Recommendation 75-1

Licensing Decisions of the Federal Banking Agencies

(Adopted June 5-6, 1975)

Entry into banking is controlled on the federal level by four agencies: the Comptroller of the Currency (for charters and branches of national banks), the Federal Home Loan Bank Board (for charters and branches of federal savings and loan associations, and via the Federal Savings and Loan Insurance Corporation for account insurance for state-chartered savings and loan associations), the Board of Governors of the Federal Reserve System (for FRS membership and accompanying FDIC deposit insurance for state-chartered banks, and for branches of state member banks), and the Federal Deposit Insurance Corporation (for deposit insurance for state banks that are not FRS members, and for branches of such banks).

The statutes which confer these powers of approval over entry into banking and banking markets contain sketchy standards, or none at all, defining how the administrative authorities should exercise their judgment. The statutory void has not as yet been filled by the agencies themselves; none of them has adopted comprehensive statements of policy or meaningful rules of general applicability, though recently the Federal Reserve and FDIC have taken steps in this direction.

In acting upon such applications, the agencies usually do not hold hearings or issue reasoned opinions. As a consequence, little authoritative information is available concerning the policies the agencies follow in exercising their broad powers over entry into banking markets and in granting valuable authorizations to some applicants and denying them to others.

Increasingly, within the last two decades, these decisions—particularly those of the Comptroller—have been subjected to judicial review. The absence of adequate explanatory opinions by the agency has impeded review that is both meaningful and limited. Reviewing courts have too often been forced to choose between pro forma validation of agency action or substitution of the court's judgment for that of the agency.

This recommendation, addressed to the agencies, is directed at the point of greatest initial need: the provision of explanation of policies and decisions. That can be accomplished in a variety of ways, and the recommendation distinguishes between different agency roles and

types of decision, in a manner intended to avoid unnecessary demands upon agency resources. Moreover, the Freedom of Information Act (5 U.S.C. 552) requires agencies to make available to the general public whatever statements of agency policy and opinions in individual cases they have prepared. This recommendation is in furtherance of those statutory objectives.

Applications are sometimes, though not often, rejected on grounds that the agency believes would be substantially injurious to a bank or individual if made public. This possibility is not a justification for a general policy of nonexplanation; it should not be automatically applied to shield all negative information. Occasionally, nevertheless, the agency may believe that it would be warranted in not disclosing certain information. If the information pertains to the applicant bank or group, the applicant could be afforded the option of withdrawing its request; if it pertains to an objecting bank, the ground could be stated In general terms, such as "to prevent an adverse impact on other institutions." The extent to which supporting evidence should be revealed in camera or by some other confidential method, if judicial review were subsequently sought, is left to be decided under existing law and is outside the scope of this recommendation.

The present recommendation has limited reach. It is not intended to express either approval or disapproval of the present system of entry controls in banking, nor is it addressed to the extent of statutory discretion possessed by the federal banking agencies in their licensing decisions, which is exceptionally broad and would remain so if this recommendation were fully accepted. What is now proposed is, simply, that when this broad discretion is exercised, the agencies should articulate their decisional standards and underlying policy objectives in a way that would facilitate understanding and evaluation on the merits.

Recommendation

1. *General.* The federal banking agencies should undertake to provide a full statement of their objectives in approving or denying applications for charters, membership, or permission to establish branches, and should define in concrete terms the standards to be applied. This can be done best by the adoption of policy statements and rules of general applicability, which should be as specific as possible. To provide additional clarity and understanding, reasoned opinions should be issued in situations described below.

2. *Chartering authority decisions: Comptroller and Federal Home Loan Bank Board.* Charter decisions are of high importance and relatively low in number. An explanatory opinion

should be furnished as a matter of course in all charter denials, since this is the most critical entry barrier; when requested, explanation of favorable action upon an application should be provided to any objecting party or to any interested federal agency.

In the case of branch applications, the numbers are large and many approvals seem a matter of routine. Probably only a small minority of approvals, but a much larger fraction of denials, would occasion a desire or need for explanation. For branches, therefore, the comptroller and FHLBB should furnish written opinions when the agency believes the case presents issues of general importance, or when requested by an applicant, an objecting party or an interested federal agency.

3. *Secondary supervisor decisions: Federal Reserve Board, Federal Deposit Insurance Corporation, and Federal Savings and Loan Insurance Corporation.* Branch approvals by the FRB and FDIC seem well nigh automatic, no doubt because of reliance on the primary approval of other authorities, and an opinion requirement in all cases would be excessive. For branches, therefore, the FRB and FDIC should also furnish written opinions when requested or when the agency believes the case presents issues of general importance.

Membership applications may not fall wholly into the same category, though only the FSLIC has a significant rejection ratio. Written opinions should be furnished on request, which would presumably be made infrequently by others than disappointed applicants.

4. *Publication.* All four agencies should systematically collect and publish their licensing opinions in some convenient form. Depending on frequency and length, those of general importance might be included as part of monthly publications such as the *Federal Reserve Bulletin* or *Federal Home Loan Bank Board Journal*, or as an appendix to annual reports; others might be published as a separate series and made available in public files at the agency's Washington and field offices.

Citations:

40 FR 27925 (July 2, 1975)

__ FR _____ (2012)

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