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Office of Thrift Supervision
Department of the Treasury

May 24, 2007

Transmittal
TR-389

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Federal Register, Vol. 72, No. 66, pp. 16987-16990

Number TR-389

The Federal Reserve System issued a final rule revising its 1980 interpretation of Regulation D (Reserve Requirements of Deposits Institutions) setting forth criteria for the “bankers’ bank” exemption from reserve requirements.

FEDERAL RESERVE SYSTEM**12 CFR Part 204****[Regulation D; Docket No. R-1262]****Reserve Requirements of Depository Institutions****AGENCY:** Board of Governors of the Federal Reserve System.**ACTION:** Final rule.

SUMMARY: The Board of Governors is revising its 1980 interpretation of Regulation D (Reserve Requirements of Depository Institutions) setting forth criteria for the “bankers’ bank” exemption from reserve requirements. The interpretation sets forth the standards that the Board uses in applying the statutory and regulatory requirements for the bankers’ banks exemption to specific institutions. The revised interpretation specifies that the Board may determine, on a case-by-case basis, whether certain entities not already expressly listed in the interpretation may become customers to a limited extent of bankers’ banks that remain exempt from reserve requirements.

DATES: *Effective Date:* May 7, 2007.

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SUPPLEMENTARY INFORMATION:**I. Statutory Background**

Section 19(b) of the Federal Reserve Act (Act) imposes reserve requirements on certain deposits and other liabilities of depository institutions for monetary policy purposes. 12 U.S.C. 461(b). The Board’s Regulation D, “Reserve Requirements of Depository Institutions” (12 CFR part 204), implements Section 19(b). Section 19(b)(9) of the Act, commonly referred to as the “bankers’ bank exemption,” exempts from reserve requirements certain institutions that would otherwise be subject to them. Specifically, Section 19(b)(9) provides that reserve requirements “shall not apply with respect to any financial institution which—(A) is organized

solely to do business with other financial institutions; (B) is owned primarily by the financial institutions with which it does business; and (C) does not do business with the general public.” 12 U.S.C. 461(b)(9). “Bankers’ banks” for purposes of Section 19(b)(9) of the Act and Regulation D include bankers’ banks for commercial banks and thrifts chartered under state or federal law authorities as well as corporate credit unions.

II. Issuance of Original Interpretation

In November 1980, the Board issued an interpretation of Regulation D specifying certain standards to be used in determining whether institutions qualify for the bankers’ bank exemption from reserve requirements. 12 CFR 204.121 (Interpretation). Under the Interpretation, an institution may be regarded as “organized solely to do business with other depository institutions even if, as an incidental part to [sic] its activities, it does business to a limited extent with entities other than depository institutions.” *Id.* In addition, a depository institution will be regarded as “being owned primarily by the institutions with which it does business” if “75 per cent or more of its capital is owned by other depository institutions * * * regardless of the type of depository institution.” *Id.*

Finally, the Interpretation states that a depository institution will be regarded as “not do[ing] business with the general public” if the depository institution has satisfied two requirements. First, the depository institution must limit the range of customers with which it does business to: depository institutions; subsidiaries or organizations owned by depository institutions; directors, officers or employees of the same or other depository institutions; individuals whose accounts are required at the request of the institution’s supervisory authority due to the actual or impending failure of another depository institution; share insurance funds; and depository institution trade associations. Second, the depository institution’s loans to or investment in that range of customers (other than depository institutions) cannot exceed 10 percent of total assets, and the extent to which it receives shares or deposits from or issues other liabilities to those same entities (other than depository institutions) cannot exceed 10 percent of total liabilities or net worth. *Id.*

III. Proposed Revisions

On August 14, 2006, the Board published for comment a proposal to revise the Interpretation to specify that

the Board may determine, on a case-by-case basis, whether certain entities not already expressly listed in the Interpretation may become customers to a limited extent of bankers' banks. (71 FR 46411.) This proposal was issued pursuant to Section 19(a) of the Act, which authorizes the Board to define the terms used in that section and to prescribe such regulations as it may deem necessary to effectuate the purposes of the section and to prevent evasions thereof.

The Board proposed to amend the Interpretation by adding to the list of non-depository institution customers with which bankers' banks may do business and remain exempt from reserve requirements the language "and such others as the Board may determine on a case-by-case basis consistent with the purposes of the Act and the bankers' bank exemption." The proposal would require that such customers still be subject to the percentage limitations specified in the Interpretation relating to ownership and doing business (*i.e.*, not more than 25 percent of bankers' bank capital may be owned by non-depository institution customers and bankers' bank business with non-depository institution customers may not exceed 10 percent of total assets/liabilities). The Board did not propose to specify any standards under which it would make such case-by-case determinations. The proposal stated, however, that the Board would not expect to exercise the authority under the proposal to expand the range of permissible bankers' bank customers to include the general public. The proposal also stated that the Board expects to obtain more experience over time with requests for determinations under the proposal and, based on that experience, may find that proposing further amendments to the Interpretation (such as specifications or standards by which the Board would make such determinations) are warranted. Comment was solicited on all aspects of the proposal.

IV. Analysis of Comments

Overview of Comments Received

The Board received seventeen comments on the proposal. Commenters included five bankers' banks (including corporate credit unions); five associations or councils representing bankers' banks, corporate credit unions, or community banks; two individuals not associated with any institution, one professor, one bank, one credit union, one financial holding company, and one bank holding company. Two commenters fully supported the

proposal, while eleven commenters supported the proposal but raised concerns and/or offered suggestions about various aspects of the proposal. Three commenters opposed the proposal. One commenter did not address the issue set forth by proposal but instead commented on a separate aspect of Regulation D.¹

A. Structure of Bankers' Banks; Competitive Concerns

A few commenters favored the flexibility that would be given to the Board so that the Board could allow banks to structure their operations optimally and increase services to the financial community. Many commenters, however, were concerned that the proposal would erode or eliminate the unique characteristics of a bankers' bank. Some of these commenters stated that adopting the proposal would increase competition between bankers' banks and their bank customers. These commenters emphasized that bankers' banks are not established to compete with community banks, but instead established to do business with community banks.

One commenter stated that the bankers' banks should not be permitted to increase their activities to the point where the bank clients and shareholders of bankers' banks perceive these activities as directly competing with their own interest. This commenter stressed that the term bankers' bank should be "restricted to banks [that] have chosen to be owned by banks, to offer services only to other banks and to embrace the concept of serving only community banks so that they in turn can compete effectively with the largest financial institutions." On the other hand, two commenters suggested increasing the extent to which bankers' banks could do business with non-depository institution customers while remaining exempt from reserve requirements. These commenters urged the Board to increase the percentage limitations specified in the Interpretation relating to ownership and doing business.

The Board believes that adopting the proposal is not likely to erode the unique characteristics of bankers' banks. The Board cannot under Regulation D authorize activities that are not authorized by a bankers' bank's chartering authority; rather, the Board can determine only whether a bankers' bank may be exempt from reserve

¹ This commenter was concerned with § 204.2(d)(2) of Regulation D (12 CFR 204.2(d)(2)) and "how consumer banking institutions are interpreting the Regulation to allow them to collect 'excess transaction fees' from banking patrons."

requirements.² Any given bankers' bank activity or customer must be authorized by the bankers' bank chartering authority before the Board can consider whether a bankers' bank may remain exempt from reserve requirements while undertaking such an activity or serving such a customer. In addition, as stated in the proposal, the Board does not anticipate permitting the reserve exemption to apply to a bankers' bank that does business with the general public.

The Board is not revising the percentage limitations on the extent to which bankers' banks may serve non-depository institution customers while remaining exempt from reserve requirements. The Board does not believe that it is appropriate to increase those percentage limitations because to do so would reduce the extent to which bankers' banks serve primarily depository institution customers. Any new non-depository institution customers that would be permitted under the revised Interpretation will still be subject to the existing percentage limitations specified in the Interpretation relating to ownership and doing business.

Finally, the purpose of reserve requirements under Section 19 is to facilitate the conduct of monetary policy. Accordingly, the Board believes that exemptions from reserve requirements are to be narrowly construed so as not to impede the effective conduct of monetary policy. The more a bankers' bank's activities resemble those of a commercial bank or other depository institution, the less appropriate the reserve requirement exemption would be for that bankers' bank. The Board believes that these considerations will keep the bankers' bank exemption from reserve requirements from undue expansion under the revised Interpretation.

B. Determination Process

Some commenters raised concerns about the process by which the Board would make determinations under the proposal. Many of these commenters suggested that the Board publish requests for determinations and permit public comment on them. Among the commenters' reasons for this request was so that bankers' banks chartered by other authorities could concomitantly seek authorization of the same activities.

² For a bankers' bank that is a state member bank, the Board would have to approve any change in the general character of its business or in the scope of the corporate powers it exercises in accordance with Section 208.3(d)(2) of Regulation H (Membership of State Banking Institutions in the Federal Reserve System, 12 CFR part 208).

Other commenters urged the Board to disclose the business reasons giving rise to requests for determinations as well as the Board's reasoning in granting any such requests. A few commenters asked that the Board issue its determinations in the form of an order. These commenters argued that this would afford the bankers' bank industry the opportunity to learn the "business rationale and the business opportunity" contained in such requests and orders until formal guidelines have been established by the Board.

One commenter asked that the Board clearly set forth in the revised Interpretation the standards which will be used in making its future case-by-case determinations to preclude arbitrary or capricious determinations. On the other hand, another commenter urged the Board to relax standards for granting such requests and to clarify whether all entities with which the bankers' bank is permitted to do business under the Interpretation will qualify as "financial institutions."

One commenter urged the Board to specify the length of time for making determinations under the revised Interpretation, claiming that the flexibility granted by the proposal could be offset by overly lengthy determination time periods. This commenter also urged the Board to address the extent to which individual Federal Reserve Banks will be involved with the decision making process, asserting that the individual Reserve Banks are in the best position to develop understanding of a company's risk profile and management team which is necessary for making such determinations.

The Board anticipates that determinations under the revised Interpretation will generally be made public and will include a description of the determination, the business and other reasons behind the request, and the Board's reasoning in granting (or denying) the request. Although the Board does not anticipate publishing requests for such determinations prior to the time that the determination is made, the Board anticipates that all requests will be handled in a timely manner and that the input of the appropriate Federal Reserve Bank or Banks, if any, will be solicited as part of that process.

Finally, the Board continues to believe that publishing more detailed criteria by which the Board would review requests under the revised Interpretation would be premature at this time. As noted above, the Board cannot under Regulation D authorize activities that are not authorized by a

bankers' bank's chartering authority. The Board cannot predict the kinds of changes that may or may not occur in activities or customers that chartering authorities may permit. Accordingly, the Board cannot predict the details of the criteria under which it would evaluate such activities or customers for consistency with the Act and the purposes of the bankers' bank exemption. Over time, however, the Board expects that it may be possible after further experience with requests under the Interpretation to articulate standards or guidelines for the further exercise of that authority by the Board.

C. Miscellaneous

One commenter supported the proposal, but asked for clarification of the "consistent with the purposes of the Act and the bankers' bank exemption" language. Another commenter asked the Board to clarify the phrase "do business with" as that phrase appears in the Act and the Interpretation. As noted above, the Board believes that it cannot predict the manner in which chartering authorities may change the permissible activities and customers of bankers' banks. Therefore, the Board believes that it cannot at this time provide greater specificity in these areas. As also noted above, however, the Board expects that it may be able to provide greater specificity in the future as an increasing amount of experience with requests and determinations under the proposal is obtained.

One commenter supported the proposal but believed that the Board inadvertently removed language from the original Interpretation when issuing the proposal for comment. The Board has corrected this inadvertent omission in the final Interpretation.

Another commenter suggested that adopting the proposal would make the regulation less specific and that this could impair any relief granted to bankers' banks by adopting the proposal. This commenter also stated that the proposal violates "Plain Language" provisions of the Gramm-Leach-Bliley Act (Section 722 of Pub. L. 106-102, 113 Stat. 1338, 1471 (Nov. 12, 1999)). Finally, this commenter argued that the proposal provides such expansive authority to the Board that there can be little Congressional oversight of the Board's activities in this area. As noted above, the Board cannot itself expand bankers' bank authority to serve new kinds of customers and undertake new lines of activities. As also noted above, the Board believes that it can only issue determinations under the revised Interpretation that are consistent with the purposes of Section

19 of the Act and of the bankers' bank exemption, and that the revised Interpretation clearly states the Board's authority and objectives. As also noted above, the Board does not anticipate exercising its authority under the revised Interpretation to expand the reserves exemption to bankers' banks that do business with the general public. As further noted above, the Board anticipates that determinations made under the revised Interpretation will be publicly available. For these reasons, the Board does not believe that the Interpretation poses the risks or violations suggested by the commenter.

V. Regulatory Analysis

A. Regulatory Flexibility Act

In accordance with Section 604 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Board has reviewed the proposed amendments to the Interpretation of Regulation D. For the reasons set out below, the Board certifies that the amendments to the Interpretation will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the objectives of the proposal.* The Board is revising its Interpretation of Regulation D in order to authorize the Board to determine, on a case-by-case basis, whether non-depository institutions that are not already listed in the Interpretation may be bankers' bank customers without the bankers' bank losing its exemption from reserve requirements. Section 19 of the Act was enacted to impose reserve requirements on certain deposits and other liabilities of depository institutions for monetary policy purposes. Section 19 exempts certain institutions from reserve requirements as "bankers' banks" provided the institutions meet the characteristics specified in the statute. Section 19 also authorizes the Board to promulgate such regulations as it may deem necessary to effectuate the purposes of the section. The Board believes the revisions to the Interpretation are within Congress' broad grant of authority to the Board to adopt provisions that carry out the purposes of section 19 of the Act.

2. *Public comments in response to initial regulatory flexibility analysis.* There were no public comments in response to the initial regulatory flexibility analysis.

3. *Description and estimate of number of small entities to which revised Interpretation will apply.* The Board estimates that there are eleven bankers' banks qualifying as "small entities" to which the revised Interpretation could apply.

4. *Projected reporting, recordkeeping, and other compliance requirements.* There are no reporting, recordkeeping, or other compliance requirements associated with the revised Interpretation.

5. *Minimizing significant economic impact of the revised Interpretation on small entities.* There were no public comments that suggested a significant alternative that would minimize the impact of the proposal on small entities. There are eleven bankers' banks qualifying as "small entities" under RFA. The revised Interpretation provides all bankers' banks with the ability to maintain their exemption from reserve requirements, if any, while undertaking certain additional bankers' bank activities or customers as authorized by their chartering authorities. No bankers' bank is required to seek a determination under the revised Interpretation. The revised Interpretation imposes no economic burdens on bankers' banks, and instead only offers the opportunity to bankers' banks that are exempt from reserve requirements to maintain the economic benefits of that exemption under the specified circumstances. Accordingly, the Board believes that the revised Interpretation will not have a significant impact on a substantial number of small entities.

B. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.10), the Board reviewed the proposal under the authority delegated to the Board by the Office of Management and Budget (OMB). The proposal contains no requirements subject to the PRA.

VI. Plain Language

The Board received one comment on whether the proposal was in plain language. This commenter stated that the Board's failure to propose standards for its exercise of authority under the proposal amounted to a failure to comply with the "Plain Language" provisions of the Gramm-Leach-Bliley act. This commenter stated that the Board should instead say that it proposes to do whatever it wants given its view of the purposes of the Act. For the reasons stated above, the Board believes that the revised Interpretation is stated in plain language to the greatest extent possible at this point in time. As also stated above, the Board expects to publish further guidance and standards as it obtains additional experience in the future with requests for determinations under the revised Interpretation. Accordingly, the Board

believes that the revised Interpretation complies with applicable plain language requirements.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

■ 2. The second sentence of paragraph (a)(2)(iii) of § 204.121 is revised to read as follows:

§ 204.121 Bankers' banks.

(a) * * *

(2) * * *

(iii) * * * First, the range of customers with which the institution does business must be limited to depository institutions, including subsidiaries or organizations owned by depository institutions; directors, officers or employees of the same or other depository institutions; individuals whose accounts are acquired at the request of the institution's supervisory authority due to the actual or impending failure of another depository institution; share insurance funds; depository institution trade associations; and such others as the Board may determine on a case-by-case basis consistent with the purposes of the Act and the bankers' bank exemption. * * *

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By order of the Board of Governors of the Federal Reserve System, April 3, 2007.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E7-6473 Filed 4-5-07; 8:45 am]

BILLING CODE 6210-02-P