



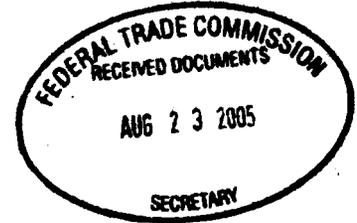
ORIGINAL

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

August 15, 2005

Federal Trade Commission/Office of the Secretary
Room H-159 (Annex A)
600 Pennsylvania Avenue, NW
Washington, DC 20580



Re: Proposed Rule for FDICIA Disclosures, Matter No. R411014

Dear Sir or Madam,

We are writing to comment on a proposed regulation published by the Federal Trade Commission that would require uninsured depository institutions to make certain disclosures regarding their uninsured status. The proposal, if adopted, would implement 12 U.S.C. § 1831t(b), originally enacted as part of FDICIA in 1991. The OCC believes that the statute and regulation should not apply to two types of uninsured depository institutions chartered by the OCC – uninsured national trust banks and uninsured Federal branches of foreign banks – and requests that the FTC clarify this in enacting a final regulation.

I. The proposal

Briefly summarized, the proposal applies to “depository institutions” lacking federal deposit insurance. The proposal defines “depository institution” as including any “bank” as defined in 12 U.S.C. § 1813. Thus, the term includes national banks and Federal branches of foreign banks.¹ “Lacking deposit insurance” is defined in the proposed regulation as a depository institution that is not insured as defined in 12 U.S.C. § 1813(c)(2).² Thus, uninsured national trust banks and uninsured Federal branches chartered by the OCC may be subject to the proposed disclosure regulation. The proposal provides that uninsured depository institutions:

- must include in all periodic statements of account, each signature card, and each passbook, certificate of deposit or similar instrument evidencing a deposit, a conspicuous notice disclosing that the institution is not federally insured, and that if the institution fails, the federal government does not guarantee that depositors will get their money.

¹ 12 U.S.C. § 1813(a)(1)(A).

² “Insured depository institutions” includes “banks” with deposits insured by the FDIC. 12 U.S.C. § 1813(c)(2).

- must include a conspicuous notice disclosing that the institution is not insured at each location where account funds or deposits are normally received such as at its main office, branches, and ATMs, and in all advertisements including print, electronic, webpage or broadcast media.
- must not receive any deposit from a new or existing depositor unless the depositor has signed a written acknowledgement indicating that the institution is not federally insured, and that if the institution fails, the federal government does not guarantee that the depositors will get their money back.

II. Discussion

A. The requirements of the regulation should not apply to uninsured national trust banks

Uninsured national trust banks³ should not be covered by the specific requirements of the regulation because these requirements are premised upon the acceptance of “deposits” and such banks do not “receive or hold deposits” in uninsured deposit accounts. While the proposed disclosure regulation does not define “deposits,” since it is based on a statutory provision amending the Federal Deposit Insurance Act (“FDIA”), FDIA definitions control.⁴ The FDIA definitions of “deposit” refer to funds or money as being “received or held.” For instance, the FDIA definition of “deposit” includes “trust funds . . . received or held by [a] bank.”⁵ However, uninsured national trust banks are prohibited from self-depositing fiduciary funds because to do so would be in direct conflict with representations made in the bank’s application for a national trust bank charter, would be in violation of the bank’s chartering conditions, and would be in violation of a provision in the bank’s articles of association that is required by the OCC. Thus, uninsured national trust banks normally place trust funds awaiting distribution or investment in insured deposit accounts at affiliated or correspondent depository institutions insured by the Federal Deposit Insurance Corporation.⁶ Under these circumstances, to provide a disclosure to the beneficiaries of these accounts that any such deposits are not insured, could be incorrect and potentially highly confusing.

³ There are currently approximately 84 uninsured national trust banks in operation.

⁴ The proposed disclosure regulation expressly cross-references the FDIA definitions of “insured depository institution,” “bank,” and “savings association.” 70 Fed. Reg. 12,828.

⁵ See, 12 U.S.C. §§ 1813(l)(2). See also, e.g., § 1813(l)(3) (“money received or held by a bank . . . in the usual course of business for a special or specific purposes, regardless of the legal relationship thereby established . . .”).

⁶ Funds also may be placed in short-term investments, such as money market mutual funds, offered by entities other than depository institutions. Even where funds are not held by an uninsured bank in a fiduciary capacity – such as where the trust company is mistakenly overpaid dividends or interest on an investment – the excess funds would not be self-deposited, but would immediately be placed in a demand account at an insured affiliate or correspondent depository institution or other short-term investment such as a money market mutual fund.

We also note that entities that do not receive deposits are within the exception proposed by the FTC, which implements the statutory exception set forth in 12 U.S.C. § 1831t(d). The exception provides:

The [FTC] may, by regulation or order, make exceptions to the [disclosure requirements] for any depository institution that, within the United States, does not receive initial deposits of less than \$100,000 from individuals who are citizens or residents of the United States, other than money received in connection with any draft or similar instrument issued to transmit money.⁷

Uninsured national trust banks fit within this exception. They are “depository institutions,” and they do not receive deposits of under \$100,000 from anyone.

Consequently, we recommend that the FTC make clear in the final regulation that uninsured national trust banks are not within the scope of the regulation and are not subject to its requirements. The proposed disclosure requirements would have no applicability to uninsured national trust banks, which do not receive and hold deposits. Moreover, the disclosure requirements could be incorrect and misleading as applied to uninsured national trust banks because any such funds customarily would be placed in an insured account at another FDIC-insured depository institution. Finally, uninsured national trust banks fit within the statutory exception, proposed to be implemented in the proposed regulation, for institutions that do not receive deposits of less than \$100,000.

B. The regulation should not apply to uninsured Federal branches of foreign banks

Federal branches are branches of foreign banks licensed by the OCC to operate and provide services in the United States. Each state also can license branches of foreign banks to operate and provide services within its borders.

In the International Banking Act (IBA), Congress adopted a comprehensive supervision scheme for the regulation of uninsured Federal and State branches of foreign banks.⁸ The statute grants to United States branches of foreign banks deposit-taking authority.⁹ It provides that uninsured United States branches of foreign banks may not hold retail deposits, but gives the OCC (for Federal branches) and the FDIC (for State branches) authority to determine by order or regulation that a branch is not engaged in domestic retail deposit activities requiring deposit insurance protection.¹⁰

⁷ The regulation proposed to implement this statutory exception would be codified at 12 C.F.R. § 320.6.

⁸ 12 U.S.C. § 3101 to § 3111. For purposes of this memorandum, uninsured Federal branches and uninsured State branches of foreign banks are referred to in the aggregate as uninsured United States branches of foreign banks.

⁹ *Id.* at § 3104.

¹⁰ *Id.* at § 3104(b) and (c).

The agencies have issued regulations under this authority identifying a limited set of circumstances under which non-retail deposits of under \$100,000 may be accepted by uninsured United States branches of foreign banks, and requiring that uninsured branches engaged in such activity provide notification to depositors that the branch is not insured.¹¹ For the following reasons, the OCC recommends that the FTC clarify in its final regulation that the disclosure requirements adopted under 12 U.S.C. § 1831t do not apply to uninsured Federal branches of foreign banks.

First, the proposed disclosure regulation substantially overlaps the disclosure regulations currently in place adopted by the FDIC and OCC pursuant to the IBA, which trace their roots to disclosure regulations originally adopted in 1979.¹² As currently codified, the FDIC disclosure regulation requires that the branch display conspicuously at each window or place where deposits are usually accepted a sign stating that deposits are not insured by the FDIC. The branch also must include in bold face conspicuous type on each signature card, passbook, and instrument evidencing a deposit a statement that the deposits are not insured by the FDIC; alternatively, the branch may require each depositor to execute a statement acknowledging that the initial deposit and all future deposits at the branch are not insured by the FDIC.¹³ OCC regulations incorporate the FDIC notice requirements.¹⁴

Second, the complex history of section 1831t and related sections demonstrates that Congress, in adopting the statute, evidenced no focused or express concern with the need to apply its disclosure requirements to non-retail deposits held in United States branches of foreign banks. The definition of “depository institution” for purposes of the statute and the proposed regulation does not specifically include uninsured State branches of foreign banks even though uninsured State branches of foreign banks, since well before the adoption of section 1831t, had long and continuously been permitted to receive non-retail deposits of under \$100,000.¹⁵ Had Congress been focused on the need to mandate disclosure by uninsured United States branches, Congress would have subjected uninsured State branches to section 1831t.

¹¹ 12 C.F.R. § 28.16 (OCC) and 12 C.F.R. § 347.206 – 207 (FDIC). Effective July 1, 2005, the relevant FDIC regulations were recodified at sections 347.216 and 347.217. 70 Fed. Reg. 17,550, 17,572 (April 6, 2005).

¹² See 44 Fed. Reg. 40,056, 40,061 (July 9, 1979) (FDIC); 44 Fed. Reg. 65,381, 65,386 (November 12, 1979) (OCC).

¹³ 12 C.F.R. § 347.207 and § 347.216.

¹⁴ 12 C.F.R. § 28.16(e). OCC regulations specifically provide that “a[n uninsured] Federal branch that accepts deposits pursuant to [section 28.16] shall provide notice to depositors pursuant to 12 CFR 347.206, which generally requires that the Federal branch conspicuously display a sign at the branch and include a statement on each signature card, passbook, and instrument evidencing a deposit that the deposit is not insured by the Federal Deposit Insurance Corporation.”

¹⁵ See, e.g., 44 Fed. Reg. 40,056, 40,061 (July 9, 1979) (codified at 12 C.F.R. § 346.6); 54 Fed. Reg. 14,064, 14,067 (April 7, 1989) (amending § 346.6). For purposes of deposit-taking, uninsured Federal branches and uninsured state branches are indistinguishable other than on the basis of which governmental entity granted them a license. 12 U.S.C. § 3104.

Moreover, as part of the same legislation in 1991 in which Congress adopted section 1831t, Congress adopted legislation that appeared to permit United States branches of foreign banks to hold deposits of under \$100,000 only if they were insured and only if they had existed prior to the date of enactment of the legislation.¹⁶ Less than a year later, however, in 1992 Congress recognized and fixed the ambiguity. As a result, Congress adopted a technical amendment to section 3104 unambiguously providing that uninsured United States branches of foreign banks were prohibited only from taking *domestic retail deposits* of under \$100,000,¹⁷ and backdated the effective date of this amendment to the effective date of the 1991 statute.¹⁸ Two years after that, Congress affirmatively instructed the OCC and the FDIC to review the acceptance by uninsured United States branches of foreign banks of non-retail deposits of under \$100,000 and adopted a nonexclusive list of the types of depositors from which it might be appropriate to take such deposits.¹⁹ Nevertheless, despite the 1992 technical amendment expressly asserting the authority of uninsured United States branches of foreign banks to receive non-retail deposits of under \$100,000, and the 1994 directive to the agencies, Congress took no action in either 1992 or 1994 to assure that section 1831t would apply to uninsured State branches. Nor did Congress evidence any awareness that section 1831t would apply to uninsured Federal branches.

The explanation for this apparent Congressional indifference with the deposits at uninsured United States branches is that Congress clearly understood that deposits held by such branches, even those below \$100,000, were non-retail in character. Thus, pursuant to the 1994 Congressional directive and its authority to permit uninsured State branches of foreign banks to accept non-retail deposits of under \$100,000,²⁰ the FDIC in 1996 adopted regulations setting

¹⁶ Pub. L. 102-242, Tit. II, § 214(a), December 19, 1991, 105 Stat. 2302-03, *codified at* 12 U.S.C. § 3104(d). This provided that “deposit accounts with balances of less than \$100,000 may be accepted or maintained in a branch of a foreign bank only if such branch was an insured branch as of the date of enactment of this subsection.” *Id.* § 3104(d)(2).

¹⁷ Pub. L. 102-558, Title III, § 302(a), (October 28, 1992), 106 Stat. 4224. As a result, section 3104(d)(2) was amended to read:

Domestic retail deposit accounts with balances of less than \$100,000 *that require deposit insurance protection* may be accepted or maintained in a branch of a foreign bank only if such branch was an insured branch as the date of enactment of this subsection.

(Emphasis added.)

¹⁸ Pub. L. 102-558 at § 302(b). Congress later described the prior history as follows:

The IBA was amended in 1991 to prohibit a foreign bank from establishing any new branches that would take domestic *retail* deposits that have balances of less than \$100,000 and require deposit insurance. As a result a foreign bank must establish a U.S. subsidiary bank in order to conduct a domestic retail deposit-taking business.

H.R. Rep. No. 103-448, 103d Cong. 2d Sess., 59-60 (March 22, 1994) (emphasis added).

¹⁹ Pub. L. 103-328, § 107, 108 Stat. 2358-59 (September 29, 1994) (codified at note following 12 U.S.C. § 3104).

²⁰ Title 12 U.S.C. § 3104(c) provides that no foreign bank may operate a branch:

forth a list of deposits that may be accepted by those branches in amounts of under \$100,000, which *are not considered to be domestic retail deposits*.²¹ Likewise, the OCC in 1996 adopted regulations,²² pursuant to the 1994 Congressional directive, under its authority to permit uninsured Federal branches to accept certain non-retail deposits of less than \$100,000.²³ These OCC regulations permitted uninsured Federal branches to accept deposits of under \$100,000 that are in all material respects identical to those listed by FDIC.²⁴

Third, application of the regulation to uninsured Federal branches, but not uninsured State branches, leads to an anomalous result.²⁵ State branches of foreign banks have been and are

in any State in which the deposits of a bank organized and existing under the laws of that State would be required to be insured, unless the branch is an insured branch [as defined in 12 U.S.C. § 1813(s)] or unless the branch will not thereafter accept deposits of less than \$100,000, or *unless the [FDIC] determines by order or regulation that the branch is not engaged in domestic retail deposit activities requiring deposit insurance protection, taking account of the size and nature of depositors and deposit account.* (Emphasis added.)

²¹ 61 Fed. Reg. 5671 (February 14, 1996). This regulation was originally codified at 12 C.F.R. § 346.6 and subsequently recodified at 12 C.F.R. § 347.206(a). This list is included in the FDIC's recently-adopted revisions to its international banking regulations and has been recodified at 12 C.F.R. § 347.215. See 70 Fed. Reg. 17,559, 17,571-72 (April 6, 2005) (effective on July 1, 2005).

²² 61 Fed. Reg. 19,524 (May 2, 1996) (codified at 12 U.S.C. § 28.16).

²³ 12 U.S.C. § 3104(b). This statute provides:

No foreign bank may establish or operate a Federal branch which receives deposits of less than \$100,000 unless the branch is an insured branch . . . *or unless the Comptroller determines by order or regulation that the branch is not engaged in domestic retail deposit activities requiring deposit insurance protection, taking account of the size and nature of depositors and deposit accounts.*

(Emphasis added.) The OCC's regulations were adopted at 61 Fed. Reg. 19,524 (May 2, 1996).

²⁴ Compare 12 C.F.R. § 28.16(b) with 12 C.F.R. § 347.206(a) and § 347.215. The FDIC list and the OCC list largely track Congress's 1994 nonexclusive list and include deposits by: (1) individuals who are not U.S. citizens or residents at the time of the initial deposit; (2) individuals who are not citizens of the U.S. but are residents of the U.S. and are employed by a foreign bank, foreign business, foreign government or recognized international agency; (3) persons to whom the branch or foreign bank has extended credit or provided other nondeposit banking services and their immediate family members; (4) foreign businesses and large U.S. businesses; (5) foreign governmental units and recognized international organizations; (6) persons who are depositing funds in connection with the issuance of a financial instrument by the branch for the transmission of funds; (7) the United States government, state governments or a political subdivision or agency of those governments; (8) persons from whom an Edge or agreement corporation may accept deposits under Regulation K (12 C.F.R. Part 211); and (9) any other depositor provided that the branch's average deposits received under this authority does not exceed one percent of the branch's average total deposits, and the branch does not solicit deposits from the general public by means of advertising, display of signs, or similar activity designed to attract the attention of the general public. Both the FDIC and OCC regulations also permit Federal and State branches to apply for exemptions for other types of deposits that are not listed but which must meet applicable standards. 12 C.F.R. § 28.16(c) (OCC), § 347.206(b) and § 347.215(b).

²⁵ We recognize that Congress gave the FTC authority to bring within the scope of the regulation an entity that the FTC determines is engaged in the business of receiving deposits and which could reasonably be mistaken for a depository institution by the entity's current or prospective customers. 12 U.S.C. § 1831t(f)(2)(B). But such an

more numerous than Federal branches and have held and hold the vast majority of total deposits held in United States branches of foreign banks. There are more than three times as many uninsured State branches of foreign banks as uninsured Federal branches of foreign banks and those State branches hold about nine times the total deposits as uninsured Federal branches and about eight times the total deposits under \$100,000.²⁶ Moreover, Congress was well aware in 1991 of the predominance of state-licensed offices of foreign banks over federally-licensed offices. In connection with the adoption of the 1991 legislation that amended the IBA and adopted section 1831t, Congress noted that 94% of the \$626 billion of assets held in branches and agencies of foreign banks were held in the 489 state-licensed offices and only six percent were held in the 86 federally-licensed offices.²⁷

In fact, only about 1.6% of total deposits currently held in all uninsured United States branches of foreign banks²⁸ are of the kind that Congress might have been concerned about in adopting section 1831t.²⁹ Even that is questionable given the characterization by Congress, the FDIC and the OCC of these deposits as non-retail deposits.³⁰ The preamble to the FTC's proposed disclosure regulation implementing the exception set forth in section 1831t(g) stated:

Because it appears unlikely that such institutions [that meet the requirements of the exception as set forth in the statute] are engaged in the business of retail deposits, insurance disclosures do not appear to be necessary for their customers. The Commission expects that customers of such institutions (*i.e.*, those dealing with initial deposits of \$100,000 or more) are sufficiently knowledgeable about these institutions and do not need the same disclosures required for other customers. *Such an exception would be similar to exemptions from deposit insurance requirements for non-retail deposits*

action by the FTC with respect to uninsured State branches that only take non-retail deposits would be pointless given the disclosures that have been required by the FDIC for more than 25 years. Moreover, when Congress wanted to add to the scope of section 1831t a type of depository institution not covered by the definition of "depository institution" contained in the FDIA, it knew how to do so. *See* 12 U.S.C. 1831t(f)(2)(A) (including uninsured credit unions). Rather, Congress did not do so despite having several opportunities where it addressed the deposit-taking authority of uninsured State branches of foreign banks.

²⁶ As of March 31, 2005, the 139 state-licensed branches of foreign banks hold about \$530 billion in deposits. In contrast, the 45 uninsured Federal branches of foreign banks hold deposits of about \$61 billion. In addition, those 45 uninsured Federal branches hold about \$9.9 billion in deposits under \$100,000, while uninsured State-licensed branches of foreign banks hold about \$81.7 billion in deposits under \$100,000.

²⁷ S. Rep. No. 102-167, 102d Cong., 1st Sess., 114 (September 19, 1991).

²⁸ This figure, by necessity, is an approximation.

²⁹ As discussed above, Congress did not specifically require disclosures by uninsured State branches of foreign banks and the exception set forth in section 1831t(g) demonstrates that Congress also was not specifically concerned about the need for disclosures with regard to deposits over \$100,000, or placed by entities rather than individuals, or placed by individuals who are neither citizens nor residents of the United States.

³⁰ We note also that committee reports relating to the adoption of section 1831t do not reflect concern about uninsured United States branches of foreign banks. S. Rep. 102-167, 102d Cong., 1st Sess., 61 (September 19, 1991) (citing incidents in Rhode Island and the District of Columbia as indicating the need for the legislation).

*accepted by federal and state branches of foreign banks (12 U.S.C. 3104(c)). Without the FTC exemption, such institutions would have to follow FTC disclosure requirements even though the FDIC specifically exempts them from the federal deposit insurance requirements designed to protect retail customers.*³¹

The same considerations should apply all non-retail deposits, described above, that both the FDIC and OCC, with Congressional sanction under the IBA, have permitted uninsured United States branches of foreign banks to hold.

Consequently, the OCC believes that a review of the statutory framework governing deposits in uninsured United States branches of foreign banks demonstrates no Congressional intent to encompass non-retail deposits held by uninsured Federal branches of foreign banks. As many courts have recognized, when interpreting a statute, it is necessary to take into account the “entire legislative scheme of which it is a part,”³² and in this case, that legislative scheme strongly supports the view that non-retail deposit-taking by uninsured Federal branches, as well as uninsured State branches, was intended to be governed by the International Banking Act and its implementing regulations, not by section 1831t. Moreover, to include uninsured Federal branches of foreign banks within the scope of the regulation when Congress did not expressly include uninsured State branches of foreign banks, leads to an absurd result that must be contrary to what Congress intended.³³

III. Conclusion

The OCC requests that the FTC clarify in its final regulation that uninsured Federal branches, which receive only non-retail deposits as defined by the OCC and FDIC under authority of the IBA, and which are subject to depositor disclosure requirements applied by the OCC and FDIC under the IBA, are not subject to the requirements of section 1831t or the implementing regulation.

The OCC also requests that the FTC clarify in its final regulation that uninsured national trust banks are not covered by section 1831t and its implementing regulation because they do not “receive or hold” deposits.³⁴ Under these circumstances, to disclose to the beneficiaries or other parties with interests in these accounts that such deposits are not insured, could be incorrect and potentially confusing. Moreover, as noted above, uninsured national trust banks fit squarely

³¹ 70 Fed. Reg. at 12,825 (emphasis added).

³² 2A Norman J. Singer, Statutes and Statutory Construction § 46.05 at fns. 3,4, and 5 and accompanying text (2000 & Supp. 2005) (noting also that “statutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme; a statutory subsection may not be considered in a vacuum, but must be considered in reference to statutes dealing with the same general subject matter”).

³³ As courts have recognized, the literal language of a statute need not bind the court to a result that is absurd and contrary to legislative intent. See, e.g., *United States v. Bryan*, 339 U.S. 323, 338 (1949); *Rod Warren Ink v. Commissioner of Internal Revenue*, 912 F/2d 325, 326 (9th Cir. 1990).

³⁴ Rather, as discussed, funds awaiting distribution or investment are placed in insured deposit accounts at affiliated or correspondent depository institutions insured by the FDIC.

within the statutory exception set forth in 12 U.S.C. § 1831t(d), and proposed to be implemented as 12 C.F.R. § 320.6, because they are depository institutions that do not receive deposits of less than \$100,000 – in fact, they receive or hold no deposits.

Thank you for considering our comments. Please contact James Gillespie, Deputy Chief Counsel, 202-874-5200, or Jerry Edelstein, Senior Counsel, 202-874-5300 if you have any questions.

Sincerely,

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

cc: Hampton Newsome, Division of Enforcement, Bureau of Consumer Protection