any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposed action be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's final rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

I. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of the final rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 10 CFR Part 1044

Administrative practice and procedure, Classified information, Energy, Government contracts, National security information, Security information, Whistleblowing.

Issued in Washington, DC, on October 4, 2001.

Spencer Abraham,

Secretary of Energy.

Accordingly, the interim final rule adding 10 CFR part 1044, which was published at 66 FR 4639 on January 18, 2001, is adopted as a final rule with the following changes:

PART 1044—SECURITY REQUIREMENTS FOR PROTECTED DISCLOSURES UNDER SECTION 3164 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2000

1. The authority citation for part 1044 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.*, 7239, and 50 U.S.C. 2401 *et seq.*

2. Section 1044.01 is revised to read as follows:

§ 1044.01 What are the purpose and scope of this part?

(a) *Purpose.* This part prescribes the security requirements for making protected disclosures of classified or unclassified controlled nuclear information under the whistleblower protection provisions of section 3164 of the National Defense Authorization Act for Fiscal Year 2000.

(b) *Scope.* The security requirements for making protected disclosures in this part are independent of, and not subject to any limitations that may be provided in, the Whistleblower Protection Act of 1989 (Public Law 101–12) or any other law that may provide protection for disclosures of information by employees of DOE or of a DOE contractor.

[FR Doc. 01–27230 Filed 10–29–01; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

RIN 3064–AC49

Engaged In The Business of Receiving Deposits Other Than Trust Funds

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: This final rule amends the FDIC's regulations covering filing procedures and delegations of authority, to clarify the meaning of the phrase ''engaged in the business of receiving deposits other than trust funds'' in the Federal Deposit Insurance Act. Under the rule, an insured depository institution must maintain one or more non-trust deposit accounts in the aggregate amount of $500,000 in order to be ''engaged in the business of receiving deposits other than trust funds''. Each newly insured depository institution will be deemed to be ''engaged in the business of receiving deposits other than trust funds'' for a period of one year from the date it opens for business. If a newly insured depository institution fails to achieve the minimum deposit standard by the end of that time period, it will be subject to a determination by the FDIC that the institution is not ''engaged in the business of receiving deposits other than trust funds'', and to appropriate administrative action to terminate its insured status. Similarly, each insured depository institution, other than a newly insured depository institution, that is below the minimum deposit standard on two consecutive call report dates will be subject to a determination by the FDIC that the institution is not ''engaged in the business of receiving deposits other than trust funds'', and to appropriate administrative action to terminate its insured status. The final rule also clarifies that the maintenance of one or more non-trust deposit accounts in the aggregate amount of $500,000 is not a ''safe harbor'', but rather the minimum standard in order for an institution to be considered ''engaged in the business of receiving deposits other than trust funds'' under the Federal Deposit Insurance Act.

EFFECTIVE DATE: November 29, 2001.

FOR FURTHER INFORMATION CONTACT: Christopher L. Hencke, Counsel, (202) 898–8839, or Robert C. Fick, Counsel, (202) 898–8962, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. The Statute

The FDIC is authorized to approve or disapprove applications by depository institutions for federal deposit insurance. *See* 12 U.S.C. 1815. In determining whether to approve deposit insurance applications, the FDIC considers the seven factors set forth in section 6 of the Federal Deposit Insurance Act (FDI Act). These factors are (1) the financial history and condition of the depository institution; (2) the adequacy of the institution's capital structure; (3) the future earnings prospects of the institution; (4) the general character and fitness of the management of the institution; (5) the risk presented by the institution to the Bank Insurance Fund or the Savings Association Insurance Fund; (6) the convenience and needs of the community to be served by the institution; and (7) whether the institution's corporate powers are consistent with the purposes of the FDI Act. 12 U.S.C. 1816. Also, under the FDI Act, the FDIC must determine as a threshold matter that an applicant is a ''depository institution which is engaged in the business of receiving deposits other than trust funds * * *'' 12 U.S.C. 1815(a)(1). Applicants that do not satisfy this threshold statutory requirement are ineligible for deposit insurance.

The FDIC applies the seven statutory factors in accordance with its ''Statement of Policy on Applications for Deposit Insurance''. *See* 63 FR 44752 (August 20, 1998). The Statement of Policy discusses each of the factors at length; however, it does not address the threshold requirement that an applicant be ''engaged in the business of receiving deposits other than trust funds''.

The threshold requirement for obtaining federal deposit insurance is set forth in section 5 of the FDI Act. *See* 12 U.S.C. 1815(a)(1). The language used by section 5 (''engaged in the business of receiving deposits other than trust funds'') also appears in section 8 and section 3 of the FDI Act. Under section 8, the FDIC is obligated to terminate the insured status of any depository institution ''not engaged in the business of receiving deposits, other than trust funds * * *'' 12 U.S.C. 1818(p). In section 3, the term ''State bank'' is defined in such a way as to include only those State banking institutions

"engaged in the business of receiving deposits, other than trust funds * * *" 12 U.S.C. 1813(a)(2).

The phrase "engaged in the business of receiving deposits other than trust funds" as used in the FDI Act is ambiguous. For example, the statute does not specify whether a depository institution must hold a particular dollar amount of deposits in order to be "engaged in the business of receiving deposits other than trust funds." Similarly, it does not specify whether a depository institution must accept a particular number of deposits within a particular period in order to be "engaged in the business of receiving deposits other than trust funds." In addition, it does not specify whether a depository institution must accept non-trust deposits from the general public as opposed to accepting deposits only from one or more members of a particular group (such as the institution's trust customers, its employees or affiliates).

In applying this statutory requirement ("engaged in the business of receiving deposits other than trust funds") for over thirty years, the FDIC has approved applications from many institutions that did not intend to accept non-trust deposits from the general public. Also, the FDIC has approved applications from institutions that only intended to hold one type of deposit account (*e.g.,* certificates of deposit) or that did not intend to hold more than one or a few non-trust deposit accounts. However, the FDIC's long-standing practice of approving applications from such non-traditional depository institutions has not been formally codified in such a way as to remove public uncertainty as to the meaning of the phrase "engaged in the business of receiving deposits other than trust funds."

II. General Counsel Opinion No. 12

In order to clarify this ambiguity in the statute, the FDIC published General Counsel Opinion No. 12. *See* 65 FR 14568 (March 17, 2000). In that opinion, the FDIC's General Counsel stated that the statutory requirement of being "engaged in the business of receiving deposits other than trust funds" can be satisfied by the continuous maintenance of one or more non-trust deposit accounts in the aggregate amount of $500,000.

The purpose of General Counsel Opinion No. 12 was to remove uncertainty as to the meaning of being "engaged in the business of receiving deposits other than trust funds." However, as indicated by a recent court ruling, issuance of the General Counsel's opinion did not achieve that purpose. In *Heaton* v. *Monogram Credit Card Bank of Georgia,* 2001 WL 15635 (E.D. La. January 5, 2001) the statutory interpretation set forth in General Counsel Opinion No. 12 was rejected by a federal district court. As a result of the court's ruling, uncertainty continues to exist as to the meaning of being "engaged in the business of receiving deposits other than trust funds."

The phrase "engaged in the business of receiving deposits other than trust funds" should not be subject to differing and, perhaps, inconsistent judicial interpretations. Uniformity is needed. Both banks and the public need to know that the applicable Federal banking laws will be applied consistently throughout the United States. Moreover, they need assurance that once the FDIC grants insurance to a bank or thrift, the deposits at that bank or thrift will remain insured so long as it satisfies the legal requirement of being "engaged in the business of receiving deposits other than trust funds," and the FDIC has not terminated its insurance.

III. The Petition

The Conference of State Bank Supervisors (CSBS), an organization representing state officials responsible for chartering, regulating and supervising state-chartered banks, petitioned the FDIC's Board of Directors to promulgate a regulation to clarify the meaning of the phrase "engaged in the business of receiving deposits other than trust funds" as used in the FDI Act.

An opposing letter submitted by the plaintiff in the *Heaton* v. *Monogram* litigation questioned the timing of the regulation. In this opposing letter, the plaintiff argued that the promulgation of a regulation while litigation relating to this issue is pending would represent an "abuse of discretion" and a "conflict of interest." The plaintiff believes that no regulation should be promulgated until the litigation is completed.

The FDIC does not agree that rulemaking would constitute an "abuse of discretion." On the contrary, the FDIC believes that rulemaking is necessary in order to remove the existing uncertainty, confusion and the potential for inconsistent interpretations. *See Smiley* v. *Citibank, N.A.,* 517 U.S. 735, 116 S. Ct. 1730 (1996).

IV. Questions And Comments

When the FDIC's Board of Directors (Board) published its notice of proposed rulemaking, *Being Engaged in the Business of Receiving Deposits Other Than Trust Funds,* 66 FR 20102, (April 19, 2001) it sought comments from the public on all aspects of the rule and also sought responses on nine specific questions. The FDIC received twenty-one timely comment letters and two comment letters submitted after the end of the comment period. Also, one letter objected to the FDIC's consideration of comment letters thought to be filed late. Overall, eighteen timely comment letters were in favor of the regulation and three were opposed.

The nine questions and a summary of the comments/responses to those questions are detailed below.

1. Should the FDIC Adopt a Regulatory Standard for Determining Whether a Depository Institution is "Engaged in the Business of Receiving Deposits Other Than Trust Funds"?

Eighteen comment letters were in favor of the FDIC's adoption of a regulatory standard: eight depository institutions or depository institution holding companies, three financial institution trade associations, three law firms, two state banking supervisors, the Office of Thrift Supervision, and VISA U.S.A., Inc. Three commenters objected to the adoption of any regulatory standard by the FDIC. These objections are addressed in detail in the following section.

2. If so, Should the Standard be Based on a Particular Number and/or Amount of Non-Trust Deposits? Or Should the Standard be Based on Other Factors, Such as the Institution's Legal Authority to Accept Non-Trust Deposits or the Institution's Policies with Respect to the Acceptance of Non-Trust Deposits?

Three commenters responded on this question. One thought that the standard could be based on a particular number and amount of non-trust deposits. Another thought that the standard should not be based on any particular number of non-trust deposits as long as the institution had the capacity to accept even one non-trust deposit. The third commenter thought that an institution only needs to have the legal authority to receive non-trust deposits in order to be engaged in the business of receiving deposits other than trust funds.

The FDIC has considered the suggestions that legal authority or capacity to accept non-trust deposits alone is sufficient, but believes that its standard is the better approach. Bare legal authority or capacity to receive non-trust deposits without the actual receipt or holding of any deposits evidences only a potential ability to receive deposits, and this potential may never be realized. If an institution can be engaged in the business of receiving deposits other than trust funds simply by having the legal authority or capacity

to receive deposits, it would be able to enjoy all of the benefits of being an insured institution *e.g.,* the ability to export interest rates, without ever actually providing any deposit services. We do not believe that such a standard would be consistent with the purposes of federal deposit insurance. Consequently, the FDIC has declined to adopt that standard.

3. Assuming a Minimum Amount of Non-Trust Deposits is Required, Should the Standard be Based on a Particular Number of Non-Trust Deposit Accounts? If so, Should that Number Be One? If not, What Should be the Minimum Number of Non-Trust Deposit Accounts? Why?

Of the thirteen commenters responding on this question, none thought that an institution should be required to maintain more than one deposit account.

4. Assuming That the Standard Should Be Based on a Particular Amount of Non-Trust Deposits, Should That Amount Be $500,000? If Not, What Should Be the Minimum Amount of Non-Trust Deposits? Why?

Of the eleven commenters responding on this question, ten thought the minimum amount of non-trust deposits should be $500,000; the other commenter thought it should be a ''modest amount.''

5. Should a Depository Institution Be Required To Accept Deposits from the Public at Large (as Opposed to Accepting Deposits From a Particular Group Such as the Institution's Trust Customers or Employees or Affiliates) in Order To Be ''Engaged in the Business of Receiving Deposits Other Than Trust Funds''? If So, Why?

Of the eleven commenters responding on this question, all thought that a depository institution should not be required to accept deposits from the public at large (as opposed to accepting deposits from a particular group such as the institution's trust customers, employees or affiliates).

6. Should a Depository Institution be Required To Offer a Selection of Different Types of Deposits (e.g., Demand Deposits, Savings Deposits, Certificates of Deposit) in Order To Be ''Engaged in the Business of Receiving Deposits Other Than Trust Funds''? If So, Why?

Of the eleven commenters responding on this question, all thought that a depository institution should not be required to offer a selection of different types of deposits (e.g., demand deposits, savings deposits, certificates of deposit).

7. Should the FDIC Create Any Exceptions for Special Circumstances? For Example, Should a New Institution Be Given a Certain Period of Time to Reach the Minimum Number of Non-Trust Deposit Accounts or To Attain the Minimum Amount of Non-Trust Deposits?

Of the eight commenters responding on this question, all thought that the FDIC should permit exceptions for special circumstances. Four commenters specifically mentioned permitting an exception for newly insured depository institutions; two also thought that there should be an exception for institutions (other than the newly insured institutions) that fall below the minimum to regain sufficient deposits; and one thought the FDIC should allow some time for banks, particularly in small communities, to meet the minimum deposit standard.

The FDIC believes that these suggestions raise significant issues. At the time they apply for deposit insurance some newly chartered institutions, for example, those organized by individuals, may not have received $500,000 in non-trust deposits. Indeed, potential depositors may not want to put their money in an institution that is not yet insured. Absent some modification to the rule, this disincentive could prolong the time it takes an institution to reach the minimum deposit standard or possibly even prevent it from reaching the minimum deposit standard. Consequently, the FDIC has decided to modify the rule to provide that an applicant for deposit insurance would be deemed to be ''engaged in the business of receiving deposits other than trust funds'' for one year from the date it opens for business. If such an institution does not meet the minimum deposit standard at the end of that period, it would be subject to a determination by the FDIC that the institution is not ''engaged in the business of receiving deposits other than trust funds'' and to termination of its insured status under section 8(p) of the FDI Act, 12 U.S.C. 1818(p).

However, certain other newly chartered depository institutions should be able to meet the $500,000 minimum deposit standard from the outset. In particular, a newly chartered depository institution that is organized by, or intended to be owned by, an existing company (whether or not a bank holding company), typically does not need a grace period to reach the $500,000 minimum deposit standard. Therefore, the FDIC intends to include a condition in any order granting deposit insurance to such a depository institution that the depository institution have the $500,000 minimum deposit before deposit insurance becomes effective.

Similarly, several commenters suggested a grace period for operating insured depository institutions that are not newly insured. The rationale for such a grace period is that any insured depository institution may, on occasion, fall below the minimum deposit standard, and it would be extremely disruptive and harmful if the institution's status were to immediately and automatically change as a result. For example, an institution's insured status might be called into doubt if it fell below the minimum deposit standard even for an instant. Furthermore, an institution that qualified as a ''State bank'' might abruptly lose that status if its total non-trust deposits fell below the minimum deposit standard. Of course, an institution's deposit insurance continues until terminated by the FDIC.

The FDIC believes, however, that any perception that an institution might abruptly lose its insured status or its status as a ''State bank'' may cause uncertainty and disruption. Consequently, the FDIC has decided to modify the proposed rule to avoid such a result. The final rule provides that an insured depository institution (other than a newly insured institution) will be subject to a determination by the FDIC that the institution is not ''engaged in the business of receiving deposits other than trust funds'' and to termination of its insured status through administrative proceedings under section 8(p) of the FDI Act if the institution is below the minimum deposit standard on two consecutive call report dates. The term ''call report'' is used herein to refer collectively to the Consolidated Reports of Condition and Income, the Thrift Financial Report, and the Report of Assets and Liabilities of US Branches and Agencies of Foreign Banks. The call report dates are March 31st, June 30th, September 30th, and December 31st.

A brief discussion about section 8(p) as it relates to the institution's depositors is warranted. Under section 8(p) of the FDI Act, the FDIC is obligated to terminate the insured status of a depository institution that is not ''engaged in the business of receiving deposits other than trust funds.'' 12 U.S.C. 1818(p). A finding by the FDIC's Board of Directors that a depository institution is not ''engaged in the business of receiving deposits other than trust funds'' is conclusive. *Id.* Such

a finding, however, does not result in the immediate loss of deposit insurance. On the contrary, the institution remains insured for a period of time during which depositors are provided with notification of the date on which the institution's deposits will cease to be insured. See 12 CFR 308.124.

8. Should Operating Insured Depository Institutions Be Held to the Same Standard as Applicants for Deposit Insurance? In Other Words, Should the Standard Under Section 8 of the FDI Act (Involving Terminations) Be the Same as the Standard Under Section 5 (Involving Applications)? Should the FDIC Terminate the Insured Status of Any Operating Institution That Does Not Meet the Chosen Standard? Should an Operating Insured Institution Be Given a Certain Period of Time To Regain the Level of $500,000 After Falling Below That Level?

Of the five commenters responding on this question, all thought that operating insured depository institutions should be held to the same standard as applicants for deposit insurance. As noted above, two commenters thought that operating insured institutions should be given a period of time to regain the $500,000 minimum deposit standard after falling below it.

The FDIC agrees that operating insured depository institutions should be held to the same standard as applicants for deposit insurance, and the final rule is consistent with that principle. With regard to the grace period suggestion, the FDIC has modified the rule, as discussed above, to provide a period of time for an institution to regain the minimum deposit standard if the institution should fall below it.

9. Should the Same Standard Apply to the Definition of ''State bank'' Under Section 3 of the FDI Act? If not, What standard Should Apply? Why?

Of the seven commenters responding on this question, all thought that the same standard should apply to the definition of ''State bank'' under section 3 of the FDI Act, and four of the seven thought that the same standard should apply throughout the FDI Act.

In addition to the responses to the nine questions, one commenter suggested that the rule should be a ''safe harbor'' as opposed to a minimum standard. The FDIC intends a minimum standard. The FDIC does not believe that a safe harbor approach will adequately clarify the meaning of the phrase ''engaged in the business of receiving deposits other than trust funds.'' Under a safe harbor approach uncertainty would exist as to the status of an institution that did not satisfy the $500,000 standard. A primary purpose of the rule is to remove ambiguity and uncertainty in this area, and the safe harbor approach does not achieve that purpose. Consequently, the FDIC has modified the rule to make it clear that the rule's requirements are a minimum standard, not a safe harbor. However, the rule is also structured so that a failure to satisfy the $500,000 standard will not result in an automatic termination of an institution's status as an insured institution or as a ''State bank.'' Rather, such a failure would make the institution subject to termination proceedings under section 8(p).

V. Objections to the Rule

As noted above three commenters opposed the regulation. One opponent simply disagreed with the FDIC's interpretation of section 5 of the FDI Act. Another opponent, U.S. Senator Mary L. Landrieu, was opposed to the FDIC's adoption of the regulation and thought it inappropriate to promulgate a regulation while the *Heaton* v. *Monogram* litigation was pending.

The FDIC believes that it has acted properly in formalizing its interpretation of the FDI Act at this time. Because of the FDIC's statutory responsibility as a federal banking regulator, the FDIC has a strong interest in interpreting the FDI Act and in providing courts and private parties with guidance concerning its interpretation. Agencies often interpret their governing statutes during the course of litigation in order to provide courts and private litigants with needed guidance. Indeed, it is often litigation that discloses the need for such guidance. The Supreme Court cited this practice with approval in *Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996), when it gave deference under the *Chevron* doctrine to a regulation interpreting the statutory term ''interest'' that was promulgated by the Comptroller of the Currency during the course of litigation. Additionally, it is appropriate for the FDIC to promulgate its statutory interpretation in the form of a formal regulation, in view of recent Supreme Court decisions restricting judicial deference in situations involving less formal interpretations of a statute. *See Christensen* v. *Harris County,* 529 U.S. 576 (2000); *U.S.* v. *Mead Corp.,* 121 S. Ct. 2164 (2001).

Indeed, this regulation presents a classic example of a federal agency acting appropriately in furtherance of its statutory responsibility. The FDIC decided many years ago, in the course of approving applications for deposit insurance, to interpret the statutory phrase ''engaged in the business of receiving deposits'' to include banking institutions with limited deposit-taking activity. Accordingly, the FDIC approved numerous applications for deposit insurance from such institutions over a period of more than thirty years. Because the ongoing litigation has disclosed a need for a more formal interpretation, the FDIC is adopting this rule interpreting the statutory phrase consistent with both the FDIC's longstanding interpretation and other federal and state banking law.

As noted above, the regulation is being issued to eliminate the current uncertainty and provide for consistency in the interpretation of the FDI Act. Consequently, the FDIC believes that it is not only appropriate but essential for the FDIC to issue a regulation clarifying the meaning of the phrase ''engaged in the business of receiving deposits other than trust funds.''

The third opposition letter was submitted by a law firm on behalf of five consumer advocacy groups. These consumer groups are the National Consumer Law Center, the Consumer Federation of America, Consumers Union, U.S. Public Interest Research Group and the National Association of Consumer Advocates. In their letter, the consumer groups presented three arguments against the adoption of the proposed regulation. Each of these arguments is addressed in turn below.

First, the consumer groups argued that the integrity of the regulatory process will be undermined by asserting a position that supports the defendant in the *Heaton* v. *Monogram* litigation. This argument ignores the nature and extent of the FDIC's statutory duties under the FDI Act. The FDIC cannot discharge its duties, for example, under section 5 of the FDI Act (involving applications for deposit insurance) and section 8 of the Act (involving terminations of insurance) without interpreting the statutory phrase. For this reason, the FDIC cannot be neutral. The FDIC must interpret the phrase ''engaged in the business of receiving deposits other than trust funds'' in order to carry out its duties. Otherwise, the FDIC would be unable to make any decisions on any applications for deposit insurance. As pointed out above, it is important to note that the FDIC's interpretation has existed for many years prior to this litigation. It was not established with the purpose of either helping or hurting any party; rather, it was established with the

purpose of fairly and consistently administering the statute.

Second, the consumer groups argued that the FDIC's interpretation as codified in the proposed regulation conflicts with the FDI Act. This argument is based upon the statute's use of the word ''business'' and the words ''receiving deposits.'' According to the consumer groups, these words mean that a depository institution must receive an ''ongoing'' stream of deposits in order to be ''engaged in the business of receiving deposits other than trust funds.''

The FDIC does not believe that the interpretation offered by the consumer groups is correct. The statute refers to ''business,'' not ''primary business.'' See *Royal Foods Co. Inc.* v. *RJR Holdings Inc.,* 252 F.3d 1102 (9th Cir. 2001). The statute also recognizes that a single deposit can be accepted or ''received'' many times through rollovers. See 12 U.S.C. 1831f(b). Thus, the word ''receiving'' in the statute is consistent with the holding—and periodic renewal or rollover—of a single certificate of deposit. Similarly, the plural word ''deposits'' is not inconsistent with the holding of a single deposit account because multiple deposits of funds can be made into a single account. In addition, the periodic accrual of interest represents the ''receiving'' of ''deposits.'' Moreover, the statute defines ''deposit'' in such a way as to treat ''receiving'' and ''holding'' with equal significance for purposes of the definition of ''deposit.'' See 12 U.S.C. 1813(l)(1).

In short, the proposed regulation is consistent with the FDI Act. This conclusion is confirmed by *Meriden Trust and Safe Deposit Company* v. *FDIC,* 62 F.3d 449 (2d Cir. 1995). In that case, the court found that a bank was ''engaged in the business of receiving deposits other than trust funds'' even though the bank held only two accounts with a combined balance of only $200,000. Both of those accounts were from affiliates: one from the bank's parent company and one from its sister bank.

In presenting their second argument, the consumer groups asserted that the *Meriden* case is distinguishable from the *Heaton* case. They noted that the two cases involved separate sections of the FDI Act (though both cases involved the same definition of ''State bank''). However, the meaning of being ''engaged in the business of receiving deposits other than trust funds'' should not vary depending upon which section of the FDI Act is under consideration and the consumer groups have presented no argument justifying such variation. Such an approach would lead to inconsistencies, uncertainties and confusion and would be contrary to the main purpose of the regulation which is to clarify the law for the benefit of depository institutions as well as the general public.

Third, the consumer groups argued that the regulation will harm the public. This argument is based upon the proposition that an out-of-state bank should not be able to avoid the host state's consumer protection laws. This argument is inconsistent with the express language of section 27 of the FDI Act, 12 U.S.C. 1831d. Through section 27, Congress has specifically provided that an out-of-state ''State bank'' may export interest rates into a host state notwithstanding the host state's laws. This section was enacted to provide state banks competitive equality with national banks.

Finally, the law firm representing the plaintiff in the *Heaton* v. *Monogram* litigation submitted a letter objecting to the FDIC's consideration of two other letters (both supporting the proposed regulation). The law firm argued that the two letters in question had been received by the FDIC after the expiration of the comment period.

In fact, one of the two letters was received by the FDIC on the last day of the comment period (July 18, 2001). This letter was timely. The second letter supported the proposed regulation but in broad, general terms. Substantively, it was similar to a number of other letters. The FDIC did not rely upon this letter or another late-filed letter in its consideration of the final rule.

The FDIC has carefully considered all of the timely comments received; most of the comments received are consistent with the FDIC's views and suggest no changes to the rule. However, as noted above, the FDIC has modified the proposed rule to incorporate certain grace periods suggested in the comments received in response to questions 7 and 8, and has clarified the fact that the rule is not a safe harbor.

VI. Reasons for the Minimum Deposit Standard

There are a number of substantial reasons for adopting the final rule. First, the statute is ambiguous (as discussed above). The FDIC in General Counsel Opinion 12 (GC12) discussed the statutory language at length. *See* 65 FR 14568, 14569 (March 17, 2000). The statute recognizes that a single deposit can be accepted or ''received'' many times through rollovers. *See* 12 U.S.C. 1831f(b) (dealing with the acceptance of brokered deposits). Thus, the word ''receiving'' in the statute can be reconciled with the holding—and periodic renewal or rollover—of a single deposit. Similarly, the plural word ''deposits'' is not inconsistent with the holding of a single deposit account because multiple deposits of funds can be made into a single account. A depositor might, for example, make a deposit of funds every month into the same account. The accrual of interest would represent an additional deposit into the same account. In the case of a certificate of deposit, the deposit would be replaced with a new deposit at maturity. Moreover, the statute defines ''deposit'' in such a way as to treat ''receiving'' and ''holding'' with equal significance for purposes of the definition of ''deposit.'' See 12 U.S.C. 1813(l)(1).

Second, as discussed at length in General Counsel Opinion No. 12, the legislative history is inconclusive. *See* H.R. Rep. No. 2564, reprinted in 1950 U.S.C.C.A.N. 3765, 3768. Third, the FDIC has approved applications from many non-traditional depository institutions that intended to maintain only one or a very limited number of non-trust deposit accounts. This practice began at least as early as 1969 with Bessemer Trust Company (Bessemer) located in Newark, New Jersey. Bessemer offered checking accounts to its own trust customers but did not offer checking accounts or any other type of non-trust accounts to the general public. Despite this limitation on Bessemer's deposit-taking activities, the FDIC approved Bessemer's application for deposit insurance. The FDIC continued to approve such applications (*i.e.,* applications from institutions with very limited deposit-taking activities) from the 1970s to the present. These non-traditional depository institutions have included trust companies, credit card banks and other specialized institutions. For example, one depository institution planned to hold no accounts except escrow accounts relating to mortgage loans. Another depository institution planned to offer deposits only to its affiliate's customers.

Fourth, the Bank Holding Company Act (BHCA) contemplates the existence of depository institutions that are insured by the FDIC even though they do not accept a continuing stream of non-trust deposits from the general public. *See* 12 U.S.C. 1841(c). In the BHCA, the definition of ''bank'' includes banks insured by the FDIC. *See* 12 U.S.C. 1841(c)(1). A list of exceptions includes institutions functioning solely in a trust or fiduciary capacity if several conditions are satisfied. The conditions related to deposit-taking are: (1) All or

substantially all of the deposits of the institution must be trust funds; (2) insured deposits of the institution must not be offered through an affiliate; and (3) the institution must not accept demand deposits or deposits that the depositor may withdraw by check or similar means. *See* 12 U.S.C. 1841(c)(2)(D)(i)–(iii). The significant conditions are (1) and (2). The first condition provides that all or substantially all of the deposits of the institution must be trust funds; the second condition involves ''insured deposits.'' Thus, the statute contemplates that a trust company—functioning solely as a trust company and holding no deposits (or substantially no deposits) except trust deposits—could hold ''insured deposits.'' In other words, the BHCA contemplates (without requiring) that an institution could be insured by the FDIC even though the institution does not accept non-trust deposits from the general public.

Fifth, the leading case indicates that a depository institution may be ''engaged in the business of receiving deposits other than trust funds'' even though the institution holds a very small amount of non-trust deposits. See *Meriden Trust and Safe Deposit Company* v. *FDIC,* 62 F.3d 449 (2d Cir. 1995). Indeed, this case indicates that an amount as small as $200,000 is a sufficient amount of non-trust deposits.

Sixth, some state banking statutes contemplate the existence of FDIC-insured depository institutions that are severely restricted in their ability to accept non-trust deposits from the general public. For example, a Virginia statute provides that a general business corporation may acquire the voting shares of a ''credit card bank'' only if certain conditions are satisfied. See Va. Code 6.1–392.1.A. These conditions comprise the definition of a ''credit card bank.'' See Va. Code 6.1–391. These conditions include the following: (1) The bank may not accept demand deposits; and (2) the bank may not accept savings or time deposits of less than $100,000. Indeed, the statute provides that a ''credit card bank'' may accept savings or time deposits (in amounts in excess of $100,000) only from affiliates of the bank having their principal place of business outside the state. See Va. Code 6.1–392.1.A.3–4. In other words, the Virginia statute prohibits the acceptance of any deposits from the general public. At the same time, the statute requires the deposits of the bank to be federally insured. See Va. Code 6.1–392.1.A.4.

The figure of $500,000 is being utilized for several reasons. First, it is more than a nominal sum. Indeed, it is greater than the amount involved in the leading case of *Meriden Trust and Safe Deposit Company* v. *FDIC*, 62 F.3d 449 (2d Cir. 1995). In that case, the court found that only $200,000 of non-trust deposits was a sufficient amount. Second, the figure of $500,000 is not so great that it would prevent non-traditional depository institutions from obtaining FDIC insurance. As previously mentioned, the Bank Holding Company Act contemplates the existence of depository institutions that are insured by the FDIC even though they do not accept a continuing stream of non-trust deposits from the general public. *See* 12 U.S.C. 1841(c). Also, some state banking statutes contemplate the existence of FDIC-insured depository institutions that are severely restricted in their ability to accept non-trust deposits from the general public. See, e.g., Va. Code 6.1–392.1.A.4. Third, $500,000 is the amount of non-trust deposits allowed by the FDIC in recent years in connection with a number of applications for deposit insurance. Applications involving the precise amount of $500,000 can be traced as far back as 1991.

As previously explained, the purpose of the regulation is to create uniformity and certainty. The choice of any specific dollar figure would serve this purpose. For the reasons set forth above, the FDIC has chosen $500,000.

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.

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 FDIC-insured depository institutions and will impose no new reporting, recordkeeping or other compliance requirements. Although the final rule specifies that depository institutions must hold non-trust deposits in the amount of $500,000 or more in order to be ''engaged in the business of receiving deposits other than trust funds,'' the rule does not create a new requirement. Rather, the final rule clarifies an existing requirement. Moreover, the final rule is consistent with the standard already applied to depository institutions by the FDIC. Accordingly, the Act's requirements relating to an initial and final regulatory flexibility analysis are not applicable.

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).

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), Banks, banking, Bank merger, Branching, 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, 1835a, 3104, 3105, 3108, 3207; 15 U.S.C. 1601–1607.

2. New § 303.14 is added to subpart A to read as follows:

§ 303.14 Being ''engaged in the business of receiving deposits other than trust funds.''

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a depository institution shall be ''engaged in the business of receiving deposits other than trust funds'' only if it

maintains one or more non-trust deposit accounts in the minimum aggregate amount of $500,000.

(b) An applicant for federal deposit insurance under section 5 of the FDI Act, 12 U.S.C. 1815(a), shall be deemed to be ''engaged in the business of receiving deposits other than trust funds'' from the date that the FDIC approves deposit insurance for the institution until one year after it opens for business.

(c) Any depository institution that fails to satisfy the minimum deposit standard specified in paragraph (a) of this section as of two consecutive call report dates (i.e., March 31st, June 30th, September 30th, and December 31st) shall be subject to a determination by the FDIC that the institution is not ''engaged in the business of receiving deposits other than trust funds'' and to termination of its insured status under section 8(p) of the FDI Act, 12 U.S.C. 1818(p). For purposes of this paragraph, the first three call report dates after the institution opens for business are excluded.

(d) Notwithstanding any failure by an insured depository institution to satisfy the minimum deposit standard in paragraph (a) of this section, the institution shall continue to be ''engaged in the business of receiving deposits other than trust funds'' for purposes of section 3 of the FDI Act until the institution's insured status is terminated by the FDIC pursuant to a proceeding under section 8(a) or section 8(p) of the FDI Act. 12 U.S.C. 1818(a) or 1818(p).

By order of the Board of Directors.

Dated at Washington, DC, this 23rd day of October 2001.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 01–27198 Filed 10–29–01; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–175–AD; Amendment 39–12484; AD 2001–22–05]

RIN 2120–AA64

Airworthiness Directives; Short Brothers Model SD3 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Short Brothers Model SD3 series airplanes, that requires an inspection to find discrepancies of the hydraulic pipelines to the 7P panel and adjacent electrical wiring harnesses, and corrective action, if necessary. This action is necessary to find and fix such discrepancies, which could result in electrical arcing between the hydraulic lines and adjacent wiring, and a potential fire. This action is intended to address the identified unsafe condition.

DATES: Effective December 4, 2001.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 4, 2001.

ADDRESSES: The service information referenced in this AD may be obtained from Short Brothers, Airworthiness & Engineering Quality, P.O. Box 241, Airport Road, Belfast BT3 9DZ, Northern Ireland. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Short Brothers Model SD3 series airplanes was published in the **Federal Register** on August 17, 2001 (66 FR 43126). That action proposed to require an inspection to find discrepancies of the hydraulic pipelines to the 7P panel and adjacent electrical wiring harnesses, and corrective action, if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 75 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $4,500, or $60 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows: