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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

RIN 3064–AC53

Insurance of State Banks Chartered as Limited Liability Companies

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) has adopted a final rule regarding whether and under what circumstances the FDIC will grant deposit insurance to a State bank chartered as a limited liability company (LLC). Pursuant to section 5 of the Federal Deposit Insurance Act (FDI Act) the FDIC may grant deposit insurance only to certain depository institutions. One of the statutory requirements for a State bank to be eligible for Federal deposit insurance is that it must be ''incorporated under the laws of any State.'' In the recent past the FDIC received two inquiries regarding whether a State bank that is chartered as an LLC (a ''Bank-LLC'') could be considered to be ''incorporated'' for purposes of that requirement. The final rule provides that a bank that is chartered as an LLC under State law would be considered to be ''incorporated'' under State law if it possesses the four traditional, corporate characteristics of perpetual succession, centralized management, limited liability and free transferability of interests.

DATES: *Effective date:* March 17, 2003.

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SUPPLEMENTARY INFORMATION:

I. Background

Generally, the FDIC may grant deposit insurance only to depository institutions that are engaged in the business of receiving deposits other than trust funds.[1] The term ''depository institution'' is defined in the Federal Deposit Insurance Act (FDI Act) to mean any bank or savings association.[2] The term ''bank'' is also defined in the FDI Act to include any State bank,[3] and ''State bank'' means:

Any bank, banking association, trust company, savings bank, industrial bank * * * or other banking institution which—

(A) Is engaged in the business of receiving deposits other than trust funds * * * and

(B) Is incorporated under the laws of any State or which is operating under the Code of Law for the District of Columbia (except a national bank),

Including any cooperative bank or other unincorporated bank the deposits of which were insured by the Corporation on the day before August 9, 1989.[4]

Recently, two banks expressed an interest in obtaining Federal deposit insurance for a State bank that would be chartered as an LLC.[5] The proponents have argued specifically that the term ''incorporated'' should not be interpreted to preclude an LLC from becoming an insured depository institution. The phrase ''incorporated under the laws of any State'' first appeared in the definition of ''State bank'' with the Banking Act of 1935,[6] but the FDI Act provides no definition of the term ''incorporated.'' Furthermore, there is no legislative history nor judicial guidance regarding its meaning as used in the FDI Act. Consequently, it is not clear how the term ''incorporated'' should be interpreted in the context of the FDI Act, and specifically, whether an LLC could be considered to be ''incorporated'' for purposes of determining eligibility for Federal deposit insurance.

II. The Nature of Corporations

At common law there were generally three types of business entities: proprietorships, partnerships, and corporations. A proprietorship is an individual carrying on a business for profit. A partnership is generally an association of two or more persons to carry on as co-owners a business for profit.[7] Proprietorships and partnerships had no existence separate and apart from their owners. Corporations, on the other hand, were created and existed by virtue of a grant of authority from the sovereign. Although there appears to be no universally accepted definition of ''corporation,'' most definitions of the term are pervaded by the notion of ''an 'artificial legal creation,' the continuance of which does not depend on that of the component persons, and the being or existence of which is owed to an act of state.''[8] One of the earliest judicial definitions reflecting that notion is that enunciated in the 1819 case of *Trustees of Dartmouth College* v. *Woodward*.[9] In *Dartmouth College*, Chief Justice Marshall stated that

[A] corporation is an artificial being, * * * existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it * * * Among the most important are immortality and * * * individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.[10]

Attributes of a Corporation

The lack of any universal agreement as to the characteristics of a corporation

[1] *See* 12 U.S.C. 1815.

[2] *See* 12 U.S.C. 1813(c)(1).

[3] *See* 12 U.S.C. 1813(a)(1).

[4] 12 U.S.C. 1813(a)(2).

[5] Currently, State law in 5 States expressly permits LLCs to engage in the business of banking; the law in 14 other States would not. An informal survey of these 14 States indicated that there appears to be no particular reason for this prohibition. Representatives of two of the States thought that one reason could be that the corporate form lends itself to regulation and supervision. Representatives of two other States mentioned that legislation was being drafted or proposed to remove the prohibition.

[6] *See* Banking Act of 1935, Pub. L. No. 74–305, sec. 101, 49 Stat. 684.

[7] *See* Unif. Partnership Act, sec. 101(6) (1997), 6 U.L.A. 61 (Supp. 2002).

[8] 1 William Meade Flectcher *et al.*, Flectcher's Cyclopedia of the Law of Private Corporations § 4 (perm. ed., rev. vol. 2001).

[9] *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518 (1819).

[10] *Id.* at 636.

may have resulted from the fact that those characteristics have evolved over time.[11] However, it has been traditionally recognized that there are four attributes of a corporation that distinguish it from other forms of business entities; those attributes are: perpetual succession, centralized management, limited liability, and free transferability of interests.

Perpetual succession (also sometimes known as continuity of life) is not generally construed to mean immortality; rather perpetual succession means that the entity continues to exist independent of its owners. For example, the death or withdrawal of a shareholder of a corporation does not terminate the existence of the corporation. Perpetual succession is an attribute that distinguishes corporations from partnerships because partnerships are created and exist by agreement of the owners (the partners). The death or withdrawal of a partner generally terminates the partnership. A corporation, on the other hand, is created and exists by virtue of a grant of authority from the State, and the death or withdrawal of a shareholder does not terminate the corporation.

Centralized management generally means that continuing, exclusive authority to manage the entity is vested in a group of individuals appointed or elected by the owners. The owners, therefore, do not have the exclusive authority to directly manage the entity. For example, the shareholders of the corporation elect a group of individuals (who may or may not be owners) to be its Board of Directors, and the Board of Directors manages the corporation. In a partnership, the general partner(s) have the exclusive authority to manage the affairs of the partnership.

Limited liability generally means that an owner of the entity is not personally liable for the debts of the entity; rather, the maximum potential liability of an owner is limited to the owner's investment in the entity. For example, the shareholders of a corporation are generally not liable for the corporation's debts, and the maximum amount that a shareholder could lose if the corporation incurs liabilities beyond its assets is his or her investment. This attribute also distinguishes a corporation from a partnership because in a partnership the general partners typically are fully liable for the debts of the partnership.

Free transferability of interests generally means that an owner of the entity may transfer an ownership interest in the entity without the consent or approval of the other owners. For example, a shareholder of a corporation can generally transfer all or a part of his or her shares to another person without the consent or approval of any other shareholder. However, in closely-held corporations, it is a common practice for shareholders to enter into agreements requiring a selling shareholder to obtain the prior approval of the remaining shareholders. In partnerships, a partner generally cannot transfer his or her interest without the consent of the other partners. This is so because partnerships exist by virtue of an agreement among all of the owners. However, even when the other partners consent, the original partnership technically is terminated, and a new partnership is created.[12]

Tax Treatment of Corporations vs. *Partnerships*

As noted above, a key distinction between a corporation and a partnership is that a corporation is created by a grant of authority from the State, whereas a partnership is created by agreement among the co-owners. A corporation, unlike a partnership, is a legal entity separate and apart from its owners, and the Federal income tax laws reflect that separate existence. As a result, a corporation's income is effectively taxed twice, once at the corporation level, and again at the shareholders' level when the shareholders receive the corporation's income as dividends. However, because a partnership is not a legal entity separate from its owners, a partnership's income is not taxed at the partnership level, but is attributed directly to the partners and taxed only at the individual partners' level. This feature of a partnership is sometimes called ''pass-through tax treatment,'' and is generally considered to be a significant advantage over the tax treatment of a corporation's income.

Since the characterization of a business entity as a ''corporation'' has significant tax implications, the Internal Revenue Service (IRS) established rules to determine whether an entity would be taxed as a corporation or a partnership. Prior to its amendment in 1997, Treas. Reg. § 301.7701–2 classified an association of two or more persons who had the purpose of carrying on a business and dividing the profits as either a partnership or a corporation depending upon whether the association possessed more corporate characteristics than noncorporate characteristics. The four corporate characteristics that the IRS utilized were: continuity of life (perpetual succession), centralized management, limited liability, and free transferability of interests. Under the former IRS regulations, if an association possessed at least three of the four corporate characteristics, it would be treated as a corporation for federal income tax purposes. As noted above, after 1996 the IRS no longer utilized the corporate characteristics test and now permits business entities that are not specifically classified as corporations in the regulation to elect partnership tax treatment.[13] In that regard, we note that one of the entities specifically classified as a corporation in the regulation is a ''[s]tate-chartered business entity conducting banking activities, if any of its deposits are insured under the Federal Deposit Insurance Act.''[14] As a result, an FDIC-insured, State bank that is chartered as an LLC would not qualify under existing IRS regulations for partnership tax treatment. Nevertheless, proponents of permitting Federal deposit insurance for Bank-LLCs argue that if the FDIC determines that Bank-LLCs are eligible for Federal deposit insurance, they would then seek a change in the IRS regulations. The proponents argue that they have considered subchapter S status but found it too limiting.

In August 1996 Congress amended the Internal Revenue Code to allow eligible financial institutions to elect subchapter S status for federal income tax purposes.[15] A principal advantage of such status is that a subchapter S corporation is taxed the same as a partnership, *i.e.*, a subchapter S corporation is entitled to pass-through tax treatment. There are, however, limits on both the number and type of shareholders permissible for a subchapter S corporation. The maximum number of shareholders of a subchapter S corporation is 75, and only individuals, estates, certain trusts, and certain tax-exempt organizations may be shareholders.[16] Furthermore, there can only be one class of stock in a subchapter S corporation, and no nonresident aliens may be shareholders.[17]

These limitations on the number and type of permissible shareholders have been cited as principal reasons why subchapter S status does not provide banks with a practical way of gaining

[11] *See* Douglas Arner, Development of the American Law of Corporations to 1832, 55 SMU Law Review 23, 43–54, 2002.

[12] *See* Flectcher, supra note 8, § 20.

[13] *See* Treas. Reg. §§ 301.7701–2, 7701–3 (1997).

[14] Treas. Reg. § 301.7701–2(b)(5) (1997).

[15] *See* Small Business Job Protection Act, Pub. L. 104–188 § 1315, 26 U.S.C. 1361(b) (1996).

[16] *See* 26 U.S.C. 1361(b) (1996).

[17] *See Id.*

pass-through tax treatment. It is recognized that in the past several bills have been introduced in Congress to increase the number of permissible shareholders for subchapter S corporations, but to date none have been enacted into law. Consequently, the proponents have sought a determination from the FDIC regarding the eligibility of Bank-LLCs for deposit insurance. In issuing this final rule it is not the FDIC's intent to influence the IRS either way. This final rule is focused on responding to a request for a determination as to whether under the FDI Act a bank that is chartered as an LLC could be considered to be "incorporated" and therefore eligible to apply for Federal deposit insurance as a State bank. Specifically, the FDIC takes no position on how such an entity should be taxed. We note that supporters of deposit insurance for Bank-LLCs argue that even if the IRS declines to amend its regulations to provide pass-through tax treatment for a Bank-LLC, there are still advantages to the LLC structure. State tax laws may provide the desired pass-through tax treatment with respect to State income taxes. Furthermore, it is argued that the increased flexibility provided by the LLC structure is itself a significant advantage over the corporation structure.

III. The Nature of Limited Liability Companies

Generally, an LLC is a business entity that combines the limited liability of a corporation with the pass-through tax treatment of a partnership.[18] Wyoming was the first State to authorize LLCs in 1977; since that time the remaining 49 States and the District of Columbia have all enacted LLC statutes. Generally, LLC statutes were crafted to authorize a business entity that is neither a partnership nor a corporation, but an entity that has some of the more desirable features of each.[19] As a result, an LLC has characteristics of both a partnership and a corporation. However, because an LLC is neither a partnership nor a corporation, State partnership laws and State corporation laws generally do not apply. For example, State corporation laws that require a board of directors, that specify how ownership interests (shares) may be issued, and that impose capital requirements generally do not apply to an LLC. LLC statutes generally allow the owners broad discretion in setting up an LLC. According to some legal scholars, "[w]hole bodies of corporate law doctrine . . . are rendered irrelevant" when an LLC is utilized.[20]

An LLC is established by filing articles of organization with the State. These articles are roughly equivalent to a corporation's articles of incorporation. Every LLC has an operating agreement which is a contract executed by the members that sets forth the manner in which the business of the LLC will be conducted. The operating agreement establishes the rights, powers, duties, and liabilities of the members with respect to each other and with respect to the LLC. It contains provisions detailing such matters as the LLC's management structure, capital contributions, accounting, distributions, transfers of a member's interest, and dissolution. As used in many LLC statutes, a "member" of an LLC is a person who owns an interest in the LLC and is roughly equivalent to a shareholder of a corporation. Furthermore, a "member's interest" in an LLC is generally the member's ownership interest in the LLC, and is sometimes evidenced by a certificate which is roughly equivalent to a stock certificate of a corporation.

Consistency of the LLC Structure With Corporate Attributes

Many LLC statutes authorize entities that do not possess the four corporate attributes. First, some State LLC statutes require, or permit LLC members to provide in the operating agreement, that the LLC will automatically terminate, or dissolve, or that its operations will be suspended pending the consent of the remaining members, upon the death, disability, bankruptcy, withdrawal, or expulsion of a member, or upon the happening of some other specified event.[21] These automatic termination/dissolution/suspension provisions are inconsistent with the notion of perpetual succession because the continued existence and operation of the entity directly depends upon the existence, condition, or status of its owners. Second, some State LLC statutes require, or permit LLC members to provide in the operating agreement, that the LLC will be managed solely and directly by the members.[22] Such member-management also tends to be inconsistent with the corporate attribute of centralized management because exclusive authority to manage the institution is vested in the owners who may or may not possess adequate expertise to manage the institution and who, as a group, may be so large or so small as to present operational or supervisory problems for the entity. Third, while members of an LLC generally have limited liability, some LLC statutes permit the LLC to provide for one or more full liability members, *i.e.*, members who are fully liable for all of the liabilities, debts, and obligations of the LLC.[23] Finally, some State LLC statutes require, or permit LLC members to provide in the operating agreement, either that LLC members may not transfer their interests in the LLC without the consent of the remaining members, or that a member may not transfer the managerial or voting rights that accompany an owner's economic interest in the LLC without the consent of the remaining members.[24] Such a provision tends to be inconsistent with the concept of free transferability of interests because the requirement for prior consent prevents, or at least restricts, an owner's transfer of his or her ownership interest.

IV. Overview of Comments Received

On July 23, 2002, the FDIC published a notice of proposed rulemaking in the **Federal Register** (67 FR 48054) (the "notice of proposed rulemaking") which generally proposed that a bank chartered as an LLC would be considered to be "incorporated" if it had the four traditional, corporate attributes. The notice of proposed rulemaking also requested comments on three specific questions regarding the proposed rule. The FDIC received 23 comment letters from 22 organizations. All of the comment letters were generally in favor of granting deposit insurance to State banks organized as LLCs. The organizations filing comments included nine State trade associations, six State banks, three national trade associations, two law firms, an organization of State bank supervisors, and a State banking commissioner.

The three questions posed and a discussion of the responses received with respect to those questions, as well as the FDIC's analysis of those responses follow.

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[18] *See* Mark A. Sargent & Walter D. Schwidetzky, Limited Liability Company Handbook § 1:3 (rev. 2002).

[19] *See* "Unif. Limited Liability Company Act," Prefatory Note, (amended 1996) 6A U.L.A. 426 (Supp. 2002).

[20] *See* Sargent & Schwidetzky, *supra* note 18, § 1:3.

[21] *See, e.g.*, Nev. Rev. Stat. § 86.491 (2001); Mass. Ann. Laws ch. 156C, § 43 (2002).

[22] *See, e.g.*, Mich. Comp. Laws § 450.4401 (2002); Ala. Code § 10–12–22(a) (2002).

[23] *See, e.g.*, Vt. Stat. Ann., tit. 11, § 3043(b) (2002); Cal. Corp. Code § 17101(e).

[24] *See, e.g.*, Mich. Comp. Laws § 450.4506 (2002); Pa. Stat. Ann. tit. 15, § 8924 (2002).

1. Should the FDIC Permit a State Bank That Is Organized as an LLC To Obtain Federal Deposit Insurance?

All of the commenters favored, at least, in general, a determination that a State bank that is organized as an LLC is eligible to apply for Federal deposit insurance.

2. If So, Should the FDIC Interpret the Term ''Incorporated'' Utilizing Some, All, or None of the Traditional Four Corporate Attributes?

Ten commenters thought the FDIC should not use any of the four corporate attributes in determining eligibility for Federal deposit insurance; four commenters thought we should use three of the four corporate attributes; three commenters thought we should use all four attributes; and five commenters did not respond specifically on this question.

Arguments Against Using Any of the Four Corporate Attributes

Of the 10 commenters who opposed using any of the four corporate attributes in determining a Bank-LLC's eligibility to apply for deposit insurance, eight specifically thought that if the particular State permits a bank to be organized as an LLC, and if the FDIC determines that the institution could be operated in a safe and sound manner, that should be sufficient for the entity to be eligible for Federal deposit insurance.

In support of their position the 10 commenters offered their views on the appropriateness of using specific corporate attributes to determine eligibility for Federal deposit insurance.

With regard to the corporate attribute of perpetual succession, several commenters construed the perpetual succession attribute to mean perpetual existence. Several commenters pointed out that in the past many FDIC-insured banks had limited lives (*e.g.*, the legal existence of some banks would terminate after 50 years). Since limited-life banks had never been a problem for the FDIC in the past, the commenters argued, they should not be a problem for the FDIC now. However, perpetual succession does not mean immortality. Rather, perpetual succession means that the existence of an entity is not dependent on the existence, condition, or status of any of its owners, and the death, disability, withdrawal, or bankruptcy of one or more of the owners of the entity does not terminate, dissolve, or suspend the entity. As noted above, some State LLC laws require, or permit an LLC to provide in its organizational documents, that the LLC will automatically terminate, dissolve, or be suspended upon the death, disability, bankruptcy, withdrawal or expulsion of an owner of an LLC or upon the happening of some other specified event. If a Bank-LLC were subject to such automatic termination, dissolution, or suspension provisions, without any advance warning, depositors in that institution might be denied access to their deposits due to an automatic termination of the institution's existence. Generally, the triggers for such automatic provisions may be wholly unrelated to the financial condition of the entity. Consequently, an institution that is well-capitalized, that is otherwise highly-rated for safety and soundness, and that is not subject to any enforcement actions could suddenly be closed for the sole reason that one of the owners died. Depositors would never know with certainty if their bank will be in existence on the day and time when they may need to withdraw their money. Furthermore, without such advance notice, the FDIC would not be prepared to handle the institution's closure and meet its deposit insurance obligation in a timely manner. In addition, not only would a customer be denied access to his or her deposits, but also any checks in transit that had not yet been paid by the bank would be rejected. The uncertainty, confusion, and disruption caused by such a closing would not only cause serious damage to public confidence in the nation's banking system, but also serious disruption to the community. Finally, without an opportunity to locate a healthy institution to purchase the assets and assume the deposits of the institution on a going-concern basis, the cost of the resolution could be substantially higher than necessary. For these reasons, the FDIC continues to believe that it is not only reasonable, but essential, that the term ''incorporated'' be interpreted to include the corporate attribute of perpetual succession.

With regard to the corporate attribute of centralized management, one commenter recognized that in a theoretical sense there may be concerns when a Bank-LLC with a large number of members is proposed to be managed directly by its members. However, rather than requiring a board of directors for every Bank-LLC, the commenter suggested that the FDIC could require a board of directors only if the number of members exceeded 25. The FDIC believes that centralized management is an important attribute for a bank for a couple of reasons. First, if the authority to manage the bank is limited to the owners of the institution, management expertise would necessarily also be limited. The quality of the management of a bank is a key factor in a bank's success or failure. In order to provide the best chance for a bank to compete successfully and to operate profitably, a bank should be free to enlist the best qualified managers available to it. Too small of a group of owners may not provide sufficient management expertise. Too large of a group may dilute the influence of those owners who do have adequate management expertise. For example, even if some of the owners possess adequate expertise, their ability to manage the institution may be negated by a larger segment of the owners that lacks such expertise. Second, management by a group that is too small could severely impair the bank's ability to respond to supervisory and regulatory direction. The volume and complexity of the demands of operating a bank might put too small of a group under excessive pressure and could result in management that is not responsive or at least so slow as to imperil the bank's effectiveness. Too large of a group may make it unwieldy or excessively difficult to disseminate information and get decisions in a timely manner because so many voices are entitled to be heard and considered. For these reasons, the FDIC believes that centralized management is also an important attribute that a bank should have in order to be eligible for deposit insurance.

With regard to the corporate attribute of limited liability, one of the 10 commenters while generally disagreeing with the use of the four corporate attributes, nevertheless thought that requiring limited liability was reasonable, since unlimited liability would certainly reduce the number of prospective shareholders. Another of the 10 commenters thought that in some cases the FDIC might conclude that unlimited liability of one or more members actually reduces the risk to the deposit insurance fund. Furthermore, the commenter argued that bank organizers should be permitted to explain the reasons for unlimited liability and show how unlimited liability impacts the bank's risk to the fund.

The FDIC believes that limited liability tends to attract more potential investors than unlimited liability and, furthermore, that the more attractive an investment generally the greater the chances that the entity will be able to maintain adequate capital. Consequently, the FDIC believes that limited liability is also a very important attribute for a bank to possess.

With regard to the corporate attribute of free transferability of interests several of the 10 commenters also thought it inappropriate to require that attribute. The commenters argued that since many existing, FDIC-insured banks are closely-held corporations that have restrictive share-transfer agreements, it would be inconsistent for the FDIC to require free transferability of interests with respect to a bank that is chartered as an LLC. Furthermore, two of those commenters suggested that rather than requiring free transferability for every Bank-LLC, a better solution would be to require that the Bank-LLC's organizational documents provide that if the primary regulator determines that the institution's capital is inadequate, then the current owners would be required to restore capital or permit free transferability of the interests. The FDIC believes that the free transferability of ownership interests is an important attribute because it tends to ensure that the bank will have the best opportunity to attract and maintain adequate capital. Even well-run business entities can experience economic stress when there is a downturn in their markets or the industry as a whole. Adequate capital provides a cushion that helps a business weather the periods of economic stress. If an owner of an interest in an LLC must obtain the consent of the other owners in order to transfer his or her interest, the transfer may be delayed until that consent can be obtained, or it may be rejected altogether if the consent is not granted. Either circumstance tends to reduce a bank's ability to attract and maintain adequate capital. Indeed, the mere presence of such a consent requirement may discourage investors who can choose from other, more liquid and, perhaps, more familiar investments. As noted above, since an LLC is neither a corporation nor a partnership, State corporation laws and State partnership laws generally would not apply. That fact, coupled with the relative novelty of the LLC form of business entity, may discourage potential investors. Many investors are familiar with, or can readily determine, the general structure of corporations and the rights, powers, privileges, duties and liabilities of a corporation's shareholders, officers, and directors. With an LLC, its structure and the rights, powers, privileges, duties and liabilities of the LLC's owners, officers and managers are all generally subject to modification according to the wishes of the members. Unlike investing in a corporation, a potential investor in an LLC may not be able to rely, to any extent, on his or her general familiarity with corporate law in making an investment decision. A potential investor would have to examine carefully the operating agreement of the particular LLC to determine the LLC's operating structure and the rights, powers, privileges, duties, and liabilities of the LLC's owners, officers, and managers. Such additional burden may also tend to discourage new investors and further reduce the bank's ability to attract and maintain capital. Furthermore, the alternative suggested by one commenter would not cure these problems. The commenter suggested that the FDIC might require a provision in the LLC's organizational documents that if capital fell below a certain level then the existing owners would have to replenish capital or waive the consent requirement. However, if a bank's capital were to fall below the minimum capital requirements, it might then be too late to try to attract new investors. It is not clear that many investors would want to get involved with a bank that has an unfamiliar legal structure at a time when its capital is depleted. Consequently, the FDIC believes that a Bank-LLC should have the corporate attribute of free transferability of interests.

Several of the 10 commenters also offered general comments on how to determine eligibility and suggested some alternative uses for the four corporate attributes. Several thought that the key to eligibility for Federal deposit insurance should simply be whether the bank is chartered in accordance with State banking law. If so, they argue, that should be enough to qualify for eligibility for deposit insurance. The FDIC disagrees with this notion entirely. Congress conferred upon the FDIC the authority to grant Federal deposit insurance to certain institutions described in the FDI Act. Allowing the individual States to determine which institutions are eligible would (i) require the FDIC to ignore the express language of the FDI Act, (ii) require the FDIC to abdicate its statutory responsibility to make such determinations, and (iii) potentially result in a wide variety of notions as to what types of institutions are eligible for deposit insurance. As a result, the FDIC's ability to manage the risks posed to the insurance fund would be seriously jeopardized. The FDIC does not believe such an approach is either reasonable or consistent with the purposes of the FDI Act.

Two commenters pointed out that the four corporate attributes are not mentioned in the factors listed in section 6 of the FDI Act, 12 U.S.C. 1816, (the ''section 6 factors'') that are required to be considered in approving applications for deposit insurance. Therefore, they believe that the FDIC should determine who is eligible for deposit insurance solely by reference to the section 6 factors. One commenter argued that while the ultimate question is whether the bank is a legal entity under State law, it thought that the FDIC could consider the four corporate attributes in assessing whether the institution could be operated in a safe and sound manner. In that regard the commenter thought that perpetual succession and centralized management were important for safety and soundness and should be accorded greater weight, while free transferability of interests was less important. The FDIC believes that while the section 6 factors are required to be considered in determining whether to grant deposit insurance, they do not determine an institution's eligibility to apply for deposit insurance. Eligibility is a threshold issue that must be determined before the section 6 factors are considered. To focus only on the section 6 factors would again require that we ignore the express language of the FDI Act. Congress carefully set out what it meant by a ''State bank,'' and the FDIC declines to ignore that language.

One commenter noted that national banks only need to be chartered pursuant to the National Bank Act (the ''NBA'') to be eligible for Federal deposit insurance and that, therefore, the FDIC should only require that state banks be chartered under State law. The FDIC agrees that in accordance with the language of the FDI Act a national bank is eligible to apply for deposit insurance if it is chartered as a national bank under the NBA. However, the NBA describes a national bank as a ''body corporate'' [25], and national banks are structured and operate essentially the same as corporations. Consequently, requiring a State-chartered, Bank-LLC to have the four corporate attributes does not represent treatment inconsistent with that applicable to national banks.

Arguments in Favor of Using Three of the Four Corporate Attributes

As noted above, four commenters thought we should use three of the four corporate attributes. Three of those four commenters disagreed specifically with requiring free transferability of interests for a Bank-LLC, but concurred with requiring the other three attributes. The other commenter while generally disagreeing with the free transferability requirement thought that the FDIC should require any three out of the four

[25] 12 U.S.C. 24.

corporate attributes. Two of the commenters who specifically disagreed with the free transferability requirement repeated the argument mentioned above that the free transferability requirement has not been viewed by the FDIC in the past as a significant impairment of an institution's ability to raise capital and, therefore, should not be required for Bank-LLCs. As discussed above, the FDIC believes that a Bank-LLC should have the corporate attribute of free transferability of interests. The FDIC's analysis of the need for this attribute is detailed above and will not be repeated here. However, in summary, the FDIC believes that free transferability of interests is necessary to ensure that a Bank-LLC will be able to attract and maintain adequate capital. With regard to the suggestion that the FDIC require any three of the four corporate attributes as its test for eligibility for deposit insurance, the FDIC does not believe that such an approach would be consistent with the purposes of the FDI Act and could lead again to a wide variety of notions about what types of institutions are eligible for deposit insurance. Each of the attributes has its own significance for purposes of the FDI Act, and each is independently justifiable as an essential requirement for the FDIC to determine that a Bank-LLC is ''incorporated.'' Among other things, a three-out-of-four approach would permit a Bank-LLC that does not have perpetual succession to be considered ''incorporated'' for purposes of eligibility for deposit insurance. As fully discussed above, an institution that could terminate without warning could cause substantial harm to depositor confidence in the nation's banking industry, seriously disrupt the communities where the bank operated, and increase the costs of resolutions. Furthermore, the wide variety of institutions that such an approach could permit would jeopardize the FDIC's ability to manage the risks to the insurance fund. Consequently, the FDIC does not believe that a three-out-of-four approach would be consistent with the FDI Act and declines to adopt it.

Comments in Favor of Using All Four Corporate Attributes

Three commenters endorsed the FDIC's use of all four of the corporate attributes. One commenter also expressed the strong belief that the full range of safety and soundness and enforcement mechanisms that currently apply to state banks should also apply to Bank-LLCs. For the reasons discussed above, the FDIC believes that the corporate attributes are not only appropriate, but essential to determining whether a Bank-LLC could be considered to be ''incorporated.'' The FDIC specifically concurs with the comment that the full range of safety and soundness and enforcement mechanisms needs to apply to Bank-LLCs. In that regard, the final rule includes some revisions to further clarify this point. The final rule clarifies that for purposes of the FDI Act (including section 8 of the FDI Act) and the FDIC's regulations, the members, managers, and officers of a Bank-LLC would be equivalent to shareholders, directors, and officers, respectively, of a bank chartered as a corporation. Also, the certificates or other evidences of ownership interests in a Bank-LLC would be equivalent to voting stock, voting shares and voting securities.

3. If the FDIC Should Not Utilize Any of the Four Corporate Attributes, How Should It Interpret the Term ''Incorporated?''

Six commenters thought that the FDIC should interpret ''incorporated'' to mean chartered under State law. Two other commenters thought that an institution should be deemed to be ''incorporated'' if it is chartered under State law and can operate in a safe and sound manner. Another commenter thought that ''incorporated'' should mean ''organized'' or ''operating'' as a bank under State law. Yet another thought that ''incorporated'' should simply mean ''chartered and regulated'' under State law and thought the FDIC should focus on whether the particular structure is consistent with the section 6 factors. All of these suggestions have been fully analyzed and considered above, and will not be repeated here. Central to all of these suggestions is the notion that if the State's laws would charter an entity as a bank, that should be enough for the FDIC. Following that argument, the FDIC should consider to be ''incorporated'' whatever type of institution a State may charter as a bank under its laws. As fully discussed above, such an approach would mean that (i) the FDIC would have to ignore the express language of the FDI Act, (ii) the FDIC would have to abdicate its responsibility under the FDI Act, and (iii) the potential variety of notions about what could be chartered as a bank would seriously impair the FDIC's ability to manage the risks to the insurance fund. For those reasons the FDIC declines to adopt such an approach.

V. Interpretation of ''Incorporated''

In order to determine whether an LLC could qualify as a State bank for purposes of Federal deposit insurance, it is necessary to determine if an LLC could be considered to be ''incorporated.'' In resolving any ambiguity in a statute it is always helpful to try to determine what Congress intended by its choice of the particular words of the statute. In this case, as noted above, there is no legislative or judicial guidance on the meaning of the term ''incorporated'' as used in the FDI Act. Consequently, the FDIC believes that the best approach is to interpret the term in a manner consistent with, and in aid of, the purposes of the FDI Act.

Congress created the Federal Deposit Insurance Corporation in 1933 to restore and maintain public confidence in the nation's banking system by, among other things, promoting the safety and soundness of the institutions whose deposits the FDIC insures.[26] Consequently, the FDIC is charged with maintaining public confidence in the nation's banking system, and promoting the safety and soundness of the institutions that it insures is a critical component of its duty.

A common understanding of the term ''incorporated'' is ''formed or constituted as a legal corporation.''[27] In addition, Black's Law Dictionary defines ''incorporate'' as ''to form a legal corporation.''[28] An institution that is labeled as a corporation under State law would then be ''incorporated'' under the common understanding of the term. One approach that the FDIC could take, therefore, is to treat as incorporated only those entities that are labeled as ''corporations'' under State law. Such an interpretation would be consistent with the language of the statute. However, such an approach might be too narrow in that it may not include all of the State banks that are currently operating as insured institutions even though they are structured and operate with the same characteristics as a corporation. Furthermore, limiting the interpretation to only those entities that are labeled as ''corporations'' would seem unduly restrictive in that it would tend to unnecessarily limit the flexibility, and stifle the innovativeness, of State banking. Thus, such an approach could arguably impair or harm the viability of the nation's banking system.

Another approach to interpreting the term ''incorporated'' is to focus on the attributes of the entity. In other words, if the entity has the four corporate

[26] *See FDIC* v. *Philadelphia Gear Corp.,* 106 S.Ct. 1931, 1935 (1986), *FDIC* v. *Eckert,* 754 F.Supp. 22, 24 (E.D. N.Y. 1990); *FDIC* v. *Rockelman,* 460 F.Supp. 999, 1001 (E.D. WI 1978).

[27] The Random House Dictionary of the English Language 968 (2d ed. 1987).

[28] Black's Law Dictionary 769 (7th ed. 1999).

attributes, it should be considered to be ''incorporated'' regardless of how it is labeled under State law.[29] Clearly, the actual nature of an entity is much more important than its label.

Within the confines of Federal law, and subject to safety and soundness, banks need to be able to take advantage of new forms of business organization in order to maintain maximum viability. Some of these new forms of business entities were never envisioned at the time that Congress passed the FDI Act almost 70 years ago. Part of the FDIC's duty in administering the FDI Act is to interpret it to carry out the purposes of the FDI Act in the modern world. Consistent with that duty, the FDIC believes that it is more reasonable to focus on the essential characteristics of a corporation that distinguish it from other forms of business entities rather than to focus on the presence or absence of a label.

Therefore, mindful of the need to maintain the viability of the nation's banking system, and consistent with the purposes of the FDI Act, the FDIC believes that the better approach, is to interpret the term ''incorporated'' to include those LLCs that have the four traditional corporate attributes.

As noted above, the attributes that are commonly identified as distinguishing a corporation from other forms of business organizations are: perpetual succession, centralized management, limited liability, and free transferability of interests.

Perpetual Succession

The first attribute, perpetual succession, is essential to the FDIC's efforts to promote public confidence in the nation's banking industry. An institution that automatically terminated, dissolved, or suspended operations upon the happening of some event would most likely have a substantial, adverse effect on public confidence. A depositor in such an institution would have no way of knowing from one day to the next whether the institution will continue in existence, and whether he or she will be able to retrieve his or her money when the need arises. Furthermore, such an automatic termination, dissolution, or suspension feature would have a significantly adverse effect on the FDIC's efforts to resolve failed institutions. The FDIC is not only charged with promoting the safety and soundness of banking institutions, but is also charged with the duty of resolving failed institutions in an orderly, least costly manner. The FDIC would have no practical opportunity to plan and execute an orderly, least-costly resolution of an institution that, without any warning or advance notice, was terminated or dissolved or whose operations were suspended. Most likely it would not be possible to arrange for a healthy institution to purchase the assets and assume the deposit liabilities of the failed institution in order to continue to serve the affected community with the least disruption. Checks that were in transit at the time of the bank's failure, but that had not yet been paid, would be rejected. The disruption to the community could be substantial. The cost to the insurance fund of resolving such an institution could be significantly higher than necessary as a result, and the higher costs would tend to deplete the insurance fund more rapidly. Consequently, the FDIC believes that perpetual succession is an essential prerequisite for an insured depository institution, and that automatic termination/dissolution/suspension features are inconsistent with the FDIC's duties and the purposes of the FDI Act.

Centralized Management

Centralized management in the form of a board of directors provides the FDIC and other banking regulators with a discrete group of individuals who are authorized to act for, and represent, the institution in virtually all matters. The typical rights, liabilities, powers, and responsibilities of a board of directors are well-established. On the other hand, management of an institution directly and solely by all of its owners presents a variety of problems both from an operational standpoint and from an enforcement standpoint. First, if the authority to manage the bank is limited to the owners of the institution, management expertise would necessarily also be limited. The quality of the management of a bank is a key factor in a bank's success or failure. In order to provide the best chance for a bank to compete successfully and to operate profitably, a bank should be free to enlist the best qualified managers available to it. If there are too few owners, the group may not provide sufficient management experience and expertise. Too large of a group may also mean that even if adequate banking expertise is represented among the owners, it may be negated by a larger segment of the owners that lacks adequate expertise. Second, management by a group that is too small could severely impair the bank's ability to respond to supervisory and regulatory direction. The volume and complexity of the demands of operating a bank might put too small of a group under excessive pressure and could result in management that is not responsive or, at least so slow as to imperil the bank's effectiveness. Too large of a group may make it unwieldy or excessively difficult to disseminate information, arrange meetings, ensure that all members have the opportunity to be heard, and get decisions in a timely manner. Finally, with a member-managed Bank-LLC, merely determining who represents the institution and the extent of his or her authority could represent a significant task for regulators. Consequently, centralized management is also an important attribute for purposes of the FDIC Act.

Limited Liability

Limited liability, of course, encourages investment in the enterprise. Potential owners are more likely to invest in an enterprise when their liability is limited to the amount of their investment. Attracting and maintaining sufficient capital helps to ensure an adequate cushion to protect an institution during periods of economic stress. Since banks are subject to periods of economic stress just as other businesses are, the FDIC believes that the owners of banks should have limited liability to encourage the maintenance of adequate capital.

Free Transferability of Ownership Interests

The free transferability of ownership interests also tends to aid in attracting and maintaining adequate capital. Conversely, requiring the prior consent of the other owners in order to transfer an ownership interest may decrease the bank's ability to attract and maintain adequate capital. At worst, prior consent to a transfer limits the pool of available investors; at best, it delays interested, potential investors. While the FDIC currently insures approximately 700 mutual institutions (that issue no stock) and more than 1,700 closely-held institutions (some of which may have stock-transfer restrictions in the form of shareholder agreements), the FDIC has substantial experience with their structure, operations, and capital maintenance capabilities. The FDIC has no similar experience with institutions organized as LLCs, and that lack of similar experience argues for facilitating, rather than impairing, the maintenance of a capital cushion.

[29] This approach is not unprecedented. In *Morrissey* v. *Commissioner of Internal Revenue,* 296 U.S. 344, 359, 56 S.Ct. 289, 296 (1935) the Supreme Court held that a trust created for the purpose of carrying on a business that had continuity of life, centralized management, limited liability, and free transferability of interests is sufficiently analogous to a corporation to justify taxation as a corporation.

Indeed, the mere presence of such a prior consent requirement may discourage investors who can choose from other, more liquid and, perhaps, more familiar investments. As noted above, since an LLC is neither a corporation nor a partnership, State corporation laws and State partnership laws generally would not apply. That fact, coupled with the relative novelty of the LLC form of business entity, may also discourage potential investors. Many investors are familiar with, or can readily determine, the general structure of corporations and the rights, powers, privileges, duties and liabilities of a corporation's shareholders, officers, and directors. With an LLC, its structure and the rights, powers, privileges, duties and liabilities of the LLC's owners, officers and managers are all generally subject to modification according to the wishes of the members. Unlike investing in a corporation, a potential investor in an LLC may not be able to rely, to any extent, on his or her general familiarity with corporate law in making an investment decision. A potential investor in an LLC would have to examine carefully the operating agreement of the particular LLC to determine its operating structure and the rights, powers, privileges, duties, and liabilities of the LLC's owners, officers, and managers. Such additional burden may tend to discourage new investors and further reduce the bank's ability to attract and maintain capital. Consequently, the FDIC believes that the free transferability of ownership interests is an important attribute for a bank.

In summary, the FDIC believes that an LLC should have all of the four corporate attributes in order to be ''incorporated.'' Therefore, a banking institution that is chartered as an LLC under the law of any State and that has all of the above four corporate attributes would be considered to be ''incorporated'' under the law of the State for purposes of the definition of ''State bank.'' Furthermore, such a banking institution would be eligible to apply for Federal deposit insurance as a State bank under section 5 of the FDI Act, 12 U.S.C. 1815.

The final rule reflects these conclusions. In general, the rule provides that a banking institution that is chartered by a State as an LLC will be deemed to be ''incorporated'' if (i) it is not subject to any automatic termination/dissolution/suspension provisions, (ii) the exclusive authority to manage the institution is vested in a board of directors or managers, (iii) neither State law nor the LLC's organizational documents provide that any owner is liable for the debts of the institution beyond his or her investment, and (iv) neither State law nor the LLC's organizational documents require the consent of any other owner in order to transfer all or a part of an ownership interest. The final rule also specifies that for purposes of the FDI Act and the FDIC's regulations, an owner of an interest in an LLC is a ''stockholder'' and a ''shareholder;'' a manager of an LLC is a ''director;'' an officer of an LLC is an ''officer;'' and a certificate or other evidence of an ownership interest in an LLC is a ''voting share,'' ''voting security,'' and ''voting stock.'' These provisions are intended to remove any ambiguity as to how the rest of the FDI Act and the FDIC's regulations apply to banking institutions chartered as LLCs, including the enforcement provisions of the FDI Act and the FDIC's regulations.

VI. Paperwork Reduction Act

The final rule does 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.

VII. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the FDIC hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The final rule will apply to all depository institutions that are currently insured under the FDI Act as well as those applying for Federal deposit insurance. The final rule clarifies the circumstances when a banking institution that is chartered under State law as a limited liability company would be considered to be ''incorporated'' for purposes of the definition of ''State bank'' in 12 U.S.C. 1813(a)(2). It does not require any banking institution to organize as, or convert to, a limited liability company, and it imposes no new reporting, recordkeeping or other compliance requirements. Accordingly, the requirements relating to an initial and final regulatory flexibility analysis are not applicable.

VIII. Impact on Families

The FDIC has determined that this final 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).

IX. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104–121) provides generally for agencies to report rules to Congress for review. The reporting requirement is triggered when the FDIC issues a final rule as defined by the Administrative Procedure Act (APA) at 5 U.S.C. 551. Because the FDIC is issuing a final rule as defined by the APA, the FDIC will file the reports required by SBREFA. The Office of Management and Budget has determined that this final rule does not constitute a ''major rule'' as defined by SBREFA.

List of Subjects in 12 CFR Part 303

Administrative practice and procedure, Authority delegations (government agencies), Bank deposit insurance, Banks, Banking, Bank merger, Branching, Foreign branches, Foreign investments, Golden parachute payments, Insured branches, Interstate branching, Reporting and recordkeeping requirements, Savings associations.

The Board of Directors of the Federal Deposit Insurance Corporation hereby amends 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, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207; 15 U.S.C. 1601–1607.

2. New § 303.15 is added to read as follows:

§ 303.15 Certain limited liability companies deemed incorporated under State law.

(a) For purposes of the definition of ''State bank'' in 12 U.S.C. 1813(a)(2) and this Chapter, a banking institution that is chartered as a limited liability company (LLC) under the law of any State is deemed to be ''incorporated'' under the law of the State, if

(1) The institution is not subject to automatic termination, dissolution, or suspension upon the happening of some event (including, *e.g.*, the death, disability, bankruptcy, expulsion, or withdrawal of an owner of the institution), other than the passage of time;

(2) The exclusive authority to manage the institution is vested in a board of

managers or directors that is elected or appointed by the owners, and that operates in substantially the same manner as, and has substantially the same rights, powers, privileges, duties, responsibilities, as a board of directors of a bank chartered as a corporation in the State;

(3) Neither State law, nor the institution's operating agreement, bylaws, or other organizational documents provide that an owner of the institution is liable for the debts, liabilities, and obligations of the institution in excess of the amount of the owner's investment; and

(4) Neither State law, nor the institution's operating agreement, bylaws, or other organizational documents require the consent of any other owner of the institution in order for an owner to transfer an ownership interest in the institution, including voting rights.

(b) For purposes of the Federal Deposit Insurance Act and this Chapter,

(1) Each of the terms ''stockholder'' and ''shareholder'' includes an owner of any interest in a bank chartered as an LLC, including a member or participant;

(2) The term ''director'' includes a manager or director of a bank chartered as an LLC, or other person who has, with respect to such a bank, authority substantially similar to that of a director of a corporation;

(3) The term ''officer'' includes an officer of a bank chartered as an LLC, or other person who has, with respect to such a bank, authority substantially similar to that of an officer of a corporation; and

(4) Each of the terms ''voting stock,'' ''voting shares,'' and ''voting securities'' includes ownership interests in a bank chartered as an LLC, as well as any certificates or other evidence of such ownership interests.

By order of the Board of Directors.

Dated in Washington, DC, this 31st day of January, 2003.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Resolution

Whereas, the Board of Directors (''Board'') of the Federal Deposit Insurance Corporation (''FDIC'') is responsible for administering the Federal Deposit Insurance Act (''FDI Act''); and

Whereas, the FDIC is authorized under section 5 of the FDI Act (12 U.S.C. 1815) to approve or disapprove applications for deposit insurance for State banks as well as other depository institutions; and

Whereas, in order for a banking institution to qualify as a ''State bank'' eligible to apply for deposit insurance, section 3(a) of the FDI Act (12 U.S.C. 1813(a)) generally requires that it be engaged in the business of receiving deposits other than trust funds and that it be ''incorporated under the laws of any State''; and

Whereas, the FDI Act does not define the term ''incorporated,'' and there is some uncertainty as to the meaning of the term ''incorporated''; and

Whereas, on July 23, 2002, the Board authorized the publication in the **Federal Register** of a proposed rule entitled Insurance of State Banks Chartered as Limited Liability Companies, describing the circumstances under which a bank chartered as a limited liability company would be considered to be ''incorporated'' and, therefore, eligible to apply for deposit insurance; and

Whereas, the Board requested public comment on the proposed rule and received 23 comment letters, and

Whereas, the staff has reviewed and the Board has considered the comments submitted by the public in response to the proposed rule; and

Whereas, the staff has recommended that the Board adopt a final rule entitled Insurance of State Banks Chartered as Limited Liability Companies as set forth in the attached **Federal Register** document; and

Whereas, the Board has decided to adopt the proposed rule entitled Insurance of State Banks Chartered as Limited Liability Companies as a final rule with certain modifications.

Now, therefore, be it resolved, that the Board does hereby adopt a final rule entitled Insurance of State Banks Chartered as Limited Liability Companies amending 12 CFR part 303 in the manner set forth in the attached **Federal Register** document.

Be it further resolved, that the Board hereby authorizes publication in the **Federal Register** of the attached final amendment to part 303.

Be it further resolved, that the Board hereby directs the Executive Secretary, or his designee, to cause the attached final rule to be published in the **Federal Register** in a form and manner satisfactory to the General Counsel, or his designee, and the Executive Secretary, or his designee.

Be it further resolved, that the Board hereby delegates authority to the General Counsel, or the General Counsel's delegate(s), and to the Executive Secretary, or the Executive Secretary's delegate(s) to make technical, non-substantive changes to the text of the attached **Federal Register** document.

[FR Doc. 03–3387 Filed 2–12–03; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1750

RIN 2550–AA26

Risk-Based Capital

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final Rule.

SUMMARY: The Office of Federal Housing Enterprise Oversight (OFHEO) is adopting an amendment to Appendix A to Subpart B of 12 CFR part 1750 Risk-Based Capital. The amendment, which more accurately incorporates and implements Financial Accounting Standard 133 in the stress test, is intended to enhance the accuracy of the calculation of the risk-based capital requirement for the Enterprises.

EFFECTIVE DATE: March 17, 2003.

FOR FURTHER INFORMATION CONTACT: Robert Pomeranz, Senior Accounting Specialist, Office of Risk Analysis and Model Development, telephone (202) 414–3796 or Marvin L. Shaw, Senior Counsel, telephone (202) 414–8913 (not toll free numbers), Office of Federal Housing Enterprise Oversight, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

OFHEO published a final regulation setting forth a risk-based capital stress test on September 13, 2001, 12 CFR part 1750 (the Rule), which formed the basis for determining the risk-based capital requirement for the federally sponsored housing enterprises—Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises).[1]

On September 12, 2002, OFHEO published a notice of proposed rulemaking (NPRM), 67 FR 57760, which proposed twelve technical and corrective amendments to the Rule.

[1] Risked-based Capital, 66 FR 47730 (September 13, 2001, 12 CFR part 1750, *as amended,* 67 FR 11850 (March 15, 2002), 67 FR 19321 (April 19, 2002), 67 FR 66533 (November 1, 2002).