July 17, 2001

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

Re: Being Engaged in the Business of Receiving Deposits Other Than Trust Funds
Notice of Proposed Rulemaking
66 FR 20102 (April 19, 2001)

Dear Mr. Feldman:

America's Community Bankers ("ACB")' is pleased to comment on the notice of proposed rulemaking[2] by the Federal Deposit Insurance Corporation (the "FDIC"), through which the FDIC seeks to promulgate a new regulation clarifying and further defining the term "engaged in the business of receiving deposits other than trust funds." [3]

ACB Position Summary

ACB supports the FDIC's efforts to definitively answer the important question of what constitutes an insured depository institution. We believe that the proposed definition, which would require that - at a minimum - an insured depository institution maintain one or more non-trust deposit accounts totaling $500,000 in the aggregate, is reasonable and consistent with the intent of, and specific language included within, the Federal Deposit Insurance Act (the "FDI Act").[a] And, we believe the FDIC should apply this regulatory standard, once finalized, uniformly throughout the FDI Act and its implementing regulations.

We also believe that the proposed definition will afford insured depository institutions the requisite degree of flexibility to pursue individualized business strategies. At the same time, this proposal will provide applicants for deposit insurance, as well as potential customers and other interested parties, the necessary certainty of a regulatory standard that is not subject to frequent and potentially inconsistent judicial interpretation.

1 ACB represents the nation's community banks of all charter types and sizes. ACB members pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

2 66 _Fed. Reg. 20102 (April 19, 2001).

3 id.

4 *See, e.g.,* 12 U.S.C. §§ 1813(a)(2); 1815(a)(1).

The Proposal

The FDIC is authorized to approve or disapprove applications for federal deposit insurance.[5] The FDI Act directs the FDIC to consider seven primary factors when assessing an application for federal deposit insurance: (1) the financial history and condition of the applicant; (2) the adequacy of the institution's capital structure; (3) the applicant's future earnings prospects; (4) the general character and fitness of the management; (5) the risk presented by the applicant to either the Bank Insurance Fund or the Savings Association Insurance Fund; (6) the convenience and needs of the community to be served by the applicant; and (7) whether the applicant institution's corporate powers are consistent with the purposes of the FDI Act.[6]

As a threshold matter, however, the FDIC first must determine whether an applicant for federal deposit insurance is "engaged in the business of receiving deposits, other than trust funds."[7] This language has proven to be ambiguous in practical application because it leaves unanswered the question of whether the FDI Act requires a specific dollar amount of deposits, a minimum number of depositors, non-affiliated as well as affiliated depositors, or even a requisite level of deposit activity in order for an institution to meet the statutory definition of being engaged in the business of receiving non-trust deposits.

In March 2000, the FDIC attempted to provide some guidance on, and finality to, the matter when it issued General Counsel Opinion Number 12 ("GC 12"). In GC 12, the FDIC concluded that, in its interpretation of the statutory language, the "engaged in" test could be satisfied by the continuous maintenance of one or more non-trust deposit accounts totaling $500,000 or more in the aggregate. This interpretation was derived from the FDIC's experience over time in reviewing and analyzing a wide variety of applications for federal deposit insurance.

Despite the FDIC's efforts, the issue remains unsettled and, in fact, is the subject of ongoing litigation that could have implications for current and future insured depository institutions. In a recent case involving the preemption of state laws governing interest rates and fees, a federal district court in Louisiana rejected the FDIC's statutory interpretation contained within GC 12, concluding that the agency's analysis of the "engaged in" statutory language was flawed.[8]

To address the ongoing uncertainty and the potential for conflicting or anomalous situations involving insured depository institutions and applicants for federal deposit insurance, the FDIC issued this proposal, which would codify the substance of GC 12. In doing so, the FDIC seeks to conclusively define the meaning of the statutory language "engaged in the business of receiving deposits other than trust funds."

[5] 12 U.S.C. § 1815.
[6] 12 U.S.C. § 1816.
[7] 12 U.S.C. § 1815(a)(1).
[8] *See* Heaton v. Monogram Credit Card Bank, 2001 U.S. Dist. LEXIS 325 (E.D. La. January 5, 2001), *cert. denied,* Monogram Credit Card Bank v. Heaton, 2001 U.S. LEXIS 4540 (June 18, 2001).

A new section would be added to the FDIC's implementing regulations containing the following language:

"For purposes of the [FDI] 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."[9]

ACB Position

ACB believes it is necessary and appropriate for the FDIC to adopt a definitive regulatory standard for determining whether a depository institution is "engaged in the business of receiving deposits other than trust funds," and we believe that the proposed definition accomplishes this mission. Hopefully, the FDIC's action will eliminate future uncertainty over the status of depository institutions.

With respect to the proposed definition, ACB supports the minimum requirement of $500,000 in aggregate non-trust deposits because it is reasonable, attainable and consistent with prior FDIC interpretations. We do not believe it is necessary, however, to include additional requirements, such as a minimum number of depositors, accounts (beyond the single account) or deposit products. We believe these aspects of an applicant's proposed business are more appropriately addressed through the application review process, which focuses on the seven statutory factors outlined above. Having met the threshold definition, an applicant still must satisfy the FDIC that it is an appropriate candidate for federal deposit insurance.

ACB does support some degree of flexibility in allowing a newly insured depository institution to achieve the minimum level of aggregate deposits, and for enabling an institution that might fall below the $500,000 mark to regain the minimum level of aggregate deposits.

Finally, ACB encourages the FDIC to determine that the proposed definition of "engaged in the business of receiving deposits other than trust funds," which is intended to implement section 5 of the FDI Act in this instance, should be applied uniformly throughout the FDI Act and its implementing regulations.

Conclusion

ACB appreciates the opportunity to comment on this important proposal and will assist the FDIC in any way possible in developing useful, yet less burdensome, regulations for community-based financial institutions throughout the United States.

[9] Proposed 12 C.F.R. § 303.14.

If you have any questions, please contact the undersigned at (202) 857-3121 or via email at cbahin@acbankers.org, or Michael W. Briggs at (202) 857-3122 or via email at mbriggs@acbankers.org.

Sincerely,

Charlotte M. Bahin
Director of Regulatory Affairs
Senior Regulatory Counsel