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FDIC Publishes General Counsel's Opinion Concerning the Insurability of Funds Underlying Stored Value Cards

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On November 13, 2008, the Federal Deposit Insurance Corporation ("FDIC") published General Counsel's Opinion No. 8 regarding the insurability of funds underlying stored value cards and other nontraditional stored value products ("Opinion").^[1] In particular, the Opinion addresses the issue of whether funds underlying stored value cards—such as prepaid cards, gift cards, payroll cards or government benefit cards—qualify as "deposits" as that term is defined in the Federal Deposit Insurance Act ("FDIA").^[2] The FDIC concludes that funds underlying stored value products will be treated as "deposits," subject to existing FDIC "pass-through" deposit insurance coverage rules, if such funds have been placed at an insured depository institution.^[3] The Opinion, however, appears to limit FDIC deposit insurance coverage to deposits underlying bank-issued stored value products as opposed to deposits underlying merchant-issued stored value products.^[4] The Opinion replaces the previous General Counsel's Opinion No. 8 published in 1996 and reverses the FDIC's previous position that funds underlying stored value products are *not* insured deposits, even when held by an FDIC-insured depository institution.^[5]

FDIC Deposit Insurance Coverage of Deposits Underlying Stored Value Products

FDIC deposit insurance coverage of stored value products is based on the application of existing FDIC "pass-through" deposit insurance coverage rules.^[6] Thus, in the event of a financial institution failure, the FDIC must address: (i) whether funds underlying stored value products are deposits as that term is defined in the FDIA; and (ii) whether the holders of stored value products (e.g., a gift card, payroll card), as opposed to the issuer of such products, should be treated as a depositor of FDIC-insured deposits.^[7]

First, in determining whether funds underlying stored value products are "deposits" subject to FDIC insurance coverage, the FDIA definition of a "deposit" is broadly defined as encompassing, subject to certain narrow exceptions, "almost all funds subject to transfer or withdrawal through traditional access mechanisms (such as checks, traveler's checks, official checks and money orders), provided that the funds have been placed at an insured depository institution."^[8] Based on the FDIA definition of "deposit," the FDIC takes the position that the form of an access mechanism is unimportant. As a result, the Opinion states that funds underlying stored value products should be treated as "deposits" under the FDIA provided that the funds have been placed at an insured depository institution.^[9]

Second, in determining whether a holder of a stored value product should be treated as a depositor of FDIC-insured deposits, under both the FDIA and regulations promulgated by the FDIC, "[f]unds owned by a natural person and deposited in one or more deposit accounts in his or her own name shall be added together and insured up to the [standard maximum deposit insurance amount] in the aggregate."^[10] The FDIC has long recognized, however, that many accounts are opened by fiduciaries on behalf of other individuals and, in response, has provided for pass-through deposit insurance that protects the ultimate beneficial owners of these accounts.^[11] Section 330.7 of the FDIC regulations provides that "[f]unds owned by a principal or principals and deposited into one or

more deposit accounts in the name of an agent, custodian or nominee, shall be insured to the same extent as if deposited in the name of the principal(s).^[12] In other words, the determination of insurance coverage passes through the agent to the principals. Similarly, the FDIC recognizes that accounts opened by corporations acting in a fiduciary capacity also are eligible for pass-through deposit insurance.^[13] Thus, while section 330.11(a) provides that deposit accounts of a corporation would be insured up to the standard maximum deposit insurance amount in the aggregate, if a corporation maintains deposit accounts in a fiduciary or representative capacity, these deposit accounts would be insured as if the funds were deposited in the name of the principals.^[14]

The FDIC regulations further provide that in order to claim pass-through deposit insurance, based on a fiduciary relationship, three conditions must be satisfied. First, the FDIC will only recognize a claim for insurance coverage if the fiduciary relationship is expressly disclosed, by way of specific references, in the “deposit account records” of the insured depository institution.^[15] Second, the interests of the beneficiary must be ascertainable from the deposit account records of the insured depository institution or records maintained in good faith by the depositor or some other person or entity that has undertaken to maintain such records.^[16] Third, the deposits actually must be owned by the named owners and not by the custodian or agent.^[17]

Accordingly, where the distributor of a stored value product (or agent on behalf of the distributor) opens a pooled account for all holders of such product, FDIC deposit insurance coverage will “pass-through” to the holders of the stored value products if the three aforementioned requirements for “pass-through” coverage are satisfied.^[18] If, however, these three requirements are not satisfied, the FDIC will treat the named accountholder (e.g., the access mechanism distributor) as the owner of the pooled deposits.^[19]

FDIC Deposit Insurance Coverage of Funds Underlying Merchant Stored Value Products

As noted above, the Opinion, by its express language, limits FDIC deposit insurance coverage to deposits underlying bank-issued stored value products as opposed to merchant-issued stored value products.^[20] In distinguishing these categories of stored value products, the Opinion describes a merchant-issued stored value product in terms of a stored value card that enables a cardholder to collect goods or services from a specific merchant or cluster of merchants (e.g., single-purpose gift cards, prepaid telephone cards).^[21] Importantly, the Opinion takes the position that a merchant-issued stored value product does not “provide access to money at a depository institution.”^[22] Further, the Opinion takes the position that when a consumer uses a merchant-issued stored value product, the merchant is *not* paid through a depository institution, but is instead prepaid for the purchase of goods or services through the sale of the stored value product.^[23] Following this line of reasoning, the Opinion states that “[i]n the absence of money at a depository institution, no insured ‘deposit’ will exist” as that term is defined in the FDIA.^[24]

On the other hand, the Opinion describes a bank-issued stored value product in terms of a stored value card that may enable a cardholder to “effect the transfer of funds” from a depository institution including to merchants at the point-of-sale or, in some instances, through ATM withdrawals.^[25] The Opinion takes the position that funds underlying bank-issued stored value products, while placed at a depository institution by the stored value product distributor, are funds subject to withdrawal or transfer by the stored value product access mechanism holder.^[26] Accordingly, the Opinion states that FDIC deposit insurance coverage is limited to “bank cards and other nontraditional access mechanisms, such as computers, that provide access to funds at insured depository institutions.”^[27]

While the Opinion is limited to funds underlying bank-issued stored value products deposited at an FDIC-insured depository institution, the Opinion could call into question funds underlying merchant-issued stored value products that similarly are placed on deposit at an FDIC-insured depository institution.^[28] Based on the analysis that funds underlying stored value products placed at an FDIC-insured depository institution are subject to deposit insurance coverage it is possible, to the extent that deposits in an FDIC-insured depository institution are comprised of funds underlying merchant-issued stored value products, that such funds would be considered deposits subject to deposit insurance coverage.

Footnotes

^[1] Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms, 73 Fed. Reg. 67,155 (Nov. 13, 2008).

^[2] *Id.*

- [3] *Id.* at 67,156.
- [4] *Id.*
- [5] *Id.* at 67,155.
- [6] *Id.*
- [7] *Id.* at 67,156.
- [8] *Id.* at 67,155; 12 U.S.C. § 1813(l).
- [9] 73 Fed. Reg. at 67,155.
- [10] 12 C.F.R. § 330.6(a).
- [11] 2002 FDIC Interp. Ltr. LEXIS 40, at *7 (Feb. 15, 2002).
- [12] 12 C.F.R. § 330.7(a).
- [13] 12 C.F.R. § 330.11(a)(1).
- [14] *Id.*; See also *Anheuser-Busch Employees Credit Union v. FDIC*, 651 F. Supp. 718, 723 (W.D. Mo. 1986) (holding that “a corporation could undertake to act in a formal agency, trust or other fiduciary capacity” and that such action “would fall squarely within the FDIC pass-through insurance regulations”).
- [15] 12 C.F.R. § 330.5(b)(1); 1999 FDIC Interp. Ltr. LEXIS 110, at *3 n.1 (Aug. 17, 1999).
- [16] 12 C.F.R. § 330.5(b)(2); 2002 FDIC Interp. Ltr. LEXIS 40, at *7 (Feb. 15, 2002).
- [17] 12 C.F.R. §§ 330.3(h), 330.5(a)(1).
- [18] 73 Fed. Reg. at 67,156.
- [19] *Id.*
- [20] *Id.*
- [21] *Id.*
- [22] *Id.*
- [23] *Id.*
- [24] *Id.*
- [25] *Id.*
- [26] *Id.*
- [27] *Id.*
- [28] *Id.*