

Indeed, the mere presence of such a prior 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 also 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 in an LLC would have to examine carefully the operating agreement of the particular LLC to determine its operating structure and the rights, powers, privileges, duties, and liabilities of the LLC's owners, officers, and managers. Such additional burden may tend to discourage new investors and further reduce the bank's ability to attract and maintain capital. Consequently, the FDIC believes that the free transferability of ownership interests is an important attribute for a bank.

In summary, the FDIC believes that an LLC should have all of the four corporate attributes in order to be "incorporated." Therefore, a banking institution that is chartered as an LLC under the law of any State and that has all of the above four corporate attributes would be considered to be "incorporated" under the law of the State for purposes of the definition of "State bank." Furthermore, such a banking institution would be eligible to apply for Federal deposit insurance as a State bank under section 5 of the FDI Act, 12 U.S.C. 1815.

The final rule reflects these conclusions. In general, the rule provides that a banking institution that is chartered by a State as an LLC will be deemed to be "incorporated" if (i) it is not subject to any automatic termination/dissolution/suspension provisions, (ii) the exclusive authority to manage the institution is vested in a board of directors or managers, (iii) neither State law nor the LLC's organizational documents provide that

any owner is liable for the debts of the institution beyond his or her investment, and (iv) neither State law nor the LLC's organizational documents require the consent of any other owner in order to transfer all or a part of an ownership interest. The final rule also specifies that for purposes of the FDI Act and the FDIC's regulations, an owner of an interest in an LLC is a "stockholder" and a "shareholder;" a manager of an LLC is a "director;" an officer of an LLC is an "officer;" and a certificate or other evidence of an ownership interest in an LLC is a "voting share," "voting security," and "voting stock." These provisions are intended to remove any ambiguity as to how the rest of the FDI Act and the FDIC's regulations apply to banking institutions chartered as LLCs, including the enforcement provisions of the FDI Act and the FDIC's regulations.

#### VI. Paperwork Reduction Act

The final rule does not involve any collections of information under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

#### VII. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the FDIC hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The final rule will apply to all depository institutions that are currently insured under the FDI Act as well as those applying for Federal deposit insurance. The final rule clarifies the circumstances when a banking institution that is chartered under State law as a limited liability company would be considered to be "incorporated" for purposes of the definition of "State bank" in 12 U.S.C. 1813(a)(2). It does not require any banking institution to organize as, or convert to, a limited liability company, and it imposes no new reporting, recordkeeping or other compliance requirements. Accordingly, the requirements relating to an initial and final regulatory flexibility analysis are not applicable.

#### VIII. Impact on Families

The FDIC has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency

Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

#### IX. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104-121) provides generally for agencies to report rules to Congress for review. The reporting requirement is triggered when the FDIC issues a final rule as defined by the Administrative Procedure Act (APA) at 5 U.S.C. 551. Because the FDIC is issuing a final rule as defined by the APA, the FDIC will file the reports required by SBREFA. The Office of Management and Budget has determined that this final rule does not constitute a "major rule" as defined by SBREFA.

#### List of Subjects in 12 CFR Part 303

Administrative practice and procedure, Authority delegations (government agencies), Bank deposit insurance, Banks, Banking, Bank merger, Branching, Foreign branches, Foreign investments, Golden parachute payments, Insured branches, Interstate branching, Reporting and recordkeeping requirements, Savings associations.

The Board of Directors of the Federal Deposit Insurance Corporation hereby amends part 303 of title 12 of the Code of Federal Regulations as follows:

#### PART 303—FILING PROCEDURES AND DELEGATIONS OF AUTHORITY

1. The authority citation for part 303 continues to read as follows:

**Authority:** 12 U.S.C. 378, 1813, 1815, 1816, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p-1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207; 15 U.S.C. 1601-1607.

2. New § 303.15 is added to read as follows:

#### § 303.15 Certain limited liability companies deemed incorporated under State law.

(a) For purposes of the definition of "State bank" in 12 U.S.C. 1813(a)(2) and this Chapter, a banking institution that is chartered as a limited liability company (LLC) under the law of any State is deemed to be "incorporated" under the law of the State, if

(1) The institution is not subject to automatic termination, dissolution, or suspension upon the happening of some event (including, *e.g.*, the death, disability, bankruptcy, expulsion, or withdrawal of an owner of the institution), other than the passage of time;

(2) The exclusive authority to manage the institution is vested in a board of