

The Riegle-Neal Act

In directing the FDIC to amend its regulation to ensure that foreign banking organizations do not have an unfair competitive advantage over United States banking organizations, Congress directed the FDIC to "consider whether to permit" an uninsured state-licensed branch of a foreign bank to accept initial deposits of less than \$100,000 from a smaller class of depositors than is currently delineated in § 346.6. This suggested smaller class is limited to:

(1) Individuals who are not citizens or residents of the United States at the time of the initial deposit;

(2) Individuals who:

(i) Are not citizens of the United States;

(ii) Are residents of the United States; and

(iii) Are employed by a foreign bank, foreign business, foreign government, or recognized international organization;

(3) Persons to whom the branch or foreign bank has extended credit or provided other nondeposit banking services;

(4) United States businesses and large United States businesses;

(5) Foreign governmental units and recognized international organizations; and

(6) Persons who are depositing funds in connection with the issuance of a financial instrument by the branch for the transmission of funds.

Moreover, section 107(b)(3) of the Riegle-Neal Act provides that any *de minimis* exception shall not exceed one percent of the average deposits at the branch, as opposed to the current five percent. The FDIC may establish a reasonable transition rule to facilitate any termination of deposit taking activities. See section 107(b)(5)(B) of the Riegle-Neal act.

If these new statutory criteria were adopted verbatim in the FDIC's proposed regulation, they would eliminate an uninsured state-licensed branch's current ability to accept initial deposits of less than \$100,000 from any domestic business entity engaged in a commercial activity for profit regardless of size, *i.e.*, only foreign businesses and large United States businesses would be subject to the exception. A verbatim adoption of the new statutory criteria would also remove the current exception for domestic federal or state governmental units. However, uninsured state-licensed branches would still be able to accept initial deposits of less than \$100,000 from foreign governmental units.

If Congress had intended the FDIC to adopt these suggested criteria verbatim,

it could have so required. However, the statute explicitly provides that the FDIC "shall consider whether to permit" an uninsured state-licensed branch to accept initial deposits of less than \$100,000 from the enumerated sources. By requiring only that the FDIC consider the statutory criteria, Congress explicitly recognized that the ultimate decision should be made by the FDIC, consistent with the statutory objective set forth in IBA section 6(a), in the exercise of its regulatory discretion and expertise.

Deposit Taking Activities of Uninsured Foreign Branches

The objective set forth by Congress in section 6(a) of the IBA is to afford equal competitive opportunities to foreign and United States banking organizations by ensuring that foreign banks do not receive an unfair competitive advantage. In order to accomplish this task, the FDIC reviewed data compiled by the staff of the Board of Governors of the Federal Reserve System concerning the deposit taking activities of uninsured U.S. branches and agencies of foreign banks. This information is significant in assessing the ability of uninsured branches and agencies to compete with United States banking organizations. As of year-end 1994, uninsured branches and agencies of foreign banks held \$386 billion of total deposits. Of that total, approximately 78 percent were accepted from other banks or non-U.S. entities. Of the approximately 22 percent of total deposits accepted from U.S. entities, virtually all were accepted in initial amounts in excess of \$100,000. Thus, this data indicates that as a group, uninsured U.S. branches of foreign banks do not compete with United States banking organizations for retail deposits. See also "Banking in a Global Economy: Economic Benefits to the United States from the Activities of International Banks", Institute of International Bankers, September, 1993, p. 27 (IIB Study). Generally, foreign banks have established operations in the United States in order to provide services to the international operations of their home country customers. *Id.* at 10.

In addition, the FDIC reviewed a 1994 study conducted by the OCC entitled "Are Foreign Banks Out-Competing U.S. Banks in the U.S. Market?" The study found that although the United States market share of subsidiaries, branches and agencies of foreign banks increased during the 1980's and early 1990's, foreign banks operating in the United States consistently performed less well than domestic banks in terms of profitability, efficiency and credit quality. Thus, the OCC study supports

the conclusion that United States banking organizations are competing quite well with their foreign counterparts operating in the United States.

Section 107(b)(4) of the Riegle-Neal Act requires that the FDIC consider the importance of maintaining and improving the availability of credit to all sectors of the United States economy, including the international trade finance sector, in affording equal competitive opportunities to foreign and United States banking organizations. United States branches and agencies of foreign banks play a substantial role in financing the export of U.S. goods and services to their home countries. See IIB Study, p. 35 (citing 1993 Federal Reserve Bank of New York statistics). Thus, the FDIC must be careful not to disadvantage state-licensed branches in order not to constrict the exportation of U.S. produced goods and services.

The Proposal

The FDIC has given careful consideration to Congress' directive that foreign banking organizations not receive an unfair competitive advantage over United States banking organizations. The FDIC has also considered the importance of maintaining and improving the availability of credit to all sectors of the United States economy, including the international trade finance sector. To that end, the Corporation has examined in detail the available data and the suggested criteria contained in section 107(b) of the Riegle-Neal Act in comparison to the criteria currently delineated in § 346.6(a) of the FDIC's regulations. In general, the FDIC has concluded that uninsured state-licensed branches of foreign banks do not have an overall unfair competitive advantage over domestic banking organizations. Therefore, the proposal provides that uninsured state-licensed branches of foreign banks may accept initial deposits of less than \$100,000 from the six categories of depositors specified in sections 107(b)(2) (A) through (F) of the Riegle-Neal Act. In addition, the proposal expands and adds certain exceptions which are discussed in the following paragraphs. These additional exceptions are consistent with Congress' concern that the FDIC not adversely affect international trade finance.

Section 346.6(a)(3) of the proposed regulation adopts the criterion suggested in section 107(b)(2)(C) of the Riegle-Neal Act that uninsured state-licensed branches should be able to accept initial deposits of less than \$100,000 from persons to whom the branch or foreign bank has extended credit or provided