

corporate attributes. Two of the commenters who specifically disagreed with the free transferability requirement repeated the argument mentioned above that the free transferability requirement has not been viewed by the FDIC in the past as a significant impairment of an institution's ability to raise capital and, therefore, should not be required for Bank-LLCs. As discussed above, the FDIC believes that a Bank-LLC should have the corporate attribute of free transferability of interests. The FDIC's analysis of the need for this attribute is detailed above and will not be repeated here. However, in summary, the FDIC believes that free transferability of interests is necessary to ensure that a Bank-LLC will be able to attract and maintain adequate capital. With regard to the suggestion that the FDIC require any three of the four corporate attributes as its test for eligibility for deposit insurance, the FDIC does not believe that such an approach would be consistent with the purposes of the FDI Act and could lead again to a wide variety of notions about what types of institutions are eligible for deposit insurance. Each of the attributes has its own significance for purposes of the FDI Act, and each is independently justifiable as an essential requirement for the FDIC to determine that a Bank-LLC is "incorporated." Among other things, a three-out-of-four approach would permit a Bank-LLC that does not have perpetual succession to be considered "incorporated" for purposes of eligibility for deposit insurance. As fully discussed above, an institution that could terminate without warning could cause substantial harm to depositor confidence in the nation's banking industry, seriously disrupt the communities where the bank operated, and increase the costs of resolutions. Furthermore, the wide variety of institutions that such an approach could permit would jeopardize the FDIC's ability to manage the risks to the insurance fund. Consequently, the FDIC does not believe that a three-out-of-four approach would be consistent with the FDI Act and declines to adopt it.

Comments in Favor of Using All Four Corporate Attributes

Three commenters endorsed the FDIC's use of all four of the corporate attributes. One commenter also expressed the strong belief that the full range of safety and soundness and enforcement mechanisms that currently apply to state banks should also apply to Bank-LLCs. For the reasons discussed above, the FDIC believes that the corporate attributes are not only appropriate, but essential to

determining whether a Bank-LLC could be considered to be "incorporated." The FDIC specifically concurs with the comment that the full range of safety and soundness and enforcement mechanisms needs to apply to Bank-LLCs. In that regard, the final rule includes some revisions to further clarify this point. The final rule clarifies that for purposes of the FDI Act (including section 8 of the FDI Act) and the FDIC's regulations, the members, managers, and officers of a Bank-LLC would be equivalent to shareholders, directors, and officers, respectively, of a bank chartered as a corporation. Also, the certificates or other evidences of ownership interests in a Bank-LLC would be equivalent to voting stock, voting shares and voting securities.

3. If the FDIC Should Not Utilize Any of the Four Corporate Attributes, How Should It Interpret the Term "Incorporated?"

Six commenters thought that the FDIC should interpret "incorporated" to mean chartered under State law. Two other commenters thought that an institution should be deemed to be "incorporated" if it is chartered under State law and can operate in a safe and sound manner. Another commenter thought that "incorporated" should mean "organized" or "operating" as a bank under State law. Yet another thought that "incorporated" should simply mean "chartered and regulated" under State law and thought the FDIC should focus on whether the particular structure is consistent with the section 6 factors. All of these suggestions have been fully analyzed and considered above, and will not be repeated here. Central to all of these suggestions is the notion that if the State's laws would charter an entity as a bank, that should be enough for the FDIC. Following that argument, the FDIC should consider to be "incorporated" whatever type of institution a State may charter as a bank under its laws. As fully discussed above, such an approach would mean that (i) the FDIC would have to ignore the express language of the FDI Act, (ii) the FDIC would have to abdicate its responsibility under the FDI Act, and (iii) the potential variety of notions about what could be chartered as a bank would seriously impair the FDIC's ability to manage the risks to the insurance fund. For those reasons the FDIC declines to adopt such an approach.

V. Interpretation of "Incorporated"

In order to determine whether an LLC could qualify as a State bank for purposes of Federal deposit insurance,

it is necessary to determine if an LLC could be considered to be "incorporated." In resolving any ambiguity in a statute it is always helpful to try to determine what Congress intended by its choice of the particular words of the statute. In this case, as noted above, there is no legislative or judicial guidance on the meaning of the term "incorporated" as used in the FDI Act. Consequently, the FDIC believes that the best approach is to interpret the term in a manner consistent with, and in aid of, the purposes of the FDI Act.

Congress created the Federal Deposit Insurance Corporation in 1933 to restore and maintain public confidence in the nation's banking system by, among other things, promoting the safety and soundness of the institutions whose deposits the FDIC insures.²⁶ Consequently, the FDIC is charged with maintaining public confidence in the nation's banking system, and promoting the safety and soundness of the institutions that it insures is a critical component of its duty.

A common understanding of the term "incorporated" is "formed or constituted as a legal corporation."²⁷ In addition, Black's Law Dictionary defines "incorporate" as "to form a legal corporation."²⁸ An institution that is labeled as a corporation under State law would then be "incorporated" under the common understanding of the term. One approach that the FDIC could take, therefore, is to treat as incorporated only those entities that are labeled as "corporations" under State law. Such an interpretation would be consistent with the language of the statute. However, such an approach might be too narrow in that it may not include all of the State banks that are currently operating as insured institutions even though they are structured and operate with the same characteristics as a corporation. Furthermore, limiting the interpretation to only those entities that are labeled as "corporations" would seem unduly restrictive in that it would tend to unnecessarily limit the flexibility, and stifle the innovativeness, of State banking. Thus, such an approach could arguably impair or harm the viability of the nation's banking system.

Another approach to interpreting the term "incorporated" is to focus on the attributes of the entity. In other words, if the entity has the four corporate

²⁶ See *FDIC v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935 (1986), *FDIC v. Eckert*, 754 F.Supp. 22, 24 (E.D. N.Y. 1990); *FDIC v. Rockelman*, 460 F.Supp. 999, 1001 (E.D. WI 1978).

²⁷ The Random House Dictionary of the English Language 968 (2d ed. 1987).

²⁸ Black's Law Dictionary 769 (7th ed. 1999).