

With regard to the corporate attribute of free transferability of interests several of the 10 commenters also thought it inappropriate to require that attribute. The commenters argued that since many existing, FDIC-insured banks are closely-held corporations that have restrictive share-transfer agreements, it would be inconsistent for the FDIC to require free transferability of interests with respect to a bank that is chartered as an LLC. Furthermore, two of those commenters suggested that rather than requiring free transferability for every Bank-LLC, a better solution would be to require that the Bank-LLC's organizational documents provide that if the primary regulator determines that the institution's capital is inadequate, then the current owners would be required to restore capital or permit free transferability of the interests. The FDIC believes that the free transferability of ownership interests is an important attribute because it tends to ensure that the bank will have the best opportunity to attract and maintain adequate capital. Even well-run business entities can experience economic stress when there is a downturn in their markets or the industry as a whole. Adequate capital provides a cushion that helps a business weather the periods of economic stress. If an owner of an interest in an LLC must obtain the consent of the other owners in order to transfer his or her interest, the transfer may be delayed until that consent can be obtained, or it may be rejected altogether if the consent is not granted. Either circumstance tends to reduce a bank's ability to attract and maintain adequate capital. Indeed, the mere presence of such a consent requirement may discourage investors who can choose from other, more liquid and, perhaps, more familiar investments. As noted above, since an LLC is neither a corporation nor a partnership, State corporation laws and State partnership laws generally would not apply. That fact, coupled with the relative novelty of the LLC form of business entity, may discourage potential investors. Many investors are familiar with, or can readily determine, the general structure of corporations and the rights, powers, privileges, duties and liabilities of a corporation's shareholders, officers, and directors. With an LLC, its structure and the rights, powers, privileges, duties and liabilities of the LLC's owners, officers and managers are all generally subject to modification according to the wishes of the members. Unlike investing in a corporation, a potential investor in an LLC may not be able to rely, to any extent, on his or her general familiarity

with corporate law in making an investment decision. A potential investor would have to examine carefully the operating agreement of the particular LLC to determine the LLC's operating structure and the rights, powers, privileges, duties, and liabilities of the LLC's owners, officers, and managers. Such additional burden may also tend to discourage new investors and further reduce the bank's ability to attract and maintain capital. Furthermore, the alternative suggested by one commenter would not cure these problems. The commenter suggested that the FDIC might require a provision in the LLC's organizational documents that if capital fell below a certain level then the existing owners would have to replenish capital or waive the consent requirement. However, if a bank's capital were to fall below the minimum capital requirements, it might then be too late to try to attract new investors. It is not clear that many investors would want to get involved with a bank that has an unfamiliar legal structure at a time when its capital is depleted. Consequently, the FDIC believes that a Bank-LLC should have the corporate attribute of free transferability of interests.

Several of the 10 commenters also offered general comments on how to determine eligibility and suggested some alternative uses for the four corporate attributes. Several thought that the key to eligibility for Federal deposit insurance should simply be whether the bank is chartered in accordance with State banking law. If so, they argue, that should be enough to qualify for eligibility for deposit insurance. The FDIC disagrees with this notion entirely. Congress conferred upon the FDIC the authority to grant Federal deposit insurance to certain institutions described in the FDI Act. Allowing the individual States to determine which institutions are eligible would (i) require the FDIC to ignore the express language of the FDI Act, (ii) require the FDIC to abdicate its statutory responsibility to make such determinations, and (iii) potentially result in a wide variety of notions as to what types of institutions are eligible for deposit insurance. As a result, the FDIC's ability to manage the risks posed to the insurance fund would be seriously jeopardized. The FDIC does not believe such an approach is either reasonable or consistent with the purposes of the FDI Act.

Two commenters pointed out that the four corporate attributes are not mentioned in the factors listed in section 6 of the FDI Act, 12 U.S.C. 1816, (the "section 6 factors") that are

required to be considered in approving applications for deposit insurance. Therefore, they believe that the FDIC should determine who is eligible for deposit insurance solely by reference to the section 6 factors. One commenter argued that while the ultimate question is whether the bank is a legal entity under State law, it thought that the FDIC could consider the four corporate attributes in assessing whether the institution could be operated in a safe and sound manner. In that regard the commenter thought that perpetual succession and centralized management were important for safety and soundness and should be accorded greater weight, while free transferability of interests was less important. The FDIC believes that while the section 6 factors are required to be considered in determining whether to grant deposit insurance, they do not determine an institution's eligibility to apply for deposit insurance. Eligibility is a threshold issue that must be determined before the section 6 factors are considered. To focus only on the section 6 factors would again require that we ignore the express language of the FDI Act. Congress carefully set out what it meant by a "State bank," and the FDIC declines to ignore that language.

One commenter noted that national banks only need to be chartered pursuant to the National Bank Act (the "NBA") to be eligible for Federal deposit insurance and that, therefore, the FDIC should only require that state banks be chartered under State law. The FDIC agrees that in accordance with the language of the FDI Act a national bank is eligible to apply for deposit insurance if it is chartered as a national bank under the NBA. However, the NBA describes a national bank as a "body corporate"²⁵, and national banks are structured and operate essentially the same as corporations. Consequently, requiring a State-chartered, Bank-LLC to have the four corporate attributes does not represent treatment inconsistent with that applicable to national banks.

Arguments in Favor of Using Three of the Four Corporate Attributes

As noted above, four commenters thought we should use three of the four corporate attributes. Three of those four commenters disagreed specifically with requiring free transferability of interests for a Bank-LLC, but concurred with requiring the other three attributes. The other commenter while generally disagreeing with the free transferability requirement thought that the FDIC should require any three out of the four

²⁵ 12 U.S.C. 24.