this issue. It said:

> Where congressional intent is difficult to discern from the words of the statute, however, or where the statute does not address the issue directly, our review is limited to "whether the agency's answer is based on a permissible construction of the statute." [*Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 (1984)]. Thus we will only reverse the FDIC's interpretation of the Federal Deposit Insurance Act if "it appears from the statute or its legislative history that the [FDIC's] interpretation is contrary to Congress's intent."

62 F.3d at 453.

The Supreme Court, too, has regularly deferred to the federal banking agencies' interpretations of federal banking statutes. *See, e.g., Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 739-44 (1996) (deferring to the OCC's interpretation concerning whether credit card late fees are "interest" that national banks may "export" under Section 85 of the National Bank Act, 12 U.S.C. § 85 ("Section 85")); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (deferring to OCC approval of national bank's application to exercise incidental powers under National Bank Act);[6] *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (deferring to the FDIC's "practice and belief" that standby letters of credit backed by promissory notes are not "deposits" under the Act).[7]

Until the *Heaton* litigation, then, banks and their depositors were comfortable in relying upon FDIC deposit insurance determinations. This comfort level, of course, has been seriously eroded by *Heaton*, since certain judicial decisions in the case have failed to recognize the finality of the FDIC's determination to grant deposit insurance to Monogram and have also failed to accord deference to the Opinion. Accordingly, the adoption of a formal regulation is warranted to remove the substantial uncertainty and confusion caused by these decisions.

---

charges on the basis of unreviewable FDIC deposit insurance determinations but to allow the courts to reject FDIC determination for this purpose.

6 In *U.S. v. Mead*, 121 S. Ct. 2164, 2001 U.S. LEXIS 4492, *23 (2001), the Supreme Court very recently cited *NationsBank* as an instance where the Court has "found reasons for *Chevron* deference even when no . . . administrative formality was required and none was afforded."

7 *Accord Gavey Properties/762 v. First Financial S. & L.*, 845 F.2d 519, 521-522 (5th Cir. 1988) (deferring to opinion letter by General Counsel of Federal Home Loan Bank Board construing interest statute virtually identical to Section 27).

This is not the first time that litigation has demonstrated the need for a clarifying regulation. Several years ago, for example, a series of class actions was brought against many national credit card issuers, challenging their authority under Section 85 and Section 27 to treat late charges as a form of "interest" and "export" such charges nationwide on the basis of the laws of their home states, as incorporated into Section 85 and Section 27. Thereupon, the OCC adopted an interpretive regulation setting forth a detailed definition of the term "interest," as used in Section 85. 12 C.F.R. §7.4001(a). The Supreme Court expressly deferred under *Chevron* to the OCC's view. In doing so, it flatly rejected the plaintiff's contention that the OCC action in adopting a regulation during the course of the litigation was somehow improper. It said: "Nor does it matter that the regulation was prompted by litigation, including this very suit. . . . That it was litigation which disclosed the need for the regulation is irrelevant." *Smiley*, 517 U.S. at 741.[8]

Specific Comments on the Proposed Rule: We strongly endorse the proposal that the maintenance of $500,000 of non-trust deposits, regardless of the source, suffices for an institution to be engaged in the business of receiving deposits other than trust funds. The FDIC has correctly observed that the Act does not specify the number or dollar amount of deposits required for an institution to be "engaged in the business of receiving deposits other than trust funds." Thus, the Act does not indicate whether an institution's deposit-taking business must be big business, either in dollar amount or as a percentage of its funding, or whether a relatively small deposit-taking business will suffice. Nor does it specify where the deposit funds must come from or what dollar amount or percentage of deposits must be insured.[9]

Moreover, there is powerful support for the FDIC to set a modest deposit threshold for banks to be engaged in the business of receiving deposits other than trust funds. As noted above, the FDIC and the OCC have repeatedly approved for deposit insurance institutions proposing to engage in limited deposit-taking activities, including a number of institutions taking one or a limited number of deposits in very low amounts. Additionally, in 1995, the Second Circuit concluded in *Meriden Trust* that an institution holding two deposits from affiliates, aggregating only $200,000, was a "state bank" "engaged in the business of receiving deposits." Even though Congress has amended the Act many times since the FDIC and OCC adopted their deposit insurance policies and several times since *Meriden Trust,* it has never expressed disapproval for the conclusion that limited deposit-taking satisfies the statutory test.

---

8 The involvement of federal banking agencies in ongoing private litigation is neither novel nor improper. *See, e.g., Smiley; Aments v. PNC Nat'l Bank*, 849 F.Supp. 1015 (W.D. Pa. 1994) (OCC *amicus curiae* brief); *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818 (1st Cir. 1992) (FDIC *amicus curiae* brief); *Smith v. Fidelity Consumer Discount Co.,* 898 F.2d 907 (3rd Cir. 1989) (Office of Thrift Supervision *amicus curiae* brief).

9 When Congress wants to detail how a financial institution must conduct its business in order to preserve the powers Congress has granted, it is fully capable of doing so. *See* Section 10(m) of the Home Owners' Loan Act, 12 U.S.C. § 1467a(m) (elaborating asset composition requirements for "qualified thrift lenders" entitled to remain as subsidiaries of savings and loan holding companies).

The Bank Holding Company Act (the "BHCA") provides additional support for a modest deposit threshold. As the FDIC noted in the Opinion and the preamble to the proposed regulation, 12 U.S.C. §§ 1841(c)(2)(D)(i) and (ii) manifest that a trust company can qualify for deposit insurance even though substantially all of its deposits are in the form of non-qualifying trust deposits. It is apparent, then, that Congress contemplated that an institution may hold a relatively insignificant amount of non-trust deposits and still qualify for FDIC insurance.[10] Further, the BHCA's deposit-taking limitations on credit card banks, 12 U.S.C. §§ 1841(c)(2)(F)(ii)-(iv), are also fully compatible with insured bank status. Indeed, the BHCA's credit card bank exception can only apply to "insured banks" under 12 U.S.C. § 1841(c)(1)(A) and not to uninsured institutions described in 12 U.S.C. § 1841(c)(1)(B) since depository institutions described in subsection (c)(1)(B) cannot be credit card banks because, by definition, they take demand deposits and make commercial loans while credit card banks do neither. Thus, the credit card bank exemption from the BHCA confirms that credit card banks can be engaged in the business of receiving deposits.

We further support the FDIC's decision, as manifested in the preamble to the proposed regulation, to treat all deposits alike, regardless of source. It is the only position consistent with the plain language of the Act, which does not limit qualifying deposits to deposits from customers or deposits from the public. It is the only position consistent with the FDIC's practice since the grant of deposit insurance to Bessemer Trust in 1969. And it is the only position consistent with *Meriden Trust*, where the Second Circuit found that an institution that only received deposits from its affiliates was engaged in the business of receiving deposits. Again, Congress has never objected to the FDIC's practice of approving deposit insurance for institutions that only take deposits from a limited class of depositor and it has never included any language in the Act limiting qualified deposit-taking to specified classes of depositors. We urge the FDIC to reiterate in the preamble to the final regulation or, better yet, in the final regulation itself, that the source of deposits is not relevant to the determination of whether an institution is "engaged in the business of receiving deposits."

In short, the conclusion of the Opinion is consistent with the "plain language" of the Act and it reaches the correct result. In light of the critical public policy issues and the uncertainty implicated by certain rulings in *Heaton*, the FDIC should adopt the proposed regulation.

Thank you for your consideration of our views.

Very truly yours,

/s/ Jeremy Rosenblum

Jeremy T. Rosenblum

cc: Christopher L. Hencke, Esquire

---

10 Neither counsel to *Heaton* nor the district court ever addressed the Opinion's observations concerning the BHCA. All Heaton's counsel could say was that "trust issues . . . are not relevant here."