



MEMORANDUM TO: Board of Directors

FROM: Sandra L. Thompson
Director

SUBJECT: Final Rule: *Financial Education Programs that Include the Provision of Bank Products and Services*

SUMMARY

On June 23, 2008, the FDIC Board of Directors adopted and issued an interim final rule and request for comment titled, *Financial Education Programs that Include the Provision of Bank Products and Services* (Interim Rule). The FDIC issued the Interim Rule in response to a number of inquiries as to whether a state nonmember bank must file a branch application with the FDIC prior to participating in a financial education program conducted at a school where, in connection with the program, deposits are received, checks are paid, or money is lent. Under FDIC regulations as they existed prior to the effective date of the Interim Rule, these school-based programs fell within the definition of a branch and, therefore, any state nonmember bank seeking to participate in such a program was required file an application with, and receive approval from, the FDIC. The Interim Rule exempted such programs from the definition of branch, thereby removing the application requirement which may have deterred some banks from providing comprehensive financial education to students.

The FDIC received three comments on the Interim Rule from trade- and research-based organizations. Generally, the commenters supported the Interim Rule, and lauded the FDIC for recognizing the importance of financial education programs, particularly for those individuals who have little or no experience using bank-provided services. The commenters expressed no concerns regarding the Interim Rule, and they proposed no substantive or technical revisions.

The Final Rule is substantively identical to the Interim Rule, which exempts from the definition of branch provided in 12 CFR part 303, subpart C, a state nonmember bank's participation in certain financial education programs. The Final Rule preserves the exemption provided in the Interim Rule,

Concur:

Sara A. Kelsey
General Counsel

thus permitting state nonmember banks to participate in financial education programs without obtaining prior approval from the FDIC, provided the program satisfies certain conditions. The Final Rule generally supports the FDIC's longstanding tradition of encouraging bank initiatives to provide financial education.

RECOMMENDATION

DSC, with the concurrence of the Legal Division, recommends that the Board of Directors of the Federal Deposit Insurance Corporation (Board) adopt and issue the attached Final Rule titled, *Financial Education Programs that Include the Provision of Bank Products and Services*, and authorize the Executive Secretary or his designee to publish the final rule in the Federal Register.

Background

On June 23, 2008, the FDIC published in the Federal Register an Interim Rule and request for comment titled, *Financial Education Programs that Include the Provision of Bank Products and Services* (the "Interim Rule").¹ The FDIC issued the Interim Rule in response to a number of inquiries as to whether a state nonmember bank must file a branch application with, and obtain approval from, the FDIC prior to participating in a financial education program conducted at a school or a facility used by a school where, in connection with the program, deposits are received, checks are paid, or money is lent.

Under the FDI Act, a domestic branch is defined to include any branch bank, branch office, branch agency, additional office or any branch place of business where deposits are received or checks paid or money lent (each a "core-banking function").² While the presence of a core banking function is one indicia of a branch, the courts have also required that (i) the facility be established and operated by the bank,³ and (ii) the facility provide the bank with an advantage in its competition for bank customers.⁴ Generally, a state nonmember bank must obtain prior approval from the FDIC to establish a domestic branch.

The FDIC has determined by regulation that a messenger service that is established and operated by a state nonmember bank, which performs one of the core-banking functions, is a branch and requires a

¹ See 73 FR 35337.

² See 12 U.S.C. § 1813(o).

³ See Cades v. H & R Block, 43 F.3d 869, 814 (4th Cir. 1994) (Justice Butzner, writing for the Fourth Circuit, explained that "courts apply a two-part test to decide whether a bank is operating a branch office. First, the court determines whether [the] branch is established and operated by the bank..."), citing, Independent Bankers Ass'n of New York v. Marine Midland Bank, 757 F.2d 453, 456-63 (2d Cir 1985); Independent Bankers Ass'n of America v. Smith, 534 F.2d, 921, 951-52 (D.C. Cir. 1976). See also First National Bank in Plant City v. Dickinson, 396 U.S. 122, 137 n. 10 (1970) (In determining whether the receipt of deposits by bank personnel on non-bank premises constitutes a branch, the Supreme Court distinguished between a bank-established or -operated facility that receives deposits on the one hand, and relatively isolated, sporadic, and inconsequential transactions where a bank employee performs one of the core-banking functions on non-bank premises).

⁴ See First National Bank in Plant City v. Dickinson.

prior approval pursuant to statute. However, a bank's participation in a financial education program conducted on school premises differs from a messenger service in that any core-banking function provided in connection with such program is: (i) provided at the discretion of the school; (ii) made available on a limited basis to a discrete group of individuals and not to the general public; and (iii) conducted and designed primarily for educational purposes.

The Interim Rule established an exemption to the definition of branch provided in 12 CFR part 303, subpart C. The exemption has the effect of permitting a state nonmember bank to participate in certain financial education programs conducted on school premises without having to submit an application to, and receive prior approval from, the FDIC.

Final Rule

Under the Final Rule a state nonmember bank would be able to participate or assist in one or more financial education programs that involve receiving deposits, paying withdrawals, or lending money without first filing a branch application if: (i) such service or services are provided on school premises, or a facility used by the school; (ii) such service or services are provided at the discretion of the school; (iii) each program is conducted and designed primarily for educational purposes; and (iv) each program is conducted in a manner that is consistent with safe and sound banking practices and complies with applicable law.⁵ Staff expects that any banking services provided in connection with each program would be: limited in nature; available only to students, parents and faculty; and accessible on a part-time basis or designated school days. The Final Rule is substantively identical to the Interim Rule, with the exception of one technical, nonsubstantive change to paragraph (a) of 12 C.F.R. 303.41. That change was moving the reference to the financial education program exception provided in 12 C.F.R. 303.46 to the sentence that lists the other exceptions to the definition of branch.

Under section 553(d)(1) of the Administrative Procedure Act (APA), the FDIC is not required to comply with the delayed-effective-date requirement of the APA if a rule establishes or recognizes an exemption or relieves a restriction.⁶ The Final Rule establishes an exemption to the definition of branch provided in 12 C.F.R. part 303, subpart C, which has the effect of permitting state nonmember banks to participate in a financial education program conducted on school premises without having to submit an application to and receive prior approval from the FDIC.

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⁵ These conditions are generally consistent with a regulation promulgated by the Office of the Comptroller of the Currency (OCC) in 2001. The OCC's rule exempts from the National Bank Act definition of "branch," participation by a national bank in a financial education program conducted on a school premises. See 12 C.F.R. 7.1021.

⁶ See 5 U.S.C. § 553(d).