

1. Should the FDIC Permit a State Bank That Is Organized as an LLC To Obtain Federal Deposit Insurance?

All of the commenters favored, at least, in general, a determination that a State bank that is organized as an LLC is eligible to apply for Federal deposit insurance.

2. If So, Should the FDIC Interpret the Term "Incorporated" Utilizing Some, All, or None of the Traditional Four Corporate Attributes?

Ten commenters thought the FDIC should not use any of the four corporate attributes in determining eligibility for Federal deposit insurance; four commenters thought we should use three of the four corporate attributes; three commenters thought we should use all four attributes; and five commenters did not respond specifically on this question.

*Arguments Against Using Any of the Four Corporate Attributes*

Of the 10 commenters who opposed using any of the four corporate attributes in determining a Bank-LLC's eligibility to apply for deposit insurance, eight specifically thought that if the particular State permits a bank to be organized as an LLC, and if the FDIC determines that the institution could be operated in a safe and sound manner, that should be sufficient for the entity to be eligible for Federal deposit insurance.

In support of their position the 10 commenters offered their views on the appropriateness of using specific corporate attributes to determine eligibility for Federal deposit insurance.

With regard to the corporate attribute of perpetual succession, several commenters construed the perpetual succession attribute to mean perpetual existence. Several commenters pointed out that in the past many FDIC-insured banks had limited lives (e.g., the legal existence of some banks would terminate after 50 years). Since limited-life banks had never been a problem for the FDIC in the past, the commenters argued, they should not be a problem for the FDIC now. However, perpetual succession does not mean immortality. Rather, perpetual succession means that the existence of an entity is not dependent on the existence, condition, or status of any of its owners, and the death, disability, withdrawal, or bankruptcy of one or more of the owners of the entity does not terminate, dissolve, or suspend the entity. As noted above, some State LLC laws require, or permit an LLC to provide in its organizational documents, that the

LLC will automatically terminate, dissolve, or be suspended upon the death, disability, bankruptcy, withdrawal or expulsion of an owner of an LLC or upon the happening of some other specified event. If a Bank-LLC were subject to such automatic termination, dissolution, or suspension provisions, without any advance warning, depositors in that institution might be denied access to their deposits due to an automatic termination of the institution's existence. Generally, the triggers for such automatic provisions may be wholly unrelated to the financial condition of the entity. Consequently, an institution that is well-capitalized, that is otherwise highly-rated for safety and soundness, and that is not subject to any enforcement actions could suddenly be closed for the sole reason that one of the owners died. Depositors would never know with certainty if their bank will be in existence on the day and time when they may need to withdraw their money. Furthermore, without such advance notice, the FDIC would not be prepared to handle the institution's closure and meet its deposit insurance obligation in a timely manner. In addition, not only would a customer be denied access to his or her deposits, but also any checks in transit that had not yet been paid by the bank would be rejected. The uncertainty, confusion, and disruption caused by such a closing would not only cause serious damage to public confidence in the nation's banking system, but also serious disruption to the community. Finally, without an opportunity to locate a healthy institution to purchase the assets and assume the deposits of the institution on a going-concern basis, the cost of the resolution could be substantially higher than necessary. For these reasons, the FDIC continues to believe that it is not only reasonable, but essential, that the term "incorporated" be interpreted to include the corporate attribute of perpetual succession.

With regard to the corporate attribute of centralized management, one commenter recognized that in a theoretical sense there may be concerns when a Bank-LLC with a large number of members is proposed to be managed directly by its members. However, rather than requiring a board of directors for every Bank-LLC, the commenter suggested that the FDIC could require a board of directors only if the number of members exceeded 25. The FDIC believes that centralized management is an important attribute for a bank for a couple of reasons. First, if the authority to manage the bank is limited to the owners of the institution,

management expertise would necessarily also be limited. The quality of the management of a bank is a key factor in a bank's success or failure. In order to provide the best chance for a bank to compete successfully and to operate profitably, a bank should be free to enlist the best qualified managers available to it. Too small of a group of owners may not provide sufficient management expertise. Too large of a group may dilute the influence of those owners who do have adequate management expertise. For example, even if some of the owners possess adequate expertise, their ability to manage the institution may be negated by a larger segment of the owners that lacks such expertise. Second, management by a group that is too small could severely impair the bank's ability to respond to supervisory and regulatory direction. The volume and complexity of the demands of operating a bank might put too small of a group under excessive pressure and could result in management that is not responsive or at least so slow as to imperil the bank's effectiveness. Too large of a group may make it unwieldy or excessively difficult to disseminate information and get decisions in a timely manner because so many voices are entitled to be heard and considered. For these reasons, the FDIC believes that centralized management is also an important attribute that a bank should have in order to be eligible for deposit insurance.

With regard to the corporate attribute of limited liability, one of the 10 commenters while generally disagreeing with the use of the four corporate attributes, nevertheless thought that requiring limited liability was reasonable, since unlimited liability would certainly reduce the number of prospective shareholders. Another of the 10 commenters thought that in some cases the FDIC might conclude that unlimited liability of one or more members actually reduces the risk to the deposit insurance fund. Furthermore, the commenter argued that bank organizers should be permitted to explain the reasons for unlimited liability and show how unlimited liability impacts the bank's risk to the fund.

The FDIC believes that limited liability tends to attract more potential investors than unlimited liability and, furthermore, that the more attractive an investment generally the greater the chances that the entity will be able to maintain adequate capital. Consequently, the FDIC believes that limited liability is also a very important attribute for a bank to possess.