



**Federal Deposit
Insurance Corporation**

Each depositor insured to at least \$250,000 per insured bank



Advanced Search

[Home](#) | [Deposit Insurance](#) | [Consumer Protection](#) | [Industry Analysis](#) | [Regulations & Examinations](#) | [Asset Sales](#) | [News & Events](#) |

[Bank Examinations](#) | [Laws & Regulations](#) | [Resources for Bank Officers & Directors](#) | [FDICconnect](#) | [Required Financial Reports](#) | [Examiner Training Programs](#)



[Home](#) > [Regulation & Examinations](#) > [Laws & Regulations](#) > FDIC Law, Regulations, Related Acts

FDIC Law, Regulations, Related Acts

[\[Table of Contents\]](#)

[\[Previous Page\]](#)

[\[Next Page\]](#)

[\[Search\]](#)

4000 - Advisory Opinions

"Deposit Liability" for Purposes of National Depositor Preference Includes Only Deposits Payable in U.S.

FDIC--94--1

February 28, 1994

Douglas H. Jones, Acting General Counsel

As we discussed in our telephone conversation, the FDIC believes "deposit liability" for purposes of the recently enacted national depositor preference provisions of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(11)) is defined with reference to "deposit" under section 3(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(1)). As a consequence, "deposit liability" for purposes of national depositor preference includes only deposits payable in the United States and excludes obligations payable *solely* at a foreign branch or branches of a United States chartered bank.

Attached is a brief analysis of the national depositor preference provisions. If you have any questions, please feel free to give me a call.

SUBJECT: United States Enactment of the National Depositor Preference Statute and Its Effect on the *Liquidation of a Multinational Bank*

Introduction

On August 10, 1993, the United States enacted amendments to the Federal Deposit Insurance Act that created a preference for depositors in the distribution of the assets of a failed bank. This memorandum discusses this new National Depositor Preference statute and addresses its effect generally on the liquidation of a multinational bank. The Federal Deposit Insurance Corporation will address more complex issues resulting from the enactment of the statute in future memoranda.

Summary of the National Depositor Preference Statute

Prior to the August 10, 1993 enactment of the National Depositor Preference statute, the order of distribution of the assets of a failed United States bank was determined according to the law of the jurisdiction that chartered the institution. For a federally chartered bank, assets were distributed *pro rata* to all creditors after the payment of administrative expenses. 12 U.S.C. § 194. The distribution plan for a state chartered bank was contained in the law of that state. State law distribution schemes varied, with some specifying different degrees of depositor preference and others mandating *pro rata* distribution.

The National Depositor Preference statute created a uniform system of distribution applicable to all federal

and state chartered insured depository institutions closed after August 10, 1993. The statute created six classes of claims,¹ which subordinate general unsecured creditor claims to any "deposit liability" of the institution. Accordingly, *all* deposit liabilities are preferred over the claims of other creditors.

"Deposit liability" is defined with reference to other provisions of United States law and excludes any obligation payable only outside of the United States and its territories. 12 U.S.C. § 1813(1).² Therefore, "deposit liability" under the National Depositor Preference statute does not include obligations payable *solely* at a foreign branch or branches of a United States chartered bank. This operative definition provides the answer to a number of questions posed about the impact of National Depositor Preference.

First, the situs of the clearing mechanism used in any transaction does not effect whether a deposit is payable in the United States. Therefore, a deposit maintained in a foreign branch does not qualify as a "deposit liability" under the National Depositor Preference statute by being processed through the Clearing House Interbank Payments System ("CHIPS"). The statutory definition requires that the depository agreement provide that the deposit be *payable* in the United States, not merely processed through the United States.

Second, deposits payable in foreign currency may still qualify as "deposits" under the National Depositor Preference statute. If the depository agreement specifies that the deposit is payable in the United States, it meets the statutory definition and qualifies for preferential treatment should the bank fail. United States' law provides that deposits, which are denominated in a foreign currency may be insured by the Federal Deposit Insurance Corporation. 12 C.F.R. § 330.3(c) (1993).

Third, deposits payable to a foreign citizen or foreign national resident in the United States are "deposits" if *payable* within the United States. Such insured deposits may be maintained by persons other than citizens or residents of the United States. *Id.* Consequently, the nationality or residence of the payee is irrelevant to whether a deposit is considered a "deposit liability" under National Depositor Preference. If the deposit agreement specifies that the deposit is payable in the United States, it will receive deposit preference upon liquidation.

Administration of Receiverships of Multinational Banks

The administration of receiverships of multinational banks may be conducted either through the "single entity" approach or through the "separate entity" approach. United States law applies the "single entity" approach to receiverships of multinational banks chartered within the United States. See 12 U.S.C. §§ 601-604, 611-632. Thus, all creditors, international or domestic, are treated the same and entitled to obtain payment from the proceeds of all of the international and domestic assets of the bank.

In contrast, receiverships of branches of foreign banks located in the United States are administered under the "separate entity" approach. See 12 U.S.C. § 3102(j)(1). Under the "separate entity" approach, the liquidation of the United States branch is administered by a United States receiver separately from the liquidation of the foreign parent bank by its chartering authority. As a result, the assets of that domestic branch are separately marshalled and distributed to the creditors of that branch alone.

The adoption of a national depositor preference scheme for the distribution of the assets of a failed insured depository institution does not necessitate a change in the use of the single entity approach in a multinational liquidation. In accordance with federal or state statutory requirements, a liquidator within the United States would continue to apply the single entity doctrine to the liquidation of a multinational bank chartered in the United States. The adoption of national depositor preference, however, would affect the priority and payment of the claims of creditors of the receivership estate once the assets of the estate have been marshalled under the doctrine and liquidated.

Conclusion

The enactment of the National Depositor Preference statute by the United States did not require any change in the approach taken when liquidating a multinational bank. National Depositor Preference provides the system for distributing the assets of the institution. Under National Depositor Preference once the assets of a failed insured depository institution are gathered, all deposit liabilities are preferred over any other creditor.

In order to qualify as a deposit liability under the National Depositor Preference statute, the depositor must meet the statutory definition provided under the Federal Deposit Insurance Act. Under this definition, the depository agreement must specify that the obligation is payable within the United States. Therefore, any deposit that is payable within the United States will be preferred over the claim of any other creditor when

liquidating a multinational institution under National Depositor Preference without regard to the approach taken in the liquidation.

¹The statute mandates the following priorities:

1. Administrative expenses of the receiver.
2. Any deposit liability of the institution.
3. Any other general or senior liabilities of the institution.
4. Any subordinated obligations.
5. Any obligation of commonly controlled depository institutions for cross-guaranty assessments under 12 U.S.C. § 1815(e)(2)(C).
6. Any obligations to shareholders or members (including holding companies and their creditors). [Go back to Text](#)

²Section 1813(1), in part, defines "deposit" by exclusion:

(5) . . . the following shall not be a deposit for any purposes of this chapter or be included as part of the total deposits or of an insured deposit:

(A) any obligation of a bank or savings association which is payable only at an office of such bank or savings association located outside of the States of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands; and

(B) any international banking facility deposit. . . .

12 U.S.C. § 1813(1). [Go back to Text](#)

[\[Table of Contents\]](#)

[\[Previous Page\]](#)

[\[Next Page\]](#)

[\[Search\]](#)

Last updated February 28, 2013

regs@fdic.gov

[Home](#) | [Contact Us](#) | [Search](#) | [Help](#) | [SiteMap](#) | [Forms](#) | [En Español](#)

[Website Policies](#) | [Privacy Policy](#) | [Accessibility Statement](#) | [Plain Writing Act of 2010](#) | [USA.gov](#) | [FDIC Office of Inspector General](#)

[Freedom of Information Act \(FOIA\) Service Center](#) | [FDIC Open Government Webpage](#) | [No FEAR Act Data](#)