

## Stored Value Cards and Other Electronic Payment Systems

FIL-59-96

August 6, 1996

TO:

CHIEF EXECUTIVE OFFICER

SUBJECT:

*FDIC Issues Guidance on Stored Value Card Obligations as Deposits, Seeks Comment on Electronic Payment Systems Issues, and Sets Public Hearing*

The FDIC Board of Directors on July 16, 1996, approved for Federal Register publication General Counsel Opinion No. 8 (attached), clarifying conditions under which the funds, or obligations, underlying stored value cards constitute "deposits" within the meaning of section 3(l) of the Federal Deposit Insurance Act. The Board also voted to seek public comment on various electronic payment system issues addressed in the second attached Federal Register notice. Comments are due by October 31, 1996.

In addition to determining whether and under what circumstances the funds underlying stored value cards meet the statutory definition of "deposit" as addressed in the attached General Counsel opinion, the FDIC has the authority to find and prescribe by regulation that some or all stored value card obligations (and obligations emanating from other electronic payment systems) of a depository institution are deposit liabilities by general usage.

The FDIC is seeking comment on various policy issues it may wish to consider in determining whether to establish a regulation that would include all or some stored value card obligations (or the obligations from other electronic payment systems) within the definition of deposit. Comments are also being sought on new stored value card systems, other electronic payment systems, and the safety and soundness concerns of each.

Finally, included in the second attached Federal Register notice is an announcement of a public hearing on the issues addressed in the notice. At the hearing, one or more members of the FDIC Board of Directors will hear oral comments from interested persons on any matter covered in the notice.

The hearing will be held in the FDIC Board Room on September 12, 1996, from 9:00 a.m. until 4:30 p.m. If necessary, the hearing will continue on the morning of September 13 and on additional dates to be announced. To participate in the hearing, a written request must be submitted by August 26 to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Each participant will be limited to a 15-minute oral presentation and must submit a written summary of his or her testimony by September 3.

Neither the second attached Federal Register notice nor the public hearing will in any way affect the analysis or conclusions in General Counsel Opinion No. 8.

For more information, please contact Marc J. Goldstrom, Counsel in the FDIC's Legal Division, at (202) 898-8807.

William F. Kroener, III  
General Counsel

Attachments:

General Counsel Opinion No. 8:

Stored Value Card and Other Electronic Payment Systems

Distribution: All Insured Banks and Savings Associations

**Federal Reserve**

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Friday  
August 2, 1996

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**Part III**

**Federal Deposit  
Insurance  
Corporation**

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**General Counsel's Opinion No. 8; Stored  
Value Cards and Other Electronic  
Payment Systems; Notices**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### General Counsel's Opinion No. 8; Stored Value Cards

**AGENCY:** Federal Deposit Insurance Corporation (FDIC or Corporation).

**ACTION:** Notice of FDIC General Counsel's Opinion No. 8.

**SUMMARY:** The FDIC has received inquiries on whether and under what circumstances funds underlying stored value cards may be considered deposits under the Federal Deposit Insurance Act. This General Counsel Opinion sets forth the Legal Division's conclusions on this issue.

**FOR FURTHER INFORMATION CONTACT:** Marc J. Goldstrom, Counsel, Legal Division, (202) 898-8807, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

Text of General Counsel's Opinion  
General Counsel's Opinion No. 8—  
Stored Value Cards

By: William F. Kroener, III, General Counsel, FDIC

#### Introduction

Insured depository institutions are increasingly utilizing new technology to offer novel and innovative products to customers. One such product is the stored-value card. A stored value card stores information electronically on a magnetic stripe or computer chip and can be used to purchase goods or services. The balance recorded on the card is debited at a merchant's point of sale terminal when the consumer makes a purchase. Generally, stored value cards contain all the information necessary to identify the card and its value. This has enabled point of sale terminals in most systems to be "off line".<sup>1</sup> In other words, it is unnecessary

<sup>1</sup> While most stored value card systems are "off line", we understand that there are "on line" stored value card systems (*i.e.*, the primary record of the balance of funds available to the consumer is not maintained on the card itself, but at the depository institution or a central data facility). Such cards are similar to debit cards except that the cardholder specifically designates the amount of money that may be accessed through the card and once so designated, such funds may only be accessed through the card. So far as we are aware, the systems of this type are not currently being utilized by depository institutions.

In its proposed amendment to Regulation E, 61 FR 19,696 (May 2, 1996), the Board of Governors of the Federal Reserve System has distinguished between "off-line accountable", "off-line unaccountable", and "on-line" stored value systems in determining whether the regulation applies to various types of stored value systems. This opinion does not use these distinctions. This is not intended as a criticism or rejection of the Board's classification system. Rather, it is indicative of the

to contact a depository institution or database for transaction authorization.

Some stored value cards are designed to be used until their value is exhausted and then are disposed. Other more sophisticated stored value cards may be "reloadable". The cards may have multiple uses, such as credit and debit features, in addition to the stored value component. Also, a particular stored value card system may have multiple card issuers and multiple card-accepting merchants. Some cards (or the stored value component of some cards) may be utilized by whomever may be in possession of such card, while others require a personal identification number to use.

Consumers may typically load value<sup>2</sup> onto a card in a number of ways. A customer without a pre-existing depositor relationship with an insured institution may purchase a stored value card from that institution. A deposit account holder may load value onto the card by withdrawing from an account through a teller, via an ATM, or, potentially, via a specially equipped telephone or personal computer. At least one system would allow the consumer to transfer the stored value to another person's card.

Typically, stored value cards are touted as substitutes for cash. Technically, however, they are not cash, and they do not have the finality of cash. Although it may not be apparent to the consumer, a stored value card transaction must typically move through a complex payment system before a payment is completed. Moreover, what is actually stored on stored value cards is information that, through the use of programmed terminals, advises a prospective payee that rights to a sum of money can be transferred to the payee, who in turn can exercise such right and be paid.

In addition to the development of stored value cards, stored value systems are being developed for making payments over computer networks such as the Internet. In such systems funds may be accessed using a personal computer, and transferred to individuals, merchants, or companies. While this opinion addresses stored

fact that these particular distinctions are not necessarily germane as to whether and under what circumstances the funds underlying a stored value card are "deposits" under the Federal Deposit Insurance Act (FDIA).

<sup>2</sup> The use of the phrase "load value onto a card", "electronic value", or any similar terms used in this opinion, is not meant to imply that the information loaded on stored value cards is legal tender or anything similar to legal tender. See 12 U.S.C. 5103. Rather, as discussed in the text below, such information is more in the nature of a right to be paid a sum of money.

value cards, the Legal Division believes that in general the principles discussed herein would apply equally to stored value computer network payment products.

#### Types of Stored Value Systems<sup>3</sup>

In some systems the funds underlying the stored value card could remain in a customer's account until the value is transferred to a merchant or other third party, who in turn collects the funds from the customer's bank ("Bank Primary—Customer Account Systems").<sup>4</sup> In other systems, as value is downloaded onto a card, funds are withdrawn from a customer's account (or paid directly by the customer) and paid into a reserve or general liability account held at the institution to pay merchants and other payees as they make claims for payments ("Bank Primary—Reserve Systems").

In still other systems, the electronic value is created by a third party and the funds underlying the electronic value are ultimately held by such third party ("Bank Secondary Systems"). In such systems, depository institutions act as intermediaries in collecting funds from customers in exchange for electronic value. In some Bank Secondary Systems, the electronic value is provided to the institution to have available for its customers. As customers exchange funds for electronic value, the funds are held for a short period of time and then forwarded to the third party ("Bank Secondary—Advance Systems"). In other systems of this nature, the depository institution will exchange its own funds for electronic value from the third party and in turn exchange electronic value for funds with its customers ("Bank Secondary—Pre-Acquisition Systems").

In Bank Secondary Systems, the depository institution may have a contingent liability to redeem the electronic value from consumers and merchants. As such electronic value is redeemed, the institution may in turn exchange the electronic value for funds with the third party.

<sup>3</sup> The classification of stored value systems described below is not intended to encompass all of the possible ways that stored value card systems may be structured. Rather, this classification system represents a mechanism to generalize the circumstances under which the funds underlying stored value cards may or may not be considered deposits within the meaning of the FDIA.

<sup>4</sup> Such a system would be similar to debit card systems, except that, unlike a debit card the information or value is on the card itself. The staff is not aware of any such system currently in development. It is our understanding, however, that such a system could be developed.

## Primary Legal Issue

From the FDIC's perspective, the primary legal issue raised by the development of stored value card systems is whether and to what extent the funds or obligations underlying stored value cards constitute "deposits"<sup>5</sup> within the meaning of section 3(l) of the Federal Deposit Insurance Act (FDIA) and are therefore assessable and qualify for deposit insurance.<sup>6</sup> The FDIC General Counsel's legal opinion on this issue is contained herein. The opinion expressed herein is general in nature and based upon the information that the FDIC staff has gathered on stored value cards to date. No view is expressed on any specific stored value card system and the specific facts of any such system might cause the opinion expressed herein to change.

## Applicable Statutes

An analysis of whether funds underlying the value on a stored value card are considered to be a part of the institution's assessment base and qualify for deposit insurance coverage begins with the definition of a deposit under section 3(l) of the FDIA. This section provides in pertinent part that:

The term "deposit" means—

(1) The unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank or savings association, or a letter of credit or a traveler's check on which the bank

<sup>5</sup> Whether and to what extent the funds or obligations underlying stored value cards constitute "deposits" within the meaning of section 3(l) of the FDIA will in large part determine whether such funds are "insured deposits" under section 3(m) of the FDIA. An "insured deposit" is that portion of a "deposit" that is insured. It is the "net amount due to any depositor" for "deposits in an insured depository institution" (after deducting offsets) less any part thereof that is in excess of \$100,000. 12 U.S.C. 1813(m), 1817(i), and 1821(a). Such net amount is also determined in accordance with regulations prescribed by the FDIC. See 12 C.F.R. Part 330.

<sup>6</sup> This opinion only addresses whether the funds underlying stored value cards constitute deposits under the FDIA. Such determinations are relevant for assessment and insurance purposes. There are other issues, not addressed by this opinion, which are of great importance to the FDIC and which the FDIC will continue to monitor as appropriate. Such issues include, but are not limited to, consumer disclosure matters, systemic risk, security, electronic funds transfer matters, reserve requirements, counterfeiting, monetary policy, and money laundering.

or savings association is primarily liable

\* \* \*

(2) Trust funds as defined in this Act received or held by such bank or savings association, whether held in the trust department or held or deposited in any other department of such bank or savings association,

(3) Money received or held by a bank or savings association, or the credit given for money or its equivalent received or held by a bank or savings association, in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including without being limited to, escrow funds, funds held as security for an obligation due to the bank or savings association or others (including funds held as dealers reserves) or for securities loaned by the bank or savings association, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes \* \* \*

(4) Outstanding draft (including advice or authorization to charge a bank's or a savings association's balance in another bank or savings association), cashier's check, money order, or other officer's check issued in the usual course of business for any purpose, including without being limited to those issued in payment for services, dividends, or purchases, and

(5) Such other obligations of a bank or savings association as the Board of Directors, after consultation with the Comptroller of the Currency, Director of the Office of Thrift Supervision, and the Board of Governors of the Federal Reserve System, shall find and prescribe by regulation to be deposit liabilities by general usage \* \* \*. 12 U.S.C. 1813(l).

## Analysis

For purposes of this analysis, the most relevant provisions of section 3(l) of the FDIA are subsections (1) and (3). Synthesizing the requirements of these two subsections, in order for the funds underlying stored value cards to constitute deposits under section 3(l)(1) or (3) of the FDIA, 12 U.S.C. 1813(l)(1) & (3), the funds must represent: (1) An unpaid balance of money or its equivalent received or held by an institution; (2) in the usual course of business; and (3) either (a) the institution must have given or be obligated to give credit to a commercial, checking, savings, time, or thrift account; or (b) the funds must be held for a special or specific purpose.

### *An Unpaid Balance of Money or Its Equivalent Received or Held by an Institution*

The first requirement is that there must be "an unpaid balance of money or its equivalent received or held by a bank or savings association". In each

type of Bank Primary System described above, the institution will hold the funds to pay merchants and other payees. Consequently, this requirement of the statute would be satisfied.

In Bank Secondary—Advance Systems the funds may initially be received by the institution but later transferred to a third party. The issue then arises as to whether the fact that funds are received and held by an institution, albeit for a short time period, satisfies this requirement of the statute, thereby possibly creating a deposit liability during the period for which the institution holds the money.

In my opinion in Bank Secondary—Advance Systems funds held by an institution for a time period prior to transfer would meet the statutory requirement of "the unpaid balance of money or its equivalent received or held by a bank or savings association". In the analogous case of an institution selling travelers' checks issued by others, the FDIC staff has long held the opinion that the proceeds from such sale are deposits while held by the institution.<sup>7</sup> In my view, an institution holding funds prior to transfer to a third party in a Bank Secondary—Advance System is indistinguishable from the aforementioned travelers' check case. It is important to note, however, that the institution would owe the obligation to the third party, not the holder of the card. Thus, to the extent such funds may constitute a deposit, the "depositor" would be the third party. Moreover, any deposit liability for such funds would be extinguished upon transfer of the funds to the third party.

In Bank Secondary—Pre-Acquisition Systems the funds underlying the stored value are received or held by the third party. The institution in effect advances these funds on behalf of its customers and later collects funds from its customer in exchange for electronic value loaded onto stored value cards. Because the funds underlying the stored value are held by the third party, in my view, such funds are received or held by the third party, not the depository institution. Consequently, it appears that the requirement of "an unpaid balance of money or its equivalent received or held by [an institution]" would not be satisfied in Bank Secondary—Pre-Acquisition Systems.

Also in some Bank Secondary Systems the institution may by contract retain a contingent liability to redeem

<sup>7</sup> See FDIC Staff Advisory Opinion 93-55 (August 6, 1993) (funds held for one business day by an agent bank selling travelers' checks on behalf of a company issuing travelers' checks, are deposits of the bank under 3(l)(3) of the FDIA, until such funds are forwarded to the company).

the electronic value from consumers and merchants. This raises the issue whether a contingent liability to redeem the electronic value represents an unpaid balance of money or its equivalent received or held by an institution. In interpreting 12 U.S.C. 1813(l)(1), the Supreme Court, in accordance with the purpose of the statute, imposed the requirement that a deposit of money or its equivalent be "hard earnings" that businesses and individuals have entrusted to banks. *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 435 (1986). The Court held that a stand-by letter of credit does not fall within the meaning of section 3(l)(1) of the FDIA because this was only a contingent obligation and did not represent "hard earnings". *Id.* at 440.

Any contingent liability of an institution to redeem electronic value in a Bank Secondary System would in my view not constitute "hard earnings" and thus, in accordance with the Court's holding in *Philadelphia Gear*, would not satisfy the requirement of an unpaid balance of money or its equivalent received or held by a bank or savings association. In Bank Secondary Systems the "hard earnings" are ultimately held by the third party, not the institution.

#### *In the Usual Course of Business*

Insured depository institutions are increasingly participating in stored value card systems. In light of this, the FDIC would likely view any funds received or held by institutions pursuant to participation in stored value card systems to be in the usual course of business.

#### *The Institution Must Have Given or Be Obligated To Give Credit to An Account*

To be a deposit under section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1), money or its equivalent must not only be held or received by an institution in the usual course of business, but must (unless another alternative condition is satisfied) be a payment for which the institution has given or is obligated to give credit to a commercial, checking, savings, time or thrift account. This requirement would not appear to be at issue in Bank Primary—Customer Account Systems because the funds remain credited to the customer's account until claims on such funds are made by payees. Assuming the other aforementioned requirements are met, the funds underlying Bank Primary—Customer Account Systems would appear to be deposits under section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1).

With respect to Bank Primary—Reserve Systems and both types of Bank Secondary Systems, stored value card

products appear to be structured so that the institution does not credit and is not obligated to credit a commercial, checking, savings, time or thrift account. As described previously, when a customer purchases a stored value card in a Bank Primary—Reserve System funds are withdrawn from the customer's account (or paid directly by the customer) and paid into a reserve or general liability account maintained by the institution. Such accounts are routinely created and maintained by insured depository institutions. The FDIC does not consider such reserve or general liability accounts to be "deposits" within the meaning of section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1), because there does not appear to be an obligation to credit the funds to a commercial, checking, savings, time, or thrift account. In addition, the sample agreements which the FDIC staff has reviewed clearly indicate that the parties to a stored value card agreement, *i.e.*, the insured depository institution and the purchaser of the card, do not intend that the funds be credited to one of the five enumerated accounts.

Similarly, in Bank Secondary Systems the funds which consumers pay to load value onto a stored value card are ultimately held by the third party originator of the stored value. In these cases also it would appear that no commercial, checking, savings, time or thrift account has been credited nor is the institution obligated to credit such an account.

The foregoing notwithstanding, at some point the institution may become obligated to credit a payee's deposit account maintained at that institution and thus create a deposit liability to the payee. For example, after a transaction wherein the value on the card is transferred from a consumer to a merchant, and the merchant requests that the funds underlying the electronic value be credited to the merchant's account, the institution would appear to be under an obligation to credit the merchant's account; thereby, possibly creating a deposit liability to the merchant.

#### *If the Institution Has Not Given or Is Not Obligated To Give Credit To An Account; The Funds Must Be Held For a Special or Specific Purpose*

If funds held by an institution underlying stored value cards are not deposits under section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1), because the institution is not obligated to credit an account, the analysis must turn to whether such funds may be considered deposits under section 3(l)(3) of the

FDIA, 12 U.S.C. 1813(l)(3). In order to be considered a deposit under 3(l)(3) of the FDIA, the value underlying a stored value card must represent: (1) Money or its equivalent (or the credit given for money or its equivalent) received or held by an institution; (2) in the usual course of business; and (3) for a special or specific purpose.

The first two requirements are essentially the same as under section 3(l)(1) of the FDIA as discussed above. While section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3), does not require that the institution be obligated to credit the funds to an account, it does require that funds be held "for a special or specific purpose" in order to qualify as a deposit.

Congress included in the statute, without limitation, the following examples of a bank or savings association holding funds for a special or specific purpose: "escrow funds, funds held as security for an obligation due to the bank or savings association or others (including funds held as dealers reserves) or for securities loaned by the bank or savings association, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes \* \* \* ." 12 U.S.C. 1813(l)(3).

While Congress included in section 3(l)(3) a number of special or specific purposes for which money may be held to qualify as a deposit, the clause "without being limited to" means that the section does not state each and every such purpose. Courts have held that money covering a Clearing House Interpayment System (CHIPS) release<sup>8</sup> and monies wired by a loan participant to the lead bank for the purpose of funding a participated loan<sup>9</sup>, each constitute funds held for a special or specific purpose within the meaning of this statute. The case law seems to suggest that to qualify as a deposit under 3(l)(3) the purpose for which the

<sup>8</sup> *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. 950, 957 (S.D.N.Y. 1983) (Money covering a CHIPS transfer has as specific a purpose as the money in the accounts listed by the statute. Just like money deposited to meet maturing obligations, money backing a CHIPS release is to insure payment to the recipient of the release.)

<sup>9</sup> *Seattle-First Bank v. FDIC*, 619 F. Supp. 1351, 1360 (D.C. Okl. 1985) (monies wired by a loan participant to the lead bank, at the lead's direction, for the purpose of funding a participated loan can become deposits within the meaning of 3(l)(3) when the wired funds are not drawn by the intended borrower. The funds were received for the special or specific purpose of funding the participated loan).

money is being held must at least be as specific as the purposes listed in the statute. See *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. 950, 957 (S.D.N.Y. 1983); *Seattle-First Bank v. FDIC*, 619 F. Supp. 1351, 1360 (D.C. Okl. 1985).

When an institution holds funds in exchange for electronic value embedded in a stored value card, the relevant questions are: (1) What is the purpose for which these funds are being held? and (2) Is that purpose at least as specific as the purposes enumerated in the statute?

With respect to Bank Primary—Reserve Systems funds appear to be held by an institution to meet its obligations to payees as they make claims on such funds pursuant to general or miscellaneous and unrelated transactions undertaken within the stored value card system. It is my opinion that this purpose is fundamentally different from the examples listed in section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3). For example, an escrow account will typically have a very specific purpose associated with a particular transaction (or two or more related transactions). Similarly, funds underlying a letter of credit and funds held for purchasing securities are linked to a specific transaction or transactions.

The cases holding that certain funds are deposits within the meaning of section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3), also involve funds held with respect to a specific transaction. For example, in *Seattle-First Bank* the court held that monies wired by a loan participant to the lead bank at the lead bank's direction for the purpose of funding a participated loan were monies received for the special or specific purpose of funding the loan. 619 F. Supp. at 1360. In that case, as in the examples contained within section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3), the funds held are for a purpose associated with a particular transaction or two or more related transactions.

Conversely, a customer who transfers funds to an institution in exchange for electronic value may engage in any of a number of unrelated transactions. Indeed, when a customer has electronic value loaded onto a card he may have no idea as to what transactions he will use the card to engage in, nor whom the transferees may be. Thus, unlike the examples listed in the statute, funds held by an institution to redeem electronic value could be associated with general or miscellaneous unrelated transactions. Consequently, an institution holding funds to meet obligations to transferees in a Bank Primary—Reserve System does not

appear to be as specific a purpose as the examples in the statute and in the cases finding deposit liabilities under section 3(l)(3) of the FDIA.<sup>10</sup> Therefore, in my view such funds would not be held for a special or specific purpose within the meaning of section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3).<sup>11</sup>

On the other hand, in the case of Bank Secondary—Advance Systems the funds are being held or received by the institution in order to pay the third party in consideration of the electronic value transferred by such third party to the institution and ultimately its customer. Thus, like the examples listed in the statute and the cases finding monies to be deposits under section 3(l)(3),<sup>12</sup> these funds are linked to a specific transaction. Moreover, these funds are analogous to funds held for one business day by an agent bank selling travelers checks on behalf of a company issuing travelers' checks. The FDIC staff considers such funds to be deposits of the bank under 3(l)(3) of the FDIA until such funds are forwarded to the company. See FDIC Staff Advisory Opinion 93-55, (August 6, 1993). Thus, in the case of Bank Secondary—Advance Systems, the funds being held or received in order to pay the third party may be considered held or received for a special or specific purpose within the meaning of section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3) and may therefore qualify as a deposit under such section. It is important to note, however, that such a deposit liability would be to the third party, not the institution's customer.

#### *Other Subsections of the Statute Defining Deposit—Trust Funds*

Trust funds are deposits under section 3(l)(2) of the FDIA, 12 U.S.C. 1813(l)(2). For purposes of the FDIA trust funds are funds held by an insured depository institution in a fiduciary capacity, including funds held as trustee, executor, administrator, guardian, or agent. 12 U.S.C. 1813(p). The FDIC staff is not aware of stored value card

<sup>10</sup> See *Seattle-First Bank v. FDIC*, 619 F. Supp. at 1360; *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. at 957.

<sup>11</sup> The funds underlying a stored value card in a Bank Primary—Reserve System could, in our view, be considered to be held for a special or specific purpose within the meaning of section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3), if the system is structured so that the ultimate payee can only be one pre-determined specific party. For example, if an institution were to issue a stored value card solely for the purchase of long-distance telephone services from a specific company, such funds could be considered to be held for a special or specific purpose.

<sup>12</sup> See *Seattle-First Bank v. FDIC*, 619 F. Supp. at 1360; *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. at 957.

systems in which funds are held by an institution in a fiduciary capacity.

#### *Other Subsections of the Statute Defining Deposit—Certain Negotiable Instruments*

Section 3(l)(4) of the FDIA, 12 U.S.C. 1813(l)(4), includes within the definition of deposit an "outstanding draft \* \* \* cashier's check, money order, or other officer's check \* \* \*." Stored value obligations have been analogized to cashier's checks and money orders. Indeed, Bank Primary—Reserve System stored value cards operate in much the same way that these instruments do. Nonetheless, unlike the payment mechanisms listed in the statute, stored value cards are not negotiable instruments.<sup>13</sup> Moreover, unlike a cashier's check or money order, the institution is not drawing a check upon itself. Rather, the institution's customer transfers to a payee the rights to a sum of money being held at the institution and in making payment to the payee, the institution is recognizing that its customer has transferred that right. See *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. at 957.

Notwithstanding the fact that stored value card obligations operate in a manner similar to cashier's checks and money orders, I am of the view that there are differences between these instruments and stored value cards. Moreover, for purposes of considering whether a payment mechanism is a deposit within the meaning of section 3(l)(4) of the FDIA, 12 U.S.C. 1813(l)(4), I believe that Congress did not intend to include payment mechanisms other than the negotiable instruments enumerated in the subsection. *Id.*<sup>14</sup>

#### *Other Subsections of The Statute Defining Deposit—Authority of the FDIC to Promulgate a Regulation Finding That Funds Underlying Stored Value Cards are Deposits*

In addition to the statutory definition of deposits under sections 3(l)(1)–(4) of the FDIA, 12 U.S.C. 1813(l)(1)–(4), section 3(l)(5) of the FDIA, 12 U.S.C. 1813(l)(5), gives the Board of Directors the authority, after consultation with the Comptroller of the Currency, Director of the Office of Thrift Supervision, and the Board of Governors of the Federal Reserve System, to find and prescribe by

<sup>13</sup> A stored value card is not in writing, not signed by the maker, and does not contain an "unconditional promise to pay a sum certain in money and no other promise, order, obligation or power". See U.C.C., Section 3-104(1).

<sup>14</sup> In my view the same conclusion would apply with respect to analogizing stored value cards to travelers' checks on which the institution is primarily liable, which are deposits under section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1).

regulation other obligations of an insured depository institution to be deposit liabilities by general usage. The FDIC has not promulgated such a regulation.

#### Summary

In summary, in my opinion funds underlying Bank Primary—Customer Account Systems appear to be funds held by an institution, in the usual course of business, which remain credited to the customer's account until the payee makes a claim on the funds. Such funds would therefore appear to be deposits under section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1).

As a general matter, funds held by an institution to meet obligations under Bank Primary—Reserve Systems would appear not to be deposits under section 3(l)(1) of the FDIA, 12 U.S.C. 1813(l)(1), because the funds are not credited to or obligated to be credited to a commercial, checking, time, or thrift account.

It is my further opinion that the funds underlying Bank Primary—Reserve Systems are not deposits under section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3), because such funds are not held for a special or specific purpose. The examples of funds held for such purposes in the statute are all linked to one or more specific transactions. Conversely, the funds underlying stored value card transactions are not necessarily linked to a specific transaction.

In Bank Secondary—Pre-Acquisition Systems the funds underlying the stored value are, in my view, received or held by the third party, not the depository institution. Consequently, it appears that this requirement of section 3(l)(1) and (3) of the FDIA, 12 U.S.C. 1813(l)(1), (3), would not be satisfied in such systems.

The funds held by an institution in a Bank Secondary—Advance System would not create a deposit liability to the customer because the liability is owed to the third party for whom the institution is temporarily holding the funds. Such funds may create a deposit liability to the third party. The funds are held by the institution in the usual course of business prior to transferring such funds to the third party. The parties may or may not intend that the institution credit an account. Even if the institution is not obligated to credit such funds to an account, and thus such funds would not be a deposit under section 3(l)(1) of the FDIA, the funds may be deemed to be held for the specific purpose of transferring the funds to the third party and thus would be considered a deposit under section 3(l)(3) of the FDIA, 12 U.S.C. 1813(l)(3).

The fact that an institution may retain a contingent liability to redeem electronic value from consumers and merchants in Bank Secondary Systems does not meet the requirement of "money or its equivalent held by an institution" and therefore would not give rise to a deposit liability to the customer under either 3(l)(1) or (3) of the FDIA, 12 U.S.C. 1813(l)(1), (3).

With respect to the other provisions of section 3(l) of the FDIA, 12 U.S.C. 1813(l), the FDIC staff is not aware of stored value card systems in which funds will be held as trust funds. Thus, the funds underlying stored value cards would not be deposits under section 3(l)(2) of the FDIA, 12 U.S.C. 1813(l)(2). Similarly, while stored value cards have certain similarities to cashier's checks and money orders, they are not drafts drawn on the bank, nor are they negotiable instruments. Consequently, they cannot be considered deposits under section 3(l)(4) of the FDIA, 12 U.S.C. 1813(l)(4).

Notwithstanding the question of whether and under what circumstances stored value card obligations are deposits within the meaning of section 3(l)(1)–(4) of the FDIA, 12 U.S.C. 1813(l)(1)–(4), section 3(l)(5) of the FDIA, 12 U.S.C. 1813(l)(5), gives the Board of Directors the authority to find and prescribe by regulation that other obligations of an insured depository institution are deposit liabilities by general usage. The FDIC has not promulgated such a regulation.

This General Counsel Opinion only addresses the extent to which funds underlying stored value cards may constitute a deposit under 12 U.S.C. 1813(l). It is not intended to address the way in which FDIC would act in its role as receiver. In the event of an institution's failure, to the extent that any funds underlying stored value cards are recognized as deposits, there may be recordkeeping issues and other issues as to who may be entitled to deposit insurance and in what amount. See 12 C.F.R. Part 330.

Finally, the FDIC would expect that institutions clearly and conspicuously disclose to their customers the insured or non-insured status of their stored value products, as appropriate.

By order of the Board of Directors, dated at Washington, D.C., this 16th day of July, 1996.

Federal Deposit Insurance Corporation

Jerry L. Langley,

*Executive Secretary.*

[FR Doc. 96-19697 Filed 8-1-96; 8:45 am]

BILLING CODE 6714-01-P

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Stored Value Cards and Other Electronic Payment Systems

**AGENCY:** Federal Deposit Insurance Corporation (FDIC or Corporation).

**ACTION:** Notice; request for comment; public hearing.

**SUMMARY:** The FDIC is seeking comment on whether and under what circumstances the FDIC should take regulatory action with respect to finding that the funds underlying stored value cards or other similar electronic payment systems are deposit liabilities for purposes of the Federal Deposit Insurance Act. The FDIC is also seeking comment on types of proposed or existing stored value card systems, similar electronic payment systems, and the safety and soundness concerns raised by the emergence of these new technologies. This notice also sets forth the time and other particulars concerning a public hearing that the FDIC will conduct on this topic.

**DATES:** Written comments must be received by the FDIC on or before October 31, 1996. Requests to participate in the public hearing must be received by August 26, 1996. Each participant must submit a summary of his or her written testimony by September 3, 1996. The public hearing will be held on September 12, 1996 and possibly also on September 13, 1996, and other dates, depending upon the number of requests received to participate in the public hearing.

**ADDRESSES:** Written comments, requests to participate in the public hearing, and summaries of testimony are to be addressed to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand-delivered to Room F-400, 1776 F Street N.W., Washington, D.C. 20429, on business days between 8:30 a.m. and 5:00 p.m. (FAX number (202) 898-3838; Internet address: comments@FDIC.gov). Comments will be available for inspection and photocopying in Room 100, 801 17th Street, N.W., Washington, D.C. 20429, between 9:00 a.m. and 5:00 p.m. on business days.

**Hearing location.** Federal Deposit Insurance Corporation, Board of Directors' Room (6th Floor), 550 17th Street N.W., Washington, D.C. 20429

**FOR FURTHER INFORMATION CONTACT:** Sharon Powers Sivertsen, Director, Office of Policy Development, (202) 898-8710; Cary Hiner, Assistant Director, Policy Branch, Division of