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Title 12—Banks and Banking

(This book contains parts 230 to 299)

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CHAPTER II—FEDERAL RESERVE SYSTEM (CONTINUED)

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SUBCHAPTER A—BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (CONTINUED)

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AUTHORITY: 12 U.S.C. 4301 *et seq.*

SOURCE: 57 FR 43376, Sept. 21, 1992, unless otherwise noted.

§ 230.1 Authority, purpose, coverage, and effect on state laws.

(a) *Authority*. This part, known as Regulation DD, is issued by the Board of Governors of the Federal Reserve System to implement the Truth in Savings Act of 1991 (the act), contained in the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 3201 *et seq.*, Pub. L. 102–242, 105 Stat. 2236). Information-collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB No. 7100–0271.

(b) *Purpose*. The purpose of this part is to enable consumers to make informed decisions about accounts at depository institutions. This part requires depository institutions to provide disclosures so that consumers can make meaningful comparisons among depository institutions.

(c) *Coverage*. This part applies to depository institutions except for credit unions. In addition, the advertising rules in § 230.8 of this part apply to any person who advertises an account offered by a depository institution, including deposit brokers.

(d) *Effect on state laws*. State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. Additional information on inconsistent state laws and the procedures for requesting a preemption determination from the Board are set forth in appendix C of this part.

[57 FR 43376, Sept. 21, 1992, as amended at 74 FR 5593, Jan. 29, 2009]

§ 230.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Account* means a deposit account at a depository institution that is held by or offered to a consumer. It includes time, demand, savings, and negotiable order of withdrawal accounts. For purposes of the advertising requirements in § 230.8 of this part, the term also includes an account at a depository institution that is held by or on behalf of a deposit broker, if any interest in the account is held by or offered to a consumer.

(b) *Advertisement* means a commercial message, appearing in any medium, that promotes directly or indirectly:

(1) The availability or terms of, or a deposit in, a new account; and

(2) For purposes of § 230.8(a) and § 230.11 of this part, the terms of, or a deposit in, a new or existing account.

(c) *Annual percentage yield* means a percentage rate reflecting the total amount of interest paid on an account, based on the interest rate and the frequency of compounding for a 365-day period and calculated according to the rules in appendix A of this part.

(d) *Average daily balance method* means the application of a periodic rate to the average daily balance in the account for the period. The average daily balance is determined by adding

the full amount of principal in the account for each day of the period and dividing that figure by the number of days in the period.

(e) *Board* means the Board of Governors of the Federal Reserve System.

(f) *Bonus* means a premium, gift, award, or other consideration worth more than $10 (whether in the form of cash, credit, merchandise, or any equivalent) given or offered to a consumer during a year in exchange for opening, maintaining, renewing, or increasing an account balance. The term does not include interest, other consideration worth $10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses.

(g) *Business day* means a calendar day other than a Saturday, a Sunday, or any of the legal public holidays specified in 5 U.S.C. 6103(a).

(h) *Consumer* means a natural person who holds an account primarily for personal, family, or household purposes, or to whom such an account is offered. The term does not include a natural person who holds an account for another in a professional capacity.

(i) *Daily balance method* means the application of a daily periodic rate to the full amount of principal in the account each day.

(j) *Depository institution* and *institution* mean an institution defined in section 19(b)(1)(A)(i)-(vi) of the Federal Reserve Act (12 U.S.C. 461), except credit unions defined in section 19(b)(1)(A)(iv).

(k) *Deposit broker* means any person who is a deposit broker as defined in section 29(g) of the Federal Deposit Insurance Act (12 U.S.C. 1831f(g)).

(l) *Fixed-rate account* means an account for which the institution contracts to give at least 30 calendar days advance written notice of decreases in the interest rate.

(m) *Grace period* means a period following the maturity of an automatically renewing time account during which the consumer may withdraw funds without being assessed a penalty.

(n) *Interest* means any payment to a consumer or to an account for the use of funds in an account, calculated by application of a periodic rate to the balance. The term does not include the payment of a bonus or other consideration worth $10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses.

(o) *Interest rate* means the annual rate of interest paid on an account which does not reflect compounding. For the purposes of the account disclosures in § 230.4(b)(1)(i) of this part, the interest rate may, but need not, be referred to as the ''annual percentage rate'' in addition to being referred to as the ''interest rate.''

(p) *Passbook savings account* means a savings account in which the consumer retains a book or other document in which the institution records transactions on the account.

(q) *Periodic statement* means a statement setting forth information about an account (other than a time account or passbook savings account) that is provided to a consumer on a regular basis four or more times a year.

(r) *State* means a state, the District of Columbia, the commonwealth of Puerto Rico, and any territory or possession of the United States.

(s) *Stepped-rate account* means an account that has two or more interest rates that take effect in succeeding periods and are known when the account is opened.

(t) *Tiered-rate account* means an account that has two or more interest rates that are applicable to specified balance levels.

(u) *Time account* means an account with a maturity of at least seven days in which the consumer generally does not have a right to make withdrawals for six days after the account is opened, unless the deposit is subject to an early withdrawal penalty of at least seven days' interest on amounts withdrawn.

(v) *Variable-rate account* means an account in which the interest rate may change after the account is opened, unless the institution contracts to give at least 30 calendar days advance written notice of rate decreases.

[57 FR 43376, Sept. 21, 1992, as amended at 58 FR 15081, Mar. 19, 1993; 59 FR 52658, Oct. 19, 1994; 70 FR 29593, May 24, 2005]

§ 230.3 General disclosure requirements.

(a) *Form.* Depository institutions shall make the disclosures required by

§§ 230.4 through 230.6 of this part, as applicable, clearly and conspicuously, in writing, and in a form the consumer may keep. The disclosures required by this part may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). The disclosures required by §§ 230.4(a)(2) and 230.8 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections. Disclosures for each account offered by an institution may be presented separately or combined with disclosures for the institution's other accounts, as long as it is clear which disclosures are applicable to the consumer's account.

(b) *General.* The disclosures shall reflect the terms of the legal obligation of the account agreement between the consumer and the depository institution. Disclosures may be made in languages other than English, provided the disclosures are available in English upon request.

(c) *Relation to Regulation E (12 CFR part 205).* Disclosures required by and provided in accordance with the Electronic Fund Transfer Act (15 U.S.C. 1601) and its implementing Regulation E (12 CFR part 205) that are also required by this part may be substituted for the disclosures required by this part.

(d) *Multiple consumers.* If an account is held by more than one consumer, disclosures may be made to any one of the consumers.

(e) *Oral response to inquiries.* In an oral response to a consumer's inquiry about interest rates payable on its accounts, the depository institution shall state the annual percentage yield. The interest rate may be stated in addition to the annual percentage yield. No other rate may be stated.

(f) *Rounding and accuracy rules for rates and yields*—(1) *Rounding.* The annual percentage yield, the annual percentage yield earned, and the interest rate shall be rounded to the nearest one-hundredth of one percentage point (.01%) and expressed to two decimal places. For account disclosures, the interest rate may be expressed to more than two decimal places.

(2) *Accuracy.* The annual percentage yield (and the annual percentage yield earned) will be considered accurate if not more that one-twentieth of one percentage point (.05%) above or below the annual percentage yield (and the annual percentage yield earned) determined in accordance with the rules in appendix A of this part.

[57 FR 43376, Sept. 21, 1992, as amended by Reg. DD, 66 FR 17802, Apr. 4, 2001; 72 FR 63483, Nov. 9, 2007]

§ 230.4 Account disclosures.

(a) *Delivery of account disclosures*—(1) *Account opening.* (i) *General.* A depository institution shall provide account disclosures to a consumer before an account is opened or a service is provided, whichever is earlier. An institution is deemed to have provided a service when a fee required to be disclosed is assessed. Except as provided in paragraph (a)(1)(ii) of this section, if the consumer is not present at the institution when the account is opened or the service is provided and has not already received the disclosures, the institution shall mail or deliver the disclosures no later than 10 business days after the account is opened or the service is provided, whichever is earlier.

(ii) *Timing of electronic disclosures.* If a consumer who is not present at the institution uses electronic means (for example, an Internet Web site) to open an account or request a service, the disclosures required under paragraph (a)(1) of this section must be provided before the account is opened or the service is provided.

(2) *Requests.* (i) A depository institution shall provide account disclosures to a consumer upon request. If a consumer who is not present at the institution makes a request, the institution shall mail or deliver the disclosures within a reasonable time after it receives the request and may provide the disclosures in paper form, or electronically if the consumer agrees.

(ii) In providing disclosures upon request, the institution may:

(A) Specify an interest rate and annual percentage yield that were offered within the most recent seven calendar

days; state that the rate and yield are accurate as of an identified date; and provide a telephone number consumers may call to obtain current rate information.

(B) State the maturity of a time account as a term rather than a date.

(b) *Content of account disclosures.* Account disclosures shall include the following, as applicable:

(1) *Rate information*—(i) *Annual percentage yield and interest rate.* The ''annual percentage yield'' and the ''interest rate,'' using those terms, and for fixed-rate accounts the period of time the interest rate will be in effect.

(ii) *Variable rates.* For variable-rate accounts:

(A) The fact that the interest rate and annual percentage yield may change;

(B) How the interest rate is determined;

(C) The frequency with which the interest rate may change; and

(D) Any limitation on the amount the interest rate may change.

(2) *Compounding and crediting*—(i) *Frequency.* The frequency with which interest is compounded and credited.

(ii) *Effect of closing an account.* If consumers will forfeit interest if they close the account before accrued interest is credited, a statement that interest will not be paid in such cases.

(3) *Balance information*—(i) *Minimum balance requirements.* Any minimum balance required to:

(A) Open the account;

(B) Avoid the imposition of a fee; or

(C) Obtain the annual percentage yield disclosed.

Except for the balance to open the account, the disclosure shall state how the balance is determined for these purposes.

(ii) *Balance computation method.* An explanation of the balance computation method specified in § 230.7 of this part used to calculate interest on the account.

(iii) *When interest begins to accrue.* A statement of when interest begins to accrue on noncash deposits.

(4) *Fees.* The amount of any fee that may be imposed in connection with the account (or an explanation of how the fee will be determined) and the conditions under which the fee may be imposed.

(5) *Transaction limitations.* Any limitations on the number or dollar amount of withdrawals or deposits.

(6) *Features of time accounts.* For time accounts:

(i) *Time requirements.* The maturity date.

(ii) *Early withdrawal penalties.* A statement that a penalty will or may be imposed for early withdrawal, how it is calculated, and the conditions for its assessment.

(iii) *Withdrawal of interest prior to maturity.* If compounding occurs during the term and interest may be withdrawn prior to maturity, a statement that the annual percentage yield assumes interest remains on deposit until maturity and that a withdrawal will reduce earnings. For accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY determined in accordance with section E of appendix A of this part, a statement that interest cannot remain on deposit and that payout of interest is mandatory.

(iv) *Renewal policies.* A statement of whether or not the account will renew automatically at maturity. If it will, a statement of whether or not a grace period will be provided and, if so, the length of that period must be stated. If the account will not renew automatically, a statement of whether interest will be paid after maturity if the consumer does not renew the account must be stated.

(7) *Bonuses.* The amount or type of any bonus, when the bonus will be provided, and any minimum balance and time requirements to obtain the bonus.

(c) *Notice to existing account holders*—(1) *Notice of availability of disclosures.* Depository institutions shall provide a notice to consumers who receive periodic statements and who hold existing accounts of the type offered by the institution on June 21, 1993. The notice shall be included on or with the first periodic statement sent on or after June 21, 1993 (or on or with the first periodic statement for a statement cycle beginning on or after that date).

The notice shall state that consumers may request account disclosures containing terms, fees, and rate information for their account. In responding to such a request, institutions shall provide disclosures in accordance with paragraph (a)(2) of this section.

(2) *Alternative to notice.* As an alternative to the notice described in paragraph (c)(1) of this section, institutions may provide account disclosures to consumers. The disclosures may be provided either with a periodic statement or separately, but must be sent no later than when the periodic statement described in paragraph (c)(1) is sent.

[57 FR 43376, Sept. 21, 1992, as amended at 58 FR 15081, Mar. 19, 1993; Reg. DD, 60 FR 5130, Jan. 26, 1995; 63 FR 40637, July 30, 1998; 66 FR 17802, Apr. 4, 2001; 72 FR 63483, Nov. 9, 2007]

§ 230.5 Subsequent disclosures.

(a) *Change in terms*—(1) *Advance notice required.* A depository institution shall give advance notice to affected consumers of any change in a term required to be disclosed under § 230.4(b) of this part if the change may reduce the annual percentage yield or adversely affect the consumer. The notice shall include the effective date of the change. The notice shall be mailed or delivered at least 30 calendar days before the effective date of the change.

(2) *No notice required.* No notice under this section is required for:

(i) *Variable-rate changes.* Changes in the interest rate and corresponding changes in the annual percentage yield in variable-rate accounts.

(ii) *Check printing fees.* Changes in fees assessed for check printing.

(iii) *Short-term time accounts.* Changes in any term for time accounts with maturities of one month or less.

(b) *Notice before maturity for time accounts longer than one month that renew automatically.* For time accounts with a maturity longer than one month that renew automatically at maturity, institutions shall provide the disclosures described below before maturity. The disclosures shall be mailed or delivered at least 30 calendar days before maturity of the existing account. Alternatively, the disclosures may be mailed or delivered at least 20 calendar days before the end of the grace period on the existing account, provided a grace period of at least five calendar days is allowed.

(1) *Maturities of longer than one year.* If the maturity is longer than one year, the institution shall provide account disclosures set forth in § 230.4(b) of this part for the new account, along with the date the existing account matures. If the interest rate and annual percentage yield that will be paid for the new account are unknown when disclosures are provided, the institution shall state that those rates have not yet been determined, the date when they will be determined, and a telephone number consumers may call to obtain the interest rate and the annual percentage yield that will be paid for the new account.

(2) *Maturities of one year or less but longer than one month.* If the maturity is one year or less but longer than one month, the institution shall either:

(i) Provide disclosures as set forth in paragraph (b)(1) of this section; or

(ii) Disclose to the consumer:

(A) The date the existing account matures and the new maturity date if the account is renewed;

(B) The interest rate and the annual percentage yield for the new account if they are known (or that those rates have not yet been determined, the date when they will be determined, and a telephone number the consumer may call to obtain the interest rate and the annual percentage yield that will be paid for the new account); and

(C) Any difference in the terms of the new account as compared to the terms required to be disclosed under § 230.4(b) of this part for the existing account.

(c) *Notice before maturity for time accounts longer than one year that do not renew automatically.* For time accounts with a maturity longer than one year that do not renew automatically at maturity, institutions shall disclose to consumers the maturity date and whether interest will be paid after maturity. The disclosures shall be mailed or delivered at least 10 calendar days before maturity of the existing account.

[57 FR 43376, Sept. 21, 1992, as amended at 58 FR 15081, Mar. 19, 1993; Reg. DD, 63 FR 52107, Sept. 29, 1998]

§ 230.6 Periodic statement disclosures.

(a) *General rule.* If a depository institution mails or delivers a periodic statement, the statement shall include the following disclosures:

(1) *Annual percentage yield earned.* The ''annual percentage yield earned'' during the statement period, using that term, calculated according to the rules in appendix A of this part.

(2) *Amount of interest.* The dollar amount of interest earned during the statement period.

(3) *Fees imposed.* Fees required to be disclosed under § 230.4(b)(4) of this part that were debited to the account during the statement period. The fees shall be itemized by type and dollar amounts. Except as provided in § 230.11(a)(1) of this part, when fees of the same type are imposed more than once in a statement period, a depository institution may itemize each fee separately or group the fees together and disclose a total dollar amount for all fees of that type.

(4) *Length of period.* The total number of days in the statement period, or the beginning and ending dates of the period.

(5) *Aggregate fee disclosure.* If applicable, the total overdraft and returned item fees required to be disclosed by § 230.11(a).

(b) *Special rule for average daily balance method.* In making the disclosures described in paragraph (a) of this section, institutions that use the average daily balance method and that calculate interest for a period other than the statement period shall calculate and disclose the annual percentage yield earned and amount of interest earned based on that period rather than the statement period. The information in paragraph (a)(4) of this section shall be stated for that period as well as for the statement period.

[Reg. DD 57 FR 43376, Sept. 21, 1992, as amended at 57 FR 46480, Oct. 9, 1992; 64 FR 49848, Sept. 14, 1999; 66 FR 17802, Apr. 4, 2001; 70 FR 29593, May 24, 2005; 75 FR 31676, June 4, 2010]

§ 230.7 Payment of interest.

(a) *Permissible methods*—(1) *Balance on which interest is calculated.* Institutions shall calculate interest on the full amount of principal in an account for each day by use of either the daily balance method or the average daily balance method.[1]

(2) *Determination of minimum balance to earn interest.* An institution shall use the same method to determine any minimum balance required to earn interest as it uses to determine the balance on which interest is calculated. An institution may use an additional method that is unequivocally beneficial to the consumer.

(b) *Compounding and crediting policies.* This section does not require institutions to compound or credit interest at any particular frequency.

(c) *Date interest begins to accrue.* Interest shall begin to accrue not later than the business day specified for interest-bearing accounts in section 606 of the Expedited Funds Availability Act (12 U.S.C. 4005 *et seq.*) and implementing Regulation CC (12 CFR part 229). Interest shall accrue until the day funds are withdrawn.

§ 230.8 Advertising.

(a) *Misleading or inaccurate advertisements.* An advertisement shall not:

(1) Be misleading or inaccurate or misrepresent a depository institution's deposit contract; or

(2) Refer to or describe an account as ''free'' or ''no cost'' (or contain a similar term) if any maintenance or activity fee may be imposed on the account. The word ''profit'' shall not be used in referring to interest paid on an account.

(b) *Permissible rates.* If an advertisement states a rate of return, it shall state the rate as an ''annual percentage yield'' using that term. (The abbreviation ''APY'' may be used provided the term ''annual percentage yield'' is stated at least once in the advertisement.) The advertisement shall not state any other rate, except that the ''interest rate,'' using that term, may be stated in conjunction with, but not more conspicuously than, the annual percentage yield to which it relates.

(c) *When additional disclosures are required.* Except as provided in paragraph

[1] Institutions shall calculate interest by use of a daily rate of at least 1/365 of the interest rate. In a leap year a daily rate of 1/366 of the interest rate may be used.

(e) of this section, if the annual percentage yield is stated in an advertisement, the advertisement shall state the following information, to the extent applicable, clearly and conspicuously:

(1) *Variable rates.* For variable-rate accounts, a statement that the rate may change after the account is opened.

(2) *Time annual percentage yield is offered.* The period of time the annual percentage yield will be offered, or a statement that the annual percentage yield is accurate as of a specified date.

(3) *Minimum balance.* The minimum balance required to obtain the advertised annual percentage yield. For tiered-rate accounts, the minimum balance required for each tier shall be stated in close proximity and with equal prominence to the applicable annual percentage yield.

(4) *Minimum opening deposit.* The minimum deposit required to open the account, if it is greater than the minimum balance necessary to obtain the advertised annual percentage yield.

(5) *Effect of fees.* A statement that fees could reduce the earnings on the account.

(6) *Features of time accounts.* For time accounts:

(i) *Time requirements.* The term of the account.

(ii) *Early withdrawal penalties:* A statement that a penalty will or may be imposed for early withdrawal.

(iii) *Required interest payouts.* For noncompounding time accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY determined in accordance with section E of appendix A of this part, a statement that interest cannot remain on deposit and that payout of interest is mandatory.

(d) *Bonuses.* Except as provided in paragraph (e) of this section, if a bonus is stated in an advertisement, the advertisement shall state the following information, to the extent applicable, clearly and conspicuously:

(1) The ''annual percentage yield,'' using that term;

(2) The time requirement to obtain the bonus;

(3) The minimum balance required to obtain the bonus;

(4) The minimum balance required to open the account, if it is greater than the minimum balance necessary to obtain the bonus; and

(5) When the bonus will be provided.

(e) *Exemption for certain advertisements*—(1) *Certain media.* If an advertisement is made through one of the following media, it need not contain the information in paragraphs (c)(1), (c)(2), (c)(4), (c)(5), (c)(6)(ii), (d)(4), and (d)(5) of this section:

(i) Broadcast or electronic media, such as television or radio;

(ii) Outdoor media, such as billboards; or

(iii) Telephone response machines.

(2) *Indoor signs.* (i) Signs inside the premises of a depository institution (or the premises of a deposit broker) are not subject to paragraphs (b), (c), (d) or (e)(1) of this section.

(ii) If a sign exempt by paragraph (e)(2) of this section states a rate of return, it shall:

(A) State the rate as an ''annual percentage yield,'' using that term or the term ''APY.'' The sign shall not state any other rate, except that the interest rate may be stated in conjunction with the annual percentage yield to which it relates.

(B) Contain a statement advising consumers to contact an employee for further information about applicable fees and terms.

(f) *Additional disclosures in connection with the payment of overdrafts.* Institutions that promote the payment of overdrafts in an advertisement shall include in the advertisement the disclosures required by §230.11(b) of this part.

[57 FR 43376, Sept. 21, 1992, as amended at 58 FR 15081, Mar. 19, 1993; Reg. DD, 60 FR 5130, Jan. 26, 1995; Reg. DD, 63 FR 40638, July 30, 1998; Reg. DD, 63 FR 52107, Sept. 29, 1998; 70 FR 29593, May 24, 2005]

§230.9 Enforcement and record retention.

(a) *Administrative enforcement.* Section 270 of the act contains the provisions relating to administrative sanctions

for failure to comply with the requirements of the act and this part. Compliance is enforced by the agencies listed in that section.

(b) *Civil liability*. Section 271 of the Act contains the provisions relating to civil liability for failure to comply with the requirements of the act and this part; Section 271 is repealed effective September 30, 2001.

(c) *Record retention*. A depository institution shall retain evidence of compliance with this part for a minimum of two years after the date disclosures are required to be made or action is required to be taken. The administrative agencies responsible for enforcing this part may require depository institutions under their jurisdiction to retain records for a longer period if necessary to carry out their enforcement responsibilities under section 270 of the act.

[57 FR 43376, Sept. 21, 1992, as amended by Reg. DD, 63 FR 52107, Sept. 29, 1998]

§ 230.10 [Reserved]

§ 230.11 Additional disclosure requirements for overdraft services.

(a) *Disclosure of total fees on periodic statements*—(1) *General*. A depository institution must separately disclose on each periodic statement, as applicable:

(i) The total dollar amount for all fees or charges imposed on the account for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn, using the term ''Total Overdraft Fees''; and

(ii) The total dollar amount for all fees or charges imposed on the account for returning items unpaid.

(2) *Totals required*. The disclosures required by paragraph (a)(1) of this section must be provided for the statement period and for the calendar year-to-date;

(3) *Format requirements*. The aggregate fee disclosures required by paragraph (a) of this section must be disclosed in close proximity to fees identified under § 230.6(a)(3), using a format substantially similar to Sample Form B–10 in Appendix B to this part.

(b) *Advertising disclosures for overdraft services*—(1) *Disclosures*. Except as provided in paragraphs (b)(2),(b)(3), and (b)(4) of this section, any advertisement promoting the payment of overdrafts shall disclose in a clear and conspicuous manner:

(i) The fee or fees for the payment of each overdraft;

(ii) The categories of transactions for which a fee for paying an overdraft may be imposed;

(iii) The time period by which the consumer must repay or cover any overdraft; and

(iv) The circumstances under which the institution will not pay an overdraft.

(2) *Communications about the payment of overdrafts not subject to additional advertising disclosures*. Paragraph (b)(1) of this section does not apply to:

(i) An advertisement promoting a service where the institution's payment of overdrafts will be agreed upon in writing and subject to the Board's Regulation Z (12 CFR part 226);

(ii) A communication by an institution about the payment of overdrafts in response to a consumer-initiated inquiry about deposit accounts or overdrafts. Providing information about the payment of overdrafts in response to a balance inquiry made through an automated system, such as a telephone response machine, ATM, or an institution's Internet site, is not a response to a consumer-initiated inquiry for purposes of this paragraph;

(iii) An advertisement made through broadcast or electronic media, such as television or radio;

(iv) An advertisement made on outdoor media, such as billboards;

(v) An ATM receipt;

(vi) An in-person discussion with a consumer;

(vii) Disclosures required by federal or other applicable law;

(viii) Information included on a periodic statement or a notice informing a consumer about a specific overdrawn item or the amount the account is overdrawn;

(ix) A term in a deposit account agreement discussing the institution's right to pay overdrafts;

(x) A notice provided to a consumer, such as at an ATM, that completing a requested transaction may trigger a fee for overdrawing an account, or a general notice that items overdrawing an account may trigger a fee;

(xi) Informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the institution's overdraft service; or

(xii) An opt-out or opt-in notice regarding the institution's payment of overdrafts or provision of discretionary overdraft services.

(3) *Exception for ATM screens and telephone response machines.* The disclosures described in paragraphs (b)(1)(ii) and (b)(1)(iv) of this section are not required in connection with any advertisement made on an ATM screen or using a telephone response machine.

(4) *Exception for indoor signs.* Paragraph (b)(1) of this section does not apply to advertisements for the payment of overdrafts on indoor signs as described by §230.8(e)(2) of this part, provided that the sign contains a clear and conspicuous statement that fees may apply and that consumers should contact an employee for further information about applicable fees and terms. For purposes of this paragraph (b)(4), an indoor sign does not include an ATM screen.

(c) *Disclosure of account balances.* If an institution discloses balance information to a consumer through an automated system, the balance may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer's account, whether under a service provided in its discretion, a service subject to the Board's Regulation Z (12 CFR part 226), or a service to transfer funds from another account of the consumer. The institution may, at its option, disclose additional account balances that include such additional amounts, if the institution prominently states that any such balance includes such additional amounts and, if applicable, that additional amounts are not available for all transactions.

[70 FR 29593, May 24, 2005, as amended at 74 FR 5593, Jan. 29, 2009; 75 FR 31676, June 4, 2010]

APPENDIX A TO PART 230—ANNUAL PERCENTAGE YIELD CALCULATION

The annual percentage yield measures the total amount of interest paid on an account based on the interest rate and the frequency of compounding.[1] The annual percentage yield is expressed as an annualized rate, based on a 365-day year.[2] Part I of this appendix discusses the annual percentage yield calculations for account disclosures and advertisements, while Part II discusses annual percentage yield earned calculations for periodic statements.

Part I. Annual Percentage Yield for Account Disclosures and Advertising Purposes

In general, the annual percentage yield for account disclosures under §§230.4 and 230.5 and for advertising under §230.8 is an annualized rate that reflects the relationship between the amount of interest that would be earned by the consumer for the term of the account and the amount of principal used to calculate that interest. Special rules apply to accounts with tiered and stepped interest rates, and to certain time accounts with a stated maturity greater than one year.

A. GENERAL RULES

Except as provided in Part I.E. of this appendix, the annual percentage yield shall be calculated by the formula shown below. Institutions shall calculate the annual percentage yield based on the actual number of days in the term of the account. For accounts without a stated maturity date (such as a typical savings or transaction account), the calculation shall be based on an assumed term of 365 days. In determining the total interest figure to be used in the formula, institutions shall assume that all principal and interest remain on deposit for the entire term and that no other transactions (deposits or withdrawals) occur during the term.[3] For time accounts that are offered in multiples of months, institutions may base the number of days on either the actual number of days during the applicable period, or the number of days that would occur for any actual sequence of that many calendar months.

[1] The annual percentage yield reflects only interest and does not include the value of any bonus (or other consideration worth $10 or less) that may be provided to the consumer to open, maintain, increase or renew an account. Interest or other earnings are not to be included in the annual percentage yield if such amounts are determined by circumstances that may or may not occur in the future.

[2] Institutions may calculate the annual percentage yield based on a 365–day or a 366–day year in a leap year.

[3] This assumption shall not be used if an institution requires, as a condition of the account, that consumers withdraw interest during the term. In such a case, the interest (and annual percentage yield calculation) shall reflect that requirement.

If institutions choose to use the latter rule, they must use the same number of days to calculate the dollar amount of interest earned on the account that is used in the annual percentage yield formula (where ''Interest'' is divided by ''Principal'').

The annual percentage yield is calculated by use of the following general formula (''APY'' is used for convenience in the formulas):

$$APY=100\ [(1+Interest/Principal)^{(365/Days\ in\ term)}-1]$$

''Principal'' is the amount of funds assumed to have been deposited at the beginning of the account.

''Interest'' is the total dollar amount of interest earned on the Principal for the term of the account.

''Days in term'' is the actual number of days in the term of the account. When the ''days in term'' is 365 (that is, where the stated maturity is 365 days or where the account does not have a stated maturity), the annual percentage yield can be calculated by use of the following simple formula:

$$APY=100\ (Interest/Principal)$$

Examples

(1) If an institution pays $61.68 in interest for a 365-day year on $1,000 deposited into a NOW account, using the general formula above, the annual percentage yield is 6.17%:

$$APY=100[(1+61.68/1,000)^{(365/365)}-1]$$
$$APY=6.17\%$$

Or, using the simple formula above (since, as an account without a stated term, the term is deemed to be 365 days):

$$APY=100(61.68/1,000)$$
$$APY=6.17\%$$

(2) If an institution pays $30.37 in interest on a $1,000 six-month certificate of deposit (where the six-month period used by the institution contains 182 days), using the general formula above, the annual percentage yield is 6.18%:

$$APY=100[(1+30.37/1,000)^{(365/182)}-1]$$
$$APY=6.18\%$$

B. STEPPED-RATE ACCOUNTS (DIFFERENT RATES APPLY IN SUCCEEDING PERIODS)

For accounts with two or more interest rates applied in succeeding periods (where the rates are known at the time the account is opened), an institution shall assume each interest rate is in effect for the length of time provided for in the deposit contract.

Examples

(1) If an institution offers a $1,000 6-month certificate of deposit on which it pays a 5% interest rate, compounded daily, for the first three months (which contain 91 days), and a 5.5% interest rate, compounded daily, for the next three months (which contain 92 days), the total interest for six months is $26.68 and, using the general formula above, the annual percentage yield is 5.39%:

$$APY=100[(1+26.68/1,000)^{(365/183)}-1]$$
$$APY=5.39\%$$

(2) If an institution offers a $1,000 two-year certificate of deposit on which it pays a 6% interest rate, compounded daily, for the first year, and a 6.5% interest rate, compounded daily, for the next year, the total interest for two years is $133.13, and, using the general formula above, the annual percentage yield is 6.45%:

$$APY=100[(1+133.13/1,000)^{(365/730)}-1]$$
$$APY=6.45\%$$

C. VARIABLE-RATE ACCOUNTS

For variable-rate accounts without an introductory premium or discounted rate, an institution must base the calculation only on the initial interest rate in effect when the account is opened (or advertised), and assume that this rate will not change during the year.

Variable-rate accounts with an introductory premium (or discount) rate must be calculated like a stepped-rate account. Thus, an institution shall assume that: (1) The introductory interest rate is in effect for the length of time provided for in the deposit contract; and (2) the variable interest rate that would have been in effect when the account is opened or advertised (but for the introductory rate) is in effect for the remainder of the year. If the variable rate is tied to an index, the index-based rate in effect at the time of disclosure must be used for the remainder of the year. If the rate is not tied to an index, the rate in effect for existing consumers holding the same account (who are not receiving the introductory interest rate) must be used for the remainder of the year.

For example, if an institution offers an account on which it pays a 7% interest rate, compounded daily, for the first three months (which, for example, contain 91 days), while the variable interest rate that would have been in effect when the account was opened was 5%, the total interest for a 365-day year for a $1,000 deposit is $56.52 (based on 91 days at 7% followed by 274 days at 5%). Using the simple formula, the annual percentage yield is 5.65%:

$$APY=100(56.52/1,000)$$
$$APY=5.65\%$$

D. TIERED-RATE ACCOUNTS (DIFFERENT RATES APPLY TO SPECIFIED BALANCE LEVELS)

For accounts in which two or more interest rates paid on the account are applicable to specified balance levels, the institution must calculate the annual percentage yield in accordance with the method described below that it uses to calculate interest. In all cases, an annual percentage yield (or a

range of annual percentage yields, if appropriate) must be disclosed for each balance tier.

For purposes of the examples discussed below, assume the following:

Interest rate (percent)	Deposit balance required to earn rate
5.25	Up to but not exceeding $2,500.
5.50	Above $2,500 but not exceeding $15,000.
5.75	Above $15,000.

Tiering Method A. Under this method, an institution pays on the full balance in the account the stated interest rate that corresponds to the applicable deposit tier. For example, if a consumer deposits $8,000, the institution pays the 5.50% interest rate on the entire $8,000.

When this method is used to determine interest, only one annual percentage yield will apply to each tier. Within each tier, the annual percentage yield will not vary with the amount of principal assumed to have been deposited.

For the interest rates and deposit balances assumed above, the institution will state three annual percentage yields—one corresponding to each balance tier. Calculation of each annual percentage yield is similar for this type of account as for accounts with a single interest rate. Thus, the calculation is based on the total amount of interest that would be received by the consumer for each tier of the account for a year and the principal assumed to have been deposited to earn that amount of interest.

First tier. Assuming daily compounding, the institution will pay $53.90 in interest on a $1,000 deposit. Using the general formula, for the first tier, the annual percentage yield is 5.39%:

$$APY=100[(1+53.90/1,000)^{(365/365)}-1]$$
$$APY=5.39\%$$

Using the simple formula:

$$APY=100(53.90/1,000)$$
$$APY=5.39\%$$

Second tier. The institution will pay $452.29 in interest on an $8,000 deposit. Thus, using the simple formula, the annual percentage yield for the second tier is 5.65%:

$$APY=100(452.29/8,000)$$
$$APY=5.65\%$$

Third tier. The institution will pay $1,183.61 in interest on a $20,000 deposit. Thus, using the simple formula, the annual percentage yield for the third tier is 5.92%:

$$APY=100(1,183.61/20,000)$$
$$APY=5.92\%$$

Tiering Method B. Under this method, an institution pays the stated interest rate only on that portion of the balance within the specified tier. For example, if a consumer deposits $8,000, the institution pays 5.25% on $2,500 and 5.50% on $5,500 (the difference between $8,000 and the first tier cut-off of $2,500).

The institution that computes interest in this manner must provide a range that shows the lowest and the highest annual percentage yields for each tier (other than for the first tier, which, like the tiers in Method A, has the same annual percentage yield throughout). The low figure for an annual percentage yield range is calculated based on the total amount of interest earned for a year assuming the minimum principal required to earn the interest rate for that tier. The high figure for an annual percentage yield range is based on the amount of interest the institution would pay on the highest principal that could be deposited to earn that same interest rate. If the account does not have a limit on the maximum amount that can be deposited, the institution may assume any amount.

For the tiering structure assumed above, the institution would state a total of five annual percentage yields—one figure for the first tier and two figures stated as a range for the other two tiers.

First tier. Assuming daily compounding, the institution would pay $53.90 in interest on a $1,000 deposit. For this first tier, using the simple formula, the annual percentage yield is 5.39%:

$$APY=100(53.90/1,000)$$
$$APY=5.39\%$$

Second tier. For the second tier, the institution would pay between $134.75 and $841.45 in interest, based on assumed balances of $2,500.01 and $15,000, respectively. For $2,500.01, interest would be figured on $2,500 at 5.25% interest rate plus interest on $.01 at 5.50%. For the low end of the second tier, therefore, the annual percentage yield is 5.39%, using the simple formula:

$$APY=100(134.75/2,500)$$
$$APY=5.39\%$$

For $15,000, interest is figured on $2,500 at 5.25% interest rate plus interest on $12,500 at 5.50% interest rate. For the high end of the second tier, the annual percentage yield, using the simple formula, is 5.61%:

$$APY=100(841.45/15,000)$$
$$APY=5.61\%$$

Thus, the annual percentage yield range for the second tier is 5.39% to 5.61%.

Third tier. For the third tier, the institution would pay $841.45 in interest on the low end of the third tier (a balance of $15,000.01). For $15,000.01, interest would be figured on $2,500 at 5.25% interest rate, plus interest on $12,500 at 5.50% interest rate, plus interest on $.01 at 5.75% interest rate. For the low end of the third tier, therefore, the annual percentage yield (using the simple formula) is 5.61%:

$$APY=100\ (841.45/15,000)$$
$$APY=5.61\%$$

Since the institution does not limit the account balance, it may assume any maximum

amount for the purposes of computing the annual percentage yield for the high end of the third tier. For an assumed maximum balance amount of $100,000, interest would be figured on $2,500 at 5.25% interest rate, plus interest on $12,500 at 5.50% interest rate, plus interest on $85,000 at 5.75% interest rate. For the high end of the third tier, therefore, the annual percentage yield, using the simple formula, is 5.87%.

APY=100 (5,871.79/100,000)
APY=5.87%

Thus, the annual percentage yield range that would be stated for the third tier is 5.61% to 5.87%.

If the assumed maximum balance amount is $1,000,000 instead of $100,000, the institution would use $985,000 rather than $85,000 in the last calculation. In that case, for the high end of the third tier the annual percentage yield, using the simple formula, is 5.91%:

APY=100 (59134.22/1,000,000)
APY=5.91%

Thus, the annual percentage yield range that would be stated for the third tier is 5.61% to 5.91%.

E. Time Accounts with a Stated Maturity Greater than One Year that Pay Interest At Least Annually

1. For time accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, and that require the consumer to withdraw interest at least annually, the annual percentage yield may be disclosed as equal to the interest rate.

Example

(1) If an institution offers a $1,000 two-year certificate of deposit that does not compound and that pays out interest semi-annually by check or transfer at a 6.00% interest rate, the annual percentage yield may be disclosed as 6.00%.

(2) For time accounts covered by this paragraph that are also stepped-rate accounts, the annual percentage yield may be disclosed as equal to the composite interest rate.

Example

(1) If an institution offers a $1,000 three-year certificate of deposit that does not compound and that pays out interest annually by check or transfer at a 5.00% interest rate for the first year, 6.00% interest rate for the second year, and 7.00% interest rate for the third year, the institution may compute the composite interest rate and APY as follows:

(a) Multiply each interest rate by the number of days it will be in effect;

(b) Add these figures together; and

(c) Divide by the total number of days in the term.

(2) Applied to the example, the products of the interest rates and days the rates are in effect are (5.00%×365 days) 1825, (6.00%×365 days) 2190, and (7.00%×365 days) 2555, respectively. The sum of these products, 6570, is divided by 1095, the total number of days in the term. The composite interest rate and APY are both 6.00%.

Part II. Annual Percentage Yield Earned for Periodic Statements

The annual percentage yield earned for periodic statements under §230.6(a) is an annualized rate that reflects the relationship between the amount of interest actually earned on the consumer's account during the statement period and the average daily balance in the account for the statement period. Pursuant to §230.6(b), however, if an institution uses the average daily balance method and calculates interest for a period other than the statement period, the annual percentage yield earned shall reflect the relationship between the amount of interest earned and the average daily balance in the account for that other period.

The annual percentage yield earned shall be calculated by using the following formulas (''APY Earned'' is used for convenience in the formulas):

A. *General formula.*

$$\text{APY Earned}=100\ [(1+\text{Interest earned}/\text{Balance})^{(365/\text{Days in period})}-1]$$

''Balance'' is the average daily balance in the account for the period.

''Interest earned'' is the actual amount of interest earned on the account for the period.

''Days in period'' is the actual number of days for the period.

Examples

(1) Assume an institution calculates interest for the statement period (and uses either the daily balance or the average daily balance method), and the account has a balance of $1,500 for 15 days and a balance of $500 for the remaining 15 days of a 30-day statement period. The average daily balance for the period is $1,000. The interest earned (under either balance computation method) is $5.25 during the period. The annual percentage yield earned (using the formula above) is 6.58%:

$$\text{APY Earned}=100\ [(1+5.25/1{,}000)^{(365/30)}-1]$$
APY Earned=6.58%

(2) Assume an institution calculates interest on the average daily balance for the calendar month and provides periodic statements that cover the period from the 16th of one month to the 15th of the next month. The account has a balance of $2,000 September 1 through September 15 and a balance of $1,000 for the remaining 15 days of September. The average daily balance for the month of September is $1,500, which results in $6.50 in interest earned for the month. The annual percentage yield earned for the month of September would be shown on the

periodic statement covering September 16 through October 15. The annual percentage yield earned (using the formula above) is 5.40%:

APY Earned=100 $[(6.50/1{,}500)^{(365/30)}-1]$

APY Earned=5.40%

(3) Assume an institution calculates interest on the average daily balance for a quarter (for example, the calendar months of September through November), and provides monthly periodic statements covering calendar months. The account has a balance of $1,000 throughout the 30 days of September, a balance of $2,000 throughout the 31 days of October, and a balance of $3,000 throughout the 30 days of November. The average daily balance for the quarter is $2,000, which results in $21 in interest earned for the quarter. The annual percentage yield earned would be shown on the periodic statement for November. The annual percentage yield earned (using the formula above) is 4.28%:

APY Earned=100 $[(1+21/2{,}000)^{(365/91)}-1]$

APY Earned=4.28%

B. *Special formula for use where periodic statement is sent more often than the period for which interest is compounded.*

Institutions that use the daily balance method to accrue interest and that issue periodic statements more often than the period for which interest is compounded shall use the following special formula:

$$\text{APY Earned} = 100\left\{\left[1+\frac{(\text{Interest earned/Balance})}{\text{Days in period}}(\text{Compounding})\right]^{(365/\text{Compounding})}-1\right\}$$

The following definition applies for use in this formula (all other terms are defined under Part II):

''Compounding'' is the number of days in each compounding period.

Assume an institution calculates interest for the statement period using the daily balance method, pays a 5.00% interest rate, compounded annually, and provides periodic statements for each monthly cycle. The account has a daily balance of $1,000 for a 30-day statement period. The interest earned is $4.11 for the period, and the annual percentage yield earned (using the special formula above) is 5.00%:

$$\text{APY Earned} = 100\left\{\left[1+\frac{(4.11/1{,}000)}{30}(365)\right]^{(365/365)}-1\right\}$$

APY Earned=5.00%

[57 FR 43376, Sept. 21, 1992, as amended at 57 FR 46480, Oct. 9, 1992; 58 FR 15082, Mar. 19, 1993; 60 FR 5130, Jan. 26, 1995; Reg. DD, 63 FR 40638, July 30, 1998]

APPENDIX B TO PART 230—MODEL CLAUSES AND SAMPLE FORMS

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B–1—MODEL CLAUSES FOR ACCOUNT DISCLOSURES

(a) Rate information

(i) Fixed-rate accounts

The interest rate on your account is ____% with an annual percentage yield of ____%. You will be paid this rate [for (time period)/ until (date)/ for at least 30 calendar days].

(ii) Variable-rate accounts

The interest rate on your account is ____% with an annual percentage yield of ____%.

Your interest rate and annual percentage yield may change.

Determination of Rate

The interest rate on your account is based on (name of index) [plus/minus a margin of _____].

or

At our discretion, we may change the interest rate on your account.

Frequency of Rate Changes

We may change the interest rate on your account [every (time period)/at any time].

Limitations on Rate Changes

The interest rate for your account will never change by more than ____% each (time period).

The interest rate will never be [less/more] than ____%.

or

The interest rate will never [exceed____% above/drop more than ____% below] the interest rate initially disclosed to you.

(iii) Stepped-rate accounts

The initial interest rate for your account is ____%. You will be paid this rate [for (time period)/until (date)]. After that time, the interest rate for your account will be ____%, and you will be paid this rate [for (time period)/until (date)]. The annual percentage yield for your account is ____%.

(iv) *Tiered-rate accounts*

Tiering Method A

• If your [daily balance/average daily balance] is $____ or more, the interest rate paid on the entire balance in your account will be ____% with an annual percentage yield of ____%.

• If your [daily balance/average daily balance] is more than $____, but less than $____, the interest rate paid on the entire balance in your account will be ____% with an annual percentage yield of ____%.

• If your [daily balance/average daily balance] is $____ or less, the interest rate paid on the entire balance will be ____% with an annual percentage yield of ____%.

Tiering Method B

• An interest rate of ____% will be paid only for that portion of your [daily balance/average daily balance] that is greater than $____. The annual percentage yield for this tier will range from ____% to ____%, depending on the balance in the account.

• An interest rate of ____% will be paid only for that portion of your [daily balance/average daily balance] that is greater than $____, but less than $____. The annual percentage yield for this tier will range from ____% to ____%, depending on the balance in the account.

• If your [daily balance/average daily balance] is $____ or less, the interest rate paid on the entire balance will be ____% with an annual percentage yield of ____%.

(b) Compounding and crediting

(i) Frequency

Interest will be compounded [on a ____ basis/every (time period)]. Interest will be credited to your account [on a ____ basis/every (time period)].

(ii) Effect of closing an account

If you close your account before interest is credited, you will not receive the accrued interest.

(c) Minimum balance requirements

(i) To open the account

You must deposit $_____ to open this account.

(ii) To avoid imposition of fees

A minimum balance fee of $_____ will be imposed every (time period) if the balance in the account falls below $_____ any day of the (time period).

A minimum balance fee of $_____ will be imposed every (time period) if the average daily balance for the (time period) falls below $_____. The average daily balance is calculated by adding the principal in the account for each day of the period and dividing that figure by the number of days in the period.

(iii) To obtain the annual percentage yield disclosed

You must maintain a minimum balance of $_____ in the account each day to obtain the disclosed annual percentage yield.

You must maintain a minimum average daily balance of $_____ to obtain the disclosed annual percentage yield. The average daily balance is calculated by adding the principal in the account for each day of the period and dividing that figure by the number of days in the period.

(d) Balance computation method

(i) Daily balance method

We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

(ii) Average daily balance method

We use the average daily balance method to calculate interest on your account. This method applies a periodic rate to the average daily balance in the account for the period. The average daily balance is calculated by adding the principal in the account for each day of the period and dividing that figure by the number of days in the period.

(e) Accrual of interest on noncash deposits

Interest begins to accrue no later than the business day we receive credit for the deposit of noncash items (for example, checks).

or

Interest begins to accrue on the business day you deposit noncash items (for example, checks).

(f) Fees

The following fees may be assessed against your account:

_____$_____
_____$_____
_____$_____
_____(*conditions for imposing fee*) $_____
_____% of _____.

(g) Transaction limitations

The minimum amount you may [withdraw/write a check for] is $_____.

You may make _____ [deposits into/withdrawals from] your account each (time period).

You may not make [deposits into/withdrawals from] your account until the maturity date.

(h) Disclosures relating to time accounts

(i) Time requirements

Your account will mature on (date).

Your account will mature in (time period).

(ii) Early withdrawal penalties

We [will/may] impose a penalty if you withdraw [any/all] of the [deposited funds/principal] before the maturity date. The fee imposed will equal _____ days/week[s]/month[s] of interest.

or

We [will/may] impose a penalty of $_____ if you withdraw [any/all] of the [deposited funds/principal] before the maturity date.

If you withdraw some of your funds before maturity, the interest rate for the remaining funds in your account will be _____% with an annual percentage yield of _____%.

(iii) Withdrawal of interest prior to maturity

The annual percentage yield assumes interest will remain on deposit until maturity. A withdrawal will reduce earnings.

(iv) Renewal policies

(1) Automatically renewable time accounts

This account will automatically renew at maturity.

You will have [_____ calendar/business] days after the maturity date to withdraw funds without penalty.

or

There is no grace period following the maturity of this account to withdraw funds without penalty.

(2) Non-automatically renewable time accounts

This account will not renew automatically at maturity. If you do not renew the account, your deposit will be placed in [an interest-bearing/a noninterest-bearing] account.

(v) Required interest distribution.

This account requires the distribution of interest and does not allow interest to remain in the account.

(i) Bonuses

You will [be paid/receive] [$_____ /(description of item)] as a bonus [when you open the account/on (date) _____].

You must maintain a minimum [daily balance/average daily balance] of $_____ to obtain the bonus.

To earn the bonus, [$_____ /your entire principal] must remain on deposit [for (time period)/until (date)_____].

B–2—MODEL CLAUSES FOR CHANGE IN TERMS

On (date), the cost of (type of fee) will increase to $_____.

On (date), the interest rate on your account will decrease to _____% with an annual percentage yield of _____%.

On (date), the minimum [daily balance/average daily balance] required to avoid imposition of a fee will increase to $_____.

B–3—MODEL CLAUSES FOR PRE-MATURITY NOTICES FOR TIME ACCOUNTS

(a) Automatically renewable time accounts with maturities of one year or less but longer than one month

Your account will mature on (date).

If the account renews, the new maturity date will be (date).

The interest rate for the renewed account will be _____% with an annual percentage yield of _____%.

or

The interest rate and annual percentage yield have not yet been determined. They will be available on (date). Please call (phone number) to learn the interest rate and annual percentage yield for your new account.

(b) Non-automatically renewable time accounts with maturities longer than one year

Your account will mature on (date).

If you do not renew the account, interest [will/will not] be paid after maturity.

B-4 – SAMPLE FORM (MULTIPLE ACCOUNTS)

BANK ABC

DISCLOSURE OF ACCOUNT TERMS

This disclosure contains information about your:

X NOW Account

- Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate on your account daily. The interest rate for your account will never be less than 2.00%.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- Interest is compounded daily and credited on the last day of each month. If you close your account before interest is credited, you will not receive the accrued interest.
- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

___ Passbook Savings Account

- The interest rate on your account will be paid for at least 30 days.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- Interest is compounded daily and credited on the last day of each month. If you close your account before interest is credited, you will not receive the accrued interest.
- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Additional disclosures for your account are included on the attached sheets.

__ Money Market Account

- Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate on your account daily. The interest rate on your account will never be less than 3.00%.
- You may make six (6) transfers from your account, but only three (3) may be payments by check to third parties.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- Interest is compounded daily and credited on the last day of each month. If you close your account before interest is credited, you will not receive the accrued interest.
- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

___ Certificates of Deposit

- The interest rate for your account will be paid until the maturity date of your certificate (_____).
- Interest is compounded daily and will be credited to your account monthly.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- This account will automatically renew at maturity. You will have ten (10) calendar days from the maturity date to withdraw your funds without being charged a penalty.
- After the account is opened, you may not make deposits into or withdrawals from this account until the maturity date.
- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.
- If any of the deposit is withdrawn before the maturity date, a penalty as shown below will be imposed:

Term	Early Withdrawal Penalty
3-month CD	30 days interest
6-month CD	90 days interest
1-year CD	120 days interest
2-year CD	180 days interest

Additional disclosures for your account are included on the attached sheets.

(Fee Schedule Insert)

BANK ABC
FEE SCHEDULE

NOW Account

- Monthly minimum balance fee if the daily balance drops below $ 500 any day of the month . . . . . $ 7.50

Passbook Savings Account

- Monthly minimum balance fee if the daily balance drops below $ 100 any day of the month . . . . . $ 6.00
- You may make three (3) withdrawals per quarter
  Each subsequent withdrawal . . . . . $ 2.00

Money Market Account

- Monthly minimum balance fee if the daily balance drops below $ 1,000 any day of the month . . . . . $ 5.00

Other Account Fees

- Deposited checks returned . . . . . $ 5.00
- Balance inquiries (at a branch or at an ATM) . . . . . $ 1.00
- Check printing ♦ . . . . . (Fee depends on style of check ordered)
- Your check returned for insufficient funds (per check) ♦ . . . . . $ 16.00
- Stop payment request (per request) ♦ . . . . . $ 12.50
- Certified check (per check) ♦ . . . . . $ 10.00

♦ Fee does not apply to Passbook Savings Accounts or Certificates of Deposit.

Additional disclosures for your account are included on the attached sheet.

(Rate Sheet Insert)

BANK ABC
RATE SHEET

ACCOUNT TYPE	MINIMUM DEPOSIT TO OPEN ACCOUNT	MINIMUM BALANCE* TO OBTAIN ANNUAL PERCENTAGE YIELD	INTEREST RATE	ANNUAL PERCENTAGE YIELD
NOW	$ 500	$ 2,500	4.00%	4.08%
PASSBOOK SAVINGS	$ 100	$ 500	3.50%	3.56%
MONEY MARKET	$ 1,000	$ 1,000	4.15%	4.24%
3-MONTH CD	$ 1,000	$ 1,000	4.20%	4.29%
6-MONTH CD	$ 1,000	$ 1,000	4.25%	4.34%
1-YEAR CD	$ 1,000	$ 1,000	5.20%	5.34%
2-YEAR CD	$ 1,000	$ 1,000	5.80%	5.97%

* Daily balance (the amount of principal in the account each day)

B-5 – SAMPLE FORM (NOW ACCOUNT)

BANK XYZ

DISCLOSURE OF INTEREST, FEES AND ACCOUNT TERMS

NOW ACCOUNT

Fee schedule

- **Monthly minimum balance fee if the daily balance drops below $1,000 any day of the month . . . . . $ 7.00**
- **Fee to stop payment of a check . . . . . $ 12.50**
- **Fee for check returns (insufficient funds – per check) . . . . . $ 16.00**
- **Certified check (per check) . . . . . $ 10.00**
- **Fee for initial check printing (per 200) . . . . . $ 12.00**
  (Cost for check printing varies depending on the style of checks ordered.)

Rate information

- The interest rate for your account is 4.00 % with an annual percentage yield of 4.08 %. Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate for your account at any time. The interest rate for your account will never be less than 2% each year.

Minimum balance requirements

- You must deposit $500 to open this account.
- You must maintain a minimum balance of $2,500 in the account each day to obtain the annual percentage yield listed above.

Balance computation method

- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Compounding and crediting

- Interest for your account will be compounded daily and credited to your account on the last day of each month.

Accrual of interest on deposits other than cash

- Interest begins to accrue on the business day you deposit noncash items (for example, checks).

B-6 -- SAMPLE FORM (TIERED-RATE MONEY MARKET ACCOUNT)

BANK ABC

DISCLOSURE OF INTEREST, FEES AND ACCOUNT TERMS

MONEY MARKET ACCOUNT

Fee schedule

- Check returned for insufficient funds (per check) $16.00
- Stop payment request (per request) $12.50
- Certified check (per check) $10.00
- Check printing . . . . . (Fee depends on style of checks ordered)

Rate information

- If your daily balance is $15,000 or more, the interest rate paid on the entire balance in your account will be _5.75_ % with an annual percentage yield of _5.92_ %.
- If your daily balance is more than $2,500, but less than $15,000, the interest rate paid on the entire balance in your account will be _5.50_ % with an annual percentage yield of _5.65_ %.
- If your daily balance is $2,500 or less, the interest rate paid on the entire balance will be _5.25_ % with an annual percentage yield of _5.39_ %.
- Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate for your account at any time. The interest rate for your account will never be less than 2.00%.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- Interest is compounded daily and credited on the last day of each month.

Minimum balance requirements

- You must deposit $1,000 to open this account.
- A minimum balance fee of $5.00 will be imposed every month if the balance in your account falls below $1,000 any day of the month.

Balance computation method

- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Transaction limitations

- You may make six (6) transfers from your account, but only three (3) may be payments by check to third parties.

B-7 -- SAMPLE FORM (CERTIFICATE OF DEPOSIT)

XYZ SAVINGS BANK
1 YEAR CERTIFICATE OF DEPOSIT

Rate information

The interest rate for your account is _5.20_ % with an annual percentage yield of _5.34_ %. You will be paid this rate until the maturity date of the certificate. Your certificate will mature on _September 30, 1993_. The annual percentage yield assumes interest remains on deposit until maturity. A withdrawal will reduce earnings.

Interest for your account will be compounded daily and credited to your account on the last day of each month.

Interest begins to accrue on the business day you deposit any noncash item (for example, checks).

Minimum balance requirements

You must deposit $1,000 to open this account.

You must maintain a minimum balance of $1,000 in your account every day to obtain the annual percentage yield listed above.

Balance computation method

We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Transaction limitations

After the account is opened, you may not make deposits into or withdrawals from the account until the maturity date.

Early withdrawal penalty

If you withdraw any principal before the maturity date, a penalty equal to three months interest will be charged to your account.

Renewal policy

This account will be automatically renewed at maturity. You have a grace period of ten (10) calendar days after the maturity date to withdraw the funds without being charged a penalty.

B-8 -- SAMPLE FORM (CERTIFICATE OF DEPOSIT ADVERTISEMENT)

BANK XYZ

ALWAYS OFFERS YOU COMPETITIVE CD RATES!!

CERTIFICATES OF DEPOSIT	ANNUAL PERCENTAGE YIELD (APY)
5 YEAR	6.31%
4 YEAR	6.07%
3 YEAR	5.72%
2 YEAR	5.52%
1 YEAR	4.54%
6 MONTH	4.34%
90 DAY	4.21%
	APYs are offered on accounts opened from 5/9/93 through 5/18/93.

The minimum balance to open an account and obtain the APY is $1,000.
A penalty may be imposed for early withdrawal.

For more information call:

202-123-1234

B-9 -- SAMPLE FORM (MONEY MARKET ACCOUNT ADVERTISEMENT)

BANK XYZ

ALWAYS OFFERS YOU COMPETITIVE RATES!!

MONEY MARKET ACCOUNTS	ANNUAL PERCENTAGE YIELD (APY)
Accounts with a balance of $5,000 or less	5.07%*
Accounts with a balance over $5,000	5.57%*
APYs are accurate as of April 30, 1993	*The rates may change after the account is opened.

Fees could reduce the earnings on the account.

For more information call:

202-123-1234

B-10 Aggregate Overdraft and Returned Item Fees Sample Form

	Total For This Period	Total Year-to-Date
Total Overdraft Fees	$60.00	$150.00
Total Returned Item Fees	$0.00	$30.00

[57 FR 43376, Sept. 21, 1992, as amended at 57 FR 46480, Oct. 9, 1992; Reg. DD, 60 FR 5131, Jan. 26, 1995; 74 FR 5593, Jan. 29, 2009; 74 FR 17768, Apr. 17, 2009]

APPENDIX C TO PART 230—EFFECT ON STATE LAWS

(a) Inconsistent Requirements

State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. A state law is inconsistent if it requires a depository institution to make disclosures or take actions that contradict the requirements of the federal law. A state law is also contradictory if it requires the use of the same term to represent a different amount or a different meaning than the federal law, requires the use of a term different from that required in the federal law to describe the same item, or permits a method of calculating interest on an account different from that required in the federal law.

(b) Preemption Determinations

A depository institution, state, or other interested party may request the Board to determine whether a state law requirement is inconsistent with the federal requirements. A request for a determination shall be in writing and addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551. Notice that the Board intends to make a determination (either on request or on its own motion) will be published in the FEDERAL REGISTER, with an opportunity for public comment unless the Board finds that notice and opportunity for comment would be impracticable, unnecessary, or contrary to the public interest and publishes its reasons for such decision. Notice of a final determination will be published in the FEDERAL REGISTER and furnished to the party who made the request and to the appropriate state official.

(c) Effect of Preemption Determinations

After the Board determines that a state law is inconsistent, a depository institution may not make disclosures using the inconsistent term or take actions relying on the inconsistent law.

(d) Reversal of Determination

The Board reserves the right to reverse a determination for any reason bearing on the coverage or effect of state or federal law. Notice of reversal of a determination will be published in the FEDERAL REGISTER and a copy furnished to the appropriate state official.

APPENDIX D TO PART 230—ISSUANCE OF STAFF INTERPRETATIONS

Officials in the Board's Division of Consumer and Community Affairs are authorized to issue official staff interpretations of this part. These interpretations provide the protections afforded under section 271(f) of the act. Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in an official commentary to this part, which will be amended periodically. No staff interpretations will be issued approving depository institutions' forms, statements, or calculation tools or methods.

SUPPLEMENT I TO PART 230—OFFICIAL STAFF INTERPRETATIONS

INTRODUCTION

1. *Official status.* This commentary is the means by which the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation DD. Good faith compliance with this commentary affords protection from liability under section 271(f) of the Truth in Savings Act.

Section 230.1 Authority, purpose, coverage, and effect on state laws

(c) Coverage

1. *Foreign applicability.* Regulation DD applies to all depository institutions, except credit unions, that offer deposit accounts to residents (including resident aliens) of any state as defined in §230.2(r). Accounts held in an institution located in a state are covered, even if funds are transferred periodically to a location outside the United States. Accounts held in an institution located outside the United States are not covered, even if held by a U.S. resident.

2. *Persons who advertise accounts.* Persons who advertise accounts are subject to the advertising rules. For example, if a deposit broker places an advertisement offering consumers an interest in an account at a depository institution, the advertising rules apply to the advertisement, whether the account is to be held by the broker or directly by the consumer.

Section 230.2 Definitions

(a) Account

1. *Covered accounts.* Examples of accounts subject to the regulation are:

i. Interest-bearing and noninterest-bearing accounts

ii. Deposit accounts opened as a condition of obtaining a credit card

iii. Accounts denominated in a foreign currency

iv. Individual retirement accounts (IRAs) and simplified employee pension (SEP) accounts

v. Payable on death (POD) or ''Totten trust'' accounts

2. *Other accounts.* Examples of accounts not subject to the regulation are:

i. Mortgage escrow accounts for collecting taxes and property insurance premiums

ii. Accounts established to make periodic disbursements on construction loans

iii. Trust accounts opened by a trustee pursuant to a formal written trust agreement (not merely declarations of trust on a signature card such as a ''Totten trust,'' or an IRA and SEP account)

iv. Accounts opened by an executor in the name of a decedent's estate

3. *Other investments*. The term ''account'' does not apply to all products of a depository institution. Examples of products not covered are:

i. Government securities

ii. Mutual funds

iii. Annuities

iv. Securities or obligations of a depository institution

v. Contractual arrangements such as repurchase agreements, interest rate swaps, and bankers acceptances

(b) Advertisement

1. *Covered messages*. Advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to prospective customers the availability of consumer accounts—such as:

i. Telephone solicitations

ii. Messages on automated teller machine (ATM) screens

iii. Messages on a computer screen in an institution's lobby (including any printout) other than a screen viewed solely by the institution's employee

iv. Messages in a newspaper, magazine, or promotional flyer or on radio

v. Messages that are provided along with information about the consumer's existing account and that promote another account at the institution

2. *Other messages*. Examples of messages that are not advertisements are:

i. Rate sheets in a newspaper, periodical, or trade journal (unless the depository institution, or a deposit broker offering accounts at the institution, pays a fee for or otherwise controls publication)

ii. In-person discussions with consumers about the terms for a specific account

iii. For purposes of §230.8(b) of this part through §230.8(e) of this part, information given to consumers about existing accounts, such as current rates recorded on a voice-response machine or notices for automatically renewable time account sent before renewal

iv. Information about a particular transaction in an existing account

v. Disclosures required by federal or other applicable law

vi. A deposit account agreement

(f) Bonus

1. *Examples*. Bonuses include items of value, other than interest, offered as incentives to consumers, such as an offer to pay the final installment deposit for a holiday club account. Items that are not a bonus include discount coupons for goods or services at restaurants or stores.

2. *De minimis rule*. Items with a *de minimis* value of $10 or less are not bonuses. Institutions may rely on the valuation standard used by the Internal Revenue Service to determine if the value of the item is *de minimis*. Examples of items of *de minimis* value are:

i. Disability insurance premiums valued at an amount of $10 or less per year

ii. Coffee mugs, T-shirts or other merchandise with a market value of $10 or less

3. *Aggregation*. In determining if an item valued at $10 or less is a bonus, institutions must aggregate per account per calendar year items that may be given to consumers. In making this determination, institutions aggregate per account only the market value of items that may be given for a specific promotion. To illustrate, assume an institution offers in January to give consumers an item valued at $7 for each calendar quarter during the year that the average account balance in a negotiable order of withdrawal (NOW) account exceeds $10,000. The bonus rules are triggered, since consumers are eligible under the promotion to receive up to $28 during the year. However, the bonus rules are not triggered if an item valued at $7 is offered to consumers opening a NOW account during the month of January, even though in November the institution introduces a new promotion that includes, for example, an offer to existing NOW account holders for an item valued at $8 for maintaining an average balance of $5,000 for the month.

4. *Waiver or reduction of a fee or absorption of expenses*. Bonuses do not include value that consumers receive through the waiver or reduction of fees (even if the fees waived exceed $10) for banking-related services such as the following:

i. A safe deposit box rental fee for consumers who open a new account

ii. Fees for travelers checks for account holders

iii. Discounts on interest rates charged for loans at the institution

(h) Consumer

1. *Professional capacity*. Examples of accounts held by a natural person in a professional capacity for another are attorney-client trust accounts and landlord-tenant security accounts.

2. *Other accounts*. Accounts not held in a professional capacity include accounts held by an individual for a child under the Uniform Gifts to Minors Act.

3. *Sole proprietors*. Accounts held by individuals as sole proprietors are not covered.

4. *Retirement plans*. IRAs and SEP accounts are consumer accounts to the extent that funds are invested in covered accounts. But Keogh accounts are not subject to the regulation.

(j) Depository institution and institution

1. *Foreign institutions*. Branches of foreign institutions located in the United States are subject to the regulation if they offer deposit accounts to consumers. Edge Act and Agreement corporations, and agencies of foreign institutions, are not depository institutions for purposes of this regulation.

(k) Deposit broker

1. *General*. A deposit broker is a person who is in the business of placing or facilitating the placement of deposits in an institution, as defined by the Federal Deposit Insurance Act (12 U.S.C. 29(g)).

(n) Interest

1. *Relation to bonuses*. Bonuses are not interest for purposes of this regulation.

(p) Passbook savings account

1. *Relation to Regulation E*. Passbook savings accounts include accounts accessed by preauthorized electronic fund transfers to the account (as defined in 12 CFR §205.2(j)), such as an account that receives direct deposit of social security payments. Accounts permitting access by other electronic means are not ''passbook saving accounts'' and must comply with the requirements of §230.6 if statements are sent four or more times a year.

(q) Periodic statement

1. *Examples*. Periodic statements do not include:

i. Additional statements provided solely upon request

ii. General service information such as a quarterly newsletter or other correspondence describing available services and products

(t) Tiered-rate account

1. *Time accounts*. Time accounts paying different rates based solely on the amount of the initial deposit are not tiered-rate accounts.

2. *Minimum balance requirements*. A requirement to maintain a minimum balance to earn interest does not make an account a tiered-rate account.

(u) Time account

1. *Club accounts*. Although club accounts typically have a maturity date, they are not time accounts unless they also require a penalty of at least seven days' interest for withdrawals during the first six days after the account is opened.

2. *Relation to Regulation D*. Regulation D permits in limited circumstances the withdrawal of funds without penalty during the first six days after a ''time deposit'' is opened. (See 12 CFR §204.2(c)(1)(i).) But the fact that a consumer makes a withdrawal as permitted by Regulation D does not disqualify the account from being a time account for purposes of this regulation.

(v) Variable-rate account

1. *General*. A certificate of deposit permitting one or more rate adjustments prior to maturity at the consumer's option is a variable-rate account.

Section 230.3 General disclosure requirements

(a) Form

1. *Design requirements*. Disclosures must be presented in a format that allows consumers to readily understand the terms of their account. Institutions are not required to use a particular type size or typeface, nor are institutions required to state any term more conspicuously than any other term. Disclosures may be made:

i. In any order

ii. In combination with other disclosures or account terms

iii. In combination with disclosures for other types of accounts, as long as it is clear to consumers which disclosures apply to their account

iv. On more than one page and on the front and reverse sides

v. By using inserts to a document or filling in blanks

vi. On more than one document, as long as the documents are provided at the same time

2. *Consistent terminology*. Institutions must use consistent terminology to describe terms or features required to be disclosed. For example, if an institution describes a monthly fee (regardless of account activity) as a ''monthly service fee'' in account-opening disclosures, the periodic statement and change-in-term notices must use the same terminology so that consumers can readily identify the fee.

(b) General

1. *Specificity of legal obligation*. Institutions may refer to the calendar month or to roughly equivalent intervals during a calendar year as a ''month.''

(c) Relation to Regulation E

1. *General rule*. Compliance with Regulation E (12 CFR part 205) is deemed to satisfy the disclosure requirements of this regulation, such as when:

i. An institution changes a term that triggers a notice under Regulation E, and uses the timing and disclosure rules of Regulation E for sending change-in-term notices

ii. Consumers add an ATM access feature to an account, and the institution provides disclosures pursuant to Regulation E, including disclosure of fees (See 12 CFR §205.7.)

iii. An institution complying with the timing rules of Regulation E discloses at the same time fees for electronic services (such as for balance inquiry fees at ATMs) required to be disclosed by this regulation but not by Regulation E

iv. An institution relies on Regulation E's rules regarding disclosure of limitations on the frequency and amount of electronic fund transfers, including security-related exceptions. But any limitations on ''intra-institutional transfers'' to or from the consumer's other accounts during a given time period

must be disclosed, even though intra-institutional transfers are exempt from Regulation E.

(e) Oral response to inquiries

1. *Application of rule.* Institutions are not required to provide rate information orally.

2. *Relation to advertising.* The advertising rules do not cover an oral response to a question about rates.

3. *Existing accounts.* This paragraph does not apply to oral responses about rate information for existing accounts. For example, if a consumer holding a one-year certificate of deposit (CD) requests interest rate information about the CD during the term, the institution need not disclose the annual percentage yield.

(f) Rounding and accuracy rules for rates and yields

(f)(1) Rounding

1. *Permissible rounding.* Examples of permissible rounding are an annual percentage yield calculated to be 5.644%, rounded down and disclosed as 5.64%; 5.645% rounded up and disclosed as 5.65%.

(f)(2) Accuracy

1. *Annual percentage yield and annual percentage yield earned.* The tolerance for annual percentage yield and annual percentage yield earned calculations is designed to accommodate inadvertent errors. Institutions may not purposely incorporate the tolerance into their calculation of yields.

Section 230.4 Account disclosures

(a) Delivery of account disclosures

(a)(1) Account opening

1. *New accounts.* New account disclosures must be provided when:

i. A time account that does not automatically rollover is renewed by a consumer

ii. A consumer changes a term for a renewable time account (see §230.5(b)–5 regarding disclosure alternatives)

iii. An institution transfers funds from an account to open a new account not at the consumer's request, unless the institution previously gave account disclosures and any change-in-term notices for the new account

iv. An institution accepts a deposit from a consumer to an account that the institution had deemed closed for the purpose of treating accrued but uncredited interest as forfeited interest (see §230.7(b)–3)

2. *Acquired accounts.* New account disclosures need not be given when an institution acquires an account through an acquisition of or merger with another institution (but see §230.5(a) regarding advance notice requirements if terms are changed).

(a)(2) Requests

(a)(2)(i)

1. *Inquiries versus requests.* A response to an oral inquiry (by telephone or in person) about rates and yields or fees does not trigger the duty to provide account disclosures. But when consumers ask for written information about an account (whether by telephone, in person, or by other means), the institution must provide disclosures unless the account is no longer offered to the public.

2. *General requests.* When responding to a consumer's general request for disclosures about a type of account (a NOW account, for example), an institution that offers several variations may provide disclosures for any one of them.

3. *Timing for response.* Ten business days is a reasonable time for responding to requests for account information that consumers do not make in person, including requests made by electronic means (such as by electronic mail).

4. *Use of electronic means.* If a consumer who is not present at the institution makes a request for account disclosures, including a request made by telephone, e-mail, or via the institution's Web site, the institution may send the disclosures in paper form or, if the consumer agrees, may provide the disclosures electronically, such as to an e-mail address that the consumer provides for that purpose, or on the institution's Web site, without regard to the consumer consent or other provisions of the E-Sign Act. The regulation does not require an institution to provide, nor a consumer to agree to receive, the disclosures required by §230.4(a)(2) in electronic form.

(a)(2)(ii)(A)

1. *Recent rates.* Institutions comply with this paragraph if they disclose an interest rate and annual percentage yield accurate within the seven calendar days preceding the date they send the disclosures.

(a)(2)(ii)(B)

1. *Term.* Describing the maturity of a time account as ''1 year'' or ''6 months,'' for example, illustrates a statement of the maturity of a time account as a term rather than a date (''January 10, 1995'').

(b) Content of account disclosures

(b)(1) Rate information

(b)(1)(i) Annual percentage yield and interest rate

1. *Rate disclosures.* In addition to the interest rate and annual percentage yield, institutions may disclose a periodic rate corresponding to the interest rate. No other rate or yield (such as ''tax effective yield'') is permitted. If the annual percentage yield is the same as the interest rate, institutions may disclose a single figure but must use both terms.

2. *Fixed-rate accounts.* For fixed-rate time accounts paying the opening rate until maturity, institutions may disclose the period of time the interest rate will be in effect by stating the maturity date. (See appendix B, B–7—Sample Form.) For other fixed-rate accounts, institutions may use a date (''This rate will be in effect through May 4, 1995'') or a period (''This rate will be in effect for at least 30 days'').

3. *Tiered-rate accounts.* Each interest rate, along with the corresponding annual percentage yield for each specified balance level (or range of annual percentage yields, if appropriate), must be disclosed for tiered-rate accounts. (See appendix A, Part I, Paragraph D.)

4. *Stepped-rate accounts.* A single composite annual percentage yield must be disclosed for stepped-rate accounts. (See appendix A, Part I, Paragraph B.) The interest rates and the period of time each will be in effect also must be provided. When the initial rate offered for a specified time on a variable-rate account is higher or lower than the rate that would otherwise be paid on the account, the calculation of the annual percentage yield must be made as if for a stepped-rate account. (See appendix A, Part I, Paragraph C.)

(b)(1)(ii) Variable rates

(b)(1)(ii)(B)

1. *Determining interest rates.* To disclose how the interest rate is determined, institutions must:

i. Identify the index and specific margin, if the interest rate is tied to an index

ii. State that rate changes are within the institution's discretion, if the institution does not tie changes to an index

(b)(1)(ii)(C)

1. *Frequency of rate changes.* An institution reserving the right to change rates at its discretion must state the fact that rates may change at any time.

(b)(1)(ii)(D)

1. *Limitations.* A floor or ceiling on rates or on the amount the rate may decrease or increase during any time period must be disclosed. Institutions need not disclose the absence of limitations on rate changes.

(b)(2) Compounding and crediting

(b)(2)(ii) Effect of closing an account

1. *Deeming an account closed.* An institution may, subject to state or other law, provide in its deposit contracts the actions by consumers that will be treated as closing the account and that will result in the forfeiture of accrued but uncredited interest. An example is the withdrawal of all funds from the account prior to the date that interest is credited.

(b)(3) Balance information

(b)(3)(ii) Balance computation method

1. *Methods and periods.* Institutions may use different methods or periods to calculate minimum balances for purposes of imposing a fee (the daily balance for a calendar month, for example) and accruing interest (the average daily balance for a statement period, for example). Each method and corresponding period must be disclosed.

(b)(3)(iii) When interest begins to accrue

1. *Additional information.* Institutions may disclose additional information such as the time of day after which deposits are treated as having been received the following business day, and may use additional descriptive terms such as ''ledger'' or ''collected'' balances to disclose when interest begins to accrue.

(b)(4) Fees

1. *Covered fees.* The following are types of fees that must be disclosed:

i. Maintenance fees, such as monthly service fees

ii. Fees to open or to close an account

iii. Fees related to deposits or withdrawals, such as fees for use of the institution's ATMs

iv. Fees for special services, such as stop-payment fees, fees for balance inquiries or verification of deposits, fees associated with checks returned unpaid, and fees for regularly sending to consumers checks that otherwise would be held by the institution

2. *Other fees.* Institutions need not disclose fees such as the following:

i. Fees for services offered to account and nonaccount holders alike, such as travelers checks and wire transfers (even if different amounts are charged to account and nonaccount holders)

ii. Incidental fees, such as fees associated with state escheat laws, garnishment or attorneys fees, and fees for photocopying

3. *Amount of fees.* Institutions must state the amount and conditions under which a fee may be imposed. Naming and describing the fee (such as ''$4.00 monthly service fee'') will typically satisfy these requirements.

4. *Tied-accounts.* Institutions must state if fees that may be assessed against an account are tied to other accounts at the institution. For example, if an institution ties the fees payable on a NOW account to balances held in the NOW account and a savings account, the NOW account disclosures must state that fact and explain how the fee is determined.

5. *Fees for overdrawing an account.* Under §230.4(b)(4) of this part, institutions must disclose the conditions under which a fee may be imposed. In satisfying this requirement institutions must specify the categories of transactions for which an overdraft fee may be imposed. An exhaustive list of transactions is not required. It is sufficient for an institution to state that the fee applies to overdrafts ''created by check, in-person withdrawal, ATM withdrawal, or other electronic means,'' as applicable. Disclosing a fee ''for overdraft items'' would not be sufficient.

(b)(5) Transaction limitations

1. *General rule.* Examples of limitations on the number or dollar amount of deposits or withdrawals that institutions must disclose are:

i. Limits on the number of checks that may be written on an account within a given time period

ii. Limits on withdrawals or deposits during the term of a time account

iii. Limitations required by Regulation D on the number of withdrawals permitted

from money market deposit accounts by check to third parties each month. Institutions need not disclose reservations of right to require notices for withdrawals from accounts required by federal or state law.

(b)(6) Features of time accounts

(b)(6)(i) Time requirements

1. *''Callable'' time accounts.* In addition to the maturity date, an institution must state the date or the circumstances under which it may redeem a time account at the institution's option (a ''callable'' time account).

(b)(6)(ii) Early withdrawal penalties

1. *General.* The term ''penalty'' may but need not be used to describe the loss of interest that consumers may incur for early withdrawal of funds from time accounts.

2. *Examples.* Examples of early withdrawal penalties are:

i. Monetary penalties, such as ''$10.00'' or ''seven days' interest plus accrued but uncredited interest''

ii. Adverse changes to terms such as a lowering of the interest rate, annual percentage yield, or compounding frequency for funds remaining on deposit

iii. Reclamation of bonuses

3. *Relation to rules for IRAs or similar plans.* Penalties imposed by the Internal Revenue Code for certain withdrawals from IRAs or similar pension or savings plans are not early withdrawal penalties for purposes of this regulation.

4. *Disclosing penalties.* Penalties may be stated in months, whether institutions assess the penalty using the actual number of days during the period or using another method such as a number of days that occurs in any actual sequence of the total calendar months involved. For example, stating ''one month's interest'' is permissible, whether the institution assesses 30 days' interest during the month of April, or selects a time period between 28 and 31 days for calculating the interest for all early withdrawals regardless of when the penalty is assessed.

(b)(6)(iv) Renewal policies

1. *Rollover time accounts.* Institutions offering a grace period on time accounts that automatically renew need not state whether interest will be paid if the funds are withdrawn during the grace period.

2. *Nonrollover time accounts.* Institutions paying interest on funds following the maturity of time accounts that do not renew automatically need not state the rate (or annual percentage yield) that may be paid. (See appendix B, Model Clause B–1(h)(iv)(2).)

Section 230.5 Subsequent disclosures

(a) Change in terms

(a)(1) Advance notice required

1. *Form of notice.* Institutions may provide a change-in-term notice on or with a periodic statement or in another mailing. If an institution provides notice through revised account disclosures, the changed term must be highlighted in some manner. For example, institutions may note that a particular fee has been changed (also specifying the new amount) or use an accompanying letter that refers to the changed term.

2. *Effective date.* An example of language for disclosing the effective date of a change is ''As of November 21, 1994.''

3. *Terms that change upon the occurrence of an event.* An institution offering terms that will automatically change upon the occurrence of a stated event need not send an advance notice of the change provided the institution fully describes the conditions of the change in the account opening disclosures (and sends any change-in-term notices regardless of whether the changed term affects that consumer's account at that time).

4. *Examples.* Examples of changes not requiring an advance change-in-terms notice are:

i. The termination of employment for consumers for whom account maintenance or activity fees were waived during their employment by the depository institution

ii. The expiration of one year in a promotion described in the account opening disclosures to ''waive $4.00 monthly service charges for one year''

(a)(2) No notice required

(a)(2)(ii) Check printing fees

1. *Increase in fees.* A notice is not required for an increase in fees for printing checks (or deposit and withdrawal slips) even if the institution adds some amount to the price charged by the vendor.

(b) Notice before maturity for time accounts longer than one month that renew automatically

1. *Maturity dates on nonbusiness days.* In determining the term of a time account, institutions may disregard the fact that the term will be extended beyond the disclosed number of days because the disclosed maturity falls on a nonbusiness day. For example, a holiday or weekend may cause a ''one-year'' time account to extend beyond 365 days (or 366, in a leap year) or a ''one-month'' time account to extend beyond 31 days.

2. *Disclosing when rates will be determined.* Ways to disclose when the annual percentage yield will be available include the use of:

i. A specific date, such as ''October 28''

ii. A date that is easily determinable, such as ''the Tuesday before the maturity date stated on this notice'' or ''as of the maturity date stated on this notice''

3. *Alternative timing rule.* Under the alternative timing rule, an institution offering a 10-day grace period would have to provide the disclosures at least 10 days prior to the scheduled maturity date.

4. *Club accounts.* If consumers have agreed to the transfer of payments from another account to a club time account for the next club period, the institution must comply

with the requirements for automatically renewable time accounts—even though consumers may withdraw funds from the club account at the end of the current club period.

5. *Renewal of a time account.* In the case of a change in terms that becomes effective if a rollover time account is subsequently renewed:

i. If the change is initiated by the institution, the disclosure requirements of this paragraph apply. (Paragraph 230.5(a) applies if the change becomes effective prior to the maturity of the existing time account.)

ii. If the change is initiated by the consumer, the account opening disclosure requirements of §230.4(b) apply. (If the notice required by this paragraph has been provided, institutions may give new account disclosures or disclosures highlighting only the new term.)

6. *Example.* If a consumer receives a prematurity notice on a one-year time account and requests a rollover to a six-month account, the institution must provide either account opening disclosures including the new maturity date or, if all other terms previously disclosed in the prematurity notice remain the same, only the new maturity date.

(b)(1) Maturities of longer than one year

1. *Highlighting changed terms.* Institutions need not highlight terms that changed since the last account disclosures were provided.

(c) Notice for time accounts one month or less that renew automatically

(d) Notice before maturity for time accounts longer than one year that do not renew automatically

1. *Subsequent account.* When funds are transferred following maturity of a nonrollover time account, institutions need not provide account disclosures unless a new account is established.

Section 230.6 Periodic statement disclosures

(a) General rule

1. *General.* Institutions are not required to provide periodic statements. If they do provide statements, disclosures need only be furnished to the extent applicable. For example, if no interest is earned for a statement period, institutions need not state that fact. Or, institutions may disclose ''$0'' interest earned and ''0%'' annual percentage yield earned.

2. *Regulation E interim statements.* When an institution provides regular quarterly statements, and in addition provides a monthly interim statement to comply with Regulation E, the interim statement need not comply with this section unless it states interest or rate information. (See 12 CFR §205.9(b).)

3. *Combined statements.* Institutions may provide information about an account (such as an MMDA) on the periodic statement for another account (such as a NOW account) without triggering the disclosures required by this section, as long as:

i. The information is limited to the account number, the type of account, or balance information, and

ii. The institution also provides a periodic statement complying with this section for each account.

4. *Other information.* Additional information that may be given on or with a periodic statement includes:

i. Interest rates and corresponding periodic rates applied to balances during the statement period

ii. The dollar amount of interest earned year-to-date

iii. Bonuses paid (or any de minimis consideration of $10 or less)

iv. Fees for products such as safe deposit boxes

(a)(1) Annual percentage yield earned

1. *Ledger and collected balances.* Institutions that accrue interest using the collected balance method may use either the ledger or the collected balance in determining the annual percentage yield earned.

(a)(2) Amount of interest

1. *Accrued interest.* Institutions must state the amount of interest that accrued during the statement period, even if it was not credited.

2. *Terminology.* In disclosing interest earned for the period, institutions must use the term ''interest'' or terminology such as:

i. ''Interest paid,'' to describe interest that has been credited

ii. ''Interest accrued'' or ''interest earned,'' to indicate that interest is not yet credited

3. *Closed accounts.* If consumers close an account between crediting periods and forfeits accrued interest, the institution may not show any figures for interest earned or annual percentage yield earned for the period (other than zero, at the institution's option).

(a)(3) Fees imposed

1. *General.* Periodic statements must state fees disclosed under §230.4(b) that were debited to the account during the statement period, even if assessed for an earlier period.

2. *Itemizing fees by type.* In itemizing fees imposed more than once in the period, institutions may group fees if they are the same type. (See §230.11(a)(1) of this part regarding certain fees that are required to be grouped.) When fees of the same type are grouped together, the description must make clear that the dollar figure represents more than a single fee, for example, ''total fees for checks written this period.'' Examples of fees that may not be grouped together are—

i. Monthly maintenance and excess-activity fees

ii. ''transfer'' fees, if different dollar amounts are imposed'' such as $.50 for deposits and $1.00 for withdrawals

iii. fees for electronic fund transfers and fees for other services, such as balance-inquiry or maintenance fees

iv. fees for paying overdrafts and fees for returning checks or other items unpaid

3. *Identifying fees.* Statement details must enable consumers to identify the specific fee. For example:

i. Institutions may use a code to identify a particular fee if the code is explained on the periodic statement or in documents accompanying the statement.

ii. Institutions using debit slips may disclose the date the fee was debited on the periodic statement and show the amount and type of fee on the dated debit slip.

4. *Relation to Regulation E.* Disclosure of fees in compliance with Regulation E complies with this section for fees related to electronic fund transfers (for example, totaling all electronic funds transfer fees in a single figure).

(a)(4) Length of period

1. *General.* Institutions providing the beginning and ending dates of the period must make clear whether both dates are included in the period.

2. *Opening or closing an account mid-cycle.* If an account is opened or closed during the period for which a statement is sent, institutions must calculate the annual percentage yield earned based on account balances for each day the account was open.

(b) Special rule for average daily balance method

1. *Monthly statements and quarterly compounding.* This rule applies, for example, when an institution calculates interest on a quarterly average daily balance and sends monthly statements. In this case, the first two monthly statements would omit annual percentage yield earned and interest earned figures; the third monthly statement would reflect the interest earned and the annual percentage yield earned for the entire quarter.

2. *Length of the period.* Institutions must disclose the length of both the interest calculation period and the statement period. For example, a statement could disclose a statement period of April 16 through May 15 and further state that ''the interest earned and the annual percentage yield earned are based on your average daily balance for the period April 1 through April 30.''

3. *Quarterly statements and monthly compounding.* Institutions that use the average daily balance method to calculate interest on a monthly basis and that send statements on a quarterly basis may disclose a single interest (and annual percentage yield earned) figure. Alternatively, an institution may disclose three interest and three annual percentage yield earned figures, one for each month in the quarter, as long as the institution states the number of days (or beginning and ending dates) in the interest period if different from the statement period.

Section 230.7 Payment of interest

(a)(1) Permissible methods

1. *Prohibited calculation methods.* Calculation methods that do not comply with the requirement to pay interest on the full amount of principal in the account each day include:

i. Paying interest on the balance in the account at the end of the period (the ''ending balance'' method)

ii. Paying interest for the period based on the lowest balance in the account for any day in that period (the ''low balance'' method)

iii. Paying interest on a percentage of the balance, excluding the amount set aside for reserve requirements (the ''investable balance'' method)

2. *Use of 365-day basis.* Institutions may apply a daily periodic rate greater than 1/365 of the interest rate—such as 1/360 of the interest rate—as long as it is applied 365 days a year.

3. *Periodic interest payments.* An institution can pay interest each day on the account and still make uniform interest payments. For example, for a one-year certificate of deposit an institution could make monthly interest payments equal to 1/12 of the amount of interest that will be earned for a 365-day period (or 11 uniform monthly payments—each equal to roughly 1/12 of the total amount of interest—and one payment that accounts for the remainder of the total amount of interest earned for the period).

4. *Leap year.* Institutions may apply a daily rate of 1/366 or 1/365 of the interest rate for 366 days in a leap year, if the account will earn interest for February 29.

5. *Maturity of time accounts.* Institutions are not required to pay interest after time accounts mature. Examples include:

i. During a grace period offered for an automatically renewable time account, if consumers decide during that period not to renew the account

ii. Following the maturity of nonrollover time accounts

iii. When the maturity date falls on a holiday, and consumers must wait until the next business day to obtain the funds

6. *Dormant accounts.* Institutions must pay interest on funds in an account, even if inactivity or the infrequency of transactions would permit the institution to consider the account to be ''inactive'' or ''dormant'' (or similar status) as defined by state or other law or the account contract.

(a)(2) Determination of minimum balance to earn interest

1. *Daily balance accounts.* Institutions that require a minimum balance may choose not to pay interest for days when the balance drops below the required minimum, if they

use the daily balance method to calculate interest.

2. *Average daily balance accounts.* Institutions that require a minimum balance may choose not to pay interest for the period in which the balance drops below the required minimum, if they use the average daily balance method to calculate interest.

3. *Beneficial method.* Institutions may not require that consumers maintain both a minimum daily balance and a minimum average daily balance to earn interest, such as by requiring consumers to maintain a $500 daily balance and a prescribed average daily balance (whether higher or lower). But an institution could offer a minimum balance to earn interest that includes an additional method that is ''unequivocally beneficial'' to consumers such as the following: An institution using the daily balance method to calculate interest and requiring a $500 minimum daily balance could offer to pay interest on the account for those days the minimum balance is not met as long as consumers maintain an average daily balance throughout the month of $400.

4. *Paying on full balance.* Institutions must pay interest on the full balance in the account that meets the required minimum balance. For example, if $300 is the minimum daily balance required to earn interest, and a consumer deposits $500, the institution must pay the stated interest rate on the full $500 and not just on $200.

5. *Negative balances prohibited.* Institutions must treat a negative account balance as zero to determine:

i. The daily or average daily balance on which interest will be paid

ii. Whether any minimum balance to earn interest is met

6. *Club accounts.* Institutions offering club accounts (such as a ''holiday'' or ''vacation'' club) cannot impose a minimum balance requirement for interest based on the total number or dollar amount of payments required under the club plan. For example, if a plan calls for $10 weekly payments for 50 weeks, the institution cannot set a $500 ''minimum balance'' and then pay interest only if the consumer has made all 50 payments.

7. *Minimum balances not affecting interest.* Institutions may use the daily balance, average daily balance, or any other computation method to calculate minimum balance requirements not involving the payment of interest—such as to compute minimum balances for assessing fees.

(b) Compounding and crediting policies

1. *General.* Institutions choosing to compound interest may compound or credit interest annually, semi-annually, quarterly, monthly, daily, continuously, or on any other basis.

2. *Withdrawals prior to crediting date.* If consumers withdraw funds (without closing the account) prior to a scheduled crediting date, institutions may delay paying the accrued interest on the withdrawn amount until the scheduled crediting date, but may not avoid paying interest.

3. *Closed accounts.* Subject to state or other law, an institution may choose not to pay accrued interest if consumers close an account prior to the date accrued interest is credited, as long as the institution has disclosed that fact.

(c) Date interest begins to accrue

1. *Relation to Regulation CC.* Institutions may rely on the Expedited Funds Availability Act (EFAA) and Regulation CC (12 CFR part 229) to determine, for example, when a deposit is considered made for purposes of interest accrual, or when interest need not be paid on funds because a deposited check is later returned unpaid.

2. *Ledger and collected balances.* Institutions may calculate interest by using a ''ledger'' or ''collected'' balance method, as long as the crediting requirements of the EFAA are met (12 CFR 229.14).

3. *Withdrawal of principal.* Institutions must accrue interest on funds until the funds are withdrawn from the account. For example, if a check is debited to an account on a Tuesday, the institution must accrue interest on those funds through Monday.

Section 230.8 Advertising

(a) Misleading or inaccurate advertisements

1. *General.* All advertisements are subject to the rule against misleading or inaccurate advertisements, even though the disclosures applicable to various media differ.

2. *Indoor signs.* An indoor sign advertising an annual percentage yield is not misleading or inaccurate when:

i. For a tiered-rate account, it also provides the lower dollar amount of the tier corresponding to the advertised annual percentage yield

ii. For a time account, it also provides the term required to obtain the advertised annual percentage yield

3. *Fees affecting ''free'' accounts.* For purposes of determining whether an account can be advertised as ''free'' or ''no cost,'' maintenance and activity fees include:

i. Any fee imposed when a minimum balance requirement is not met, or when consumers exceed a specified number of transactions

ii. Transaction and service fees that consumers reasonably expect to be imposed on a regular basis

iii. A flat fee, such as a monthly service fee

iv. Fees imposed to deposit, withdraw, or transfer funds, including per-check or per-transaction charges (for example, $.25 for each withdrawal, whether by check or in person)

4. *Other fees.* Examples of fees that are not maintenance or activity fees include:

i. Fees not required to be disclosed under §230.4(b)(4)

ii. Check printing fees

iii. Balance inquiry fees

iv. Stop-payment fees and fees associated with checks returned unpaid

v. Fees assessed against a dormant account

vi. Fees for ATM or electronic transfer services (such as preauthorized transfers or home banking services) not required to obtain an account

5. *Similar terms.* An advertisement may not use the term ''fees waived'' if a maintenance or activity fee may be imposed because it is similar to the terms ''free'' or ''no cost.''

6. *Specific account services.* Institutions may advertise a specific account service or feature as free if no fee is imposed for that service or feature. For example, institutions offering an account that is free of deposit or withdrawal fees could advertise that fact, as long as the advertisement does not mislead consumers by implying that the account is free and that no other fee (a monthly service fee, for example) may be charged.

7. *Free for limited time.* If an account (or a specific account service) is free only for a limited period of time—for example, for one year following the account opening—the account (or service) may be advertised as free if the time period is also stated.

8. *Conditions not related to deposit accounts.* Institutions may advertise accounts as ''free'' for consumers meeting conditions not related to deposit accounts, such as the consumer's age. For example, institutions may advertise a NOW account as ''free for persons over 65 years old,'' even though a maintenance or activity fee is assessed on accounts held by consumers 65 or younger.

9. *Electronic advertising.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) displays a triggering term (such as a bonus or annual percentage yield) the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a bonus or annual percentage yield may be accompanied by a link that directly takes the consumer to the additional information.

10. *Examples.* Examples of advertisements that would ordinarily be misleading, inaccurate, or misrepresent the deposit contract are:

i. Representing an overdraft service as a ''line of credit,'' unless the service is subject to the Board's Regulation Z, 12 CFR part 226.

ii. Representing that the institution will honor all checks or authorize payment of all transactions that overdraw an account, with or without a specified dollar limit, when the institution retains discretion at any time not to honor checks or authorize transactions.

iii. Representing that consumers with an overdrawn account are allowed to maintain a negative balance when the terms of the account's overdraft service require consumers promptly to return the deposit account to a positive balance.

iv. Describing an institution's overdraft service solely as protection against bounced checks when the institution also permits overdrafts for a fee for overdrawing their accounts by other means, such as ATM withdrawals, debit card transactions, or other electronic fund transfers.

v. Advertising an account-related service for which the institution charges a fee in an advertisement that also uses the word ''free'' or ''no cost'' (or a similar term) to describe the account, unless the advertisement clearly and conspicuously indicates that there is a cost associated with the service. If the fee is a maintenance or activity fee under §230.8(a)(2) of this part, however, an advertisement may not describe the account as ''free'' or ''no cost'' (or contain a similar term) even if the fee is disclosed in the advertisement.

11. *Additional disclosures in connection with the payment of overdrafts.* The rule in §230.3(a), providing that disclosures required by §230.8 may be provided to the consumer in electronic form without regard to E-Sign Act requirements, applies to the disclosures described in §230.11(b), which are incorporated by reference in §230.8(f).

(b) Permissible rates

1. *Tiered-rate accounts.* An advertisement for a tiered-rate account that states an annual percentage yield must also state the annual percentage yield for each tier, along with corresponding minimum balance requirements. Any interest rates stated must appear in conjunction with the applicable annual percentage yields for each tier.

2. *Stepped-rate accounts.* An advertisement that states an interest rate for a stepped-rate account must state all the interest rates and the time period that each rate is in effect.

3. *Representative examples.* An advertisement that states an annual percentage yield for a given type of account (such as a time account for a specified term) need not state the annual percentage yield applicable to other time accounts offered by the institution or indicate that other maturity terms are available. In an advertisement stating that rates for an account may vary depending on the amount of the initial deposit or the term of a time account, institutions need not list each balance level and term offered. Instead, the advertisement may:

i. Provide a representative example of the annual percentage yields offered, clearly described as such. For example, if an institution offers a $25 bonus on all time accounts and the annual percentage yield will vary depending on the term selected, the institution

may provide a disclosure of the annual percentage yield as follows: ''For example, our 6-month certificate of deposit currently pays a 3.15% annual percentage yield.''

ii. Indicate that various rates are available, such as by stating short-term and longer-term maturities along with the applicable annual percentage yields: ''We offer certificates of deposit with annual percentage yields that depend on the maturity you choose. For example, our one-month CD earns a 2.75% APY. Or, earn a 5.25% APY for a three-year CD.''

(c) When additional disclosures are required

1. *Trigger terms*. The following are examples of information stated in advertisements that are not ''trigger'' terms:

i. ''One, three, and five year CDs available''

ii. ''Bonus rates available''

iii. ''1% over our current rates,'' so long as the rates are not determinable from the advertisement

(2) Time annual percentage yield is offered

1. *Specified date*. If an advertisement discloses an annual percentage yield as of a specified date, that date must be recent in relation to the publication or broadcast frequency of the media used, taking into account the particular circumstances or production deadlines involved. For example, the printing date of a brochure printed once for a deposit account promotion that will be in effect for six months would be considered ''recent,'' even though rates change during the six-month period. Rates published in a daily newspaper or on television must reflect rates offered shortly before (or on) the date the rates are published or broadcast.

2. *Reference to date of publication*. An advertisement may refer to the annual percentage yield as being accurate as of the date of publication, if the date is on the publication itself. For instance, an advertisement in a periodical may state that a rate is ''current through the date of this issue,'' if the periodical shows the date.

(c)(5) Effect of fees

1. *Scope*. This requirement applies only to maintenance or activity fees described in paragraph 8(a).

(c)(6) Features of time accounts

(c)(6)(i) Time requirements

1. *Club accounts*. If a club account has a maturity date but the term may vary depending on when the account is opened, institutions may use a phrase such as: ''The maturity date of this club account is November 15; its term varies depending on when the account is opened.''

(c)(6)(ii) Early withdrawal penalties

1. *Discretionary penalties*. Institutions imposing early withdrawal penalties on a case-by-case basis may disclose that they ''may'' (rather than ''will'') impose a penalty if such a disclosure accurately describes the account terms.

(d) Bonuses

1. *General reference to ''bonus.''* General statements such as ''bonus checking'' or ''get a bonus when you open a checking account'' do not trigger the bonus disclosures.

(e) Exemption for certain advertisements

(e)(1) Certain media

(e)(1)(i)

1. *Internet advertisements*. The exemption for advertisements made through broadcast or electronic media does not extend to advertisements posted on the Internet or sent by e-mail.

(e)(1)(iii)

1. *Tiered-rate accounts*. Solicitations for a tiered-rate account made through telephone response machines must provide the annual percentage yields and the balance requirements applicable to each tier.

(e)(2) Indoor signs

(e)(2)(i)

1. *General*. Indoor signs include advertisements displayed on computer screens, banners, preprinted posters, and chalk or peg boards. Any advertisement inside the premises that can be retained by a consumer (such as a brochure or a printout from a computer) is not an indoor sign.

Section 230.9 Enforcement and record retention

(c) Record retention

1. *Evidence of required actions*. Institutions comply with the regulation by demonstrating that they have done the following:

i. Established and maintained procedures for paying interest and providing timely disclosures as required by the regulation, and

ii. Retained sample disclosures for each type of account offered to consumers, such as account-opening disclosures, copies of advertisements, and change-in-term notices; and information regarding the interest rates and annual percentage yields offered.

2. *Methods of retaining evidence*. Institutions must be able to reconstruct the required disclosures or other actions. They need not keep disclosures or other business records in hard copy. Records evidencing compliance may be retained on microfilm, microfiche, or by other methods that reproduce records accurately (including computer files).

3. *Payment of interest*. Institutions must retain sufficient rate and balance information to permit the verification of interest paid on an account, including the payment of interest on the full principal balance.

Section 230.10 Electronic Communication [Reserved]

Section 230.11 Additional disclosures regarding the payment of overdrafts

(a) Disclosure of total fees on periodic statements.

(a)(1) General.

1. *Transfer services.* The overdraft services covered by §230.11(a)(1) of this part do not include a service providing for the transfer of funds from another deposit account of the consumer to permit the payment of items without creating an overdraft, even if a fee is charged for the transfer.

2. *Fees for paying overdrafts.* Institutions must disclose on periodic statements a total dollar amount for all fees or charges imposed on the account for paying overdrafts. The institution must disclose separate totals for the statement period and for the calendar year-to-date. The total dollar amount for each of these periods includes per-item fees as well as interest charges, daily or other periodic fees, or fees charged for maintaining an account in overdraft status, whether the overdraft is by check, debit card transaction, or by any other transaction type. It also includes fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. It does not include fees for transferring funds from another account of the consumer to avoid an overdraft, or fees charged under a service subject to the Board's Regulation Z (12 CFR part 226). *See also* comment 11(c)–2. Under §230.11(a)(1)(i), the disclosure must describe the total dollar amount for all fees or charges imposed on the account for the statement period and calendar year-to-date for paying overdrafts using the term ''Total Overdraft Fees.'' This requirement applies notwithstanding comment 3(a)–2.

3. *Fees for returning items unpaid.* The total dollar amount for all fees for returning items unpaid must include all fees charged to the account for dishonoring or returning checks or other items drawn on the account. The institution must disclose separate totals for the statement period and for the calendar year-to-date. Fees imposed when deposited items are returned are not included. Institutions may use terminology such as ''returned item fee'' or ''NSF fee'' to describe fees for returning items unpaid.

4. *Waived fees.* In some cases, an institution may provide a statement for the current period reflecting that fees imposed during a previous period were waived and credited to the account. Institutions may, but are not required to, reflect the adjustment in the total for the calendar year-to-date and in the applicable statement period. For example, if an institution assesses a fee in January and refunds the fee in February, the institution could disclose a year-to-date total reflecting the amount credited, but it should not affect the total disclosed for the February statement period, because the fee was not assessed in the February statement period. If an institution assesses and then waives and credits a fee within the same cycle, the institution may, at its option, reflect the adjustment in the total disclosed for fees imposed during the current statement period and for the total for the calendar year-to-date. Thus, if the institution assesses and waives the fee in the February statement period, the February fee total could reflect a total net of the waived fee.

5. *Totals for the calendar year to date.* Some institutions' statement periods do not coincide with the calendar month. In such cases, the institution may disclose a calendar year-to-date total by aggregating fees for 12 monthly cycles, starting with the period that begins during January and finishing with the period that begins during December. For example, if statement periods begin on the 10th day of each month, the statement covering December 10, 2006 through January 9, 2007 may disclose the year-to-date total for fees imposed from January 10, 2006 through January 9, 2007. Alternatively, the institution could provide a statement for the cycle ending January 9, 2007 showing the year-to-date total for fees imposed January 1, 2006 through December 31, 2006.

6. *Itemization of fees.* An institution may itemize each fee in addition to providing the disclosures required by §230.11(a)(1) of this part.

(a)(3) Time period covered by disclosures

1. *Periodic statement disclosures.* The disclosures under section 230.11(a) must be included on periodic statements provided by an institution starting the first statement period that begins after January 1, 2010. For example, if a consumer's statement period typically closes on the 15th of each month, an institution must provide the disclosures required by §230.11(a)(1) on subsequent periodic statements for that consumer beginning with the statement reflecting the period from January 16, 2010 to February 15, 2010.

(b) Advertising Disclosures in Connection With Overdraft Services

1. *Examples of institutions promoting the payment of overdrafts.* A depository institution would be required to include the advertising disclosures in §230.11(b)(1) of this part if the institution:

i. Promotes the institution's policy or practice of paying overdrafts (unless the service would be subject to the Board's Regulation Z (12 CFR part 226)). This includes advertisements using print media such as newspapers or brochures, telephone solicitations, electronic mail, or messages posted on an Internet site. (But see §230.11(b)(2) of this part for communications that are not subject to the additional advertising disclosures);

ii. Includes a message on a periodic statement informing the consumer of an overdraft limit or the amount of funds available for overdrafts. For example, an institution that includes a message on a periodic statement informing the consumer of a $500 overdraft

limit or that the consumer has $300 remaining on the overdraft limit, is promoting an overdraft service.

iii. Discloses an overdraft limit or includes the dollar amount of an overdraft limit in a balance disclosed on an automated system, such as a telephone response machine, ATM screen or the institution's Internet site. (See, however, §230.11(b)(3) of this part.).

2. *Transfer services*. The overdraft services covered by §230.11(b)(1) of this part do not include a service providing for the transfer of funds from another deposit account of the consumer to permit the payment of items without creating an overdraft, even if a fee is charged for the transfer.

3. *Electronic media*. The exception for advertisements made through broadcast or electronic media, such as television or radio, does not apply to advertisements posted on an institution's Internet site, on an ATM screen, provided on telephone response machines, or sent by electronic mail.

4. *Fees*. The fees that must be disclosed under §230.11(b)(1) of this part include per-item fees as well as interest charges, daily or other periodic fees, and fees charged for maintaining an account in overdraft status, whether the overdraft is by check or by other means. The fees also include fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. The fees do not include fees for transferring funds from another account to avoid an overdraft, or fees charged when the institution has previously agreed in writing to pay items that overdraw the account and the service is subject to the Board's Regulation Z, 12 CFR part 226.

5. *Categories of transactions*. An exhaustive list of transactions is not required. Disclosing that a fee may be imposed for covering overdrafts ''created by check, in-person withdrawal, ATM withdrawal, or other electronic means' would satisfy the requirements of §230.11(b)(1)(ii) of this part where the fee may be imposed in these circumstances. See comment 4(b)(4)–5 of this part.

6. *Time period to repay*. If a depository institution reserves the right to require a consumer to pay an overdraft immediately or on demand instead of affording consumers a specific time period to establish a positive balance in the account, an institution may comply with §230.11(b)(1)(iii) of this part by disclosing this fact.

7. *Circumstances for nonpayment*. An institution must describe the circumstances under which it will not pay an overdraft. It is sufficient to state, as applicable: ''Whether your overdrafts will be paid is discretionary and we reserve the right not to pay. For example, we typically do not pay overdrafts if your account is not in good standing, or you are not making regular deposits, or you have too many overdrafts.''

8. *Advertising an account as ''free.''* If the advertised account-related service is an overdraft service subject to the requirements of §230.11(b)(1) of this part, institutions must disclose the fee or fees for the payment of each overdraft, not merely that a cost is associated with the overdraft service, as well as other required information. Compliance with comment 8(a)–10.v. is not sufficient.

(c) Disclosure of account balances

1. *Balance that does not include additional amounts*. For purposes of the balance disclosure requirement in §230.11(c), if an institution discloses balance information to a consumer through an automated system, it must disclose a balance that excludes any funds that the institution may provide to cover an overdraft pursuant to a discretionary overdraft service, that will be paid by the institution under a service subject to the Board's Regulation Z (12 CFR part 226), or that will be transferred from another account held individually or jointly by a consumer. The balance may, but need not, include funds that are deposited in the consumer's account, such as from a check, that are not yet made available for withdrawal in accordance with the funds availability rules under the Board's Regulation CC (12 CFR part 229). In addition, the balance may, but need not, include funds that are held by the institution to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the bank has not settled).

2. *Retail sweep programs*. In a retail sweep program, an institution establishes two legally distinct subaccounts, a transaction subaccount and a savings subaccount, which together make up the consumer's account. The institution allocates and transfers funds between the two subaccounts in order to maximize the balance in the savings account while complying with the monthly limitations on transfers out of savings accounts under the Board's Regulation D, 12 CFR 204.2(d)(2). Retail sweep programs are generally not established for the purpose of covering overdrafts. Rather, institutions typically establish retail sweep programs by agreement with the consumer, in order for the institution to minimize its transaction account reserve requirements and, in some cases, to provide a higher interest rate than the consumer would earn on a transaction account alone. Section 230.11(c) does not require an institution to exclude from the consumer's balance funds that may be transferred from another account pursuant to a retail sweep program that is established for such purposes and that has the following characteristics:

i. The account involved complies with the Board's Regulation D, 12 CFR 204.2(d)(2),

ii. The consumer does not have direct access to the non-transaction subaccount that is part of the retail sweep program, and

iii. The consumer's periodic statements show the account balance as the combined balance in the subaccounts.

3. *Additional balance.* The institution may disclose additional balances supplemented by funds that may be provided by the institution to cover an overdraft, whether pursuant to a discretionary overdraft service, a service subject to the Board's Regulation Z (12 CFR part 226), or a service that transfers funds from another account held individually or jointly by the consumer, so long as the institution prominently states that any additional balance includes these additional overdraft amounts. The institution may not simply state, for instance, that the second balance is the consumer's ''available balance,'' or contains ''available funds.'' Rather, the institution should provide enough information to convey that the second balance includes these amounts. For example, the institution may state that the balance includes ''overdraft funds.'' Where a consumer has not opted into, or as applicable, has opted out of the institution's discretionary overdraft service, any additional balance disclosed should not include funds that otherwise might be available under that service. Where a consumer has not opted into, or as applicable, has opted out of, the institution's discretionary overdraft service for some, but not all transactions (*e.g.*, the consumer has not opted into overdraft services for ATM and one-time debit card transactions), an institution that includes these additional overdraft funds in the second balance should convey that the overdraft funds are not available for all transactions. For example, the institution could state that overdraft funds are not available for ATM and one-time (or everyday) debit card transactions. Similarly, if funds are not available for all transactions pursuant to a service subject to the Board's Regulation Z (12 CFR part 226) or a service that transfers funds from another account, a second balance that includes such funds should also indicate this fact.

4. *Automated systems.* The balance disclosure requirement in §230.11(c) applies to any automated system through which the consumer requests a balance, including, but not limited to, a telephone response system, the institution's Internet site, or an ATM. The requirement applies whether the institution discloses a balance through an ATM owned or operated by the institution or through an ATM not owned or operated by the institution (including an ATM operated by a nondepository institution). If the balance is obtained at an ATM, the requirement also applies whether the balance is disclosed on the ATM screen or on a paper receipt.

APPENDIX A TO PART 230—ANNUAL PERCENTAGE YIELD CALCULATION

Part I. Annual Percentage Yield for Account Disclosures and Advertising Purposes

1. *Rounding for calculations.* The following are examples of permissible rounding for calculating interest and the annual percentage yield:

i. The daily rate applied to a balance carried to five or more decimal places

ii. The daily interest earned carried to five or more decimal places

Part II. Annual Percentage Yield Earned for Periodic Statements

1. *Balance method.* The interest figure used in the calculation of the annual percentage yield earned may be derived from the daily balance method or the average daily balance method. The balance used in the formula for the annual percentage yield earned is the sum of the balances for each day in the period divided by the number of days in the period.

2. *Negative balances prohibited.* Institutions must treat a negative account balance as zero to determine the balance on which the annual percentage yield earned is calculated. (See commentary to §230.7(a)(2).)

A. General Formula

1. *Accrued but uncredited interest.* To calculate the annual percentage yield earned, accrued but uncredited interest:

i. May not be included in the balance for statements issued at the same time or less frequently than the account's compounding and crediting frequency. For example, if monthly statements are sent for an account that compounds interest daily and credits interest monthly, the balance may not be increased each day to reflect the effect of daily compounding.

ii. Must be included in the balance for succeeding statements if a statement is issued more frequently than compounded interest is credited on an account. For example, if monthly statements are sent for an account that compounds interest daily and credits interest quarterly, the balance for the second monthly statement would include interest that had accrued for the prior month.

2. *Rounding.* The interest earned figure used to calculate the annual percentage yield earned must be rounded to two decimals and reflect the amount actually paid. For example, if the interest earned for a statement period is $20.074 and the institution pays the consumer $20.07, the institution must use $20.07 (not $20.074) to calculate the annual percentage yield earned. For accounts paying interest based on the daily balance method that compound and credit interest quarterly, and send monthly statements, the institution may, but need not,

round accrued interest to two decimals for calculating the annual percentage yield earned on the first two monthly statements issued during the quarter. However, on the quarterly statement the interest earned figure must reflect the amount actually paid.

B. Special Formula for Use Where Periodic Statement is Sent More Often Than the Period for Which Interest is Compounded

1. *Statements triggered by Regulation E.* Institutions may, but need not, use this formula to calculate the annual percentage yield earned for accounts that receive quarterly statements and are subject to Regulation E's rule calling for monthly statements when an electronic fund transfer has occurred. They may do so even though no monthly statement was issued during a specific quarter. But institutions must use this formula for accounts that compound and credit interest quarterly and receive monthly statements that, while triggered by Regulation E, comply with the provisions of § 230.6.

2. *Days in compounding period.* Institutions using the special annual percentage yield earned formula must use the actual number of days in the compounding period.

APPENDIX B TO PART 230—MODEL CLAUSES AND SAMPLE FORMS

1. *Modifications.* Institutions that modify the model clauses will be deemed in compliance as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures.

2. *Format.* Institutions may use inserts to a document (see Sample Form B–4) or fill-in blanks (see Sample Forms B–5, B–6 and B–7, which use underlining to indicate terms that have been filled in) to show current rates, fees, or other terms.

3. *Disclosures for opening accounts.* The sample forms illustrate the information that must be provided to consumers when an account is opened, as required by § 230.4(a)(1). (See § 230.4(a)(2), which states the requirements for disclosing the annual percentage yield, the interest rate, and the maturity of a time account in responding to a consumer's request.)

4. *Compliance with Regulation E.* Institutions may satisfy certain requirements under Regulation DD with disclosures that meet the requirements of Regulation E. (See § 230.3(c).) For disclosures covered by both this regulation and Regulation E (such as the amount of fees for ATM usage, institutions should consult appendix A to Regulation E for appropriate model clauses.

5. *Duplicate disclosures.* If a requirement such as a minimum balance applies to more than one account term (to obtain a bonus and determine the annual percentage yield, for example), institutions need not repeat the requirement for each term, as long as it is clear which terms the requirement applies to.

6. *Sample forms.* The sample forms (B–4 through B–8) serve a purpose different from the model clauses. They illustrate ways of adapting the model clauses to specific accounts. The clauses shown relate only to the specific transactions described.

B–1 Model Clauses for Account Disclosures

B–1(h) Disclosures Relating to Time Accounts

1. *Maturity.* The disclosure in Clause (h)(i) stating a specific date may be used in all cases. The statement describing a time period is appropriate only when providing disclosures in response to a consumer's request.

B–2 Model Clauses for Change in Terms

1. *General.* The second clause, describing a future decrease in the interest rate and annual percentage yield, applies to fixed-rate accounts only.

B–4 Sample Form (Multiple Accounts)

1. *Rate sheet insert.* In the rate sheet insert, the calculations of the annual percentage yield for the three-month and six-month certificates are based on 92 days and 181 days respectively. All calculations in the insert assume daily compounding.

B–6 Sample Form (Tiered-Rate Money Market Account)

1. *General.* Sample Form B–6 uses Tiering Method A (discussed in appendix A and Clause (a)(iv)) to calculate interest. It gives a narrative description of a tiered-rate account; institutions may use different formats (for example, a chart similar to the one in Sample Form B–4), as long as all required information for each tier is clearly presented. The form does not contain a separate disclosure of the minimum balance required to obtain the annual percentage yield; the tiered-rate disclosure provides that information.

[Reg. DD, 59 FR 40221, Aug. 8, 1994, as amended at 59 FR 52658, Oct. 19, 1994; 63 FR 52107, Sept. 29, 1998; 66 FR 17803, Apr. 4, 2001; 70 FR 29594, May 24, 2005; 72 FR 63484, Nov. 9, 2007; 74 FR 5594, Jan. 29, 2009; 75 FR 31676, June 4, 2010; 76 FR 42020, July 18, 2011]

PART 231—NETTING ELIGIBILITY FOR FINANCIAL INSTITUTION (REGULATION EE)

Sec.
231.1 Authority, purpose, and scope.
231.2 Definitions.

231.3 Qualification as a financial institution.

AUTHORITY: 12 U.S.C. 4402(1)(B) and 4402(9).

SOURCE: Reg. EE, 59 FR 4784, Feb. 2, 1994, unless otherwise noted.

§ 231.1 Authority, purpose, and scope.

(a) *Authority*. This part (Regulation EE; 12 CFR part 231) is issued by the Board of Governors of the Federal Reserve System under the authority of sections 402(1)(B) and 402(9) of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4402(1)(B) and 4402(9)).

(b) *Purpose and scope*. The purpose of the Act and this part is to enhance efficiency and reduce systemic risk in the financial markets. This part expands the Act's definition of ''financial institution'' to allow more financial market participants to avail themselves of the netting provisions set forth in sections 401–407 of the Act (12 U.S.C. 4401–4407). This part does not affect the status of those financial institutions specifically defined in the Act.

§ 231.2 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236), as amended.

(b) *Affiliate*, with respect to a person, means any other person that controls, is controlled by, or is under common control with the person.

(c) *Financial contract* means a qualified financial contract as defined in section 11(e)(8)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)), as amended, except that a forward contract includes a contract with a maturity date two days or less after the date the contract is entered into (i.e., a ''spot'' contract).

(d) *Financial market* means a market for a financial contract.

(e) *Gross mark-to-market positions* in one or more financial contracts means the sum of the absolute values of positions in those contracts, adjusted to reflect the market values of those positions in accordance with the methods used by the parties to each contract to value the contract.

(f) *Person* means any legal entity, foreign or domestic, including a corporation, unincorporated company, partnership, government unit or instrumentality, trust, natural person, or any other entity or organization.

§ 231.3 Qualification as a financial institution.

(a) A person qualifies as a financial institution for purposes of sections 401–407 of the Act if it represents, orally or in writing, that it will engage in financial contracts as a counterparty on both sides of one or more financial markets and either—

(1) Had one or more financial contracts of a total gross dollar value of at least $1 billion in notional principal amount outstanding on any day during the previous 15-month period with counterparties that are not its affiliates; or

(2) Had total gross mark-to-market positions of at least $100 million (aggregated across counterparties) in one or more financial contracts on any day during the previous 15-month period with counterparties that are not its affiliates.

(b) If a person qualifies as a financial institution under paragraph (a) of this section, that person will be considered a financial institution for the purposes of any contract entered into during the period it qualifies, even if the person subsequently fails to qualify.

(c) If a person qualifies as a financial institution under paragraph (a) of this section on March 7, 1994, that person will be considered a financial institution for the purposes of any outstanding contract entered into prior to March 7, 1994.

[Reg. EE, 59 FR 4784, Feb. 2, 1994, as amended at 61 FR 1274, Jan. 19, 1996]

PART 232—OBTAINING AND USING MEDICAL INFORMATION IN CONNECTION WITH CREDIT (REGULATION FF)

Sec.
232.1 Scope, General Prohibition and Definitions
232.2 Rule of Construction for Obtaining and Using Unsolicited Medical Information

232.3 Financial Information Exception for Obtaining and Using Medical Information
232.4 Specific Exceptions for Obtaining and Using Medical Information

AUTHORITY: 15 U.S.C. 1681b.

SOURCE: 70 FR 70682, Nov. 22, 2005, unless otherwise noted.

§ 232.1 Scope, General Prohibition and Definitions

(a) *Scope*. This part applies to creditors, as defined in paragraph (c)(3) of this section, except for creditors that are subject to §§ 41.30, 222.30, 334.30, 571.30, or 717.30.

(b) *In general*. A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(c) *Definitions*. (1) *Consumer* means an individual.

(2) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(3) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(4) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(i) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(ii) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(iii) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(5) *Medical information* means:

(i) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(A) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) The provision of health care to an individual; or

(C) The payment for the provision of health care to an individual.

(ii) The term does not include:

(A) The age or gender of a consumer;

(B) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(C) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(D) Information that does not identify a specific consumer.

(6) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

§ 232.2 Rule of construction for obtaining and using unsolicited medical information.

(a) *In general*. A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(b) *Use of unsolicited medical information*. A creditor that receives unsolicited medical information in the manner described in paragraph (a) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 232.3 or § 232.4.

(c) *Examples*. A creditor does not obtain medical information in violation of the prohibition if, for example:

(1) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(2) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(3) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

§ 232.3 Financial information exception for obtaining and using medical information.

(a) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(1) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(2) The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(3) The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(b) *Examples*—(1) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (a)(1) of this section permits a creditor, for example, to obtain and use information about:

(i) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(ii) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(iii) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(iv) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(2) *Examples of uses of medical information consistent with the exception.* (i) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(ii) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(iii) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the

loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(3) *Examples of uses of medical information inconsistent with the exception.* (i) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(ii) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(iii) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

§ 232.4 Specific exceptions for obtaining and using medical information.

(a) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(1) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(2) To comply with applicable requirements of local, state, or Federal laws;

(3) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special

credit program or credit-related assistance program that is—

(i) Designed to meet the special needs of consumers with medical conditions; and

(ii) Established and administered pursuant to a written plan that—

(A) Identifies the class of persons that the program is designed to benefit; and

(B) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(4) To the extent necessary for purposes of fraud prevention or detection;

(5) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(6) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(7) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(8) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(9) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(b) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(c) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (1) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(2) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the creditor may use that medical information to offer the consumer only $5,000 of credit.

(3) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established

loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(d) *Examples of obtaining and using medical information at the request of the consumer.* (1) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(2) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(3) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or nonmedical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(4) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(5) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(e) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor

attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

PART 233—PROHIBITION ON FUNDING OF UNLAWFUL INTERNET GAMBLING (REGULATION GG)

Sec.

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APPENDIX A TO PART 233—MODEL NOTICE

AUTHORITY: 31 U.S.C. 5364.

SOURCE: Reg. GG, 73 FR 69405, Nov. 18, 2008, unless otherwise noted.

§ 233.1 Authority, purpose, collection of information, and incorporation by reference.

(a) *Authority*. This part is issued jointly by the Board of Governors of the Federal Reserve System (Board) and the Secretary of the Department of the Treasury (Treasury) under section 802 of the Unlawful Internet Gambling Enforcement Act of 2006 (Act) (enacted as Title VIII of the Security and Accountability For Every Port Act of 2006, Pub. L. No. 109–347, 120 Stat. 1884, and codified at 31 U.S.C. 5361–5367). The Act states that none of its provisions shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States. *See* 31 U.S.C. 5361(b). In addition, the Act states that its provisions are not intended to change which activities related to horseracing may or may not be allowed under Federal law, are not intended to change the existing relationship between the Interstate Horseracing Act of 1978 (IHA) (15 U.S.C. 3001 *et seq.*) and other Federal statutes in effect on October 13, 2006, the date of the Act's enactment, and are not intended to resolve any existing disagreements over how to interpret the relationship between the IHA and other Federal statutes. *See* 31 U.S.C. 5362(10)(D)(iii). This part is intended to be consistent with these provisions.

(b) *Purpose*. The purpose of this part is to issue implementing regulations as required by the Act. The part sets out necessary definitions, designates payment systems subject to the requirements of this part, exempts certain participants in designated payment systems from certain requirements of this part, provides nonexclusive examples of policies and procedures reasonably designed to identify and block, or otherwise prevent and prohibit, restricted transactions, and sets out the Federal entities that have exclusive regulatory enforcement authority with respect to the designated payments systems and non-exempt participants therein.

(c) *Collection of information*. The Office of Management and Budget (OMB) has approved the collection of information requirements in this part for the Department of the Treasury and assigned OMB control number 1505–0204. The Board has approved the collection of information requirements in this part under the authority delegated to the Board by OMB, and assigned OMB control number 7100–0317.

(d) *Incorporation by reference—relevant definitions from ACH rules*. (1) This part incorporates by reference the relevant definitions of ACH terms as published in the ''2008 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network'' (the ''ACH Rules''). The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the ''2008 ACH Rules'' are available from the National Automated Clearing House Association, Suite 100, 13450

Sunrise Valley Drive, Herndon, Virginia 20171, *http://nacha.org*, (703) 561–1100. Copies also are available for public inspection at the Department of Treasury Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, and the National Archives and Records Administration (NARA). Before visiting the Treasury library, you must call (202) 622–0990 for an appointment. For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html 20002*.

(2) Any amendment to definitions of the relevant ACH terms in the ACH Rules shall not apply to this part unless the Treasury and the Board jointly accept such amendment by publishing notice of acceptance of the amendment to this part in the FEDERAL REGISTER. An amendment to the definition of a relevant ACH term in the ACH Rules that is accepted by the Treasury and the Board shall apply to this part on the effective date of the rulemaking specified by the Treasury and the Board in the joint FEDERAL REGISTER notice expressly accepting such amendment.

§ 233.2 Definitions.

The following definitions apply solely for purposes of this part:

(a) *Actual knowledge* with respect to a transaction or commercial customer means when a particular fact with respect to that transaction or commercial customer is known by or brought to the attention of:

(1) An individual in the organization responsible for the organization's compliance function with respect to that transaction or commercial customer; or

(2) An officer of the organization.

(b) *Automated clearing house system* or *ACH system* means a funds transfer system, primarily governed by the ACH Rules, which provides for the clearing and settlement of batched electronic entries for participating financial institutions. When referring to ACH systems, the terms in this regulation (such as ''originating depository financial institution,'' ''operator,'' ''originating gateway operator,'' ''receiving depository financial institution,'' ''receiving gateway operator,'' and ''third-party sender'') are defined as those terms are defined in the ACH Rules.

(c) *Bet or wager:*

(1) Means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;

(2) Includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

(3) Includes any scheme of a type described in 28 U.S.C. 3702;

(4) Includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering (which does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service); and

(5) Does not include—

(i) Any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that act (15 U.S.C. 78c(a)(10));

(ii) Any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);

(iii) Any over-the-counter derivative instrument;

(iv) Any other transaction that—

(A) Is excluded or exempt from regulation under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); or

(B) Is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act (7 U.S.C. 16(e)) or section 28(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(a));

(v) Any contract of indemnity or guarantee;

(vi) Any contract for insurance;

(vii) Any deposit or other transaction with an insured depository institution;

(viii) Participation in any game or contest in which participants do not stake or risk anything of value other than—

(A) Personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or

(B) Points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or

(ix) Participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in 28 U.S.C. 3701) and that meets the following conditions:

(A) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(B) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(C) No winning outcome is based—

(*1*) On the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams, or

(*2*) Solely on any single performance of an individual athlete in any single real-world sporting or other event.

(d) *Block* means to reject a particular transaction before or during processing, but it does not require freezing or otherwise prohibiting subsequent transfers or transactions regarding the proceeds or account.

(e) *Card issuer* means any person who issues a credit card, debit card, prepaid card, or stored value card, or the agent of such person with respect to such card.

(f) *Card system* means a system for authorizing, clearing and settling transactions in which credit cards, debit cards, pre-paid cards, or stored value cards (such cards being issued or authorized by the operator of the system), are used to purchase goods or services or to obtain a cash advance. The term includes systems both in which the merchant acquirer, card issuer, and system operator are separate entities and in which more than one of these roles are performed by the same entity.

(g) *Check clearing house* means an association of banks or other payors that regularly exchange checks for collection or return.

(h) *Check collection system* means an interbank system for collecting, presenting, returning, and settling for checks or intrabank system for settling for checks deposited in and drawn on the same bank. When referring to check collection systems, the terms in this regulation (such as ''paying bank,'' ''collecting bank,'' ''depositary bank,'' ''returning bank,'' and ''check'') are defined as those terms are defined in 12 CFR 229.2. For purposes of this part, ''check'' also includes an electronic representation of a check that a bank agrees to handle as a check.

(i) *Commercial customer* means a person that is not a consumer and that contracts with a non-exempt participant in a designated payment system to receive, or otherwise accesses, payment transaction services through that non-exempt participant.

(j) *Consumer* means a natural person.

(k) *Designated payment system* means a system listed in § ____.3.

(l) *Electronic fund transfer* has the same meaning given the term in section 903 of the Electronic Fund Transfer Act (15 U.S.C. 1693a), except that such term includes transfers that would otherwise be excluded under section 903(6)(E) of that act (15 U.S.C. 1693a(6)(E)), and includes any funds transfer covered by Article 4A of the Uniform Commercial Code, as in effect in any State.

(m) *Financial institution* means a State or national bank, a State or Federal savings and loan association, a

mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds an account belonging to a consumer. The term does not include a casino, sports book, or other business at or through which bets or wagers may be placed or received.

(n) *Financial transaction provider* means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

(o) *Foreign banking office* means:

(1) Any non-U.S. office of a financial institution; and

(2) Any non-U.S. office of a foreign bank as described in 12 U.S.C. 3101(7).

(p) *Interactive computer service* means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(q) *Internet* means the international computer network of interoperable packet switched data networks.

(r) *Internet gambling business* means the business of placing, receiving or otherwise knowingly transmitting a bet or wager by any means which involves the use, at least in part, of the Internet, but does not include the performance of the customary activities of a financial transaction provider, or any interactive computer service or telecommunications service.

(s) *Intrastate transaction* means placing, receiving, or otherwise transmitting a bet or wager where—

(1) The bet or wager is initiated and received or otherwise made exclusively within a single State;

(2) The bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—

(i) Age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(ii) Appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and

(3) The bet or wager does not violate any provision of—

(i) The Interstate Horseracing Act of 1978 (15 U.S.C. 3001 *et seq.*);

(ii) 28 U.S.C. chapter 178 (professional and amateur sports protection);

(iii) The Gambling Devices Transportation Act (15 U.S.C. 1171 *et seq.*); or

(iv) The Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*).

(t) *Intratribal transaction* means placing, receiving or otherwise transmitting a bet or wager where—

(1) The bet or wager is initiated and received or otherwise made exclusively—

(i) Within the Indian lands of a single Indian tribe (as such terms are defined under the Indian Gaming Regulatory Act (25 U.S.C. 2703)); or

(ii) Between the Indian lands of two or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*);

(2) The bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of—

(i) The applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(ii) With respect to class III gaming, the applicable Tribal-State compact;

(3) The applicable tribal ordinance or resolution or Tribal-State compact includes—

(i) Age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(ii) Appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(4) The bet or wager does not violate any provision of—

(i) The Interstate Horseracing Act of 1978 (15 U.S.C. 3001 *et seq.*);

(ii) 28 U.S.C. chapter 178 (professional and amateur sports protection);

(iii) The Gambling Devices Transportation Act (15 U.S.C. 1171 *et seq.*); or

(iv) The Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*).

(u) *Money transmitting business* has the meaning given the term in 31 U.S.C. 5330(d)(1) (determined without regard to any regulations prescribed by the Secretary of the Treasury thereunder).

(v) *Operator* of a designated payment system means an entity that provides centralized clearing and delivery services between participants in the designated payment system and maintains the operational framework for the system. In the case of an automated clearinghouse system, the term ''operator'' has the same meaning as provided in the ACH Rules.

(w) *Participant in a designated payment system* means an operator of a designated payment system, a financial transaction provider that is a member of, or has contracted for financial transaction services with, or is otherwise participating in, a designated payment system, or a third-party processor. This term does not include a customer of the financial transaction provider, unless the customer is also a financial transaction provider otherwise participating in the designated payment system on its own behalf.

(x) *Reasoned legal opinion* means a written expression of professional judgment by a State-licensed attorney that addresses the facts of a particular client's business and the legality of the client's provision of its services to relevant customers in the relevant jurisdictions under applicable federal and State law, and, in the case of intratribal transactions, applicable tribal ordinances, tribal resolutions, and Tribal-State compacts. A written legal opinion will not be considered ''reasoned'' if it does nothing more than recite the facts and express a conclusion.

(y) *Restricted transaction* means any of the following transactions or transmittals involving any credit, funds, instrument, or proceeds that the Act prohibits any person engaged in the business of betting or wagering (which does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service) from knowingly accepting, in connection with the participation of another person in unlawful Internet gambling—

(1) Credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) An electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; or

(3) Any check, draft, or similar instrument that is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution.

(z) *State* means any State of the United States, the District of Columbia, or any commonwealth, territory, or other possession of the United States, including the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, and the Virgin Islands.

(aa) *Third-party processor* means a service provider that—

(1) In the case of a debit transaction payment, such as an ACH debit entry or card system transaction, has a direct relationship with the commercial customer that is initiating the debit transfer transaction and acts as an intermediary between the commercial customer and the first depository institution to handle the transaction;

(2) In the case of a credit transaction payment, such as an ACH credit entry, has a direct relationship with the commercial customer that is to receive the proceeds of the credit transfer and acts

as an intermediary between the commercial customer and the last depository institution to handle the transaction; and

(3) In the case of a cross-border ACH debit or check collection transaction, is the first service provider located within the United States to receive the ACH debit instructions or check for collection.

(bb) *Unlawful Internet gambling* means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made. The term does not include placing, receiving, or otherwise transmitting a bet or wager that is excluded from the definition of this term by the Act as an intrastate transaction or an intra-tribal transaction, and does not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 *et seq.*; *see* § 233.1(a)). The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.

(cc) *Wire transfer system* means a system through which an unconditional order to a bank to pay a fixed or determinable amount of money to a beneficiary upon receipt, or on a day stated in the order, is transmitted by electronic or other means through the network, between banks, or on the books of a bank. When referring to wire transfer systems, the terms in this regulation (such as ''bank,'' ''originator's bank,'' ''beneficiary's bank,'' and ''intermediary bank'') are defined as those terms are defined in 12 CFR part 210, appendix B.

§ 233.3 Designated payment systems.

The following payment systems could be used by participants in connection with, or to facilitate, a restricted transaction:

(a) Automated clearing house systems;

(b) Card systems;

(c) Check collection systems;

(d) Money transmitting businesses solely to the extent they

(1) Engage in the transmission of funds, which does not include check cashing, currency exchange, or the issuance or redemption of money orders, travelers' checks, and other similar instruments; and

(2) Permit customers to initiate transmission of funds transactions remotely from a location other than a physical office of the money transmitting business; and

(e) Wire transfer systems.

§ 233.4 Exemptions.

(a) *Automated clearing house systems.* The participants processing a particular transaction through an automated clearing house system are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that transaction, except for—

(1) The receiving depository financial institution and any third-party processor receiving the transaction on behalf of the receiver in an ACH credit transaction;

(2) The originating depository financial institution and any third-party processor initiating the transaction on behalf of the originator in an ACH debit transaction; and

(3) The receiving gateway operator and any third-party processor that receives instructions for an ACH debit transaction directly from a foreign sender (which could include a foreign banking office, a foreign third-party processor, or a foreign originating gateway operator).

(b) *Check collection systems.* The participants in a particular check collection through a check collection system are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that check collection, except for the depositary bank.

(c) *Money transmitting businesses.* The participants in a money transmitting business are exempt from this regulation's requirements for establishing

written policies and procedures reasonably designed to prevent or prohibit restricted transactions, except for the operator.

(d) *Wire transfer systems.* The participants in a particular wire transfer through a wire transfer system are exempt from this regulation's requirements for establishing written policies and procedures reasonably designed to prevent or prohibit restricted transactions with respect to that transaction, except for the beneficiary's bank.

§ 233.5 Policies and procedures required.

(a) All non-exempt participants in designated payment systems shall establish and implement written policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions.

(b) A non-exempt financial transaction provider participant in a designated payment system shall be considered to be in compliance with the requirements of paragraph (a) of this section if—

(1) It relies on and complies with the written policies and procedures of the designated payment system that are reasonably designed to—

(i) Identify and block restricted transactions; or

(ii) Otherwise prevent or prohibit the acceptance of the products or services of the designated payment system or participant in connection with restricted transactions; and

(2) Such policies and procedures of the designated payment system comply with the requirements of this part.

(c) For purposes of paragraph (b)(2) in this section, a participant in a designated payment system may rely on a written statement or notice by the operator of that designated payment system to its participants that states that the operator has designed or structured the system's policies and procedures for identifying and blocking or otherwise preventing or prohibiting restricted transactions to comply with the requirements of this part as conclusive evidence that the system's policies and procedures comply with the requirements of this part, unless the participant is notified otherwise by its Federal functional regulator or, in the case of participants that are not directly supervised by a Federal functional regulator, the Federal Trade Commission.

(d) As provided in the Act, a person that identifies and blocks a transaction, prevents or prohibits the acceptance of its products or services in connection with a transaction, or otherwise refuses to honor a transaction, shall not be liable to any party for such action if—

(1) The transaction is a restricted transaction;

(2) Such person reasonably believes the transaction to be a restricted transaction; or

(3) The person is a participant in a designated payment system and blocks or otherwise prevents the transaction in reliance on the policies and procedures of the designated payment system in an effort to comply with this regulation.

(e) Nothing in this part requires or is intended to suggest that designated payment systems or participants therein must or should block or otherwise prevent or prohibit any transaction in connection with any activity that is excluded from the definition of ''unlawful Internet gambling'' in the Act as an intrastate transaction, an intratribal transaction, or a transaction in connection with any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 *et seq.*; see § 233.1(a)).

(f) Nothing in this part modifies any requirement imposed on a participant by other applicable law or regulation to file a suspicious activity report to the appropriate authorities.

(g) The requirement of this part to establish and implement written policies and procedures applies only to the U.S. offices of participants in designated payment systems.

§ 233.6 Non-exclusive examples of policies and procedures.

(a) *In general.* The examples of policies and procedures to identify and block or otherwise prevent or prohibit restricted transactions set out in this section are non-exclusive. In establishing and implementing written policies and procedures to identify and

block or otherwise prevent or prohibit restricted transactions, a non-exempt participant in a designated payment system is permitted to design and implement policies and procedures tailored to its business that may be different than the examples provided in this section. In addition, non-exempt participants may use different policies and procedures with respect to different business lines or different parts of the organization.

(b) *Due diligence*. If a non-exempt participant in a designated payment system establishes and implements procedures for due diligence of its commercial customer accounts or commercial customer relationships in order to comply, in whole or in part, with the requirements of this regulation, those due diligence procedures will be deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if the procedures include the steps set out in paragraphs (b)(1), (b)(2), and (b)(3) of this section and subject to paragraph (b)(4) of this section.

(1) At the establishment of the account or relationship, the participant conducts due diligence of a commercial customer and its activities commensurate with the participant's judgment of the risk of restricted transactions presented by the customer's business.

(2) Based on its due diligence, the participant makes a determination regarding the risk the commercial customer presents of engaging in an Internet gambling business and follows either paragraph (b)(2)(i) or (b)(2)(ii) of this section.

(i) The participant determines that the commercial customer presents a minimal risk of engaging in an Internet gambling business.

(ii) The participant cannot determine that the commercial customer presents a minimal risk of engaging in an Internet gambling business, in which case it obtains the documentation in either paragraph (b)(2)(ii)(A) or (b)(2)(ii)(B) of this section—

(A) Certification from the commercial customer that it does not engage in an Internet gambling business; or

(B) If the commercial customer does engage in an Internet gambling business, each of the following—

(*1*) Evidence of legal authority to engage in the Internet gambling business, such as—

(*i*) A copy of the commercial customer's license that expressly authorizes the customer to engage in the Internet gambling business issued by the appropriate State or Tribal authority or, if the commercial customer does not have such a license, a reasoned legal opinion that demonstrates that the commercial customer's Internet gambling business does not involve restricted transactions; and

(*ii*) A written commitment by the commercial customer to notify the participant of any changes in its legal authority to engage in its Internet gambling business.

(*2*) A third-party certification that the commercial customer's systems for engaging in the Internet gambling business are reasonably designed to ensure that the commercial customer's Internet gambling business will remain within the licensed or otherwise lawful limits, including with respect to age and location verification.

(3) The participant notifies all of its commercial customers, through provisions in the account or commercial customer relationship agreement or otherwise, that restricted transactions are prohibited from being processed through the account or relationship.

(4) With respect to the determination in paragraph (b)(2)(i) of this section, participants may deem the following commercial customers to present a minimal risk of engaging in an Internet gambling business—

(i) An entity that is directly supervised by a Federal functional regulator as set out in § 233.7(a); or

(ii) An agency, department, or division of the Federal government or a State government.

(c) *Automated clearing house system examples*. (1) The policies and procedures of the originating depository financial institution and any third party processor in an ACH debit transaction, and the receiving depository financial institution and any third party processor in an ACH credit transaction, are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they—

(i) Address methods to conduct due diligence in establishing a commercial customer account or relationship as set out in § 233.6(b);

(ii) Address methods to conduct due diligence as set out in § 233.6(b)(2)(ii)(B) in the event that the participant has actual knowledge that an existing commercial customer of the participant engages in an Internet gambling business; and

(iii) Include procedures to be followed with respect to a commercial customer if the originating depository financial institution or third-party processor has actual knowledge that its commercial customer has originated restricted transactions as ACH debit transactions or if the receiving depository financial institution or third-party processor has actual knowledge that its commercial customer has received restricted transactions as ACH credit transactions, such as procedures that address—

(A) The circumstances under which the commercial customer should not be allowed to originate ACH debit transactions or receive ACH credit transactions; and

(B) The circumstances under which the account should be closed.

(2) The policies and procedures of a receiving gateway operator and third-party processor that receives instructions to originate an ACH debit transaction directly from a foreign sender are deemed to be reasonably designed to prevent or prohibit restricted transactions if they include procedures to be followed with respect to a foreign sender if the receiving gateway operator or third-party processor has actual knowledge, obtained through notification by a government entity, such as law enforcement or a regulatory agency, that such instructions included instructions for restricted transactions. Such procedures may address sending notification to the foreign sender, such as in the form of the notice contained in appendix A to this part.

(d) *Card system examples.* The policies and procedures of a card system operator, a merchant acquirer, third-party processor, or a card issuer, are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions, if the policies and procedures—

(1) Provide for either—

(i) Methods to conduct due diligence—

(A) In establishing a commercial customer account or relationship as set out in § 233.6(b); and

(B) As set out in § 233.6(b)(2)(ii)(B) in the event that the participant has actual knowledge that an existing commercial customer of the participant engages in an Internet gambling business; or

(ii) Implementation of a code system, such as transaction codes and merchant/business category codes, that are required to accompany the authorization request for a transaction, including—

(A) The operational functionality to enable the card system operator or the card issuer to reasonably identify and deny authorization for a transaction that the coding procedure indicates may be a restricted transaction; and

(B) Procedures for ongoing monitoring or testing by the card system operator to detect potential restricted transactions, including—

(*1*) Conducting testing to ascertain whether transaction authorization requests are coded correctly; and

(*2*) Monitoring and analyzing payment patterns to detect suspicious payment volumes from a merchant customer; and

(2) For the card system operator, merchant acquirer, or third-party processor, include procedures to be followed when the participant has actual knowledge that a merchant has received restricted transactions through the card system, such as—

(i) The circumstances under which the access to the card system for the merchant, merchant acquirer, or third-party processor should be denied; and

(ii) The circumstances under which the merchant account should be closed.

(e) *Check collection system examples.* (1) The policies and procedures of a depositary bank are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions, if they—

(i) Address methods for the depositary bank to conduct due diligence in establishing a commercial customer account or relationship as set out in § 233.6(b);

(ii) Address methods for the depositary bank to conduct due diligence as set out in § 233.6(b)(2)(ii)(B) in the event that the depositary bank has actual knowledge that an existing commercial customer engages in an Internet gambling business; and

(iii) Include procedures to be followed if the depositary bank has actual knowledge that a commercial customer of the depositary bank has deposited checks that are restricted transactions, such as procedures that address—

(A) The circumstances under which check collection services for the customer should be denied; and

(B) The circumstances under which the account should be closed.

(2) The policies and procedures of a depositary bank that receives checks for collection from a foreign banking office are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they include procedures to be followed by the depositary bank when it has actual knowledge, obtained through notification by a government entity, such as law enforcement or a regulatory agency, that a foreign banking office has sent checks to the depositary bank that are restricted transactions. Such procedures may address sending notification to the foreign banking office, such as in the form of the notice contained in the appendix to this part.

(f) *Money transmitting business examples*. The policies and procedures of an operator of a money transmitting business are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they—

(1) Address methods for the operator to conduct due diligence in establishing a commercial customer relationship as set out in § 233.6(b);

(2) Address methods for the operator to conduct due diligence as set out in § 233.6(b)(2)(ii)(B) in the event that the operator has actual knowledge that an existing commercial customer engages in an Internet gambling business;

(3) Include procedures regarding ongoing monitoring or testing by the operator to detect potential restricted transactions, such as monitoring and analyzing payment patterns to detect suspicious payment volumes to any recipient; and

(4) Include procedures when the operator has actual knowledge that a commercial customer of the operator has received restricted transactions through the money transmitting business, that address—

(i) The circumstances under which money transmitting services should be denied to that commercial customer; and

(ii) The circumstances under which the commercial customer account should be closed.

(g) *Wire transfer system examples*. The policies and procedures of the beneficiary's bank in a wire transfer are deemed to be reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions if they—

(1) Address methods for the beneficiary's bank to conduct due diligence in establishing a commercial customer account as set out in § 233.6(b);

(2) Address methods for the beneficiary's bank to conduct due diligence as set out in § 233.6(b)(2)(ii)(B) in the event that the beneficiary's bank has actual knowledge that an existing commercial customer of the bank engages in an Internet gambling business;

(3) Include procedures to be followed if the beneficiary's bank obtains actual knowledge that a commercial customer of the bank has received restricted transactions through the wire transfer system, such as procedures that address

(i) The circumstances under which the beneficiary bank should deny wire transfer services to the commercial customer; and

(ii) The circumstances under which the commercial customer account should be closed.

§ 233.7 Regulatory enforcement.

The requirements under this part are subject to the exclusive regulatory enforcement of—

(a) The Federal functional regulators, with respect to the designated payment systems and participants therein that are subject to the respective jurisdiction of such regulators under section 505(a) of the Gramm-

Leach-Bliley Act (15 U.S.C. 6805(a)) and section 5g of the Commodity Exchange Act (7 U.S.C. 7b–2); and

(b) The Federal Trade Commission, with respect to designated payment systems and participants therein not otherwise subject to the jurisdiction of any Federal functional regulators (including the Commission) as described in paragraph (a) of this section.

APPENDIX A TO PART 233—MODEL NOTICE

[Date]

[Name of foreign sender or foreign banking office]

[Address]

Re: *U.S. Unlawful Internet Gambling Enforcement Act Notice*

Dear [Name of foreign counterparty]:

On [date], U.S. government officials informed us that your institution processed payments through our facilities for Internet gambling transactions restricted by U.S. law on [dates, recipients, and other relevant information if available].

We provide this notice to comply with U.S. Government regulations implementing the Unlawful Internet Gambling Enforcement Act of 2006 (Act), a U.S. federal law. Our policies and procedures established in accordance with those regulations provide that we will notify a foreign counterparty if we learn that the counterparty has processed payments through our facilities for Internet gambling transactions restricted by the Act. This notice ensures that you are aware that we have received information that your institution has processed payments for Internet gambling restricted by the Act.

The Act is codified in subchapter IV, chapter 53, title 31 of the U.S. Code (31 U.S.C. 5361 *et seq.*). Implementing regulations that duplicate one another can be found at part 233 of title 12 of the U.S. Code of Federal Regulations (12 CFR part 233) and part 132 of title 31 of the U.S. Code of Federal Regulations (31 CFR part 132).

PART 235—DEBIT CARD INTERCHANGE FEES AND ROUTING

Sec.
235.1 Authority and purpose.
235.2 Definitions.
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APPENDIX A TO PART 235—OFFICIAL BOARD COMMENTARY ON REGULATION II

AUTHORITY: 15 U.S.C. 1693o–2.

SOURCE: 76 FR 43466, July 20, 2011, unless otherwise noted.

§ 235.1 Authority and purpose.

(a) *Authority*. This part is issued by the Board of Governors of the Federal Reserve System (Board) under section 920 of the Electronic Fund Transfer Act (EFTA) (15 U.S.C. 1693o–2, as added by section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010)).

(b) *Purpose*. This part implements the provisions of section 920 of the EFTA, including standards for reasonable and proportional interchange transaction fees for electronic debit transactions, standards for receiving a fraud-prevention adjustment to interchange transaction fees, exemptions from the interchange transaction fee limitations, prohibitions on evasion and circumvention, prohibitions on payment card network exclusivity arrangements and routing restrictions for debit card transactions, and reporting requirements for debit card issuers and payment card networks.

§ 235.2 Definitions.

For purposes of this part:

(a) *Account* (1) Means a transaction, savings, or other asset account (other than an occasional or incidental credit balance in a credit plan) established for any purpose and that is located in the United States; and

(2) Does not include an account held under a bona fide trust agreement that is excluded by section 903(2) of the Electronic Fund Transfer Act and rules prescribed thereunder.

(b) *Acquirer* means a person that contracts directly or indirectly with a merchant to provide settlement for the merchant's electronic debit transactions over a payment card network. An acquirer does not include a person that acts only as a processor for the services it provides to the merchant.

(c) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(d) *Cardholder* means the person to whom a debit card is issued.

(e) *Control* of a company means—

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(f) *Debit card* (1) Means any card, or other payment code or device, issued or approved for use through a payment card network to debit an account, regardless of whether authorization is based on signature, personal identification number (PIN), or other means, and regardless of whether the issuer holds the account, and

(2) Includes any general-use prepaid card; and

(3) Does not include—

(i) Any card, or other payment code or device, that is redeemable upon presentation at only a single merchant or an affiliated group of merchants for goods or services; or

(ii) A check, draft, or similar paper instrument, or an electronic representation thereof.

(g) *Designated automated teller machine (ATM) network* means either—

(1) All ATMs identified in the name of the issuer; or

(2) Any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's customers.

(h) *Electronic debit transaction* (1) Means the use of a debit card by a person as a form of payment in the United States to initiate a debit to an account, and

(2) Does not include transactions initiated at an ATM, including cash withdrawals and balance transfers initiated at an ATM.

(i) *General-use prepaid card* means a card, or other payment code or device, that is—

(1) Issued on a prepaid basis in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(2) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services.

(j) *Interchange transaction fee* means any fee established, charged, or received by a payment card network and paid by a merchant or an acquirer for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

(k) *Issuer* means any person that authorizes the use of a debit card to perform an electronic debit transaction.

(l) *Merchant* means any person that accepts debit cards as payment.

(m) *Payment card network* means an entity that—

(1) Directly or indirectly provides the proprietary services, infrastructure, and software that route information and data to an issuer from an acquirer to conduct the authorization, clearance, and settlement of electronic debit transactions; and

(2) A merchant uses in order to accept as a form of payment a brand of debit card or other device that may be used to carry out electronic debit transactions.

(n) *Person* means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.

(o) *Processor* means a person that processes or routes electronic debit transactions for issuers, acquirers, or merchants.

(p) *Route* means to direct and send information and data to an unaffiliated entity or to an affiliated entity acting on behalf of an unaffiliated entity.

(q) *United States* means the States, territories, and possessions of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 235.3 Reasonable and proportional interchange transaction fees.

(a) *In general.* The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the electronic debit transaction.

(b) *Determination of reasonable and proportional fees.* An issuer complies with the requirements of paragraph (a) of this section only if each interchange transaction fee received or charged by the issuer for an electronic debit transaction is no more than the sum of—

(1) 21 cents and;

(2) 5 basis points multiplied by the value of the transaction.

§ 235.4 Fraud-prevention adjustment.

(a) *In general.* If an issuer meets the standards set forth in paragraph (b) of this section, it may receive or charge an additional amount of no more than 1 cent per transaction to any interchange transaction fee it receives or charges in accordance with § 235.3.

(b) *Issuer standards.* To be eligible to receive the fraud-prevention adjustment, an issuer shall—

(1) Develop and implement policies and procedures reasonably designed to—

(i) Identify and prevent fraudulent electronic debit transactions;

(ii) Monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions;

(iii) Respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and

(iv) Secure debit card and cardholder data; and

(2) Review its fraud-prevention policies and procedures at least annually, and update them as necessary to address changes in prevalence and nature of fraudulent electronic debit transactions and available methods of detecting, preventing, and mitigating fraud.

(c) *Certification.* To be eligible to receive or charge a fraud-prevention adjustment, an issuer that meets the standards set forth in paragraph (b) of this section must certify such compliance to its payment card networks on an annual basis.

[76 FR 43486, July 20, 2011]

§ 235.5 Exemptions.

(a) *Exemption for small issuers*—(1) *In general.* Except as provided in paragraph (a)(3) of this section, §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction if—

(i) The issuer holds the account that is debited; and

(ii) The issuer, together with its affiliates, has assets of less than $10 billion as of the end of the calendar year preceding the date of the electronic debit transaction.

(2) *Determination of issuer asset size.* A person may rely on lists published by the Board to determine whether an issuer, together with its affiliates, has assets of less than $10 billion as of the end of the calendar year preceding the date of the electronic debit transaction.

(3) *Change in status.* If an issuer qualifies for the exemption in paragraph (a)(1) in a particular calendar year, but, as of the end of that calendar year no longer qualifies for the exemption because at that time it, together with its affiliates, has assets of $10 billion or more, the issuer must begin complying with §§ 235.3, 235.4, and 235.6 no later than July 1 of the succeeding calendar year.

(b) *Exemption for government-administered programs.* Except as provided in paragraph (d) of this section, §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction if—

(1) The electronic debit transaction is made using a debit card that has been provided to a person pursuant to a Federal, State, or local government-administered payment program; and

(2) The cardholder may use the debit card only to transfer or debit funds, monetary value, or other assets that have been provided pursuant to such program.

(c) *Exemption for certain reloadable prepaid cards*—(1) *In general*. Except as provided in paragraph (d) of this section, §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction using a general-use prepaid card that is—

(i) Not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis);

(ii) Reloadable and not marketed or labeled as a gift card or gift certificate; and

(iii) The only means of access to the underlying funds, except when all remaining funds are provided to the cardholder in a single transaction.

(2) *Temporary cards*. For purposes of this paragraph (c), the term ''reloadable'' includes a temporary non-reloadable card issued solely in connection with a reloadable general-use prepaid card.

(d) *Exception*. The exemptions in paragraphs (b) and (c) of this section do not apply to any interchange transaction fee received or charged by an issuer on or after July 21, 2012, with respect to an electronic debit transaction if any of the following fees may be charged to a cardholder with respect to the card:

(1) A fee or charge for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance, unless the fee or charge is imposed for transferring funds from another asset account to cover a shortfall in the account accessed by the card; or

(2) A fee imposed by the issuer for the first withdrawal per calendar month from an ATM that is part of the issuer's designated ATM network.

§ 235.6 Prohibition on circumvention, evasion, and net compensation.

(a) *Prohibition of circumvention or evasion*. No person shall circumvent or evade the interchange transaction fee restrictions in §§ 235.3 and 235.4.

(b) *Prohibition of net compensation*. An issuer may not receive net compensation from a payment card network with respect to electronic debit transactions or debit card-related activities within a calendar year. Net compensation occurs when the total amount of payments or incentives received by an issuer from a payment card network with respect to electronic debit transactions or debit card-related activities, other than interchange transaction fees passed through to the issuer by the network, during a calendar year exceeds the total amount of all fees paid by the issuer to the network with respect to electronic debit transactions or debit card-related activities during that calendar year. Payments and incentives paid by a network to an issuer, and fees paid by an issuer to a network, with respect to electronic debit transactions or debit card related activities are not limited to volume-based or transaction-specific payments, incentives, or fees, but also include other payments, incentives or fees related to an issuer's provision of debit card services.

§ 235.7 Limitations on payment card restrictions.

(a) *Prohibition on network exclusivity*—(1) *In general*. An issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed to less than two unaffiliated networks.

(2) *Permitted arrangements*. An issuer satisfies the requirements of paragraph (a)(1) of this section only if the issuer allows an electronic debit transaction to be processed on at least two unaffiliated payment card networks, each of which does not, by rule or policy, restrict the operation of the network to a limited geographic area, specific merchant, or particular type of merchant or transaction, and each of which has taken steps reasonably designed to enable the network to process the electronic debit transactions that the network would reasonably expect will be routed to it, based on expected transaction volume.

(3) *Prohibited exclusivity arrangements by networks.* For purposes of paragraph (a)(1) of this section, a payment card network may not restrict or otherwise limit an issuer's ability to contract with any other payment card network that may process an electronic debit transaction involving the issuer's debit cards.

(4) *Subsequent affiliation.* If unaffiliated payment card networks become affiliated as a result of a merger or acquisition such that an issuer is no longer in compliance with paragraph (a) of this section, the issuer must add an unaffiliated payment card network through which electronic debit transactions on the relevant debit card may be processed no later than six months after the date on which the previously unaffiliated payment card networks consummate the affiliation.

(b) *Prohibition on routing restrictions.* An issuer or payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person that accepts or honors debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions.

(c) *Compliance dates*—(1) *General.* Except as otherwise provided in paragraphs (c)(2), (c)(3), and (c)(4) of this section, the compliance date of paragraph (a) of this section is April 1, 2012.

(2) *Restrictions by payment card networks.* The compliance date of paragraphs (a)(1) and (a)(3) of this section for payment card networks is October 1, 2011.

(3) *Debit cards that use transaction qualification or substantiation systems.* Issuers shall comply with the requirements of paragraph (a) of this section by April 1, 2013, for electronic debit transactions using debit cards that use point-of-sale transaction qualification or substantiation systems for verifying the eligibility of purchased goods or services.

(4) *General-use prepaid cards.* Issuers shall comply with the requirements of paragraph (a) of this section with respect to general-use prepaid cards as set out below.

(i) With respect to non-reloadable general-use prepaid cards, the compliance date is April 1, 2013. Non-reloadable general-use prepaid cards sold prior to April 1, 2013 are not subject to paragraph (a) of this section.

(ii) With respect to reloadable general-use prepaid cards, the compliance date is April 1, 2013. Reloadable general-use prepaid cards sold prior to April 1, 2013 are not subject to paragraph (a) of this section unless and until they are reloaded, in which case the following compliance dates apply:

(A) With respect to reloadable general-use prepaid cards sold and reloaded prior to April 1, 2013, the compliance date is May 1, 2013.

(B) With respect to reloadable general-use prepaid cards sold prior to April 1, 2013, and reloaded on or after April 1, 2013, the compliance date is 30 days after the date of reloading.

§ 235.8 Reporting requirements and record retention.

(a) *Entities required to report.* Each issuer that is not otherwise exempt from the requirements of this part under § 235.5(a) and each payment card network shall file a report with the Board in accordance with this section.

(b) *Report.* Each entity required to file a report with the Board shall submit data in a form prescribed by the Board for that entity. Data required to be reported may include, but may not be limited to, data regarding costs incurred with respect to an electronic debit transaction, interchange transaction fees, network fees, fraud-prevention costs, fraud losses, and transaction value, volume, and type.

(c) *Record retention.* (1) An issuer subject to this part shall retain evidence of compliance with the requirements imposed by this part for a period of not less than five years after the end of the calendar year in which the electronic debit transaction occurred.

(2) Any person subject to this part having actual notice that it is the subject of an investigation or an enforcement proceeding by its enforcement agency shall retain the records that pertain to the investigation, action, or proceeding until final disposition of the matter unless an earlier time is allowed by court or agency order.

§ 235.9 Administrative enforcement.

(a)(1) Compliance with the requirements of this part shall be enforced under—

(i) Section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) National banks, federal savings associations, and federal branches and federal agencies of foreign banks;

(B) Member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than federal branches, federal Agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act;

(C) Banks and state savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured state branches of foreign banks;

(ii) The Federal Credit Union Act (12 U.S.C. 1751 *et seq.*), by the Administrator of the National Credit Union Administration (National Credit Union Administration Board) with respect to any federal credit union;

(iii) The Federal Aviation Act of 1958 (49 U.S.C. 40101 *et seq.*), by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act; and

(iv) The Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), by the Securities and Exchange Commission, with respect to any broker or dealer subject to that Act.

(2) The terms used in paragraph (a)(1) of this section that are not defined in this part or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(b) *Additional powers.* (1) For the purpose of the exercise by any agency referred to in paragraphs (a)(1)(i) through (a)(1)(iv) of this section of its power under any statute referred to in those paragraphs, a violation of this part is deemed to be a violation of a requirement imposed under that statute.

(2) In addition to its powers under any provision of law specifically referred to in paragraphs (a)(1)(i) through (a)(1)(iv) of this section, each of the agencies referred to in those paragraphs may exercise, for the purpose of enforcing compliance under this part, any other authority conferred on it by law.

(c) *Enforcement authority of Federal Trade Commission.* Except to the extent that enforcement of the requirements imposed under this title is specifically granted to another government agency under paragraphs (a)(1)(i) through (a)(1)(iv) of this section, and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission has the authority to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of this part shall be deemed a violation of a requirement imposed under the Federal Trade Commission Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person subject to the jurisdiction of the Federal Trade Commission with the requirements of this part, regardless of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.

§ 235.10 Effective and compliance dates.

Except as provided in § 235.7, this part becomes effective and compliance is mandatory on October 1, 2011.

APPENDIX A TO PART 235—OFFICIAL BOARD COMMENTARY ON REGULATION II

INTRODUCTION

The following commentary to Regulation II (12 CFR part 235) provides background material to explain the Board's intent in adopting a particular part of the regulation. The commentary also provides examples to aid in understanding how a particular requirement is to work.

SECTION 235.2 DEFINITIONS

2(a) Account

1. *Types of accounts.* The term ''account'' includes accounts held by any person, including consumer accounts (*i.e.,* those established primarily for personal, family or household purposes) and business accounts. Therefore, the limitations on interchange transaction fees and the prohibitions on network exclusivity arrangements and routing restrictions apply to all electronic debit transactions, regardless of whether the transaction involves a debit card issued primarily for personal, family, or household purposes or for business purposes. For example, an issuer of a business-purpose debit card is subject to the restrictions on interchange transaction fees and is also prohibited from restricting the number of payment card networks on which an electronic debit transaction may be processed under §235.7.

2. *Bona fide trusts.* This part does not define the term bona fide trust agreement; therefore, institutions must look to state or other applicable law for interpretation. An account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code, such as an individual retirement account, is considered to be held under a trust agreement for purposes of this part.

3. *Account located in the United States.* This part applies only to electronic debit transactions that are initiated to debit (or credit, for example, in the case of returned goods or cancelled services) an account located in the United States. If a cardholder uses a debit card to debit an account held outside the United States, then the electronic debit transaction is not subject to this part.

2(b) Acquirer

1. *In general.* The term ''acquirer'' includes only the institution that contracts, directly or indirectly, with a merchant to provide settlement for the merchant's electronic debit transactions over a payment card network (referred to as acquiring the merchant's electronic debit transactions). In some acquiring relationships, an institution provides processing services to the merchant and is a licensed member of the payment card network, but does not settle the transactions with the merchant (by crediting the merchant's account) or with the issuer. These institutions are not ''acquirers'' because they do not provide credit to the merchant for the transactions or settle the merchant's transactions with the issuer. These institutions are considered processors and in some circumstances may be considered payment card networks for purposes of this part (*See* §§235.2(m), 235.2(o), and commentary thereto).

2(c) Affiliate

1. *Types of entities.* The term ''affiliate'' includes any bank and nonbank affiliates located in the United States or a foreign country.

2. *Other affiliates.* For commentary on whether merchants are affiliated, see comment 2(f)–7.

2(d) Cardholder

1. *Scope.* In the case of debit cards that access funds in transaction, savings, or other similar asset accounts, ''the person to whom a card is issued'' generally will be the named person or persons holding the account. If the account is a business account, multiple employees (or other persons associated with the business) may have debit cards that can access the account. Each employee that has a debit card that can access the account is a cardholder. In the case of a prepaid card, the cardholder generally is either the purchaser of the card or a person to whom the purchaser gave the card, such as a gift recipient.

2(e) Control [Reserved]

2(f) Debit Card

1. *Card, or other payment code or device.* The term ''debit card'' as defined in §235.2(f) applies to any card, or other payment code or device, even if it is not issued in a physical form. Debit cards include, for example, an account number or code that can be used to access funds in an account to make Internet purchases. Similarly, the term ''debit card'' includes a device with a chip or other embedded mechanism, such as a mobile phone or sticker containing a contactless chip that links the device to funds stored in an account, and enables an account to be debited. The term ''debit card,'' however, does not include a one-time password or other code if such password or code is used for the purposes of authenticating the cardholder and is used in addition to another card, or other payment code or device, rather than as the payment code or device.

2. *Deferred debit cards.* The term ''debit card'' includes a card, or other payment code or device, that is used in connection with deferred debit card arrangements in which transactions are not immediately posted to and funds are not debited from the underlying transaction, savings, or other asset account upon settlement of the transaction. Instead, the funds in the account typically are held and made unavailable for other transactions for a period of time specified in the issuer-cardholder agreement. After the expiration of the time period, the cardholder's account is debited for the value of all transactions made using the card that have been submitted to the issuer for settlement during that time period. For example,

under some deferred debit card arrangements, the issuer may debit the consumer's account for all debit card transactions that occurred during a particular month at the end of the month. Regardless of the time period between the transaction and account posting, a card, or other payment code or device, that is used in connection with a deferred debit arrangement is considered a debit card for purposes of the requirements of this part.

3. *Decoupled debit cards.* Decoupled debit cards are issued by an entity other than the financial institution holding the cardholder's account. In a decoupled debit arrangement, transactions that are authorized by the card issuer settle against the cardholder's account held by an entity other than the issuer, generally via a subsequent ACH debit to that account. The term ''debit card'' includes any card, or other payment code or device, issued or approved for use through a payment card network to debit an account, regardless of whether the issuer holds the account. Therefore, decoupled debit cards are debit cards for purposes of this part.

4. *Hybrid cards.*

i. Some cards, or other payment codes or devices, may have both credit- and debit-like features (''hybrid cards''). For example, these cards may enable a cardholder to access a line of credit, but select certain transactions for immediate repayment (*i.e.,* prior to the end of a billing cycle) via a debit to the cardholder's account, as the term is defined in §235.2(a), held either with the issuer or at another institution. If a card permits a cardholder to initiate transactions that debit an account or funds underlying a prepaid card, the card is considered a debit card for purposes of this part. Not all transactions initiated by such a hybrid card, however, are electronic debit transactions. Rather, only those transactions that debit an account as defined in this part or funds underlying a prepaid card are electronic debit transactions. If the transaction posts to a line of credit, then the transaction is a credit transaction.

ii. If an issuer conditions the availability of a credit or charge card that permits preauthorized repayment of some or all transactions on the cardholder maintaining an account at the issuer, such a card is considered a debit card for purposes of this part.

5. *Virtual wallets.* A virtual wallet is a device (*e.g.,* a mobile phone) that stores several different payment codes or devices (''virtual cards'') that access different accounts, funds underlying the card, or lines of credit. At the point of sale, the cardholder may select from the virtual wallet the virtual card he or she wishes to use for payment. The virtual card that the cardholder uses for payment is considered a debit card under this part if the virtual card that initiates a transaction meets the definition of debit card, notwithstanding the fact that other cards in the wallet may not be debit cards.

6. *General-use prepaid card.* The term ''debit card'' includes general-use prepaid cards. See §235.2(i) and related commentary for information on general-use prepaid cards.

7. *Store cards.* The term ''debit card'' does not include prepaid cards that may be used at a single merchant or affiliated merchants. Two or more merchants are affiliated if they are related by either common ownership or by common corporate control. For purposes of the ''debit card'' definition, franchisees are considered to be under common corporate control if they are subject to a common set of corporate policies or practices under the terms of their franchise licenses.

8. *Checks, drafts, and similar instruments.* The term ''debit card'' does not include a check, draft, or similar paper instrument or a transaction in which the check is used as a source of information to initiate an electronic payment. For example, if an account holder provides a check to buy goods or services and the merchant takes the account number and routing number information from the MICR line at the bottom of a check to initiate an ACH debit transfer from the cardholder's account, the check is not a debit card, and such a transaction is not considered an electronic debit transaction. Likewise, the term ''debit card'' does not include an electronic representation of a check, draft, or similar paper instrument.

9. *ACH transactions.* The term ''debit card'' does not include an account number when it is used by a person to initiate an ACH transaction that debits that person's account. For example, if an account holder buys goods or services over the Internet using an account number and routing number to initiate an ACH debit, the account number is not a debit card, and such a transaction is not considered an electronic debit transaction. However, the use of a card to purchase goods or services that debits the cardholder's account that is settled by means of a subsequent ACH debit initiated by the card issuer to the cardholder's account, as in the case of a decoupled debit card arrangement, involves the use of a debit card for purposes of this part.

2(g) Designated Automated Teller Machine (ATM) Network

1. *Reasonable and convenient access clarified.* Under §235.2(g)(2), a designated ATM network includes any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's cardholders. Whether a network provides reasonable and convenient access depends on the facts and circumstances, including the distance between ATMs in the designated network and each cardholder's last known home

or work address, or if a home or work address is not known, where the card was first issued.

2(h) Electronic Debit Transaction

1. *Debit an account.* The term ''electronic debit transaction'' includes the use of a card to debit an account. The account debited could be, for example, the cardholder's asset account or the account that holds the funds used to settle prepaid card transactions.

2. *Form of payment.* The term ''electronic debit transaction'' includes the use of a card as a form of payment that may be made in exchange for goods or services, as a charitable contribution, to satisfy an obligation (*e.g.*, tax liability), or for other purposes.

3. *Subsequent transactions.* The term ''electronic debit transaction'' includes both the cardholder's use of a debit card for the initial payment and any subsequent use by the cardholder of the debit card in connection with the initial payment. For example, the term ''electronic debit transaction'' includes using the debit card to return merchandise or cancel a service that then results in a debit to the merchant's account and a credit to the cardholder's account.

4. *Cash withdrawal at the point of sale.* The term ''electronic debit transaction'' includes a transaction in which a cardholder uses the debit card both to make a purchase and to withdraw cash (known as a ''cash-back transaction'').

5. *Geographic limitation.* This regulation applies only to electronic debit transactions that are initiated at a merchant located in the United States. If a cardholder uses a debit card at a merchant located outside the United States to debit an account held in the United States, the electronic debit transaction is not subject to this part.

2(i) General-Use Prepaid Card

1. *Redeemable upon presentation at multiple, unaffiliated merchants.* A prepaid card is redeemable upon presentation at multiple, unaffiliated merchants if such merchants agree to honor the card.

2. *Selective authorization cards.* Selective authorization cards, (*e.g.*, mall cards) are generally intended to be used or redeemed for goods or services at participating retailers within a shopping mall or other limited geographic area. Selective authorization cards are considered general-use prepaid cards, regardless of whether they carry the mark, logo, or brand of a payment card network, if they are redeemable at multiple, unaffiliated merchants.

2(j) Interchange Transaction fee

1. *In general.* Generally, the payment card network is the entity that establishes and charges the interchange transaction fee to the acquirers or merchants. The acquirers then pay to the issuers any interchange transaction fee established and charged by the network. Acquirers typically pass the interchange transaction fee through to merchant-customers.

2. *Compensating an issuer.* The term ''interchange transaction fee'' is limited to those fees that a payment card network establishes, charges, or receives to compensate the issuer for its role in the electronic debit transaction. By contrast, payment card networks generally charge issuers and acquirers fees for services the network performs. Such fees are not interchange transaction fees because the payment card network is charging and receiving the fee as compensation for services it provides.

3. *Established, charged, or received.* Interchange transaction fees are not limited to those fees for which a payment card network sets the value. A fee that compensates an issuer is an interchange transaction fee if the fee is set by the issuer but charged to acquirers by virtue of the network determining each participant's net settlement position.

2(k) Issuer

1. *In general.* A person issues a debit card by authorizing the use of debit card by a cardholder to perform electronic debit transactions. That person may provide the card directly to the cardholder or indirectly by using a third party (such as a processor, or a telephone network or manufacturer) to provide the card, or other payment code or device, to the cardholder. The following examples illustrate the entity that is the issuer under various card program arrangements. For purposes of determining whether an issuer is exempted under §235.5(a), however, the term issuer is limited to the entity that holds the account being debited.

2. *Traditional debit card arrangements.* In a traditional debit card arrangement, the bank or other entity holds the cardholder's funds and authorizes the cardholder to use the debit card to access those funds through electronic debit transactions, and the cardholder receives the card directly or indirectly (*e.g.*, through an agent) from the bank or other entity that holds the funds (except for decoupled debit cards, discussed below). In this system, the bank or entity holding the cardholder's funds is the issuer.

3. *BIN-sponsor arrangements.* Payment card networks assign Bank Identification Numbers (BINs) to member-institutions for purposes of issuing cards, authorizing, clearing, settling, and other processes. In exchange for a fee or other financial considerations, some members of payment card networks permit other entities to issue debit cards using the member's BIN. The entity permitting the use of its BIN is referred to as the ''BIN sponsor'' and the entity that uses the BIN to issue cards is often referred to as the ''affiliate

member.'' BIN sponsor arrangements can follow at least two different models:

i. *Sponsored debit card model.* In some cases, a community bank or credit union may provide debit cards to its account holders through a BIN sponsor arrangement with a member institution. In general, the bank or credit union will authorize its account holders to use debit cards to perform electronic debit transactions that access funds in accounts at the bank or credit union. The bank or credit union's name typically will appear on the debit card. The bank or credit union may directly or indirectly provide the cards to cardholders. Under these circumstances, the bank or credit union is the issuer for purposes of this part. If that bank or credit union, together with its affiliates, has assets of less than $10 billion, then that bank or credit union is exempt from the interchange transaction fee restrictions. Although the bank or credit union may distribute cards through the BIN sponsors, the BIN sponsor does not enter into the agreement with the cardholder that authorizes the cardholder to use the card to perform electronic debit transactions that access funds in the account at the bank or credit union, and therefore the BIN sponsor is not the issuer.

ii. *Prepaid card model.* A member institution may also serve as the BIN sponsor for a prepaid card program. Under these arrangements, a program manager distributes prepaid cards to the cardholders and the BIN-sponsoring institution generally holds the funds for the prepaid card program in an omnibus or pooled account. Either the BIN sponsor or the prepaid card program manager may keep track of the underlying funds for each individual prepaid card through subaccounts. While the cardholder may receive the card directly from the program manager or at a retailer, the BIN sponsor authorizes the cardholder to use the card to perform electronic debit transactions that access the funds in the pooled account and the cardholder's relationship generally is with the BIN sponsor. Accordingly, under these circumstances, the BIN sponsor, or the bank holding the pooled account, is the issuer.

4. *Decoupled debit cards.* In the case of decoupled debit cards, an entity other than the bank holding the cardholder's account enters into a relationship with the cardholder authorizing the use of the card to perform electronic debit transactions. The entity authorizing the use of the card to perform electronic debit transaction typically arranges for the card to be provided directly or indirectly to the cardholder and has a direct relationship with the cardholder with respect to the card. The bank holding the cardholder's account has agreed generally to permit ACH debits to the account, but has not authorized the use of the debit card to access the funds through electronic debit transactions. Under these circumstances, the entity authorizing the use of the debit card, and not the account-holding institution, is considered the issuer. An issuer of a decoupled debit card is not exempt under § 235.5(a), even if, together with its affiliates, it has assets of less than $10 billion, because it is not the entity holding the account to be debited.

2(l) Merchant [Reserved]

2(m) Payment Card Network

1. *In general.* An entity is a considered a payment card network with respect to an electronic debit transaction for purposes of this rule if it routes information and data to the issuer from the acquirer to conduct authorization, clearance, and settlement of the electronic debit transaction. By contrast, if an entity receives transaction information and data from a merchant and authorizes and settles the transaction without routing the information and data to another entity (*i.e.,* the issuer or the issuer's processor) for authorization, clearance, or settlement, that entity is not considered a payment card network with respect to the electronic debit transaction.

2. *Three-party systems.* In the case of a three-party system, electronic debit transactions are processed by an entity that acts as system operator and issuer, and may also act as the acquirer. The entity acting as system operator and issuer that receives the transaction information from the merchant or acquirer also holds the cardholder's funds. Therefore, rather than directing the transaction information to a separate issuer, the entity authorizes and settles the transaction based on the information received from the merchant. As these entities do not connect (or ''network'') multiple issuers and do not route information to conduct the transaction, they are not ''payment card networks'' with respect to these transactions.

3. *Processors as payment card networks.* A processor is considered a payment card network if, in addition to acting as processor for an acquirer and issuer, the processor routes transaction information and data received from a merchant or the merchant's acquirer to an issuer. For example, if a merchant uses a processor in order to accept any, some, or all brands of debit cards and the processor routes transaction information and data to the issuer or issuer's processor, the merchant's processor is considered a payment card network with respect to the electronic debit transaction. If the processor establishes, charges, or receives a fee for the purpose of compensating an issuer, that fee is considered an interchange transaction fee for purposes of this part.

4. *Automated clearing house (ACH) operators.* An ACH operator is not considered a payment card network for purposes of this part. While an ACH operator processes transactions that debit an account and provides

for interbank clearing and settlement of such transactions, a person does not use the ACH system to accept as a form of payment a brand of debit card.

5. *ATM networks.* An ATM network is not considered a payment card network for purposes of this part. While ATM networks process transactions that debit an account and provide for interbank clearing and settlement of such transactions, a cash withdrawal from an ATM is not a payment because there is no exchange of money for goods or services, or payment made as a charitable contribution, to satisfy an obligation (*e.g.,* tax liability), or for other purposes.

2(n) Person [Reserved]

2(o) Processor

1. *Distinction from acquirers.* A processor may perform all transaction-processing functions for a merchant or acquirer, but if it does not acquire (that is, settle with the merchant for the transactions), it is not an acquirer. The entity that acquirers electronic debit transactions is the entity that is responsible to other parties to the electronic debit transaction for the amount of the transaction.

2. *Issuers.* A processor may perform services related to authorization, clearance, and settlement of transactions for an issuer without being considered to be an issuer for purposes of this part.

2(p) Route

1. An entity routes information if it both directs and sends the information to an unaffiliated entity (or affiliated entity acting on behalf of the unaffiliated entity). This other entity may be a payment card network or processor (if the entity directing and sending the information is a merchant or an acquirer) or an issuer or processor (if the entity directing and sending the information is a payment card network).

2(q) United States [Reserved]

SECTION 235.3 REASONABLE AND PROPORTIONAL INTERCHANGE TRANSACTION FEES

3(a) [Reserved]

3(b) Determining Reasonable and Proportional Fees

1. *Two components.* The standard for the maximum permissible interchange transaction fee that an issuer may receive consists of two components: a base component that does not vary with a transaction's value and an *ad valorem* component. The amount of any interchange transaction fee received or charged by an issuer may not exceed the sum of the maximum permissible amounts of each component and any fraud-prevention adjustment the issuer is permitted to receive under § 235.4 of this part.

2. *Variation in interchange fees.* An issuer is permitted to charge or receive, and a network is permitted to establish, interchange transaction fees that vary in their base component and *ad valorem* component based on, for example, the type of transaction or merchant, provided the amount of any interchange transaction fee for any transaction does not exceed the sum of the maximum permissible base component of 21 cents and 5 basis points of the value of the transaction.

3. *Example.* For a $39 transaction, the maximum permissible interchange transaction fee is 22.95 cents (21 cents plus 5 basis points of $39). A payment card network may, for example, establish an interchange transaction fee of 22 cents without any *ad valorem* component.

SECTION 235.4 FRAUD-PREVENTION ADJUSTMENT

4(b) Issuer Standards

1. *In general.* Section 235.4(b) does not specify particular policies and procedures that an issuer must implement. Rather, an issuer must determine which policies and procedures are reasonably designed to achieve the objectives set forth in the standards. An issuer's policies and procedures must include fraud-prevention technologies and other methods or practices reasonably designed to detect, prevent, and mitigate fraudulent electronic debit transactions. An issuer does not satisfy the standards in § 235.4(b) if it merely develops policies and procedures; the issuer also must implement those policies and procedures. Implementing an issuer's fraud-prevention policies and procedures should include training the issuer's employees and agents, as appropriate.

2. An issuer's policies and procedures should address, among other things, fraud related to debit card use by unauthorized persons, which is a type of fraud that can be effectively addressed by the issuer, as the entity with the direct relationship with the cardholder and that authorizes the transaction. Examples of use by unauthorized persons include the following:

i. A thief steals a cardholder's wallet and uses the debit card to purchase goods, without the authority of the cardholder.

ii. A cardholder makes a $100 purchase at a merchant. Subsequently, the merchant's employee uses information from the debit card to initiate a subsequent transaction for an additional $100, without the authority of the cardholder.

iii. A hacker steals cardholder account information from a merchant processor and uses that information to make unauthorized purchases of goods or services.

Paragraph 4(b)(1)(i). *Identify and prevent fraudulent debit card transactions.*

1. *In general.* An issuer shall develop and implement policies and procedures reasonably designed to identify and prevent fraudulent electronic debit transactions. These policies and procedures should include activities to prevent, detect, and mitigate fraud even if the costs of these activities are not recoverable as part of the fraud-prevention adjustment. The issuer's policies and procedures may include the following:

i. An automated mechanism to assess the risk that a particular electronic debit transaction is fraudulent during the authorization process (*i.e.*, before the issuer approves or declines an authorization request). For example, an issuer may use neural networks to identify transactions that present increased risk of fraud. As a result of this analysis, the issuer may decide to decline to authorize these transactions. An issuer may not be able to determine whether a given transaction in isolation is fraudulent at the time of authorization, and therefore may have policies and procedures that monitor sets of transactions initiated with a cardholder's debit card. For example, an issuer could compare a set of transactions initiated with the card to a customer's typical transactions in order to determine whether a transaction is likely to be fraudulent. Similarly, an issuer could compare a set of transactions initiated with a debit card and common fraud patterns in order to determine whether a transaction or future transaction is likely to be fraudulent.

ii. Practices to support reporting of lost and stolen cards or suspected incidences of fraud by cardholders or other parties to a transaction. As an example, an issuer may promote customer awareness by providing text alerts of transactions in order to detect fraudulent transactions in a timely manner. An issuer may also report debit cards suspected of being fraudulent to their networks for inclusion in a database of compromised cards.

iii. Practices to help determine whether a user is authorized to use the card at the time of a transaction. For example, an issuer may specify the use of particular technologies or methods, such as dynamic data, to better authenticate a cardholder at the point of sale.

2. *Review of authentication methods.* The issuer's policies and procedures should include an assessment of the effectiveness of the different authentication methods that the issuer enables its cardholders to use, including a review of the rate of fraudulent transactions for each authentication method. If one method of authentication results in significantly lower fraud losses than other method(s) of authentication enabled on the issuer's debit cards, the issuer should consider practices to encourage its cardholders to use the more effective authentication method. It should also consider methods for reducing fraud related to the authentication method that experiences higher fraud rates. In addition, the issuer should monitor industry developments and consider adopting, where practical, new method(s) of authentication that are materially more effective than the methods currently available to its cardholders.

Paragraph 4(b)(1)(ii). *Monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions.*

1. In order to inform its policies and procedures, an issuer must be able to track its fraudulent electronic debit transactions over time. Accordingly, an issuer must have policies and procedures designed to monitor the types, number, and value of fraudulent electronic debit transactions. In addition, an issuer must track its and its cardholders' losses from fraudulent electronic debit transactions, its fraud-related chargebacks to acquirers, and any reimbursements from other parties. Other reimbursements could include payments made to issuers as a result of fines assessed to merchants for noncompliance with Payment Card Industry (PCI) Data Security Standards or other industry standards.

Paragraph 4(b)(1)(iii). *Respond to suspicious electronic debit transactions.*

1. An issuer may identify transactions that it suspects to be fraudulent after it has authorized or settled the transaction. For example, a cardholder may inform the issuer that the cardholder did not authorize a transaction or transactions, or the issuer may learn of a fraudulent transaction or possibly compromised debit cards from the network, the acquirer, or other parties. An issuer must have policies and procedures in place designed to implement an appropriate response once an issuer has identified suspicious transactions or transactions likely to be fraudulent. The appropriate response is likely to differ depending on the circumstances and the risk of future fraudulent electronic debit transactions. For example, in some circumstances, it may be sufficient for an issuer to monitor more closely the account with the suspicious transactions. In other circumstances, it may be necessary to reissue cards or close the account. An appropriate response may also require coordination with industry organizations, law enforcement agencies, and other parties, such as payment card networks, merchants, and issuer or merchant processors. An appropriate response would be reasonably designed to mitigate fraud losses due to suspicious transactions and transactions alleged to be fraudulent across all parties to such transactions.

2. An issuer's policies and procedures do not provide an appropriate response if they merely shift the loss to another party, other than the party that committed the fraud.

Paragraph 4(b)(1)(iv). *Secure debit card and cardholder data.*

1. An issuer must have policies and procedures designed to secure debit card and cardholder data that are transmitted by the issuer (or its service provider) during transaction processing, that are stored by the issuer (or its service provider), and that are carried on media (*e.g.*, laptops, transportable data storage devices) by employees or agents of the issuer. This standard may be incorporated into an issuer's information security program, as required by Section 501(b) of the Gramm-Leach-Bliley Act.

Paragraph 4(b)(2) *Annual review*

1. *Periodic updates of policies and procedures.* In general, an issuer must review its policies and procedures at least annually. In certain circumstances, however, an issuer may need to review and update its policies and procedures more frequently than once a year. For example, during a particular year, there may be significant changes in fraud types, fraud patterns, or fraud-prevention methods or technologies. If a significant change occurs, an issuer must review and, if necessary, update its fraud-prevention policies and procedures to address the significant change, even if the issuer has reviewed its policies and procedures within the preceding year.

4(c) Certification.

1. To be eligible to receive the fraud-prevention adjustment, each issuer must certify its compliance with the Board's fraud-prevention standards to the payment card networks in which it participates on an annual basis. Payment card networks that plan to allow issuers to receive or charge a fraud-prevention adjustment will develop their own processes for identifying issuers eligible for this adjustment. An issuer need not certify if it chooses not to receive any fraud-prevention adjustment available through a network.

SECTION 235.5 EXEMPTIONS FOR CERTAIN ELECTRONIC DEBIT TRANSACTIONS

1. *Eligibility for multiple exemptions.* An electronic debit transaction may qualify for one or more exemptions. For example, a debit card that has been provided to a person pursuant to a Federal, State, or local government-administered payment program may be issued by an entity that, together with its affiliates, has assets of less than $10 billion as of the end of the preceding calendar year. In this case, an electronic debit transaction made using that card may qualify for the exemption under §235.5(a) for small issuers or for the exemption under §235.5(b) for government-administered payment programs. A payment card network establishing interchange fees for transactions that qualify for more than one exemption need only satisfy itself that the issuer's transactions qualify for at least one of the exemptions in order to exempt the electronic debit transaction from the interchange fee restrictions.

2. *Certification process.* Payment card networks that plan to allow issuers to receive higher interchange fees than permitted under §§235.3 and 235.4 pursuant to one of the exemptions in §235.5 could develop their own processes for identifying issuers and products eligible for such exemptions. Section 235.5(a)(2) permits payment card networks to rely on lists published by the Board to help determine eligibility for the small issuer exemption set forth in §235.5(a)(1).

5(a) Exemption for Small Issuers

1. *Asset size determination.* An issuer would qualify for the small-issuer exemption if its total worldwide banking and nonbanking assets, including assets of affiliates, other than trust assets under management, are less than $10 billion, as of December 31 of the preceding calendar year.

2. *Change in status.* If an exempt issuer becomes covered based on its and its affiliates assets at the end of a calendar year, that issuer must begin complying with the interchange fee standards (§235.3), the fraud-prevention adjustment standards (to the extent the issuer wishes to receive a fraud-prevention adjustment) (§235.4), and the provisions prohibiting circumvention, evasion, and net compensation (§235.6) no later than July 1.

5(b) Exemption for Government-Administered Payment Programs

1. *Government-administered payment program.* A program is considered government-administered regardless of whether a Federal, State, or local government agency operates the program or outsources some or all functions to third parties so long as the program is operated on behalf of the government agency. In addition, a program may be government-administered even if a Federal, State, or local government agency is not the source of funds for the program it administers. For example, child support programs are government-administered programs even though a Federal, State, or local government agency is not the source of funds. A tribal government is considered a local government for purposes of this exemption.

5(c) Exemption for Certain Reloadable Prepaid Cards

1. *Subaccount clarified.* A subaccount is an account within an account, opened in the name of an agent, nominee, or custodian for the benefit of two or more cardholders, where the transactions and balances of individual cardholders are tracked in such subaccounts. An account that is opened solely in the name of a single cardholder is not a subaccount.

2. *Reloadable.* A general-use prepaid card is ''reloadable'' if the terms and conditions of the agreement permit funds to be added to the general-use prepaid card at any time after the initial purchase or issuance. A general-use prepaid card is not ''reloadable'' merely because the issuer or processor is technically able to add functionality that would otherwise enable the general-use prepaid card to be reloaded.

3. *Marketed or labeled as a gift card or gift certificate.* i. Electronic debit transactions made using a reloadable general-use prepaid card are not exempt from the interchange fee restrictions if the card is marketed or labeled as a gift card or gift certificate. The term ''marketed or labeled as a gift card or gift certificate'' means directly or indirectly offering, advertising or otherwise suggesting the potential use of a general-use prepaid card as a gift for another person. Whether the exclusion applies generally does not depend on the type of entity that makes the promotional message. For example, a card may be marketed or labeled as a gift card or gift certificate if anyone (other than the purchaser of the card), including the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used, promotes the use of the card as a gift card or gift certificate. A general-use prepaid card is marketed or labeled as a gift card or gift certificate even if it is only occasionally marketed as a gift card or gift certificate. For example, a network-branded general purpose reloadable card would be marketed or labeled as a gift card or gift certificate if the issuer principally advertises the card as a less costly alternative to a bank account but promotes the card in a television, radio, newspaper, or Internet advertisement, or on signage as ''the perfect gift'' during the holiday season.

ii. The mere mention of the availability of gift cards or gift certificates in an advertisement or on a sign that also indicates the availability of exempted general-use prepaid cards does not by itself cause the general-use prepaid card to be marketed as a gift card or a gift certificate. For example, the posting of a sign in a store that refers to the availability of gift cards does not by itself constitute the marketing of otherwise exempted general-use prepaid cards that may also be sold in the store along with gift cards or gift certificates, provided that a person acting reasonably under the circumstances would not be led to believe that the sign applies to all cards sold in the store. (*See, however,* comment 5(c)–4.ii.)

4. *Examples of marketed or labeled as a gift card or gift certificate.*

i. The following are examples of marketed or labeled as a gift card or gift certificate:

A. Using the word ''gift'' or ''present'' on a card or accompanying material, including documentation, packaging and promotional displays;

B. Representing or suggesting that a card can be given to another person, for example, as a ''token of appreciation'' or a ''stocking stuffer,'' or displaying a congratulatory message on the card or accompanying material;

C. Incorporating gift-giving or celebratory imagery or motifs, such as a bow, ribbon, wrapped present, candle, or a holiday or congratulatory message, on a card, accompanying documentation, or promotional material;

ii. The term does not include the following:

A. Representing that a card can be used as a substitute for a checking, savings, or deposit account;

B. Representing that a card can be used to pay for a consumer's health-related expenses—for example, a card tied to a health savings account;

C. Representing that a card can be used as a substitute for travelers checks or cash;

D. Representing that a card can be used as a budgetary tool, for example, by teenagers, or to cover emergency expenses.

5. *Reasonable policies and procedures to avoid marketing as a gift card.* The exemption for a general-use prepaid card that is reloadable and not marketed or labeled as a gift card or gift certificate in §235.5(c) applies if a reloadable general-use prepaid card is not marketed or labeled as a gift card or gift certificate and if persons involved in the distribution or sale of the card, including issuers, program managers, and retailers, maintain policies and procedures reasonably designed to avoid such marketing. Such policies and procedures may include contractual provisions prohibiting a reloadable general-use prepaid card from being marketed or labeled as a gift card or gift certificate, merchandising guidelines or plans regarding how the product must be displayed in a retail outlet, and controls to regularly monitor or otherwise verify that the general-use prepaid card is not being marketed as a gift card. Whether a general-use prepaid card has been marketed as a gift card or gift certificate will depend on the facts and circumstances, including whether a reasonable person would be led to believe that the general-use prepaid card is a gift card or gift certificate. The following examples illustrate the application of §235.5(c):

i. An issuer or program manager of prepaid cards agrees to sell general-purpose reloadable cards through a retailer. The contract between the issuer or program manager and the retailer establishes the terms and conditions under which the cards may be sold and marketed at the retailer. The terms and conditions prohibit the general-purpose reloadable cards from being marketed as a gift card or gift certificate, and require policies and procedures to regularly monitor or otherwise verify that the cards are not being

marketed as such. The issuer or program manager sets up one promotional display at the retailer for gift cards and another physically separated display for exempted products under §235.5(c), including general-purpose reloadable cards, such that a reasonable person would not believe that the exempted cards are gift cards. The exemption in §235.5(c) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

ii. Same facts as in comment 5(c)–5.i, except that the issuer or program manager sets up a single promotional display at the retailer on which a variety of prepaid cards are sold, including store gift cards and general-purpose reloadable cards. A sign stating ''Gift Cards'' appears prominently at the top of the display. The exemption in §235.5(c) does not apply with respect to the general-purpose reloadable cards because policies and procedures reasonably designed to avoid the marketing of exempted cards as gift cards or gift certificates are not maintained.

iii. Same facts as in comment 5(c)–5.i, except that the issuer or program manager sets up a single promotional multi-sided display at the retailer on which a variety of prepaid card products, including store gift cards and general-purpose reloadable cards are sold. Gift cards are segregated from exempted cards, with gift cards on one side of the display and exempted cards on a different side of a display. Signs of equal prominence at the top of each side of the display clearly differentiate between gift cards and the other types of prepaid cards that are available for sale. The retailer does not use any more conspicuous signage suggesting the general availability of gift cards, such as a large sign stating ''Gift Cards'' at the top of the display or located near the display. The exemption in §235.5(c) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

iv. Same facts as in comment 5(c)–5.i, except that the retailer sells a variety of prepaid card products, including store gift cards and general-purpose reloadable cards, arranged side-by-side in the same checkout lane. The retailer does not affirmatively indicate or represent that gift cards are available, such as by displaying any signage or other indicia at the checkout lane suggesting the general availability of gift cards. The exemption in §235.5(c) applies because policies and procedures reasonably designed to avoid marketing the general-purpose reloadable cards as gift cards or gift certificates are maintained.

6. *On-line sales of prepaid cards.* Some web sites may prominently advertise or promote the availability of gift cards or gift certificates in a manner that suggests to a consumer that the web site exclusively sells gift cards or gift certificates. For example, a web site may display a banner advertisement or a graphic on the home page that prominently states ''Gift Cards,'' ''Gift Giving,'' or similar language without mention of other available products, or use a web address that includes only a reference to gift cards or gift certificates in the address. In such a case, a consumer acting reasonably under the circumstances could be led to believe that all prepaid products sold on the web site are gift cards or gift certificates. Under these facts, the web site has marketed all such products as gift cards or gift certificates, and the exemption in §235.5(c) does not apply to any products sold on the web site.

7. *Temporary non-reloadable cards issued in connection with a general-use reloadable card.* Certain general-purpose prepaid cards that are typically marketed as an account substitute initially may be sold or issued in the form of a temporary non-reloadable card. After the card is purchased, the cardholder is typically required to call the issuer to register the card and to provide identifying information in order to obtain a reloadable replacement card. In most cases, the temporary non-reloadable card can be used for purchases until the replacement reloadable card arrives and is activated by the cardholder. Because the temporary non-reloadable card may only be obtained in connection with the reloadable card, the exemption in §235.5(c) applies so long as the card is not marketed as a gift card or gift certificate.

5(d) Exception

1. *Additional ATM access.* Some debit cards may be used to withdraw cash from ATMs that are not part of the issuer's designated ATM network. An electronic debit card transaction may still qualify for the exemption under §§235.5(b) or (c) with a respect to a card for which a fee may be imposed for a withdrawal from an ATM that is outside of the issuer's designated ATM network as long as the card complies with the condition set forth in §235.5(d)(2) for withdrawals within the issuer's designated ATM network. The condition with respect to ATM fees does not apply to cards that do not provide ATM access.

SECTION 235.6 PROHIBITION ON CIRCUMVENTION, EVASION, AND NET COMPENSATION

1. *No applicability to exempt issuers or electronic debit transactions.* The prohibition

against circumventing or evading the interchange transaction fee restrictions or against net compensation does not apply to issuers or electronic debit transactions that qualify for an exemption under § 235.5 from the interchange transaction fee restrictions.

6(a) Prohibition of Circumvention or Evasion

1. *Finding of circumvention or evasion.* A finding of evasion or circumvention will depend on all relevant facts and circumstances. Although net compensation may be one form of circumvention or evasion prohibited under § 235.6(a), it is not the only form.

2. *Examples of circumstances that may constitute circumvention or evasion.*

The following examples do not constitute per se circumvention or evasion, but may warrant additional supervisory scrutiny to determine whether the totality of the facts and circumstances constitute circumvention or evasion:

i. A payment card network decreases network processing fees paid by issuers for electronic debit transactions by 50 percent and increases the network processing fees charged to merchants or acquirers with respect to electronic debit transactions by a similar amount. Because the requirements of this subpart do not restrict or otherwise establish the amount of fees that a network may charge for its services, the increase in network fees charged to merchants or acquirers and decrease in fees charged to issuers is not a per se circumvention or evasion of the interchange transaction fee standards, but may warrant additional supervisory scrutiny to determine whether the facts and circumstances constitute circumvention or evasion.

ii. An issuer replaces its debit cards with prepaid cards that are exempt from the interchange limits of §§ 235.3 and 235.4. The exempt prepaid cards are linked to its customers' transaction accounts and funds are swept from the transaction accounts to the prepaid accounts as needed to cover transactions made. Again, this arrangement is not per se circumvention or evasion, but may warrant additional supervisory scrutiny to determine whether the facts and circumstances constitute circumvention or evasion.

6(b) Prohibition of Net Compensation

1. *Net compensation.* Net compensation to an issuer through the use of network fees is prohibited.

2. *Consideration of payments or incentives provided by the network in net compensation determination.*

i. For purposes of the net compensation determination, payments or incentives paid by a payment card network to an issuer with respect to electronic debit transactions or debit card related activities could include, but are not limited to, marketing incentives; payments or rebates for meeting or exceeding a specific transaction volume, percentage share, or dollar amount of transactions processed; or other payments for debit card related activities. For example, signing bonuses paid by a network to an issuer for the issuer's debit card portfolio would also be included in the total amount of payments or incentives received by an issuer from a payment card network with respect to electronic debit transactions. A signing bonus for an entire card portfolio, including credit cards, may be allocated to the issuer's debit card business based on the proportion of the cards or transactions that are debit cards or electronic debit transactions, as appropriate to the situation, for purposes of the net compensation determination.

ii. Incentives paid by the network with respect to multiple-year contracts may be allocated over the life of the contract.

iii. For purposes of the net compensation determination, payments or incentives paid by a payment card network with respect to electronic debit transactions or debit card-related activities do not include interchange transaction fees that are passed through to the issuer by the network, or discounts or rebates provided by the network or an affiliate of the network for issuer-processor services. In addition, funds received by an issuer from a payment card network as a result of chargebacks, fines paid by merchants or acquirers for violations of network rules, or settlements or recoveries from merchants or acquirers to offset the costs of fraudulent transactions or a data security breach do not constitute incentives or payments made by a payment card network.

3. *Consideration of fees paid by an issuer in net compensation determination.*

i. For purposes of the net compensation determination, fees paid by an issuer to a payment card network with respect to electronic debit transactions or debit card related activities include, but are not limited to, membership or licensing fees, network administration fees, and fees for optional network services, such as risk management services.

ii. For purposes of the net compensation determination, fees paid by an issuer to a payment card network with respect to electronic debit transactions or debit card-related activities do not include network processing fees (such as switch fees and network connectivity fees) or fees paid to an issuer processor affiliated with the network for authorizing, clearing, or settling an electronic debit transaction.

4. *Example of circumstances not involving net compensation to the issuer.* The following example illustrates circumstances that would not indicate net compensation by the payment card network to the issuer:

i. Because of an increase in debit card transactions that are processed through a payment card network during a calendar year, an issuer receives an additional volume-based incentive payment from the network for that period. Over the same period, however, the total network fees (other than processing fees) the issuer pays the payment card network with respect to debit card transactions also increase so that the total amount of fees paid by the issuer to the network continue to exceed incentive payments by the network to the issuer. Under these circumstances, the issuer does not receive net compensation from the network for electronic debit transactions or debit card related activities.

SECTION 235.7 LIMITATIONS ON PAYMENT CARD RESTRICTIONS

1. *Application of small issuer, government-administered payment program, and reloadable card exemptions to payment card network restrictions.* The exemptions under §235.5 for small issuers, cards issued pursuant to government-administered payment programs, and certain reloadable prepaid cards do not apply to the limitations on payment card network restrictions. For example, debit cards for government-administered payment programs, although exempt from the restrictions on interchange transaction fees, are subject to the requirement that electronic debit transactions made using such cards must be capable of being processed on at least two unaffiliated payment card networks and to the prohibition on inhibiting a merchant's ability to determine the routing for electronic debit transactions.

7(a) Prohibition on Network Exclusivity

1. *Scope of restriction.* Section 235.7(a) requires a debit card subject to the regulation to be enabled on at least two unaffiliated payment card networks. This paragraph does not, however, require an issuer to have two or more unaffiliated networks available for each method of cardholder authentication. For example, it is sufficient for an issuer to issue a debit card that operates on one signature-based card network and on one PIN-based card network, as long as the two card networks are not affiliated. Alternatively, an issuer may issue a debit card that is accepted on two unaffiliated signature-based card networks or on two unaffiliated PIN-based card networks. *See also,* comment 7(a)–7.

2. *Permitted networks.* i. A smaller payment card network could be used to help satisfy the requirement that an issuer enable two unaffiliated networks if the network was willing to expand its coverage in response to increased merchant demand for access to its network and it meets the other requirements for a permitted arrangement, including taking steps reasonably designed to enable it to process the electronic debit transactions that it would reasonably expect to be routed to it. If, however, the network's policy or practice is to limit such expansion, it would not qualify as one of the two unaffiliated networks.

ii. A payment card network that is accepted only at a limited category of merchants (such as a particular grocery store chain, merchants located in a particular shopping mall, or a single class of merchants, such as grocery stores or gas stations) would not satisfy the rule.

iii. One of the steps a network can take to form a reasonable expectation of transaction volume is to consider factors such as the number of cards expected to be issued that are enabled on the network and expected card usage patterns.

3. *Examples of prohibited network restrictions on an issuer's ability to contract.* The following are examples of prohibited network restrictions on an issuer's ability to contract with other payment card networks:

i. Network rules or contract provisions limiting or otherwise restricting the other payment card networks that may be enabled on a particular debit card, or network rules or contract provisions that specify the other networks that may be enabled on a particular debit card.

ii. Network rules or guidelines that allow only that network's (or its affiliated network's) brand, mark, or logo to be displayed on a particular debit card, or that otherwise limit the ability of brands, marks, or logos of other payment card networks to appear on the debit card.

4. *Network logos or symbols on card not required.* Section 235.7(a) does not require that a debit card display the brand, mark, or logo of each payment card network over which an electronic debit transaction may be processed. For example, this rule does not require a debit card that is enabled for two or more unaffiliated payment card networks to bear the brand, mark, or logo for each card network.

5. *Voluntary exclusivity arrangements prohibited.* Section 235.7(a) requires the issuance of debit cards that are enabled on at least two unaffiliated payment card networks, even if the issuer is not subject to any rule of, or contract or other agreement with, a payment card network requiring that all or a specified minimum percentage of electronic debit transactions be processed on the network or its affiliated networks.

6. *Affiliated payment card networks.* Section 235.7(a) does not prohibit an issuer from including an affiliated payment card network among the networks that may process an electronic debit transaction with respect to a particular debit card, as long as at least two of the networks that are enabled on the card are unaffiliated. For example, an issuer

may offer debit cards that are accepted on a payment card network for signature debit transactions and on an affiliated payment card network for PIN debit transactions as long as those debit cards may also be accepted on another unaffiliated payment card network.

7. *Application of rule regardless of form factor*. The network exclusivity provisions in §235.7(a) require that all debit cards be enabled on at least two unaffiliated payment card networks for electronic debit transactions, regardless of whether the debit card is issued in card form. This applies to any supplemental device, such as a fob or token, or chip or application in a mobile phone, that is issued in connection with a plastic card, even if that plastic card fully complies with the rule.

7(b) Prohibition on Routing Restrictions

1. *Relationship to the network exclusivity restrictions*. An issuer or payment card network is prohibited from inhibiting a merchant's ability to route or direct an electronic debit transaction over any of the payment card networks that the issuer has enabled to process an electronic debit transaction for that particular debit card. This rule does not permit a merchant to route the transaction over a network that the issuer did not enable to process transactions using that debit card.

2. *Examples of prohibited merchant restrictions*. The following are examples of issuer or network practices that would inhibit a merchant's ability to direct the routing of an electronic debit transaction that are prohibited under §235.7(b):

i. Prohibiting a merchant from encouraging or discouraging a cardholder's use of a particular method of debit card authorization, such as rules prohibiting merchants from favoring a cardholder's use of PIN debit over signature debit, or from discouraging the cardholder's use of signature debit.

ii. Establishing network rules or designating issuer priorities directing the processing of an electronic debit transaction on a specified payment card network or its affiliated networks, or directing the processing of the transaction away from a specified network or its affiliates, except as a default rule in the event the merchant, or its acquirer or processor, does not designate a routing preference, or if required by state law.

iii. Requiring a specific payment card network based on the type of access device provided to the cardholder by the issuer.

3. *Merchant payments not prohibited*. A payment card network does not restrict a merchant's ability to route transactions over available payment card networks in violation of §235.7(b) by offering payments or other incentives to encourage the merchant to route electronic debit card transactions to the network for processing.

4. *Real-time routing decision not required*. A merchant need not make network routing decisions on a transaction-by-transaction basis. A merchant and its acquirer or processor may agree to a pre-determined set of routing choices that apply to all electronic debit transactions that are processed by the acquirer or processor on behalf of the merchant.

5. *No effect on network rules governing the routing of subsequent transactions*. Section 235.7 does not supersede a network rule that requires a chargeback or return of an electronic debit transaction to be processed on the same network that processed the original transaction.

7(c) Effective Date

1. *Health care and employee benefit cards*. Section 235.7(c)(1) delays the effective date of the network exclusivity provisions for certain debit cards issued in connection with a health care or employee benefit account to the extent such cards use (even if not required) transaction substantiation or qualification authorization systems at point of sale to verify that the card is only used for eligible goods and services for purposes of qualifying for favorable tax treatment under Internal Revenue Code requirements. Debit cards that may qualify for the delayed effective date include, but may not be limited to, cards issued in connection with flexible spending accounts established under section 125 of the Internal Revenue Code for health care related expenses and health reimbursement accounts established under section 105 of the Internal Revenue Code.

SECTION 235.8 REPORTING REQUIREMENTS AND RECORD RETENTION

[Reserved]

SECTION 235.9 ADMINISTRATIVE ENFORCEMENT

[Reserved]

SECTION 235.10 EFFECTIVE AND COMPLIANCE DATES

[Reserved]

[76 FR 43466, July 20, 2011, as amended at 76 FR 43487, July 20, 2011]

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AUTHORITY: 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 1813, 1817, 1829e, 1831i, 1972; 15 U.S.C. 78 *l*.

SOURCE: Regulation LL, 76 FR 56532, Sept. 13, 2011, unless otherwise noted.

Subpart A—General Provisions

§ 238.1 Authority, purpose and scope.

(a) *Authority*. This part is issued by the Board of Governors of the Federal Reserve System (*Board*) under section 10(g) of the Home Owners' Loan Act

(*HOLA*); section 7(j)(13) of the Federal Deposit Insurance Act, as amended by the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(13)) (*Bank Control Act*); sections 8(b), 19 and 32 of the Federal Deposit Insurance Act (12 U.S.C. 1818(b), 1829, and 1831i); and section 914 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 1831i) and the Depository Institution Management Interlocks Act (12 U.S.C. 3201 *et seq.*).

(b) *Purpose*. The principal purposes of this part are to:

(1) Regulate the acquisition of control of savings associations by companies and individuals;

(2) Define and regulate the activities in which savings and loan holding companies may engage;

(3) Set forth the procedures for securing approval for these transactions and activities; and

(4) Set forth the procedures under which directors and executive officers may be appointed or employed by savings and loan holding companies in certain circumstances.

§ 238.2 Definitions.

As used in this part and in the forms under this part, the following definitions apply, unless the context otherwise requires:

(a) *Affiliate* means any person or company which controls, is controlled by or is under common control with a person, savings association or company.

(b) *Bank* means any national bank, state bank, state-chartered savings bank, cooperative bank, or industrial bank, the deposits of which are insured by the Deposit Insurance Fund.

(c) *Bank holding company* has the meaning found in the Board's Regulation Y (12 CFR 225.2(c)).

(d) *Company* means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization, as defined in paragraph (o) of this section; but a company does not include:

(1) The Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or any Federal Home Loan Bank, or

(2) Any company the majority of shares of which is owned by:

(i) The United States or any State,

(ii) An officer of the United States or any State in his or her official capacity, or

(iii) An instrumentality of the United States or any State.

(e) A person shall be deemed to have *control* of:

(1) A savings association if the person directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 25 percent of the voting shares of such savings association, or controls in any manner the election of a majority of the directors of such association;

(2) Any other company if the person directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 25 percent of the voting shares or rights of such other company, or controls in any manner the election or appointment of a majority of the directors or trustees of such other company, or is a general partner in or has contributed more than 25 percent of the capital of such other company;

(3) A trust if the person is a trustee thereof; or

(4) A savings association or any other company if the Board determines, after reasonable notice and opportunity for hearing, that such person directly or indirectly exercises a controlling influence over the management or policies of such association or other company.

(f) *Director* means any director of a corporation or any individual who performs similar functions in respect of any company, including a trustee under a trust.

(g) *Management official* means any president, chief executive officer, chief operating officer, vice president, director, partner, or trustee, or any other person who performs or has a representative or nominee performing similar policymaking functions, including executive officers of principal business units or divisions or subsidiaries who perform policymaking functions, for a savings association or a company, whether or not incorporated.

(h) *Multiple savings and loan holding company* means any savings and loan holding company which directly or indirectly controls two or more savings associations.

(i) *Officer* means the chairman of the board, president, vice president, treasurer, secretary, or comptroller of any company, or any other person who participates in its major policy decisions.

(j) *Person* includes an individual, bank, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(k) *Qualified thrift lender* means a financial institution that meets the appropriate qualified thrift lender test set forth in 12 U.S.C. 1467a(m).

(l) *Savings Association* means a Federal savings and loan association or a Federal savings bank chartered under section 5 of the Home Owners' Loan Act, a building and loan, savings and loan or homestead association or a cooperative bank (other than a cooperative bank described in 12 U.S.C. 1813(a)(2)) the deposits of which are insured by the Federal Deposit Insurance Corporation, and any corporation (other than a bank) the deposits of which are insured by the Federal Deposit Insurance Corporation that the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation jointly determine to be operating in substantially the same manner as a savings association, and shall include any savings bank or any cooperative bank which is deemed by the Office of the Comptroller of the Currency to be a savings association under 12 U.S.C. 1467a(1).

(m) *Savings and loan holding company* means any company (including a savings association) that directly or indirectly controls a savings association, but does not include:

(1) Any company by virtue of its ownership or control of voting stock of a savings association acquired in connection with the underwriting of securities if such stock is held only for such period of time (not exceeding 120 days unless extended by the Board) as will permit the sale thereof on a reasonable basis;

(2) Any trust (other than a pension, profit-sharing, stockholders', voting, or business trust) which controls a savings association if such trust by its terms must terminate within 25 years or not later than 21 years and 10 months after the death of individuals living on the effective date of the trust, and:

(i) Was in existence and in control of a savings association on June 26, 1967, or

(ii) Is a testamentary trust;

(3) A bank holding company that is registered under, and subject to, the Bank Holding Company Act of 1956, or any company directly or indirectly controlled by such company (other than a savings association);

(4) A company that controls a savings association that functions solely in a trust or fiduciary capacity as provided in section 2(c)(2)(D) of the Bank Holding Company Act; or

(5) A company described in section 10(c)(9)(C) of HOLA solely by virtue of such company's control of an intermediate holding company established under section 10A of the Home Owners' Loan Act.

(n) *Shareholder*—(1) *Controlling shareholder* means a person that owns or control, directly or indirectly, more than 25 percent of any class of voting securities of a savings association or other company.

(2) *Principal shareholder* means a person that owns or controls, directly or indirectly, 10 percent or more of any class of voting securities of a savings association or other company, or any person that the Board determines has the power, directly or indirectly, to exercise a controlling influence over the management or policies of a savings association or other company.

(o) *Stock* means common or preferred stock, general or limited partnership shares or interests, or similar interests.

(p) *Subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes any service corporation owned in whole or in part by a savings association, or a subsidiary of such service corporation.

(q) *Uninsured institution* means any financial institution the deposits of

which are not insured by the Federal Deposit Insurance Corporation.

(r)(1) *Voting securities* means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or

(ii) To vote on or to direct the conduct of the operations or other significant policies of the issuing company.

(2) *Nonvoting shares.* Preferred shares, limited partnership shares or interests, or similar interests are not *voting securities* if:

(i) Any voting rights associated with the shares or interest are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears;

(ii) The shares or interest represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing company; and

(iii) The shares or interest do not entitle the holder, by statute, charter, or in any manner, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuing company.

(3) *Class of voting shares.* Shares of stock issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights other than matters described in paragraph (r)(2)(i) of this section that affect solely the rights or preferences of the shares.

(s) *Well capitalized.* (1) A savings and loan holding company is well capitalized if:

(i) Each of the savings and loan holding company's depository institutions is well capitalized; and

(ii) The savings and loan holding company is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the Board to meet and maintain a specific capital level for any capital measure.

(2) In the case of a savings association, ''well capitalized'' takes the meaning provided in § 225.2(r)(2) of this chapter.

(t) *Well managed.* The term ''well managed'' takes the meaning provided in § 225.2(s) of this chapter except that a ''satisfactory rating for management'' refers to a management rating, if such rating is given, or otherwise a risk-management rating, if such rating is given.

(u) *Depository institution.* For purposes of this part, the term ''depository institution'' has the same meaning as in section 3(c) of Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

§ 238.3 Administration.

(a) *Delegation of authority.* Designated Board members and officers and the Federal Reserve Banks are authorized by the Board to exercise various functions prescribed in this regulation, in the Board's Rules Regarding Delegation of Authority (12 CFR part 265), the Board's Rules of Procedure (12 CFR part 262), and in Board orders.

(b) *Appropriate Federal Reserve Bank.* In administering this regulation, unless a different Federal Reserve Bank is designated by the Board, the appropriate Federal Reserve Bank is as follows:

(1) For a savings and loan holding company (or a company applying to become a savings and loan holding company): the Reserve Bank of the Federal Reserve district in which the company's banking operations are principally conducted, as measured by total domestic deposits in its subsidiary savings association on the date it became (or will become) a savings and loan holding company;

(2) For an individual or company submitting a notice under subpart D of this part: The Reserve Bank of the Federal Reserve district in which the

banking operations of the savings and loan holding company to be acquired are principally conducted, as measured by total domestic deposits on the date the notice is filed.

§ 238.4 Records, reports, and inspections.

(a) *Records.* Each savings and loan holding company shall maintain such books and records as may be prescribed by the Board. Each savings and loan holding company and its non-depository affiliates shall maintain accurate and complete records of all business transactions. Such records shall support and be readily reconcilable to any regulatory reports submitted to the Board and financial reports prepared in accordance with GAAP. The records shall be maintained in the United States and be readily accessible for examination and other supervisory purposes within 5 business days upon request by the Board, at a location acceptable to the Board.

(b) *Reports.* Each savings and loan holding company and each subsidiary thereof, other than a savings association, shall file with the Board such reports as may be required by the Board. Such reports shall be made under oath or otherwise, and shall be in such form and for such periods, as the Board may prescribe. Each report shall contain information concerning the operations of such savings and loan holding company and its subsidiaries as the Board may require.

(c) *Registration statement*—(1) *Filing of registration statement.* Not later than 90 days after becoming a savings and loan holding company, each savings and loan holding company shall register with the Board by furnishing information in the manner and form prescribed by the Board.

(2) *Date of registration.* The date of registration of a savings and loan holding company shall be the date on which its registration statement is received by the Board.

(3) *Extension of time for registration.* For timely and good cause shown, the Board may extend the time within which a savings and loan holding company shall register.

(d) *Release from registration.* The Board may at any time, upon its own motion or upon application, release a registered savings and loan holding company from any registration theretofore made by such company, if the Board shall determine that such company no longer has control of any savings association or no longer qualifies as a savings and loan holding company.

(e) *Examinations.* Each savings and loan holding company and each subsidiary thereof shall be subject to such examinations as the Board may prescribe. The Board shall, to the extent deemed feasible, use for the purposes of this section reports filed with or examinations made by other Federal agencies or the appropriate State supervisory authority.

(f) *Appointment of agent.* The Board may require any savings and loan holding company, or persons connected therewith if it is not a corporation, to execute and file a prescribed form of irrevocable appointment of agent for service of process.

§ 238.5 Audit of savings association holding companies.

(a) *General.* The Board may require, at any time, an independent audit of the financial statements of, or the application of procedures agreed upon by the Board to a savings and loan holding company, or nondepository affiliate by qualified independent public accountants when needed for any safety and soundness reason identified by the Board.

(b) *Audits required for safety and soundness purposes.* The Board requires an independent audit for safety and soundness purposes if, as of the beginning of its fiscal year, a savings and loan holding company controls savings association subsidiary(ies) with aggregate consolidated assets of $500 million or more.

(c) *Procedures.* (1) When the Board requires an independent audit because such an audit is needed for safety and soundness purposes, the Board shall determine whether the audit was conducted and filed in a manner satisfactory to the Board.

(2) When the Board requires the application of procedures agreed upon by the Board for safety and soundness purposes, the Board shall identify the procedures to be performed. The Board

shall also determine whether the agreed upon procedures were conducted and filed in a manner satisfactory to the Board.

(d) *Qualifications for independent public accountants.* The audit shall be conducted by an independent public accountant who:

(1) Is registered or licensed to practice as a public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the savings association's or holding company's principal office is located;

(2) Agrees in the engagement letter to provide the Board with access to and copies of any work papers, policies, and procedures relating to the services performed;

(3)(i) Is in compliance with the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff; and

(4) Has received, or is enrolled in, a peer review program that meets guidelines acceptable to the Board.

(e) *Voluntary audits.* When a savings and loan holding company or nondepository affiliate obtains an independent audit voluntarily, it must be performed by an independent public accountant who satisfies the requirements of paragraphs (d)(1), (d)(2), and (d)(3)(i) of this section.

§ 238.6 Penalties for violations.

(a) *Criminal and civil penalties.* (1) Section 10 of the HOLA provides criminal penalties for willful violation, and civil penalties for violation, by any company or individual, of HOLA or any regulation or order issued under it, or for making a false entry in any book, report, or statement of a savings and loan holding company.

(2) Civil money penalty assessments for violations of HOLA shall be made in accordance with subpart C of the Board's Rules of Practice for Hearings (12 CFR part 263, subpart C). For any willful violation of the Bank Control Act or any regulation or order issued under it, the Board may assess a civil penalty as provided in 12 U.S.C. 1817(j)(15).

(b) *Cease-and-desist proceedings.* For any violation of HOLA, the Bank Control Act, this regulation, or any order or notice issued thereunder, the Board may institute a cease-and-desist proceeding in accordance with the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*).

§ 238.7 Tying restriction exception.

(a) *Safe harbor for combined-balance discounts.* A savings and loan holding company or any savings association or any affiliate of either may vary the consideration for any product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the company varying the consideration (eligible products), if:

(1) That company (if it is a savings association) or a savings association affiliate of that company (if it is not a savings association) offers deposits, and all such deposits are eligible products; and

(2) Balances in deposits count at least as much as non-deposit products toward the minimum balance.

(b) *Limitations on exception.* This exception shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a savings and loan holding company or savings association or affiliate of either to operate under this exception shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

§ 238.8 Safe and sound operations.

(a) *Savings and loan holding company policy and operations.* (1) A savings and loan holding company shall serve as a source of financial and managerial strength to its subsidiary savings associations and shall not conduct its operations in an unsafe or unsound manner.

(2) Whenever the Board believes an activity of a savings and loan holding company or control of a nonbank subsidiary (other than a nonbank subsidiary of a savings association) constitutes a serious risk to the financial

safety, soundness, or stability of a subsidiary savings association of the savings and loan holding company and is inconsistent with sound banking principles or the purposes of HOLA or the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*), the Board may require the savings and loan holding company to terminate the activity or to terminate control of the subsidiary, as provided in section 10(g)(5) of the HOLA.

(b) [Reserved]

Subpart B—Acquisitions of Saving Association Securities or Assets

§ 238.11 Transactions requiring Board approval.

The following transactions require the Board's prior approval under section 10 of HOLA except as exempted under § 238.12:

(a) *Formation of savings and loan holding company.* Any action that causes a savings association or other company to become a savings and loan holding company.

(b) *Acquisition of subsidiary savings association.* Any action that causes a savings association to become a subsidiary of a savings and loan holding company.

(c) *Acquisition of control of savings association or savings and loan holding company securities.* (1) The acquisition by a savings and loan holding company of direct or indirect ownership or control of any voting securities of a savings association or savings and loan holding company, that is not a subsidiary, if the acquisition results in the company's control of more than 5 percent of the outstanding shares of any class of voting securities of the savings association or savings and loan holding company.

(2) An acquisition includes the purchase of additional securities through the exercise of preemptive rights, but does not include securities received in a stock dividend or stock split that does not alter the savings and loan holding company's proportional share of any class of voting securities.

(3) In the case of a multiple savings and loan holding company, acquisition of direct or indirect ownership or control of any voting securities of a savings association or savings and loan holding company, that is not a subsidiary, if the acquisition results in the company's control of more than 5 percent of the outstanding shares of any class of voting securities of the savings association or savings and loan holding company that is engaged in any business activity other than those specified in § 238.51 of this part.

(d) *Acquisition of savings association or savings and loan holding company assets.* The acquisition by a savings and loan holding company or by a subsidiary thereof (other than a savings association) of all or substantially all of the assets of a savings association, or savings and loan holding company.

(e) *Merger of savings and loan holding companies.* The merger or consolidation of savings and loan holding companies, and the acquisition of a savings association through a merger or consolidation.

(f) *Acquisition of control by certain individuals.* The acquisition, by a director or officer of a savings and loan holding company, or by any individual who owns, controls, or holds the power to vote (or holds proxies representing) more than 25 percent of the voting shares of such savings and loan holding company, of control of any savings association that is not a subsidiary of such savings and loan holding company.

§ 238.12 Transactions not requiring Board approval.

(a) The requirements of § 238.11(a), (b), (d), (e) and (f) do not apply to:

(1) Control of a savings association acquired by devise under the terms of a will creating a trust which is excluded from the definition of savings and loan holding company;

(2) Control of a savings association acquired in connection with a reorganization that involves solely the acquisition of control of that association by a newly formed company that is controlled by the same acquirors that controlled the savings association for the immediately preceding three years, and entails no other transactions, such as an assumption of the acquirors' debt by the newly formed company: Provided, that the acquirors have filed the designated form with the appropriate

Reserve Bank and have provided all additional information requested by the Board or Reserve Bank, and the Board nor the appropriate Reserve Bank object to the acquisition within 30 days of the filing date;

(3) Control of a savings association acquired by a bank holding company that is registered under and subject to, the Bank Holding Company Act of 1956, or any company controlled by such bank holding company;

(4) Control of a savings association acquired solely as a result of a pledge or hypothecation of stock to secure a loan contracted for in good faith or the liquidation of a loan contracted for in good faith, in either case where such loan was made in the ordinary course of the business of the lender: *Provided, further*, That acquisition of control pursuant to such pledge, hypothecation or liquidation is reported to the Board within 30 days, and *Provided, further*, That the acquiror shall not retain such control for more than one year from the date on which such control was acquired; however, the Board may, upon application by an acquiror, extend such one-year period from year to year, for an additional period of time not exceeding three years, if the Board finds such extension is warranted and would not be detrimental to the public interest;

(5) Control of a savings association acquired through a percentage increase in stock ownership following a *pro rata* stock dividend or stock split, if the proportional interests of the recipients remain substantially the same;

(6) Acquisitions of up to twenty-five percent (25%) of a class of stock by a tax-qualified employee stock benefit plan; and

(7) Acquisitions of up to 15 percent of the voting stock of any savings association by a savings and loan holding company (other than a bank holding company) in connection with a qualified stock issuance if such acquisition is approved by the Board pursuant to subpart E.

(b) The requirements of § 238.11(c) do not apply to voting shares of a savings association or of a savings and loan holding company—

(1) Held as a *bona fide* fiduciary (whether with or without the sole discretion to vote such shares);

(2) Held temporarily pursuant to an underwriting commitment in the normal course of an underwriting business;

(3) Held in an account solely for trading purposes or over which no control is held other than control of voting rights acquired in the normal course of a proxy solicitation;

(4) Acquired in securing or collecting a debt previously contracted in good faith, for two years after the date of acquisition or for such additional time (not exceeding three years) as the Board may permit if, in the Board's judgment, such an extension would not be detrimental to the public interest;

(5) Acquired under section 13(k)(1)(A)(i) of the Federal Deposit Insurance Act (or section 408(m) of the National Housing Act as in effect immediately prior to the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989);

(6) Held by any insurance companies as defined in section 2(a)(17) of the Investment Company Act of 1940: *Provided*, That all shares held by all insurance company affiliates of such savings association or savings and loan holding company may not, in the aggregate, exceed five percent of all outstanding shares or of the voting power of the savings association or savings and loan holding company, and such shares are not acquired or retained with a view to acquiring, exercising, or transferring control of the savings association or savings and loan holding company; and

(7) Acquired pursuant to a qualified stock issuance if such a purchase is approved pursuant to subpart E of this part.

(c) The aggregate amount of shares held under paragraph (b) of this section (other than pursuant to paragraphs (b)(1) through (4) and (b)(6)) may not exceed 15 percent of all outstanding shares or the voting power of a savings association or savings and loan holding company.

(d) *Acquisitions involving savings association mergers and internal corporate reorganizations*—The requirements of § 238.11 do not apply to:

(1) *Certain transactions subject to the Bank Merger Act.* The acquisition by a savings and loan holding company of shares of a savings association or company controlling a savings association or the merger of a company controlling a savings association with the savings and loan holding company, if the transaction is part of the merger or consolidation of the savings association with a subsidiary savings association (other than a nonoperating subsidiary savings association) of the acquiring savings and loan holding company, or is part of the purchase of substantially all of the assets of the savings association by a subsidiary savings association (other than a nonoperating subsidiary savings association) of the acquiring savings and loan holding company, and if:

(i) The savings association merger, consolidation, or asset purchase occurs simultaneously with the acquisition of the shares of the savings association or savings and loan holding company or the merger of holding companies, and the savings association is not operated by the acquiring savings and loan holding company as a separate entity other than as the survivor of the merger, consolidation, or asset purchase;

(ii) The transaction requires the prior approval of a federal supervisory agency under the Bank Merger Act (12 U.S.C. 1828(c));

(iii) The transaction does not involve the acquisition of any company that would require prior notice or approval under section 10(c) of the HOLA;

(iv) The transaction does not involve a depository institution organized in mutual form, a savings and loan holding company organized in mutual form, a subsidiary holding company of a savings and loan holding company organized in mutual form, or a bank holding company organized in mutual form;

(v) The transaction will not have a material adverse impact on the financial condition of the acquiring savings and loan holding company;

(vi) At least 10 days prior to the transaction, the acquiring savings and loan holding company has provided to the Reserve Bank written notice of the transaction that contains:

(A) A copy of the filing made to the appropriate federal banking agency under the Bank Merger Act; and

(B) A description of the holding company's involvement in the transaction, the purchase price, and the source of funding for the purchase price; and

(vii) Prior to expiration of the period provided in paragraph (d)(1)(vi) of this section, neither the Board nor the Reserve Bank has informed the savings and loan holding company that an application under § 238.11 is required.

(2) *Internal corporate reorganizations.* (i) Subject to paragraph (d)(2)(ii) of this section, any of the following transactions performed in the United States by a savings and loan holding company:

(A) The merger of holding companies that are subsidiaries of the savings and loan holding company;

(B) The formation of a subsidiary holding company;[1]

(C) The transfer of control or ownership of a subsidiary savings association or a subsidiary holding company between one subsidiary holding company and another subsidiary holding company or the savings and loan holding company.

(ii) A transaction described in paragraph (d)(2)(i) of this section qualifies for this exception if—

(A) The transaction represents solely a corporate reorganization involving companies and insured depository institutions that, both preceding and following the transaction, are lawfully controlled and operated by the savings and loan holding company;

(B) The transaction does not involve the acquisition of additional voting shares of an insured depository institution that, prior to the transaction, was less than majority owned by the savings and loan holding company;

(C) The transaction does not involve a savings and loan holding company organized in mutual form, a subsidiary holding company of a savings and loan holding company organized in mutual form, or a bank holding company organized in mutual form; and

[1] In the case of a transaction that results in the formation or designation of a new savings and loan holding company, the new savings and loan holding company must complete the registration requirements described in section 238.11.

(D) The transaction will not have a material adverse impact on the financial condition of the holding company.

§ 238.13 Prohibited acquisitions.

(a) No savings and loan holding company may, directly or indirectly, or through one or more subsidiaries or through one or more transactions, acquire control of an uninsured institution or retain, for more than one year after the date any savings association subsidiary becomes uninsured, control of such association.

(b) *Control of mutual savings association.* No savings and loan holding company or any subsidiary thereof, or any director, officer, or employee of a savings and loan holding company or subsidiary thereof, or person owning, controlling, or holding with power to vote, or holding proxies representing, more than 25 percent of the voting shares of such holding company or subsidiary, may hold, solicit, or exercise any proxies in respect of any voting rights in a mutual savings association.

§ 238.14 Procedural requirements.

(a) *Filing application.* An application for the Board's prior approval under § 238.11 shall be governed by the provisions of this section and shall be filed with the appropriate Reserve Bank on the designated form.

(b) *Request for confidential treatment.* An applicant may request confidential treatment for portions of its application pursuant to 12 CFR 261.15.

(c) *Public notice*—(1) *Newspaper publication*—(i) *Location of publication.* In the case of each application, the applicant shall publish a notice in a newspaper of general circulation, in the form and at the locations specified in § 262.3 of the Rules of Procedure (12 CFR 262.3) in this chapter;

(ii) *Contents of notice.* A newspaper notice under this paragraph shall provide an opportunity for interested persons to comment on the proposal for a period of at least 30 calendar days;

(iii) *Timing of publication.* Each newspaper notice published in connection with a proposal under this paragraph shall be published no more than 15 calendar days before and no later than 7 calendar days following the date that an application is filed with the appropriate Reserve Bank.

(2) FEDERAL REGISTER *notice*—(i) *Publication by Board.* Upon receipt of an application, the Board shall promptly publish notice of the proposal in the FEDERAL REGISTER and shall provide an opportunity for interested persons to comment on the proposal for a period of no more than 30 days;

(ii) *Request for advance publication.* An applicant may request that, during the 15-day period prior to filing an application, the Board publish notice of a proposal in the FEDERAL REGISTER. A request for advance FEDERAL REGISTER Notice publication shall be made in writing to the appropriate Reserve Bank and shall contain the identifying information prescribed by the Board for FEDERAL REGISTER Notice publication.

(3) *Waiver or shortening of notice.* The Board may waive or shorten the required notice periods under this section if the Board determines that an emergency exists requiring expeditious action on the proposal, or if the Board finds that immediate action is necessary to prevent the probable failure of an insured depository institution.

(d) *Public comment*—(1) *Timely comments.* Interested persons may submit information and comments regarding a proposal filed under this subpart. A comment shall be considered timely for purposes of this subpart if the comment, together with all supplemental information, is submitted in writing in accordance with the Board's Rules of Procedure and received by the Board or the appropriate Reserve Bank prior to the expiration of the latest public comment period provided in paragraph (c) of this section.

(2) *Extension of comment period*—(i) *In general.* The Board may, in its discretion, extend the public comment period regarding any proposal submitted under this subpart.

(ii) *Requests in connection with obtaining application or notice.* In the event that an interested person has requested a copy of a notice or application submitted under this subpart, the Board may, in its discretion and based on the facts and circumstances, grant such person an extension of the comment period for up to 15 calendar days.

(iii) *Joint requests by interested person and applicant.* The Board will grant a joint request by an interested person and the applicant for an extension of the comment period for a reasonable period for a purpose related to the statutory factors the Board must consider under this subpart.

(3) *Substantive comment.* A comment will be considered substantive for purposes of this subpart unless it involves individual complaints, or raises frivolous, previously-considered or wholly unsubstantiated claims or irrelevant issues.

(e) *Hearings.* The Board may order a formal or informal hearing or other proceeding on the application, as provided in § 262.3(i)(2) of this chapter. Any request for a hearing (other than from the primary supervisor) shall comply with § 262.3(e) in this chapter.

(f) *Accepting application for processing.* Within 7 calendar days after the Reserve Bank receives an application under this section, the Reserve Bank shall accept it for processing as of the date the application was filed or return the application if it is substantially incomplete. Upon accepting an application, the Reserve Bank shall immediately send copies to the Board and to the primary banking supervisor of the savings association to be acquired and to the Attorney General, and shall request from the Attorney General a report on the competitive factors involved. The Reserve Bank or the Board may request additional information necessary to complete the record of an application at any time after accepting the application for processing.

(g) *Action on applications*—(1) *Action under delegated authority.* Except as provided in paragraph (g)(4) of this section, unless the Reserve Bank, upon notice to the applicant, refers the application to the Board for decision because action under delegated authority is not appropriate, the Reserve Bank shall approve an application under this section:

(i) Not earlier than the third business day following the close of the public comment period; and

(ii) Not later than the later of the fifth business day following the close of the public comment period or the 30th calendar day after the acceptance date for the application.

(2) *Board action.* The Board shall act on an application under this section that is referred to it for decision within 60 calendar days after the acceptance date for the application, unless the Board notifies the applicant that the 60-day period is being extended for a specified period and states the reasons for the extension. The Board may, at any time, request additional information that it believes is necessary for its decision.

(3) *Approval through failure to act*—(i) *Ninety-one day rule.* An application shall be deemed approved if the Board fails to act on the application within 91 calendar days after the date of submission to the Board of the complete record on the application. For this purpose, the Board acts when it issues an order stating that the Board has approved or denied the application or notice, reflecting the votes of the members of the Board, and indicating that a statement of the reasons for the decision will follow promptly.

(ii) *Complete record.* For the purpose of computing the commencement of the 91-day period, the record is complete on the latest of:

(A) The date of receipt by the Board of an application that has been accepted by the Reserve Bank;

(B) The last day provided in any notice for receipt of comments and hearing requests on the application or notice;

(C) The date of receipt by the Board of the last relevant material regarding the application that is needed for the Board's decision, if the material is received from a source outside of the Federal Reserve System; or

(D) The date of completion of any hearing or other proceeding.

(4) *Expedited reorganization*—(i) *In general.* The Board or the appropriate Reserve Bank shall act on an application of a reorganization that meets the requirements of § 238.15(f):

(A) Not earlier than the third business day following the close of the public comment period; and

(B) Not later than the fifth business day following the close of the public comment period, except that the Board may extend the period for action under

this paragraph (g)(4) for up to 5 business days.

(ii) *Acceptance of notice in event expedited procedure not available.* In the event that the Board or the Reserve Bank determines that an application filed pursuant to 238.15(f) does not meet one or more of the requirements of § 238.15(f), paragraph (g)(4) of this section shall not apply and the Board or Reserve Bank will act on the application according to the other provisions of paragraph (g) of this section.

§ 238.15 Factors considered in acting on applications.

(a) *Generally.* The Board may not approve any application under this subpart if:

(1) The transaction would result in a monopoly or would further any combination or conspiracy to monopolize, or to attempt to monopolize, the savings and loan business in any part of the United States;

(2) The effect of the transaction may be substantially to lessen competition in any section of the country, tend to create a monopoly, or in any other manner be in restraint of trade, unless the Board finds that the transaction's anti-competitive effects are clearly outweighed by its probable effect in meeting the convenience and needs of the community;

(3) The applicant has failed to provide the Board with adequate assurances that it will make available such information on its operations or activities, and the operations or activities of any affiliate of the applicant, that the Board deems appropriate to determine and enforce compliance with HOLA and other applicable federal banking statutes, and any regulations thereunder; or

(4) In the case of an application involving a foreign banking organization, the foreign banking organization is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country, as provided in § 211.24(c)(1)(ii) of the Board's Regulation K (12 CFR 211.24(c)(1)(ii)).

(5) In the case of an application by a savings and loan holding company to acquire an insured depository institution, section 10(e)(2)(E) of HOLA prohibits the Board from approving the transaction.

(b) *Other factors.* In deciding applications under this subpart, the Board also considers the following factors with respect to the acquiror, its subsidiaries, any savings associations or banks related to the acquiror through common ownership or management, and the savings association or associations to be acquired:

(1) *Financial condition.* Their financial condition and future prospects, including whether current and projected capital positions and levels of indebtedness conform to standards and policies established by the Board.

(2) *Managerial resources.* The competence, experience, and integrity of the officers, directors, and principal shareholders of the acquiror, its subsidiaries, and the savings association and savings and loan holding companies concerned; their record of compliance with laws and regulations; and the record of the applicant and its affiliates of fulfilling any commitments to, and any conditions imposed by, the Board in connection with prior applications.

(3) *Convenience and needs of community.* In the case of an application required under § 238.11(c), (d), or (e), (or an application by a savings and loan holding company under § 238.11(b)), the convenience and needs of the communities to be served, including the record of performance under the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) and regulations issued thereunder, including the Board's Regulation BB (12 CFR part 228).

(c) *Presumptive disqualifiers*—(1) *Integrity factors.* The following factors shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the managerial resources and future prospects tests of paragraph (b) of this section:

(i) During the 10-year period immediately preceding filing of the application or notice, criminal, civil or administrative judgments, consents or orders, and any indictments, formal investigations, examinations, or civil or administrative proceedings (excluding

routine or customary audits, inspections and investigations) that terminated in any agreements, undertakings, consents or orders, issued against, entered into by, or involving the acquiror or affiliates of the acquiror by any federal or state court, any department, agency, or commission of the U.S. Government, any state or municipality, any Federal Home Loan Bank, any self-regulatory trade or professional organization, or any foreign government or governmental entity, which involve:

(A) Fraud, moral turpitude, dishonesty, breach of trust or fiduciary duties, organized crime or racketeering;

(B) Violation of securities or commodities laws or regulations;

(C) Violation of depository institution laws or regulations;

(D) Violation of housing authority laws or regulations; or

(E) Violation of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization;

(ii) Denial, or withdrawal after receipt of formal or informal notice of an intent to deny, by the acquiror or affiliates of the acquiror, of

(A) Any application relating to the organization of a financial institution,

(B) An application to acquire any financial institution or holding company thereof under HOLA or the Bank Holding Company Act or otherwise,

(C) A notice relating to a change in control of any of the foregoing under the CIC Act; or

(D) An application or notice under a state holding company or change in control statute;

(iii) The acquiror or affiliates of the acquiror were placed in receivership or conservatorship during the preceding 10 years, or any management official of the acquiror was a management official or director (other than an official or director serving at the request of the Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the former Federal Savings and Loan Insurance Corporation, or their predecessors) or principal shareholder of a company or savings association that was placed into receivership, conservatorship, or a management consignment program, or was liquidated during his or her tenure or control or within two years thereafter;

(iv) Felony conviction of the acquiror, an affiliate of the acquiror or a management official of the acquiror or an affiliate of the acquiror;

(v) Knowingly making any written or oral statement to the Board or any predecessor agency (or its delegate) in connection with an application, notice or other filing under this part that is false or misleading with respect to a material fact or omits to state a material fact with respect to information furnished or requested in connection with such an application, notice or other filing;

(vi) Acquisition and retention at the time of submission of an application or notice, of stock in the savings association by the acquiror in violation of this part or its predecessor regulations.

(2) *Financial factors*. The following shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the financial-resources and future-prospects tests of paragraph (c) of this section:

(i) Liability for amounts of debt which, in the opinion of the Board, create excessive risks of default and pressure on the savings association to be acquired; or

(ii) Failure to furnish a business plan or furnishing a business plan projecting activities which are inconsistent with economical home financing.

(d) *Competitive factor*. Before approving any such acquisition, except a transaction under section 13(k) of the Federal Deposit Insurance Act, the Board shall consider any report rendered by the Attorney General within 30 days of such request under § 238.14(f) on the competitive factors involved.

(e) *Expedited reorganizations*. An application by a savings association solely for the purpose of obtaining approval for the creation of a savings and loan holding company by such savings association shall be eligible for expedited processing under § 238.14(g)(4) if it satisfies the following criteria:

(1) The holding company shall not be capitalized initially in an amount exceeding the amount the savings association is permitted to pay in dividends to its holding company as of the date

of the reorganization pursuant to applicable regulations or, in the absence thereof, pursuant to the then current policy guidelines;

(2) The creation of the savings and loan holding company by the association is the sole transaction contained in the application, and there are no other transactions requiring approval incident to the creation of the holding company (other than the creation of an interim association that will disappear upon consummation of the reorganization and the merger of the savings association with such interim association to effect the reorganization), and the holding company is not also seeking any regulatory waivers, regulatory forbearances, or resolution of legal or supervisory issues;

(3) The board of directors and executive officers of the holding company are composed of persons who, at the time of acquisition, are executive officers and directors of the association;

(4) The acquisition raises no significant issues of law or policy;

(5) Prior to consummation of the reorganization transaction, the holding company shall enter into any dividend limitation, regulatory capital maintenance, or prenuptial agreement required by Board regulations, or in the absence thereof, required pursuant to policy guidelines issued by the Board; and

(f) *Conditional approvals.* The Board may impose conditions on any approval, including conditions to address competitive, financial, managerial, safety and soundness, convenience and needs, compliance or other concerns, to ensure that approval is consistent with the relevant statutory factors and other provisions of HOLA.

(g) No acquisition shall be approved by the Board pursuant to § 238.11 which would result in the formation by any company, through one or more subsidiaries or through one or more transactions, of a multiple savings and loan holding company controlling savings associations in more than one state where the acquisition causes a savings association to become an affiliate of another savings association with which it was not previously affiliated unless:

(1) Such company, or a savings association subsidiary of such company, is authorized to acquire control of a savings association subsidiary, or to operate a home or branch office, in the additional state or states pursuant to section 13(k) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(k) (or section 408(m) of the National Housing Act as in effect immediately prior to enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989);

(2) Such company controls a savings association subsidiary which operated a home or branch office in the additional state or states as of March 5, 1987; or

(3) The statute laws of the state in which the savings association, control of which is to be acquired, is located are such that a savings association chartered by such state could be acquired by a savings association chartered by the state where the acquiring savings association or savings and loan holding company is located (or by a holding company that controls such a state chartered savings association), and such statute laws specifically authorize such an acquisition by language to that effect and not merely by implication.

Subpart C—Control Proceedings

§ 238.21 Control proceedings.

(a) *Preliminary determination of control.* (1) The Board may issue a preliminary determination of control under the procedures set forth in this section in any case in which:

(i) Any of the presumptions of control set forth in paragraph (d) of this section is present; or

(ii) It otherwise appears that a company has the power to exercise a controlling influence over the management or policies of a savings association or other company.

(2) If the Board makes a preliminary determination of control under this section, the Board shall send notice to the controlling company containing a statement of the facts upon which the preliminary determination is based.

(b) *Response to preliminary determination of control.* Within 30 calendar days of issuance by the Board of a preliminary determination of control or such longer period permitted by the Board,

the company against whom the determination has been made shall:

(1) Submit for the Board's approval a specific plan for the prompt termination of the control relationship;

(2) File an application under this regulation to retain the control relationship; or

(3) Contest the preliminary determination by filing a response, setting forth the facts and circumstances in support of its position that no control exists, and, if desired, requesting a hearing or other proceeding.

(c) *Hearing and final determination.* (1) The Board shall order a formal hearing or other appropriate proceeding upon the request of a company that contests a preliminary determination that the company has the power to exercise a controlling influence over the management or policies of a savings association or other company, if the Board finds that material facts are in dispute. The Board may also in its discretion order a formal hearing or other proceeding with respect to a preliminary determination that the company controls voting securities of the savings association or other company under the presumptions in paragraph (d)(1) of this section.

(2) At a hearing or other proceeding, any applicable presumptions established by paragraph (d) of this section shall be considered in accordance with the Federal Rules of Evidence and the Board's Rules of Practice for Formal Hearings (12 CFR part 263).

(3) After considering the submissions of the company and other evidence, including the record of any hearing or other proceeding, the Board shall issue a final order determining whether the company controls voting securities, or has the power to exercise a controlling influence over the management or policies, of the savings association or other company. If a control relationship is found, the Board may direct the company to terminate the control relationship or to file an application for the Board's approval to retain the control relationship under subpart B of this part.

(d) *Rebuttable presumptions of control.* The following rebuttable presumptions shall be used in any proceeding under this section:

(1) *Control of voting securities*—(i) *Securities convertible into voting securities.* A company that owns, controls, or holds securities that are immediately convertible, at the option of the holder or owner, into voting securities of a bank or other company, controls the voting securities.

(ii) *Option or restriction on voting securities.* A company that enters into an agreement or understanding under which the rights of a holder of voting securities of a savings association or other company are restricted in any manner controls the securities. This presumption does not apply where the agreement or understanding:

(A) Is a mutual agreement among shareholders granting to each other a right of first refusal with respect to their shares;

(B) Is incident to a *bona fide* loan transaction; or

(C) Relates to restrictions on transferability and continues only for the time necessary to obtain approval from the appropriate Federal supervisory authority with respect to acquisition by the company of the securities.

(2) *Control over company*—(i) *Management agreement.* A company that enters into any agreement or understanding with a savings association or other company (other than an investment advisory agreement), such as a management contract, under which the first company or any of its subsidiaries directs or exercises significant influence over the general management or overall operations of the savings association or other company controls the savings association or other company.

(ii) *Shares controlled by company and associated individuals.* A company that, together with its management officials or principal shareholders (including members of the immediate families of either), owns, controls, or holds with power to vote 25 percent or more of the outstanding shares of any class of voting securities of a savings association or other company controls the savings association or other company, if the first company owns, controls, or holds with power to vote more than 5 percent of the outstanding shares of any class of voting securities of the savings association or other company.

(iii) *Common management officials.* A company that has one or more management officials in common with a savings association or other company controls the savings association or other company, if the first company owns, controls or holds with power to vote more than 5 percent of the outstanding shares of any class of voting securities of the savings association or other company, and no other person controls as much as 5 percent of the outstanding shares of any class of voting securities of the savings association or other company.

(e) *Presumption of non-control*—(1) In any proceeding under this section, there is a presumption that any company that directly or indirectly owns, controls, or has power to vote less than 5 percent of the outstanding shares of any class of voting securities of a savings association or other company does not have control over that savings association or other company.

(2) In any proceeding under this section, or judicial proceeding under the Home Owners' Loan Act, other than a proceeding in which the Board has made a preliminary determination that a company has the power to exercise a controlling influence over the management or policies of the savings association or other company, a company may not be held to have had control over the savings association or other company at any given time, unless that company, at the time in question, directly or indirectly owned, controlled, or had power to vote 5 percent or more of the outstanding shares of any class of voting securities of the savings association or other company, or had already been found to have control on the basis of the existence of a controlling influence relationship.

Subpart D—Change in Bank Control

§ 238.31 Transactions requiring prior notice.

(a) *Prior notice requirement.* Any person acting directly or indirectly, or through or in concert with one or more persons, shall give the Board 60 days' written notice, as specified in § 238.33 of this subpart, before acquiring control of a savings and loan holding company, unless the acquisition is exempt under § 238.32.

(b) *Definitions.* For purposes of this subpart:

(1) *Acquisition* includes a purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership of a savings and loan holding company resulting from a redemption of voting securities.

(2) *Acting in concert* includes knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a savings and loan holding company whether or not pursuant to an express agreement.

(3) *Immediate family* includes a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse.

(c) *Acquisitions requiring prior notice*—(1) *Acquisition of control.* The acquisition of voting securities of a savings and loan holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 25 percent or more of any class of voting securities of the institution.

(2) *Rebuttable presumption of control.* The Board presumes that an acquisition of voting securities of a savings and loan holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if:

(i) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.[2]

(d) *Rebuttable presumption of concerted action.* The following persons shall be presumed to be acting in concert for purposes of this subpart:

(1) A company and any principal shareholder, partner, trustee, or management official of the company, if both the company and the person own voting securities of the savings and loan holding company;

(2) An individual and the individual's immediate family;

(3) Companies under common control;

(4) Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a savings and loan holding company, other than through a revocable proxy as described in § 238.32(a)(5) of this subpart;

(5) Persons that have made, or propose to make, a joint filing under sections 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission; and

(6) A person and any trust for which the person serves as trustee.

(e) *Acquisitions of loans in default.* The Board presumes an acquisition of a loan in default that is secured by voting securities of a savings and loan holding company to be an acquisition of the underlying securities for purposes of this section.

(f) *Other transactions.* Transactions other than those set forth in paragraph (c) of this section resulting in a person's control of less than 25 percent of a class of voting securities of a savings and loan holding company are not deemed by the Board to constitute control for purposes of the Bank Control Act.

[2] If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting securities of the savings and loan holding company, each person must file prior notice to the Board.

(g) *Rebuttal of presumptions.* Prior notice to the Board is not required for any acquisition of voting securities under the presumption of control set forth in this section, if the Board finds that the acquisition will not result in control. The Board shall afford any person seeking to rebut a presumption in this section an opportunity to present views in writing or, if appropriate, orally before its designated representatives at an informal conference.

§ 238.32 Transactions not requiring prior notice.

(a) *Exempt transactions.* The following transactions do not require notice to the Board under this subpart:

(1) *Existing control relationships.* The acquisition of additional voting securities of a savings and loan holding company by a person who:

(i) Continuously since March 9, 1979 (or since the institution commenced business, if later), held power to vote 25 percent or more of any class of voting securities of the institution; or

(ii) Is presumed, under § 238.31(c)(2), to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities of the institution or, in other cases, where the Board determines that the person has controlled the institution continuously since March 9, 1979;

(2) *Increase of previously authorized acquisitions.* Unless the Board or the Reserve Bank otherwise provides in writing, the acquisition of additional shares of a class of voting securities of a savings and loan holding company by any person (or persons acting in concert) who has lawfully acquired and maintained control of the institution (for purposes of § 238.31(c)), after complying with the procedures and receiving approval to acquire voting securities of the institution under this subpart, or in connection with an application approved under section 10(e) of HOLA (12 U.S.C. 1467a(e) and § 238.11 or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c));

(3) *Acquisitions subject to approval under HOLA or Bank Merger Act.* Any acquisition of voting securities subject

to approval under section 10(e) of HOLA (12 U.S.C. 1467a(e) and § 238.11), or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c));

(4) *Transactions exempt under HOLA.* Any transaction described in sections 10(a)(3)(A) or 10(e)(1)(B)(ii) of HOLA by a person described in those provisions;

(5) *Proxy solicitation.* The acquisition of the power to vote securities of a savings and loan holding company through receipt of a revocable proxy in connection with a proxy solicitation for the purposes of conducting business at a regular or special meeting of the institution, if the proxy terminates within a reasonable period after the meeting;

(6) *Stock dividends.* The receipt of voting securities of a savings and loan holding company through a stock dividend or stock split if the proportional interest of the recipient in the institution remains substantially the same; and

(7) *Acquisition of foreign banking organization.* The acquisition of voting securities of a qualifying foreign banking organization. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the Bank Control Act (12 U.S.C. 1817(j) (9), (10), and (12)) and § 238.34.)

(b) *Prior notice exemption.* (1) The following acquisitions of voting securities of a savings and loan holding company, which would otherwise require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate Reserve Bank within 90 calendar days after the acquisition and provides any relevant information requested by the Reserve Bank:

(i) Acquisition of voting securities through inheritance;

(ii) Acquisition of voting securities as a *bona fide* gift; and

(iii) Acquisition of voting securities in satisfaction of a debt previously contracted (DPC) in good faith.

(2) The following acquisitions of voting securities of a savings and loan holding company, which would otherwise require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person does not reasonably have advance knowledge of the transaction, and provides the written notice required under § 238.33 to the appropriate Reserve Bank within 90 calendar days after the transaction occurs:

(i) Acquisition of voting securities resulting from a redemption of voting securities by the issuing savings and loan holding company; and

(ii) Acquisition of voting securities as a result of actions (including the sale of securities) by any third party that is not within the control of the acquiror.

(3) Nothing in paragraphs (b)(1) or (b)(2) of this section limits the authority of the Board to disapprove a notice pursuant to § 238.33(h).

§ 238.33 Procedures for filing, processing, publishing, and acting on notices.

(a) *Filing notice.* (1) A notice required under this subpart shall be filed with the appropriate Reserve Bank and shall contain all the information required by paragraph 6 of the Bank Control Act (12 U.S.C. 1817(j)(6)), or prescribed in the designated Board form.

(2) The Board may waive any of the informational requirements of the notice if the Board determines that it is in the public interest.

(3) A notificant shall notify the appropriate Reserve Bank or the Board immediately of any material changes in a notice submitted to the Reserve Bank, including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated Board form, together with a statement of any material changes since the date of the statement or summary. The Reserve Bank or the Board, nevertheless, may request additional information, if appropriate.

(b) *Acceptance of notice.* The 60-day notice period specified in § 238.31 of this subpart begins on the date of receipt of a complete notice. The Reserve Bank shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is or was complete and thereby accepted for

processing. The Reserve Bank or the Board may request additional relevant information at any time after the date of acceptance.

(c) *Publication*—(1) *Newspaper announcement.* Any person(s) filing a notice under this subpart shall publish, in a form prescribed by the Board, an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the head office of the savings and loan holding company is located and in the community in which the head office of each of its subsidiary savings associations is located. The announcement shall be published no earlier than 15 calendar days before the filing of the notice with the appropriate Reserve Bank and no later than 10 calendar days after the filing date; and the publisher's affidavit of a publication shall be provided to the appropriate Reserve Bank.

(2) *Contents of newspaper announcement.* The newspaper announcement shall state:

(i) The name of each person identified in the notice as a proposed acquiror of the savings and loan holding company;

(ii) The name of the savings and loan holding company to be acquired, including the name of each of the savings and loan holding company's subsidiary savings association; and

(iii) A statement that interested persons may submit comments on the notice to the Board or the appropriate Reserve Bank for a period of 20 days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section.

(3) FEDERAL REGISTER *announcement.* The Board shall, upon filing of a notice under this subpart, publish announcement in the FEDERAL REGISTER of receipt of the notice. The FEDERAL REGISTER announcement shall contain the information required under paragraphs (c)(2)(i) and (c)(2)(ii) of this section and a statement that interested persons may submit comments on the proposed acquisition for a period of 15 calendar days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section. The Board may waive publication in the FEDERAL REGISTER if the Board determines that such action is appropriate.

(4) *Delay of publication.* The Board may permit delay in the publication required under paragraphs (c)(1) and (c)(3) of this section if the Board determines, for good cause shown, that it is in the public interest to grant such delay. Requests for delay of publication may be submitted to the appropriate Reserve Bank.

(5) *Shortening or waiving notice.* The Board may shorten or waive the public comment or newspaper publication requirements of this paragraph, or act on a notice before the expiration of a public comment period, if it determines in writing that an emergency exists, or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the savings and loan holding company to be acquired.

(6) *Consideration of public comments.* In acting upon a notice filed under this subpart, the Board shall consider all public comments received in writing within the period specified in the newspaper or FEDERAL REGISTER announcement, whichever is later. At the Board's option, comments received after this period may, but need not, be considered.

(7) *Standing.* No person (other than the acquiring person) who submits comments or information on a notice filed under this subpart shall thereby become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice or to appeal or otherwise contest the notice or the Board's action regarding the notice.

(d) *Time period for Board action*—(1) *Consummation of acquisition*—(i) The notificant(s) may consummate the proposed acquisition 60 days after submission to the Reserve Bank of a complete notice under paragraph (a) of this section, unless within that period the Board disapproves the proposed acquisition or extends the 60-day period, as provided under paragraph (d)(2) of this section.

(ii) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period if the Board notifies the notificant(s) in

writing of the Board's intention not to disapprove the acquisition.

(2) *Extensions of time period.* (i) The Board may extend the 60-day period in paragraph (d)(1) of this section for an additional 30 days by notifying the acquiring person(s).

(ii) The Board may further extend the period during which it may disapprove a notice for two additional periods of not more than 45 days each, if the Board determines that:

(A) Any acquiring person has not furnished all the information required under paragraph (a) of this section;

(B) Any material information submitted is substantially inaccurate;

(C) The Board is unable to complete the investigation of an acquiring person because of inadequate cooperation or delay by that person; or

(D) Additional time is needed to investigate and determine that no acquiring person has a record of failing to comply with the requirements of the Bank Secrecy Act, subchapter II of Chapter 53 of Title 31, United States Code.

(iii) If the Board extends the time period under this paragraph, it shall notify the acquiring person(s) of the reasons therefor and shall include a statement of the information, if any, deemed incomplete or inaccurate.

(e) *Advice to bank supervisory agencies.* The Reserve Bank shall send a copy of any notice to the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

(f) *Investigation and report.* (1) After receiving a notice under this subpart, the Board or the appropriate Reserve Bank shall conduct an investigation of the competence, experience, integrity, and financial ability of each person by and for whom an acquisition is to be made. The Board shall also make an independent determination of the accuracy and completeness of any information required to be contained in a notice under paragraph (a) of this section. In investigating any notice accepted under this subpart, the Board or Reserve Bank may solicit information or views from any person, including any savings and loan holding company involved in the notice, and any appropriate state, federal, or foreign governmental authority.

(2) The Board or the appropriate Reserve Bank shall prepare a written report of its investigation, which shall contain, at a minimum, a summary of the results of the investigation.

(g) *Factors considered in acting on notices.* In reviewing a notice filed under this subpart, the Board shall consider the information in the record, the views and recommendations of the appropriate bank supervisor, and any other relevant information obtained during any investigation of the notice.

(h) *Disapproval and hearing*—(1) *Disapproval of notice.* The Board may disapprove an acquisition if it finds adverse effects with respect to any of the factors set forth in paragraph 7 of the Bank Control Act (12 U.S.C. 1817(j)(7)) (*i.e.*, competitive, financial, managerial, banking, or incompleteness of information).

(2) *Disapproval notification.* Within three days after its decision to issue a notice of intent to disapprove any proposed acquisition, the Board shall notify the acquiring person in writing of the reasons for the action.

(3) *Hearing.* Within 10 calendar days of receipt of the notice of the Board's intent to disapprove, the acquiring person may submit a written request for a hearing. Any hearing conducted under this paragraph shall be in accordance with the Rules of Practice for Formal Hearings (12 CFR part 263). At the conclusion of the hearing, the Board shall, by order, approve or disapprove the proposed acquisition on the basis of the record of the hearing. If the acquiring person does not request a hearing, the notice of intent to disapprove becomes final and unappealable.

Subpart E—Qualified Stock Issuances

§ 238.41 Qualified stock issuances by undercapitalized savings associations or holding companies.

(a) *Acquisitions by savings and loan holding companies.* No savings and loan holding company shall be deemed to control a savings association solely by reason of the purchase by such savings and loan holding company of shares issued by such savings association, or issued by any savings and loan holding company (other than a bank holding

company) which controls such savings association, in connection with a qualified stock issuance if prior approval of such acquisition is granted by the Board under this subpart, unless the acquiring savings and loan holding company, directly or indirectly, or acting in concert with 1 or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing, more than 15 percent of the voting shares of such savings association or holding company.

(b) *Qualification.* For purposes of this section, any issuance of shares of stock shall be treated as a qualified stock issuance if the following conditions are met:

(1) The shares of stock are issued by—

(i) An undercapitalized savings association, which for purposes of this paragraph (b)(1)(i) shall mean any savings association—

(A) The assets of which exceed the liabilities of such association; and

(B) Which does not comply with one or more of the capital standards in effect under section 5(t) of HOLA; or

(ii) A savings and loan holding company which is not a bank holding company but which controls an undercapitalized savings association if, at the time of issuance, the savings and loan holding company is legally obligated to contribute the net proceeds from the issuance of such stock to the capital of an undercapitalized savings association subsidiary of such holding company.

(2) All shares of stock issued consist of previously unissued stock or treasury shares.

(3) All shares of stock issued are purchased by a savings and loan holding company that is registered, as of the date of purchase, with the Board in accordance with the provisions of section 10(b) of the HOLA and the Board's regulations promulgated thereunder.

(4) Subject to paragraph (c) of this section, the Board approves the purchase of the shares of stock by the acquiring savings and loan holding company.

(5) The entire consideration for the stock issued is paid in cash by the acquiring savings and loan holding company.

(6) At the time of the stock issuance, each savings association subsidiary of the acquiring savings and loan holding company (other than an association acquired in a transaction pursuant to section 13(c) or 13(k) of the Federal Deposit Insurance Act, or section 408(m) of the National Housing Act, as in effect immediately prior to enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989) has capital (after deducting any subordinated debt, intangible assets, and deferred, unamortized gains or losses) of not less than 6½ percent of the total assets of such savings association.

(7) Immediately after the stock issuance, the acquiring savings and loan holding company holds not more than 15 percent of the outstanding voting stock of the issuing undercapitalized savings association or savings and loan holding company.

(8) Not more than one of the directors of the issuing association or company is an officer, director, employee, or other representative of the acquiring company or any of its affiliates.

(9) Transactions between the savings association or savings and loan holding company that issues the shares pursuant to this section and the acquiring company and any of its affiliates shall be subject to the provisions of section 11 of HOLA and the Board's regulations promulgated thereunder.

(c) *Approval of acquisitions*—(1) *Criteria.* The Board, in deciding whether to approve or deny an application filed on the basis that it is a qualified stock issuance, shall apply the application criteria set forth in § 238.15(a), (b), and (c).

(2) *Additional capital commitments not required.* The Board shall not disapprove any application for the purchase of stock in connection with a qualified stock issuance on the grounds that the acquiring savings and loan holding company has failed to undertake to make subsequent additional capital contributions to maintain the capital of the undercapitalized savings association at or above the minimum level required by the Board or any other Federal agency having jurisdiction.

(3) *Other conditions.* The Board shall impose such conditions on any approval of an application for the purchase of stock in connection with a qualified stock issuance as the Board determines to be appropriate, including—

(i) A requirement that any savings association subsidiary of the acquiring savings and loan holding company limit dividends paid to such holding company for such period of time as the Board may require; and

(ii) Such other conditions as the Board deems necessary or appropriate to prevent evasions of this section.

(4) *Application deemed approved if not disapproved within 90 days.* (i) An application for approval of a purchase of stock in connection with a qualified stock issuance shall be deemed to have been approved by the Board if such application has not been disapproved by the Board before the end of the 90-day period beginning on the date of submission to the Board of the complete record on the application as defined in § 238.14(g)(3)(ii).

(ii) [Reserved]

(d) *No limitation on class of stock issued.* The shares of stock issued in connection with a qualified stock issuance may be shares of any class.

(e) *Application form.* A savings and loan holding company making application to acquire a qualified stock issuance pursuant to this subpart shall submit the appropriate form to the appropriate Reserve Bank.

Subpart F—Savings and Loan Holding Company Activities and Acquisitions

§ 238.51 Prohibited activities.

(a) *Evasion of law or regulation.* No savings and loan holding company or subsidiary thereof which is not a savings association shall, for or on behalf of a subsidiary savings association, engage in any activity or render any services for the purpose or with the effect of evading any law or regulation applicable to such savings association.

(b) *Unrelated business activity.* No savings and loan holding company or subsidiary thereof that is not a savings association shall commence any business activity at any time, or continue any business activity after the end of the two-year period beginning on the date on which such company received approval to become a savings and loan holding company that is subject to the limitations of this paragraph (b), except (in either case) the following:

(1) Furnishing or performing management services for a savings association subsidiary of such company;

(2) Conducting an insurance agency or an escrow business;

(3) Holding, managing, or liquidating assets owned by or acquired from a subsidiary savings association of such company;

(4) Holding or managing properties used or occupied by a subsidiary savings association of such company;

(5) Acting as trustee under deed of trust;

(6) Any other activity:

(i) That the Board of Governors of the Federal Reserve System has permitted for bank holding companies pursuant to regulations promulgated under section 4(c) of the Bank Holding Company Act; or

(ii) Is set forth in § 238.53, subject to the limitations therein; or

(7)(i) In the case of a savings and loan holding company, purchasing, holding, or disposing of stock acquired in connection with a qualified stock issuance if prior approval for the acquisition of such stock by such savings and loan holding company is granted by the Board pursuant to § 238.41.

(ii) Notwithstanding the provisions of this paragraph (b), any savings and loan holding company that, between March 5, 1987 and August 10, 1987, received approval pursuant to 12 U.S.C. 1730a(e), as then in effect, to acquire control of a savings association shall not continue any business activity other than those activities set forth in this paragraph (b) after August 10, 1987.

(c) *Treatment of certain holding companies.* If a director or officer of a savings and loan holding company, or an individual who owns, controls, or holds with the power to vote (or proxies representing) more than 25 percent of the voting shares of a savings and loan holding company, directly or indirectly controls more than one savings association, any savings and loan holding company controlled by such individual

shall be subject to the activities limitations contained in paragraph (b) of this section, to the same extent such limitations apply to multiple savings and loan holding companies pursuant to §§ 238.51, 238.52, 238.53, and 238.54.

§ 238.52 Exempt savings and loan holding companies and grandfathered activities.

(a) *Exempt savings and loan holding companies.* (1) The following savings and loan holding companies are exempt from the limitations of § 238.51(b):

(i) Any savings and loan holding company (or subsidiary of such company) that controls only one savings association, if the savings association subsidiary of such company is a qualified thrift lender as defined in § 238.2(k).

(ii) Any savings and loan holding company (or subsidiary thereof) that controls more than one savings association if all, or all but one of the savings association subsidiaries of such company were acquired pursuant to an acquisition under section 13(c) or 13(k) of the Federal Deposit Insurance Act, or section 408(m) of the National Housing Act, as in effect immediately prior to the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, and all of the savings association subsidiaries of such company are qualified thrift lenders as defined in § 238.2(k).

(2) Any savings and loan holding company whose subsidiary savings association(s) fails to qualify as a qualified thrift lender pursuant to 12 U.S.C. 1467a(m) may not commence, or continue, any service or activity other than those permitted under § 238.51(b) of this part, except that, the Board may allow, for good cause shown, such company (or subsidiary of such company which is not a savings association) up to 3 years to comply with the limitations set forth in § 238.51(b) of this part: *Provided,* That effective August 9, 1990, any company that controls a savings association that should have become or ceases to be a qualified thrift lender, except a savings association that requalified as a qualified thrift lender pursuant to section 10(m)(3)(D) of the Home Owners' Loan Act, shall within one year after the date on which the savings association fails to qualify as a qualified thrift lender, register as and be deemed to be a bank holding company, subject to all of the provisions of the Bank Holding Company Act, section 8 of the Federal Deposit Insurance Act, and other statutes applicable to bank holding companies in the same manner and to the same extent as if the company were a bank holding company and the savings association were a bank, as those terms are defined in the Bank Holding Company Act.

(b) *Grandfathered activities for certain savings and loan holding companies.* Notwithstanding § 238.51(b) and subject to paragraph (c) of this section, any savings and loan holding company that received approval prior to March 5, 1987 to acquire control of a savings association may engage, directly or indirectly or through any subsidiary (other than a subsidiary savings association of such company) in any activity in which it was lawfully engaged on March 5, 1987, *provided,* that:

(1) The holding company does not, after August 10, 1987, acquire control of a bank or an additional savings association, other than a savings association acquired pursuant to section 13(c) or 13(k) of the Federal Deposit Insurance Act, or section 406(f) or 408(m) of the National Housing Act, as in effect immediately prior to the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989;

(2) Any savings association subsidiary of the holding company continues to qualify as a domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code of 1986 after August 10, 1987;

(3) The holding company does not engage in any business activity other than those permitted under § 238.51(b) or in which it was engaged on March 5, 1987;

(4) Any savings association subsidiary of the holding company does not increase the number of locations from which such savings association conducts business after March 5, 1987, other than an increase due to a transaction under section 13(c) or 13(k) of the Federal Deposit Insurance Act, or under section 408(m) of the National Housing Act, as in effect immediately

prior to the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989; and

(5) Any savings association subsidiary of the holding company does not permit any overdraft (including an intra-day overdraft) or incur any such overdraft in its account at a Federal Reserve bank, on behalf of an affiliate, unless such overdraft results from an inadvertent computer or accounting error that is beyond the control of both the savings association subsidiary and the affiliate.

(c) *Termination by the Board of grandfathered activities.* Notwithstanding the provisions of paragraph (b) of this section, the Board may, after opportunity for hearing, terminate any activity engaged in under paragraph (b) of this section upon determination that such action is necessary:

(1) To prevent conflicts of interest;

(2) To prevent unsafe or unsound practices; or

(3) To protect the public interest.

(d) *Foreign holding company.* Any savings and loan holding company organized under the laws of a foreign country as of June 1, 1984 (including any subsidiary thereof that is not a savings association) that controlled a single savings association on August 10, 1987, shall not be subject to the restrictions set forth in § 238.51(b) with respect to any activities of such holding company that are conducted exclusively in a foreign country.

§ 238.53 Prescribed services and activities of savings and loan holding companies.

(a) *General.* For the purpose of § 238.51(b)(6)(ii), the activities set forth in paragraph (b) of this section are, and were as of March 5, 1987, permissible services and activities for savings and loan holding companies or subsidiaries thereof that are neither savings associations nor service corporation subsidiaries of subsidiary savings associations. Services and activities of service corporation subsidiaries of savings and loan holding company subsidiary savings associations are prescribed by paragraph (d) of this section.

(b) *Prescribed services and activities.* Subject to the provisions of paragraph (c) of this section, a savings and loan holding company subject to restrictions on its activities pursuant to § 238.51(b), or a subsidiary thereof which is neither a savings association nor a service corporation of a subsidiary savings association, may furnish or perform the following services and engage in the following activities to the extent that it has legal power to do so:

(1) Originating, purchasing, selling and servicing any of the following:

(i) Loans, and participation interests in loans, on a prudent basis and secured by real estate, including brokerage and warehousing of such real estate loans, except that such a company or subsidiary shall not invest in a loan secured by real estate as to which a subsidiary savings association of such company has a security interest;

(ii) Manufactured home chattel paper (written evidence of both a monetary obligation and a security interest of first priority in one or more manufactured homes, and any equipment installed or to be installed therein), including brokerage and warehousing of such chattel paper;

(iii) Loans, with or without security, for the altering, repairing, improving, equipping or furnishing of any residential real estate;

(iv) Educational loans; and

(v) Consumer loans, as defined in § 160.3 of this title, *Provided,* That, no subsidiary savings association of such holding company or service corporation of such savings association shall engage directly or indirectly, in any transaction with any affiliate involving the purchase or sale, in whole or in part, of any consumer loan.

(2) Subject to the provisions of 12 U.S.C. 1468, furnishing or performing clerical accounting and internal audit services primarily for its affiliates;

(3) Subject to the provisions of 12 U.S.C. 1468, furnishing or performing the following services primarily for its affiliates, and for any savings association and service corporation subsidiary thereof, and for other multiple holding companies and affiliates thereof:

(i) Data processing;

(ii) Credit information, appraisals, construction loan inspections, and abstracting;

(iii) Development and administration of personnel benefit programs, including life insurance, health insurance, and pension or retirement plans;

(iv) Research, studies, and surveys;

(v) Purchase of office supplies, furniture and equipment;

(vi) Development and operation of storage facilities for microfilm or other duplicate records; and

(vii) Advertising and other services to procure and retain both savings accounts and loans;

(4) Acquisition of unimproved real estate lots, and acquisition of other unimproved real estate for the purpose of prompt development and subdivision, for:

(i) Construction of improvements,

(ii) Resale to others for such construction, or

(iii) Use as mobile home sites;

(5) Development, subdivision and construction of improvements on real estate acquired pursuant to paragraph (b)(4) of this section, for sale or rental;

(6) Acquisition of improved real estate and mobile homes to be held for rental;

(7) Acquisition of improved real estate for remodeling, rehabilitation, modernization, renovation, or demolition and rebuilding for sale or for rental;

(8) Maintenance and management of improved real estate;

(9) Underwriting or reinsuring contract of credit life or credit health and accident insurance in connection with extensions of credit by the savings and loan holding company or any of its subsidiaries, or extensions of credit by any savings association or service corporation subsidiary thereof, or any other savings and loan holding company or subsidiary thereof;

(10) Preparation of State and Federal tax returns for accountholders of or borrowers from (including immediate family members of such accountholders or borrowers but not including an accountholder or borrower which is a corporation operated for profit) an affiliated savings association;

(11) Purchase and sale of gold coins minted and issued by the United States Treasury pursuant to Public Law 99–185, 99 Stat. 1177 (1985), and activities reasonably incident thereto; and

(12) Any services or activities approved by order of the former Federal Savings and Loan Insurance Corporation prior to March 5, 1987, pursuant to its authority under section 408(c)(2)(F) of the National Housing Act, as in effect at the time.

(c) *Procedures for commencing services or activities.* A notice to engage in or acquire a company engaged in a service or activity prescribed by paragraph (b) of this section (other than purchase or sale of a government debt security) shall be filed by a savings and loan holding company (including a company seeking to become a savings and loan holding company) with the appropriate Reserve Bank in accordance with this paragraph and the Board's Rules of Procedure (12 CFR 262.3).

(1) *Engaging de novo in services or activities.* A savings and loan holding company seeking to commence or to engage de novo in a service or activity pursuant to this section, either directly or through a subsidiary, shall file a notice containing a description of the activities to be conducted and the identity of the company that will conduct the activity.

(2) *Acquiring company engaged in services or activities.* A savings and loan holding company seeking to acquire or control voting securities or assets of a company engaged in a service or activity pursuant to this section, shall file a notice containing the following:

(i) A description of the proposal, including a description of each proposed service or activity;

(ii) The identity of any entity involved in the proposal, and, if the notificant proposes to conduct the service or activity through an existing subsidiary, a description of the existing activities of the subsidiary;

(iii) If the savings and loan holding company has consolidated assets of $150 million or more:

(A) Parent company and consolidated pro forma balance sheets for the acquiring savings and loan holding company as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction;

(B) Consolidated pro forma risk-based capital and leverage ratio calculations for the acquiring savings and loan holding company as of the most recent quarter; and

(C) A description of the purchase price and the terms and sources of funding for the transaction;

(iv) If the savings and loan holding company has consolidated assets of less than $150 million:

(A) A pro forma parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction; and

(B) A description of the purchase price and the terms and sources of funding for the transaction and, if the transaction is debt funded, one-year income statement and cash flow projections for the parent company, and the sources and schedule for retiring any debt incurred in the transaction;

(v) For each insured depository institution whose Tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, Tier 1 capital and total capital of the institution on a pro forma basis; and

(vi) A description of the management expertise, internal controls and risk management systems that will be utilized in the conduct of the proposed service or activity; and

(vii) A copy of the purchase agreements, and balance sheet and income statements for the most recent quarter and year-end for any company to be acquired.

(d) *Notice provided to Board*. The Reserve Bank shall immediately send to the Board a copy of any notice received under paragraphs (c)(1) or (c)(2) of this section.

(e) *Notice to public*—(1) the Reserve Bank shall notify the Board for publication in the FEDERAL REGISTER immediately upon receipt by the Reserve Bank of:

(i) A notice under paragraph (c) of this section or

(ii) A written request that notice of a proposal under paragraph (c) of this section be published in the FEDERAL REGISTER. Such a request may request that FEDERAL REGISTER publication occur up to 15 calendar days prior to submission of a notice under this subpart.

(2) The FEDERAL REGISTER notice published under this paragraph (e) shall invite public comment on the proposal, generally for a period of 15 days.

(f) *Action on notices*—(1) *Reserve Bank action*—(i) *In general*. Within 30 calendar days after receipt by the Reserve Bank of a notice filed pursuant to paragraphs (c)(1) or (c)(2) of this section, the Reserve Banks shall:

(A) Approve the notice; or

(B) Refer the notice to the Board for decision because action under delegated authority is not appropriate.

(ii) *Return of incomplete notice*. Within 7 calendar days of receipt, the Reserve Bank may return any notice as informationally incomplete that does not contain all of the information required by this section. The return of such a notice shall be deemed action on the notice.

(iii) *Notice of action*. The Reserve Bank shall promptly notify the savings and loan holding company of any action or referral under this paragraph.

(iv) *Close of public comment period*. The Reserve Bank shall not approve any notice under this paragraph (e)(1) of this section prior to the third business day after the close of the public comment period, unless an emergency exists that requires expedited or immediate action.

(2) *Board action; internal schedule*. The Board seeks to act on every notice referred to it for decision within 60 days of the date that the notice is filed with the Reserve Bank. If the Board is unable to act within this period, the Board shall notify the notificant and explain the reasons and the date by which the Board expects to act.

(3)(i) *Required time limit for System action*. The Board or the Reserve Bank shall act on any notice under this section within 60 days after the submission of a complete notice.

(ii) Extension of required period for action. The Board may extend the 60-day period required for Board action under paragraph (e)(3)(i) of this section for an additional 30 days upon notice to the notificant.

(4) *Requests for additional information*. The Board or the Reserve Bank may

modify the information requirements under this section or at any time request any additional information that either believes is needed for a decision on any notice under this section.

(5) *Tolling of period*. The Board or the Reserve Bank may at any time extend or toll the time period for action on a notice for any period with the consent of the notificant.

(g) *Modification or termination of service or activity*. The Board may require a savings and loan holding company or subsidiary thereof which has commenced a service or activity pursuant to this section to modify or terminate, in whole or in part, such service or activity as the Board finds necessary in order to ensure compliance with the provisions and purposes of this part and of section 10 of the Home Owners' Loan Act, as amended, or to prevent evasions thereof.

(h) *Alterations*. Except as may be otherwise provided in a resolution by or on behalf of the Board in a particular case, a service or activity commenced pursuant to this section shall not be altered in any material respect from that described in the notice filed under paragraph (c)(1) of this section, unless before making such alteration notice of intent to do so is filed in compliance with the appropriate procedures of said paragraph (c)(1) of this section.

(i) *Service corporation subsidiaries of savings associations*. The Board hereby approves without application the furnishing or performing of such services or engaging in such activities as permitted by the OTS pursuant to § 545.74 of this title, as in effect on March 5, 1987, if such service or activity is conducted by a service corporation subsidiary of a subsidiary savings association of a savings and loan holding company and if such service corporation has legal power to do so.

§ 238.54 Permissible bank holding company activities of savings and loan holding companies.

(a) *General*. For purposes of § 238.51(b)(6)(i), the services and activities permissible for bank holding companies pursuant to regulations that the Board has promulgated pursuant to section 4(c) of the Bank Holding Company Act are permissible for savings and loan holding companies, or subsidiaries thereof that are neither savings associations nor service corporation subsidiaries of subsidiary savings associations: *Provided*, That no savings and loan holding company shall commence any activity described in this paragraph (a) without the prior approval of this Board pursuant to paragraph (b) of this section, unless—

(1) The holding company received a rating of satisfactory or above prior to January 1, 2008, or a composite rating of ''1'' or ''2'' thereafter, in its most recent examination, and is not in a troubled condition as defined in § 238.72, and the holding company does not propose to commence the activity by an acquisition (in whole or in part) of a going concern; or

(2) The activity is permissible under authority other than section 10(c)(2)(F)(i) of the HOLA without prior notice or approval. Where an activity is within the scope of both § 238.53 and this section, the procedures of § 238.53 shall govern.

(b) *Procedures for applications*. Applications to commence any activity prescribed under paragraph (a) of this section shall be filed with the appropriate Reserve Bank on the designated form. The Board must act upon such application according to the procedures of § 238.53(d), (e), and (f).

(c) *Factors considered in acting on applications*. In evaluating an application filed under paragraph (b) of this section, the Board shall consider whether the performance by the applicant of the activity can reasonably be expected to produce benefits to the public (such as greater convenience, increased competition, or gains in efficiency) that outweigh possible adverse effects (such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound financial practices). This consideration includes an evaluation of the financial and managerial resources of the applicant, including its subsidiaries, and of any company to be acquired, and the effect of the proposed transaction on those resources.

Subpart G—Financial Holding Company Activities

§ 238.61 Scope.

Section 10(c)(2)(H) of the HOLA (12 U.S.C. 1467a(c)(2)(H)) permits a savings and loan holding company to engage in activities that are permissible for a financial holding company if the savings and holding company meets the criteria to qualify as a financial holding company and complies with all of the requirements applicable to a financial holding company under sections 4(l) and 4(m) of the BHC Act as if the savings and loan holding company was a bank holding company. This subpart provides the requirements and restrictions for a savings and holding company to be treated as a financial holding company for the purpose of engaging in financial holding company activities. This subpart does not apply to savings and loan holding companies described in section 10(c)(9)(C) of the HOLA (12 U.S.C. 1467a(c)(9)(C)).

§ 238.62 Definitions.

For the purposes of this subpart:

(a) *Financial holding company activities* refers to activities permissible under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) and § 225.86 of this chapter.

(b) [Reserved]

§ 238.63 Requirements to engage in financial holding company activities.

(a) *In general.* In order for a savings and loan holding company to engage in financial holding company activities:

(1) The savings and loan holding company and all depository institutions controlled by the savings and loan holding company must be and remain well capitalized;

(2) The savings and loan holding company and all depository institutions controlled by the savings and loan company must be and remain well managed; and

(3) The savings and loan holding company must have made an effective election to be treated as a financial holding company.

(b) [Reserved]

§ 238.64 Election required.

(a) *In general.* Except as provided below, a savings and loan holding company that wishes to engage in financial holding company activities must have an effective election to be treated as a financial holding company.

(b) *Activities performed under separate HOLA authority.* A savings and loan holding company that conducts only the following activities is not required to elect to be treated as a financial holding company:

(1) *BHC Act section 4(c)(8) activities.* Activities permissible under section 10(c)(2)(F)(i) of the HOLA (12 U.S.C. 1467a(c)(2)(F)(i)).

(2) *Insurance agency or escrow business activities.* Activities permissible under section 10(c)(2)(B) of the HOLA (12 U.S.C. 1467a(c)(2)(B)).

(3) *''1987 List'' activities.* Activities permissible under section 10(c)(2)(F)(ii) of the HOLA (12 U.S.C. 1467a(c)(2)(F)(ii)).

(c) *Existing requirements apply.* A savings and loan holding company that has not made an effective election to be treated as a financial holding company and that conducts the activities described in paragraphs (b)(1) through (3) of this section remains subject to any rules and requirements applicable to the conduct of such activities.

§ 238.65 Election procedures.

(a) *Filing requirement.* A savings and loan holding company may elect to be treated as a financial holding company by filing a written declaration with the appropriate Reserve Bank. A declaration by a savings and loan holding company is considered to be filed on the date that all information required by paragraph (b) of this section is received by the appropriate Reserve Bank.

(b) *Contents of declaration.* To be deemed complete, a declaration must:

(1) State that the savings and loan holding company elects to be treated as a financial holding company in order to engage in financial holding company activities;

(2) Provide the name and head office address of the savings and loan holding company and of each depository institution controlled by the savings and loan holding company;

(3) Certify that the savings and loan holding company and each depository institution controlled by the savings and loan holding company is well capitalized as of the date the savings and loan holding company submits its declaration;

(4) Certify that the savings and loan holding company and each savings association controlled by the savings and loan holding company is well managed as of the date the savings and loan holding company submits its declaration;

(c) *Effectiveness of election.* An election by a savings and loan holding company to be treated as a financial holding company shall not be effective if, during the period provided in paragraph (d) of this section, the Board finds that, as of the date the declaration was filed with the appropriate Reserve Bank:

(1) Any insured depository institution controlled by the savings and loan holding company (except an institution excluded under paragraph (d) of this section) has not achieved at least a rating of ''satisfactory record of meeting community credit needs'' under the Community Reinvestment Act at the savings association's most recent examination; or

(2) Any depository institution controlled by the bank holding company is not both well capitalized and well managed.

(d) *Consideration of the CRA performance of a recently acquired savings association.* Except as provided in paragraph (f) of this section, a savings association will be excluded for purposes of the review of the Community Reinvestment Act rating provisions of paragraph (c)(1) of this section if:

(1) The savings and loan holding company acquired the savings association during the 12-month period preceding the filing of an election under paragraph (a) of this section;

(2) The savings and loan holding company has submitted an affirmative plan to the appropriate Federal banking agency for the savings association to take actions necessary for the institution to achieve at least a rating of ''satisfactory record of meeting community credit needs'' under the Community Reinvestment Act at the next examination of the savings association; and

(3) The appropriate Federal banking agency for the savings association has accepted the plan described in paragraph (d)(2) of this section.

(e) *Effective date of election*—(1) *In general.* An election filed by a savings and loan holding company under paragraph (a) of this section is effective on the 31st calendar day after the date that a complete declaration was filed with the appropriate Reserve Bank, unless the Board notifies the savings and loan holding company prior to that time that the election is ineffective.

(2) *Earlier notification that an election is effective.* The Board or the appropriate Reserve Bank may notify a savings and loan holding company that its election to be treated as a financial holding company is effective prior to the 31st day after the date that a complete declaration was filed with the appropriate Reserve Bank. Such a notification must be in writing.

(3) *Special effective date rules for the OTS transfer date*—(i) *Deadline for filing declaration.* For savings and loan holding companies that meet the requirements of § 238.63 and that are engaged in financial holding company activities pursuant to existing authority as of July 21, 2011, an election under paragraph (a) must be filed with the appropriate Reserve Bank by December 31, 2011. The election must be accompanied by a description of the financial holding company activities conducted by the savings and loan holding company.

(ii) *Effective date of election.* An election filed under paragraph (e)(3)(i) of this section is effective on the 61st calendar day after the date that a complete declaration was filed with the appropriate Reserve Bank, unless the Board notifies the savings and loan holding company prior to that time that the election is ineffective.

(iii) *Earlier notification that an election is effective.* The Board or the appropriate Reserve Bank may notify a savings and loan holding company that its election under paragraph (e)(3)(i) of this section to be treated as a financial holding company is effective prior to

the 61st day after the date that a complete declaration was filed with the appropriate Reserve Bank. Such notification must be in writing.

(iv) *Filings by savings and loan holding companies that do not meet requirements.* (A) For savings and loan holding companies that are engaged in financial holding company activities as of July 21, 2011 but do not meet the requirements of § 238.63, a declaration must be filed with the appropriate Reserve Bank by December 31, 2011, specifying:

(*1*) The name and head office address of the savings and loan holding company and of each despoitory institution controlled by the savings and loan holding company;

(*2*) The financial holding company activities that the savings and loan holding company is engaged in;

(*3*) The requirements of § 238.63 that the savings and loan holding company does not meet; and

(*4*) A description of how the savings and loan holding company will achieve compliance with § 238.63 prior to June 30, 2012.

(B) A savings and loan holding company covered by this subparagraph will be subject to:

(*1*) The notice, remediation agreement, divestiture, and any other requirements described in § 225.83 of this chapter; or

(*2*) The activities limitations and any other requirements described in § 225.84 of this chapter, depending on which requirements of § 238.63 the savings and loan holding company does not meet.

(f) *Requests to be treated as a financial holding company submitted as part of an application to become a savings and loan holding company.* A company that is not a savings and loan holding company and has applied for the Board's approval to become a savings and loan holding company under section 10(e) of the HOLA (12 U.S.C. 1467a(e)) may as part of that application submit a request to be treated as a financial holding company. Such requests shall be made and reviewed by the Board as described in § 225.82(f) of this chapter.

(g) *Board's authority to exercise supervisory authority over a savings and loan holding company treated as a financial holding company.* An effective election to be treated as a financial holding company does not in any way limit the Board's statutory authority under the HOLA, the Federal Deposit Insurance Act, or any other relevant Federal statute to take appropriate action, including imposing supervisory limitations, restrictions, or prohibitions on the activities and acquisitions of a savings and loan holding company that has elected to be treated as a financial holding company, or enforcing compliance with applicable law.

§ 238.66 Ongoing requirements.

(a) *In general.* A savings and loan holding company with an effective election to be treated as a financial holding company is subject to the same requirements applicable to a financial holding company, under sections 4(l) and 4(m) of the Bank Holding Company Act and section 804(c) of the Community Reinvestment Act of 1977 (12 U.S.C. 2903(c)) as if the savings and loan holding company was a bank holding company.

(b) *Consequences of failing to continue to meet applicable capital and management requirements.* A savings and loan holding company with an effective election to be treated as a financial holding company that fails to meet applicable capital and management requirements at § 238.63 is subject to the notice, remediation agreement, divestiture, and any other requirements described in § 225.83 of this chapter.

(c) *Consequences of failing to continue to maintain a satisfactory or better rating under the Community Reinvestment Act at all insured depository institution subsidiaries.* A savings and loan holding company with an effective election to be treated as a financial holding company that fails to maintain a satisfactory or better rating under the Community Reinvestment Act at all insured deposit institution subsidiaries is subject to the activities limitations and any other requirements described in § 225.84 of this chapter.

(d) *Notice and approval requirements for conducting financial holding company activities; permissible activities.* A savings and loan holding company with an effective election to be treated as a financial holding company may conduct the activities listed in § 225.86 of this chapter subject to the notice, approval,

and any other requirements described in §§ 225.85 through 225.89 of this chapter.

Subpart H—Notice of Change of Director or Senior Executive Officer

§ 238.71 Purpose.

This subpart implements 12 U.S.C. 1831i, which requires certain savings and loan holding companies to notify the Board before appointing or employing directors and senior executive officers.

§ 238.72 Definitions.

The following definitions apply to this subpart:

(a) *Director* means an individual who serves on the board of directors of a savings and loan holding company. This term does not include an advisory director who:

(1) Is not elected by the shareholders;

(2) Is not authorized to vote on any matters before the board of directors or any committee of the board of directors;

(3) Provides only general policy advice to the board of directors or any committee of the board of directors; and

(4) Has not been identified by the Board or Reserve Bank in writing as an individual who performs the functions of a director, or who exercises significant influence over, or participates in, major policymaking decisions of the board of directors.

(b) *Senior executive officer* means an individual who holds the title or performs the function of one or more of the following positions (without regard to title, salary, or compensation): president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the Board or Reserve Bank in writing as an individual who exercises significant influence over, or participates in, major policymaking decisions, whether or not hired as an employee.

(c) *Troubled condition* means:

(1) A savings and loan holding company that has an unsatisfactory rating under the applicable holding company rating system, or that is informed in writing by the Board or Reserve Bank that it has an adverse effect on its subsidiary savings association.

(2) A savings and loan holding company that is subject to a capital directive, a cease-and-desist order, a consent order, a formal written agreement, or a prompt corrective action directive relating to the safety and soundness or financial viability of the savings association, unless otherwise informed in writing by the Board or Reserve Bank; or

(3) A savings and loan holding company that is informed in writing by the Board or Reserve Bank that it is in troubled condition based on information available to the Board or Reserve Bank.

§ 238.73 Prior notice requirements.

(a) *Savings and loan holding company*. Except as provided under § 238.78, a savings and loan holding company must give the Board 30 days' written notice, as specified in § 238.74, before adding or replacing any member of its board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive position if the savings and loan holding company is in troubled condition.

(b) *Notice by individual*. An individual seeking election to the board of directors of a savings and loan holding company described in paragraph (a) of this section that has not been nominated by management, must either provide the prior notice required under paragraph (a) of this section or follow the process under § 238.78(b).

§ 238.74 Filing and processing procedures.

(a) *Filing notice*—(1) *Content*. The notice required in § 238.73 shall be filed with the appropriate Reserve Bank and shall contain:

(i) The information required by paragraph 6(A) of the Change in Bank Control Act (12 U.S.C. 1817(j)(6)(A)) as may be prescribed in the designated Board form;

(ii) Additional information consistent with the Federal Financial Institutions Examination Council's Joint Statement of Guidelines on Conducting Background Checks and Change in Control Investigations, as set forth in the designated Board form; and

(iii) Such other information as may be required by the Board or Reserve Bank.

(2) *Modification.* The Reserve Bank may modify or accept other information in place of the requirements of this section for a notice filed under this subpart.

(3) *Acceptance and processing of notice.* The 30-day notice period specified in section 238.73 shall begin on the date all information required to be submitted by the notificant pursuant to this section is received by the appropriate Reserve Bank. The Reserve Bank shall notify the savings and loan holding company or individual submitting the notice of the date on which all required information is received and the notice is accepted for processing, and of the date on which the 30-day notice period will expire. The Board or Reserve Bank may extend the 30-day notice period for an additional period of not more than 60 days by notifying the savings and loan holding company or individual filing the notice that the period has been extended and stating the reason for not processing the notice within the 30-day notice period.

(b) [Reserved]

§ 238.75 Standards for review.

(a) *Notice of disapproval.* The Board or Reserve Bank will disapprove a notice if, pursuant to the standard set forth in 12 U.S.C. 1831i(e), the Board or Reserve Bank finds that the competence, experience, character, or integrity of the proposed individual indicates that it would not be in the best interests of the depositors of the savings and loan holding company or of the public to permit the individual to be employed by, or associated with, the savings and loan holding company. If the Board or Reserve Bank disapproves a notice, it will issue a written notice that explains why the Board or Reserve Bank disapproved the notice. The Board or Reserve Bank will send the notice to the savings and loan holding company and the individual.

(b) *Appeal of a notice of disapproval.* (1) A disapproved individual or a regulated institution that has submitted a notice that is disapproved under this section may appeal the disapproval to the Board within 15 days of the effective date of the notice of disapproval. An appeal shall be in writing and explain the reasons for the appeal and include all facts, documents, and arguments that the appealing party wishes to be considered in the appeal, and state whether the appealing party is requesting an informal hearing.

(2) Written notice of the final decision of the Board shall be sent to the appealing party within 60 days of the receipt of an appeal, unless the appealing party's request for an informal hearing is granted.

(3) The disapproved individual may not serve as a director or senior executive officer of the state member bank or bank holding company while the appeal is pending.

(c) *Informal hearing.* (1) An individual or regulated institution whose notice under this section has been disapproved may request an informal hearing on the notice. A request for an informal hearing shall be in writing and shall be submitted within 15 days of a notice of disapproval. The Board may, in its sole discretion, order an informal hearing if the Board finds that oral argument is appropriate or necessary to resolve disputes regarding material issues of fact.

(2) An informal hearing shall be held within 30 days of a request, if granted, unless the requesting party agrees to a later date.

(3) Written notice of the final decision of the Board shall be given to the individual and the regulated institution within 60 days of the conclusion of any informal hearing ordered by the Board, unless the requesting party agrees to a later date.

§ 238.76 Waiting period.

(a) *At expiration of period.* A proposed director or senior executive officer may begin service at the end of the 30-day period and any extension as provided under § 238.74 unless the Board or Reserve Bank notifies you that it has

disapproved the notice before the end of the period.

(b) *Prior to expiration of period.* A proposed director or senior executive officer may begin service before the end of the 30-day period and any extension as provided under section 238.74 of this section, if the Board or the Reserve Bank notifies in writing the savings and loan holding company or individual submitting the notice of the Board's or Reserve Bank's intention not to disapprove the notice.

§ 238.77 Waiver of prior notice requirement.

(a) *Waiver request.* An individual may serve as a director or senior executive officer before filing a notice under this subpart if the Board or Reserve Bank finds that:

(1) Delay would threaten the safety or soundness of the savings and loan holding company;

(2) Delay would not be in the public interest; or

(3) Other extraordinary circumstances exist that justify waiver of prior notice.

(b) *Automatic waiver.* An individual may serve as a director upon election to the board of directors before filing a notice under this subpart, if the individual:

(1) Is not proposed by the management of the savings and loan holding company;

(2) Is elected as a new member of the board of directors at a meeting of the savings and loan holding company; and

(3) Provides to the appropriate Reserve Bank all the information required in § 238.74 within two (2) business days after the individual's election.

(c) *Subsequent Board or Reserve Bank action.* The Board or Reserve Bank may disapprove a notice within 30 days after the Board or Reserve Bank issues a waiver under paragraph (a) of this section or within 30 days after the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (b) of this section.

Subpart I—Prohibited Service at Savings and Loan Holding Companies

§ 238.81 Purpose.

This subpart implements section 19(e)(1) of the Federal Deposit Insurance Act (FDIA), which prohibits persons who have been convicted of certain criminal offenses or who have agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such criminal offenses from occupying various positions with a savings and loan holding company. This part also implements section 19(e)(2) of the FDIA, which permits the Board to provide exemptions, by regulation or order, from the application of the prohibition. This subpart provides an exemption for savings and loan holding company employees whose activities and responsibilities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations, and a temporary exemption for certain persons who held positions with respect to a savings and loan holding company as of October 13, 2006. The subpart also describes procedures for applying to the Board for an exemption.

§ 238.82 Definitions.

The following definitions apply to this subpart:

(a) *Institution-affiliated party* is defined at 12 U.S.C. 1813(u), except that the phrase ''savings and loan holding company'' is substituted for ''insured depository institution'' each place that it appears in that definition.

(b) *Enforcement Counsel* means any individual who files a notice of appearance to serve as counsel on behalf of the Board in the proceeding.

(c) *Person* means an individual and does not include a corporation, firm or other business entity.

(d) *Savings and loan holding company* is defined at § 238.2(m), but excludes a subsidiary of a savings and loan holding company that is not itself a savings and loan holding company.

§ 238.83 Prohibited actions.

(a) *Person.* If a person was convicted of a criminal offense described in

§ 238.84, or agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such a criminal offense, he or she may not:

(1) Become, or continue as, an institution-affiliated party with respect to any savings and loan holding company.

(2) Own or control, directly or indirectly, any savings and loan holding company. A person will own or control a savings and loan holding company if he or she owns or controls that company under subpart D of this part.

(3) Otherwise participate, directly or indirectly, in the conduct of the affairs of any savings and loan holding company.

(b) *Savings and loan holding company.* A savings and loan holding company may not permit any person described in paragraph (a) of this section to engage in any conduct or to continue any relationship prohibited under that paragraph.

§ 238.84 Covered convictions or agreements to enter into pre-trial diversions or similar programs.

(a) *Covered convictions and agreements.* Except as described in § 238.85, this subpart covers:

(1) Any conviction of a criminal offense involving dishonesty, breach of trust, or money laundering. Convictions do not cover arrests, pending cases not brought to trial, acquittals, convictions reversed on appeal, pardoned convictions, or expunged convictions.

(2) Any agreement to enter into a pretrial diversion or similar program in connection with a prosecution for a criminal offense involving dishonesty, breach of trust or money laundering. A pretrial diversion or similar program is a program involving a suspension or eventual dismissal of charges or of a criminal prosecution based upon an agreement for treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternative.

(b) *Dishonesty or breach of trust.* A determination whether a criminal offense involves dishonesty or breach of trust is based on the statutory elements of the crime.

(1) ''Dishonesty'' means directly or indirectly to cheat or defraud, to cheat or defraud for monetary gain or its equivalent, or to wrongfully take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving a want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest.

(2) ''Breach of trust'' means a wrongful act, use, misappropriation, or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

§ 238.85 Adjudications and offenses not covered.

(a) *Youthful offender or juvenile delinquent.* This subpart does not cover any adjudication by a court against a person as:

(1) A youthful offender under any youthful offender law; or

(2) A juvenile delinquent by a court with jurisdiction over minors as defined by state law.

(b) *De minimis criminal offense.* This subpart does not cover *de minimis* criminal offenses. A criminal offense is *de minimis* if:

(1) The person has only one conviction or pretrial diversion or similar program of record;

(2) The offense was punishable by imprisonment for a term of less than one year, a fine of less than $1,000, or both, and the person did not serve time in jail.

(3) The conviction or program was entered at least five years before the date the person first held a position described in § 238.83(a); and

(4) The offense did not involve an insured depository institution, insured credit union, or other banking organization (including a savings and loan holding company, bank holding company, or financial holding company).

(5) The person must disclose the conviction or pretrial diversion or similar program to all insured depository institutions and other banking organizations the affairs of which he or she participates.

(6) The person must be covered by a fidelity bond to the same extent as others in similar positions with the savings and loan holding company.

§ 238.86 Exemptions.

(a) *Employees.* An employee of a savings and loan holding company is exempt from the prohibition in § 238.83, if all of the following conditions are met:

(1) The employee's responsibilities and activities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations.

(2) The savings and loan holding company maintains a list of all policymaking positions and reviews this list annually.

(3) The employee's position does not appear on the savings and loan holding company's list of policymaking positions, and the employee does not, in fact, exercise any policymaking function with the savings and loan holding company.

(4) The employee:

(i) Is not an institution-affiliated party of the savings and loan holding company other than by virtue of the employment described in paragraph (a) of this section.

(ii) Does not own or control, directly or indirectly, the savings and loan holding company; and

(iii) Does not participate, directly or indirectly, in the conduct of the affairs of the savings and loan holding company.

(b) *Temporary exemption.* (1) Any prohibited person who was an institution affiliated party with respect to a savings and loan holding company, who owned or controlled, directly or indirectly a savings and loan holding company, or who otherwise participated directly or indirectly in the conduct of the affairs of a savings and loan holding company on October 13, 2006, may continue to hold the position with the savings and loan holding company.

(2) This exemption expires on December 31, 2012, unless the savings and loan holding company or the person files an application seeking a case-by-case exemption for the person under § 238.87 by that date. If the savings and loan holding company or the person files such an application, the temporary exemption expires on:

(i) The date of issuance of a Board approval of the application under § 238.89(a);

(ii) The expiration of the 20-day period for filing a request for hearing under § 238.90(a) provided there is no timely request for hearing following the issuance by the Board of a denial of the application under that section;

(iii) The date that the Board denies a timely request for hearing under § 238.90(b) following the issuance of a Board denial of the application under § 238.89(b);

(iv) The date that the Board issues a decision under § 238.90(d); or

(v) The date an applicant withdraws the application.

§ 238.87 Filing procedures.

(a) *Who may file.* (1) A savings and loan holding company or a person who was convicted of a criminal offense described in § 238.84 or who has agreed to enter into a pre-trial diversion or similar program in connection with a prosecution for such a criminal offense may file an application with the Board seeking an exemption from the prohibitions in this subpart.

(2) A savings and loan holding company or a person may seek an exemption only for a designated position (or positions) with respect to a named savings and loan holding company.

(3) A savings and loan holding company or a person may not file an application less than one year after the latter of the date of a denial of the same exemption under § 238.89(b), § 238.90(a) or § 238.90(d).

(b) *Prohibition pending Board action.* Unless a savings and loan holding company or a person is exempt under § 238.86(b), the prohibitions in § 238.83 continue to apply pending Board action on the application.

§ 238.88 Factors for review.

(a) *Board review.* (1) In determining whether to approve an exemption application filed under § 238.87, the Board will consider the extent to which the position that is the subject of the application enables a person to:

(i) Participate in the major policymaking functions of the savings and loan holding company; or

(ii) Threaten the safety and soundness of any insured depository institution that is controlled by the savings and loan holding company, the interests of its depositors, or the public confidence in the insured depository institution.

(2) The Board will also consider whether the applicant has demonstrated the person's fitness to hold the described position. Some positions may be approved without an extensive review of a person's fitness because the position does not enable a person to take the actions described in paragraph (a)(1) of this section.

(b) *Factors*. In making the determinations under paragraph (a) of this section, the Board will consider the following factors:

(1) The position;

(2) The amount of influence and control a person holding the position will be able to exercise over the affairs and operations of the savings and loan holding company and the insured depository institution;

(3) The ability of the management of the savings and loan holding company to supervise and control the activities of a person holding the position;

(4) The level of ownership that the person will have at the savings and loan holding company;

(5) The specific nature and circumstances of the criminal offense. The question whether a person who was convicted of a crime or who agreed to enter into a pretrial diversion or similar program for a crime was guilty of that crime is not relevant;

(6) Evidence of rehabilitation; and

(7) Any other relevant factor.

§ 238.89 Board action.

(a) *Approval*. The Board will notify an applicant if an application under this subpart is approved. An approval by the Board may include such conditions as the Board determines to be appropriate.

(b) *Denial*. If Board denies an application, the Board will notify an applicant promptly.

§ 238.90 Hearings.

(a) *Hearing requests*. Within 20 days of the date of issuance of a denial of an application filed under this subpart, a savings and loan holding company or a person whose application the Board has denied may file a written request demonstrating good cause for a hearing on the denial.

(b) *Board review of hearing request*. The Board will review the hearing request to determine if the savings and loan holding company or person has demonstrated good cause for a hearing on the application. Within 30 days after the filing of a timely request for a hearing, the Board will notify the savings and loan holding company or person in writing of its decision to grant or deny the hearing request. If the Board grants the request for a hearing, it will order a hearing to be commenced within 60 days of the issuance of the notification. Upon the request of a party, the Board may at its discretion order a later hearing date.

(c) *Hearing procedures*. The following procedures apply to hearings under this subpart.

(1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Board.

(2) An applicant may elect in writing to have the matter determined on the basis of written submissions, rather than an oral hearing.

(3) The parties to the hearing are Enforcement Counsel and the applicant.

(4) The provisions of §§ 263.2, 263.4, 263.6 through 263.12, and 263.16 of this chapter apply to the hearing.

(5) Discovery is not permitted.

(6) A party may introduce relevant and material documents and make oral argument at the hearing.

(7) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses must be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party may cross-examine any witness presented by the opposing

party. The Board will furnish a transcript of the proceedings upon an applicant's request and upon the payment of the costs of the transcript.

(8) The presiding officer has the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. If the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees are paid in accordance with section 263.14 of this chapter.

(9) Upon the request of a party, the record will remain open for five business days following the hearing for additional submissions to the record.

(10) Enforcement Counsel has the burden of proving a *prima facie* case that a person is prohibited from a position under section 19(e) of the FDIA. The applicant has the burden of proof on all other matters.

(11) The presiding officer must make recommendations to the Board, where possible, within 20 days after the last day for the parties to submit additions to the record.

(12) The presiding officer must forward his or her recommendation to the Board who shall promptly certify the entire record, including the presiding officer's recommendations. The Board's certification will close the record.

(d) *Decision*. After the certification of the record, the Board will notify the parties of its decision by issuing an order approving or denying the application.

(1) An approval order will require fidelity bond coverage for the position to the same extent as similar positions with the savings and loan holding company. The approval order may include such other conditions as may be appropriate.

(2) A denial order will include a summary of the relevant factors under § 238.88(b).

Subpart J—Management Official Interlocks

§ 238.91 Authority, purpose, and scope.

(a) *Authority*. This subpart is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose*. The purpose of the Interlocks Act and this subpart is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope*. This subpart applies to management officials of savings and loan holding companies, and their affiliates.

§ 238.92 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Affiliate*. (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section 202, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' means spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a savings and loan holding company based on common ownership does not exist if the Board determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the Board considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate to that person's ownership of shares in the other organization.

(b) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(c) *Community* means a city, town, or village, and contiguous or adjacent cities, towns, or villages.

(d) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(e) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(f) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(g) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(h) *Depository organization* means a depository institution or a depository holding company.

(i) *Low- and moderate-income areas* means census tracts (or, if an area is not in a census tract, block numbering areas delineated by the United States Bureau of the Census) where the median family income is less than 100 percent of the area median income.

(j) *Management official.* (1) The term *management official* means:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in § 225.71(c) of this chapter;

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (j)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(k) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(l) *Person* means a natural person, corporation, or other business entity.

(m) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(n) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The Board will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The Board will determine,

after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee*.

(o) *Savings association* means:

(1) Any Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2)));

(2) Any state savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))) the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(3) Any corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(1))) the deposits of which are insured by the Federal Deposit Insurance Corporation, that the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller of the Currency jointly determine to be operating in substantially the same manner as a savings association.

(p) *Total assets*. (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(q) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 238.93 Prohibitions.

(a) *Community*. A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA*. A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $50 million or more.

(c) *Major assets*. A management official of a depository organization with total assets exceeding $2.5 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. The Board will adjust these thresholds, as necessary, based on the year-to-year change in the average of the Consumer Price Index for the Urban Wage Earners and Clerical Workers, not seasonally adjusted, with rounding to the nearest $100 million. The Board will announce the revised thresholds by publishing a final rule without notice and comment in the FEDERAL REGISTER.

§ 238.94 Interlocking relationships permitted by statute.

The prohibitions of § 238.93 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq*. and 12 U.S.C. 611 *et seq*., respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United

States except as an incident to its activities outside the United States;

(e) A State-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired;

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The Board may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the Board.

(3) The Board may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period; and

(i) Any savings association or any savings and loan holding company (as defined in section 10(a)(1)(D) of the Home Owners' Loan Act) which has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of such Act, except that this paragraph (i) shall apply only with regard to service by a single management official of such savings association or holding company, or any subsidiary of such savings association or holding company, by a single management official of the savings and loan holding company which purchased the stock issued in connection with such qualified stock issuance, and shall apply only when the Board has determined that such service is consistent with the purposes of the Interlocks Act and the Home Owners' Loan Act.

§ 238.95 Small market share exemption.

(a) *Exemption.* A management interlock that is prohibited by § 238.93 is permissible, if:

(1) The interlock is not prohibited by § 238.93(c); and

(2) The depository organizations (and their depository institution affiliates) hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or community in which both depository organizations (or their depository institution affiliates) have offices. The amount of deposits shall be determined by reference to the most recent annual Summary of Deposits published by the FDIC for the RMSA or community.

(b) *Confirmation and records.* Each depository organization must maintain records sufficient to support its determination of eligibility for the exemption under paragraph (a) of this section, and must reconfirm that determination on an annual basis.

§ 238.96 General exemption.

(a) *Exemption.* The Board may by agency order exempt an interlock from the prohibitions in § 238.93 if the Board finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns. A depository organization may apply to the Board for an exemption.

(b) *Presumptions.* In reviewing an application for an exemption under this section, the Board will apply a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition if the depository organization seeking to add a management official:

(1) Primarily serves low- and moderate-income areas;

(2) Is controlled or managed by persons who are members of a minority group, or women;

(3) Is a depository institution that has been chartered for less than two years; or

(4) Is deemed to be in ''troubled condition'' as defined in § 238.72.

(c) *Duration.* Unless a shorter expiration period is provided in the Board approval, an exemption permitted by paragraph (a) of this section may continue so long as it does not result in a monopoly or substantial lessening of competition, or is unsafe or unsound. If the Board grants an interlock exemption in reliance upon a presumption under paragraph (b) of this section, the interlock may continue for three years, unless otherwise provided by the Board in writing.

§ 238.97 Change in circumstances.

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption if a change in circumstances causes the service to become prohibited. A change in circumstances may include an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an increase in the aggregate deposits of the depository organization, or an acquisition, merger, consolidation, or reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the depository organization involved in the interlock for 15 months following the date of the change in circumstances. The Board may shorten this period under appropriate circumstances.

§ 238.98 Enforcement.

Except as provided in this section, the Board administers and enforces the Interlocks Act with respect to savings and loan holding companies and its affiliates, and may refer any case of a prohibited interlocking relationship involving these entities to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a savings and loan holding company is subject to the primary regulation of another Federal depository organization supervisory agency, then the Board does not administer and enforce the Interlocks Act with respect to that affiliate.

§ 238.99 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.

A management official or prospective management official of a depository organization may enter into an otherwise prohibited interlocking relationship with another depository organization for a period of up to 10 years if such relationship is approved by the Federal Deposit Insurance Corporation pursuant to section 13(k)(1)(A)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1823(k)(1)(A)(v)).

Subpart K—Dividends by Subsidiary Savings Associations

§ 238.101 Authority and purpose.

This subpart implements section 10(f) of HOLA which requires savings associations with holding companies to provide the Board not less than 30 days' notice of a proposed declaration of a dividend. This subpart applies to all declarations of dividends by a subsidiary savings association of a savings and loan holding company.

§ 238.102 Definitions.

The following definitions apply to this subpart:

(a) *Appropriate Federal banking agency* has the same meaning as in 12 U.S.C. 1813(q) and includes, with respect to agreements entered into and conditions imposed prior to July 21, 2011, the Office of Thrift Supervision.

(b) *Dividend* means:

(1) A distribution of cash or other property to owners of a savings association made on account of their ownership, but not any dividend consisting only of shares or rights to purchase shares; or

(2) Any transaction that the Board determines, by order or regulation, to be in substance a dividend.

(c) *Shares* means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term ''share'' also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a dividend.

§ 238.103 Filing requirement.

(a) *Filing*. A subsidiary savings association of a savings and loan holding company must file a notice with the appropriate Reserve Bank on the designated form at least 30 days before the proposed declaration of a dividend by its board of directors.

(b) *Schedules*. A notice may include a schedule proposing dividends over a specified period, not to exceed 12 months.

§ 238.104 Board action and criteria for review.

(a) *Board action*. (1) A subsidiary savings association of a savings and loan holding company may declare a proposed dividend after the end of a 30-day review period commencing on the date of submission to the Federal Reserve System of the complete record on the notice, unless the Board or Reserve Bank disapproves the notice before the end of the period.

(2) A subsidiary savings association of a savings and loan holding company may declare a proposed dividend before the end of the 30-day period if the Board or Reserve Bank notifies the applicant in writing of the Board's or Reserve Bank's intention not to disapprove the notice.

(b) *Criteria*. The Board or Reserve Bank may disapprove a notice, in whole or in part, if the Board or Reserve Bank makes any of the following determinations.

(1) Following the dividend the subsidiary savings association will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in applicable regulations under 12 U.S.C. 1831o.

(2) The proposed dividend raises safety or soundness concerns.

(3) The proposed dividend violates a prohibition contained in any statute, regulation, enforcement action, or agreement between the subsidiary savings association or any savings and loan holding company of which it is a subsidiary and an appropriate Federal banking agency, a condition imposed on the subsidiary savings association or any savings and loan holding company of which it is a subsidiary in an application or notice approved by an appropriate Federal banking agency, or any formal or informal enforcement action involving the subsidiary savings association or any savings and loan holding company of which it is a subsidiary. If so, the Board will determine whether it may permit the dividend notwithstanding the prohibition, condition, or enforcement action.

Subpart L—Investigative Proceedings and Formal Examination Proceedings

§ 238.111 Scope.

This part prescribes rules of practice and procedure applicable to the conduct of investigative proceedings under section 10(g)(2) of the Home Owners' Loan Act, as amended, 12 U.S.C. 1467a(g)(2) (''HOLA'') and to the conduct of formal examination proceedings with respect to savings and loan holding companies and their affiliates under section 5(d)(1)(B) of the HOLA, as amended, 12 U.S.C. 1464(d)(1)(B) or section 7(j)(15) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(j)(15) (''FDIA''), section 8(n) of the FDIA, 12 U.S.C. 1818(n), or section 10(c) of the FDIA, 12 U.S.C. 1820(c). This part does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 262 of this chapter.

§ 238.112 Definitions.

As used in this part:

(a) *Investigative proceeding* means an investigation conducted under section 10(g)(2) of the HOLA;

(b) *Formal examination proceeding* means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence, memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of savings and loan holding companies and their affiliates conducted pursuant to section 5(d)(1)(B) of the HOLA, section 7(j)(15) of the FDIA, section 8(n) of the FDIA or section 10(c) of the FDIA; and

(c) *Designated representative* means the person or persons empowered by the Board to conduct an investigative proceeding or a formal examination proceeding.

§ 238.113 Confidentiality of proceedings.

All formal examination proceedings shall be private and, unless otherwise ordered by the Board, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the Board, or required by law, and except as provided in §§ 238.114 and 238.115, the entire record of any investigative proceeding or formal examination proceeding, including the resolution of the Board or its delegate(s) authorizing the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

§ 238.114 Transcripts.

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or transcript of his own testimony upon payment of the cost thereof; *provided,* that a person seeking a transcript of his own testimony must file a written request with the Board stating the reason he desires to procure such transcript, and the Board may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

§ 238.115 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or give testimony at an investigative proceeding or formal examination proceeding shall have the right to examine, upon request, the Board resolution authorizing such proceeding. Copies of such resolution shall be furnished, for their retention, to such persons only with the written approval of the Board.

(b) Any witness at an investigative proceeding or formal examination proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the Board in accordance with the provisions of part 263 of this chapter and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s)

for the association(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

(3) The Board, for good cause, may exclude a particular attorney from further participation in any investigation in which the Board has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous or contumacious conduct. The person conducting an investigation may report to the Board instances of apparently dilatory, obstructionist, egregious, contemptuous or contumacious conduct on the part of an attorney. After due notice to the attorney, the Board may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the Board may permit or direct.

§ 238.116 Obstruction of proceedings.

The designated representative shall report to the Board any instances where any witness or counsel has engaged in dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigative proceeding or formal examination proceeding; and the Board may take such action as the circumstances warrant, including the exclusion of counsel from further participation in such proceeding.

§ 238.117 Subpoenas.

(a) *Service*. Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person*. Service of a subpoena upon a natural person may be effected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons*. When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash*. Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the Board or its designee to quash or modify such subpoena, accompanying such application with a statement of the reasons therefore. The Board or its designee, as appropriate, may:

(1) Deny the application;

(2) Quash or revoke the subpoena;

(3) Modify the subpoena; or

(4) Condition the granting of the application on such terms as the Board or its designee determines to be just, reasonable, and proper.

(c) *Attendance of witnesses*. Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any State or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage*. Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the Board by any of its designated representatives.

PART 239—MUTUAL HOLDING COMPANIES (REGULATION MM)

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APPENDIX D TO PART 239—SUBSIDIARY HOLDING COMPANY OF A MUTUAL HOLDING COMPANY MODEL BYLAWS

AUTHORITY: 12 U.S.C. 1462, 1462a, 1464, 1467a, 1828, and 2901.

SOURCE: Regulation MM, 76 FR 56357, Sept. 13, 2011, unless otherwise noted.

Subpart A—General Provisions

§ 239.1 Authority, purpose, and scope.

(a) *Authority*. This part is issued by the Board of Governors of the Federal Reserve System (''Board'') under section 10(g) and (o) of the Home Owners' Loan Act (''HOLA'').

(b) *Purpose*. The principal purposes of this part are to:

(1) Regulate the reorganization of mutual savings associations to mutual holding companies and the creation of subsidiary holding companies of mutual holding companies;

(2) Define and regulate the operations of mutual holding companies and subsidiary holding companies of mutual holding companies; and

(3) Set forth the procedures for securing approval for these transactions.

(c) *Scope*. Except as the Board may otherwise determine, the reorganization of mutual savings associations into mutual holding companies, any related stock issuances by subsidiary holding companies, and the conversion of mutual holding companies into stock form are exclusively governed by

the provisions of this part, and no mutual savings association shall reorganize to a mutual holding company, no subsidiary holding company of a mutual holding company shall issue minority stock, and no mutual holding company shall convert into stock form without the prior written approval of the Board. The Board may grant a waiver in writing from any requirement of this part for good cause shown.

§ 239.2 Definitions.

As used in this part and in the forms under this part, the following definitions apply, unless the context otherwise requires:

(a) *Acquiree association* means any savings association, other than a resulting association, that:

(1) Is acquired by a mutual holding company as part of, and concurrently with, a mutual holding company reorganization; and

(2) Is in the mutual form immediately prior to such acquisition.

(b) *Acting in concert* has the same meaning as in § 238.31(b) of this chapter.

(c) *Affiliate* has the same meaning as in § 238.2(a) of this chapter.

(d) *Associate* of a person is:

(1) A corporation or organization (other than the mutual holding company, subsidiary holding company, or any majority-owned subsidiaries of such holding companies), if the person is a senior officer or partner, or beneficially owns, directly or indirectly, 10 percent or more of any class of equity securities of the corporation or organization.

(2) A trust or other estate, if the person has a substantial beneficial interest in the trust or estate or is a trustee or fiduciary of the trust or estate. For purposes of §§ 239.59(k), 239.59(m), 239.59(n), 239.59(o), 239.59(p), 239.63(b), a person who has a substantial beneficial interest in the mutual holding company or subsidiary holding company's tax-qualified or non-tax-qualified employee stock benefit plan, or who is a trustee or a fiduciary of the plan, is not an associate of the plan. For the purposes of § 239.59(k), the mutual holding company or subsidiary holding company's tax-qualified employee stock benefit plan is not an associate of a person.

(3) Any natural person who is related by blood or marriage to such person and:

(i) Who lives in the same home as the person; or

(ii) Who is a director or senior officer of the mutual holding company, subsidiary holding company, or other subsidiary.

(e) *Company* means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization, as defined in paragraph (u) of this section; but a company does not include:

(1) The Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or any Federal Home Loan Bank, or

(2) Any company the majority of shares of which is owned by:

(i) The United States or any State,

(ii) An officer of the United States or any State in his or her official capacity, or

(iii) An instrumentality of the United States or any State.

(f) *Control* has the same meaning as in § 238.2(e) of this chapter.

(g) *Default* means any adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for a mutual holding company or subsidiary savings association of a mutual holding company.

(h) *Demand accounts* mean non-interest-bearing demand deposits that are subject to check or to withdrawal or transfer on negotiable or transferable order to the savings association and that are permitted to be issued by statute, regulation, or otherwise and are payable on demand.

(i) *Insider* means any officer or director of a company or of any affiliate of such company, and any person acting in concert with any such officer or director.

(j) *Member* means any depositor or borrower of a mutual savings association that is entitled, under the charter of the savings association, to vote on matters affecting the association, and any depositor or borrower of a subsidiary savings association of a mutual holding company that is entitled,

under the charter of the mutual holding company, to vote on matters affecting the mutual holding company.

(k) *Mutual holding company* means a holding company organized in mutual form under this part, and unless otherwise indicated, a subsidiary holding company controlled by a mutual holding company, organized under this part.

(l) *Parent* means any company which directly or indirectly controls any other company or companies.

(m) *Person* includes an individual, bank, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(n) *Reorganization Notice* means a notice of a proposed mutual holding company reorganization that is in the form and contains the information required by the Board.

(o) *Reorganization Plan* means a plan to reorganize into the mutual holding company format containing the information required by § 239.6.

(p) *Reorganizing association* means a mutual savings association that proposes to reorganize to become a mutual holding company pursuant to this part.

(q) *Resulting association* means a savings association in the stock form that is organized as a subsidiary of a reorganizing association to receive the substantial part of the assets and liabilities (including all deposit accounts) of the reorganizing association upon consummation of the reorganization.

(r) *Savings account* means any withdrawable account, except a demand account, a tax and loan account, a note account, a United States Treasury general account, or a United States Treasury time deposit-open account.

(s) *Savings Association* has the same meaning as in § 238.2(l) of this chapter.

(t) *Savings and loan holding company* has the same meaning as specified in section 10(a)(1) of the HOLA and § 238.2(m) of this chapter.

(u) *Similar organization* for purposes of paragraph (e) of this section means a combination of parties with the potential for or practical likelihood of continuing rather than temporary existence, where the parties thereto have knowingly and voluntarily associated for a common purpose pursuant to identifiable and binding relationships which govern the parties with respect to either:

(1) The transferability and voting of any stock or other indicia of participation in another entity, or

(2) Achievement of a common or shared objective, such as to collectively manage or control another entity.

(v) *Stock* means common or preferred stock, or any other type of equity security, including (without limitation) warrants or options to acquire common or preferred stock, or other securities that are convertible into common or preferred stock.

(w) *Stock Issuance Plan* means a plan, submitted pursuant to § 239.24 and containing the information required by § 239.25, providing for the issuance of stock by a subsidiary holding company.

(x) *Subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes any service corporation owned in whole or in part by a savings association, or a subsidiary of such service corporation.

(y) *Subsidiary holding company* means a federally chartered stock holding company controlled by a mutual holding company that owns the stock of a savings association whose depositors have membership rights in the parent mutual holding company.

(z) *Tax and loan account* means an account, the balance of which is subject to the right of immediate withdrawal, established for receipt of payments of Federal taxes and certain United States obligations. Such accounts are not savings accounts or savings deposits.

(aa) *Tax-qualified employee stock benefit plan* means any defined benefit plan or defined contribution plan, such as an employee stock ownership plan, stock bonus plan, profit-sharing plan, or other plan, and a related trust, that is qualified under sec. 401 of the Internal Revenue Code (26 U.S.C. 401).

(bb) *United States Treasury General Account* means an account maintained in the name of the United States Treasury the balance of which is subject to the right of immediate withdrawal, except in the case of the closure of the

member, and in which a zero balance may be maintained. Such accounts are not savings accounts or savings deposits.

(cc) *United States Treasury Time Deposit Open Account* means a non-interest-bearing account maintained in the name of the United States Treasury which may not be withdrawn prior to the expiration of 30 days' written notice from the United States Treasury, or such other period of notice as the Treasury may require. Such accounts are not savings accounts or savings deposits.

Subpart B—Mutual Holding Companies

§ 239.3 Mutual holding company reorganizations.

(a) A mutual savings association may not reorganize to become a mutual holding company, or join in a mutual holding company reorganization as an acquiree association, unless it satisfies the following conditions:

(1) A Reorganization Plan is approved by a majority of the board of directors of the reorganizing association and any acquiree association;

(2) A Reorganization Notice is filed with the Board pursuant to § 238.14 of this chapter;

(3) The Reorganization Plan is submitted to the members of the reorganizing association and any acquiree association pursuant and is approved by a majority of the total votes of the members of each association eligible to be cast at a meeting held at the call of each association's directors in accordance with the procedures prescribed by each association's charter and bylaws; and

(4) All necessary regulatory approvals have been obtained and all conditions imposed by the Board have been satisfied.

(b) Upon receipt of an application under this section, the Reserve Bank will promptly furnish notice and a copy of the Reorganization Plan to the primary federal supervisor of any savings association involved in the transaction. The primary supervisor will have 30 calendar days from the date of the letter giving notice in which to submit its views and recommendations to the Board.

§ 239.4 Grounds for disapproval of reorganizations.

(a) *Basic standards.* The Board may disapprove a proposed mutual holding company reorganization filed pursuant to § 239.3(a) if:

(1) Disapproval is necessary to prevent unsafe or unsound practices;

(2) The financial or managerial resources of the reorganizing association or any acquiree association warrant disapproval;

(3) The proposed capitalization of the mutual holding company fails to meet the requirements of paragraph (b) of this section;

(4) A stock issuance is proposed in connection with the reorganization pursuant to § 239.24 that fails to meet the standards established by that section;

(5) The reorganizing association or any acquiree association fails to furnish the information required to be included in the Reorganization Notice or any other information requested by the Board in connection with the proposed reorganization; or

(6) The proposed reorganization would violate any provision of law, including (without limitation) § 239.3(a) and (c) (regarding board of directors and membership approval) or § 239.5(a) (regarding continuity of membership rights).

(b) *Capitalization.* (1) The Board shall disapprove a proposal by a reorganizing association or any acquiree association to capitalize a mutual holding company in an amount in excess of a nominal amount if immediately following the reorganization, the resulting association or the acquiree association would fail to be ''adequately capitalized'' under the regulatory capital requirements applicable to the savings association.

(2) Proposals by reorganizing associations and acquiree associations to capitalize mutual holding companies shall also comply with any applicable statutes, and with regulations or written policies of the Comptroller of the Currency or the Federal Deposit Insurance Corporation, as applicable, governing

capital distributions by savings associations in effect at the time of the reorganization.

(c) *Presumptive disqualifiers*—(1) *Managerial resources.* The factors specified in § 238.15(d)(1)(i) through (vi) of this chapter shall give rise to a rebuttable presumption that the managerial resources test of paragraph (a)(2) of this section is not met. For this purpose, each place the term *acquiror* appears in § 238.15(d)(1)(i) through (vi) of this chapter, it shall be read to mean the reorganizing association or any acquiree association, and the reference in § 238.15(d)(1)(v) of this chapter to filings under this part shall be deemed to include filings under either part 238 of this chapter or this part.

(2) *Safety and soundness and financial resources.* Failure by a reorganizing association and any acquiree association to submit a business plan in connection with a Reorganization Notice, or submission of a business plan that projects activities that are inconsistent with the credit and lending needs of the reorganizing association or acquiree association's proposed market area or that fails to demonstrate that the capital of the mutual holding company will be deployed in a safe and sound manner, shall give rise to a rebuttable presumption that the safety and soundness and financial resources tests of paragraphs (a)(1) and (a)(2) of this section are not met.

(d) *Failure of the Board to act on a Reorganization Notice within the prescribed time period.* A proposed reorganization that obtains regulatory clearance from the Board due to the operation of § 238.14 of this chapter may take place in the manner proposed, subject to the following conditions:

(1) The reorganization shall be consummated within one year of the date of the expiration of the Board's review period under § 238.14 of this chapter;

(2) The mutual holding company shall not be capitalized in an amount in excess of what is permissible under § 239.4(b);

(3) No request for regulatory waivers or forbearances shall be deemed granted;

(4) The following information shall be submitted within the specified time frames:

(i) On the business day prior to the date of the reorganization, the chief financial officers of the reorganizing association and any acquiree association shall certify to the Board in writing that no material adverse events or material adverse changes have occurred with respect to the financial condition or operations of their respective associations since the date of the financial statements submitted with the Reorganization Notice;

(ii) No later than thirty days after the reorganization, the mutual holding company shall file with the Board a certification by legal counsel stating the effective date of the reorganization, the exact number of shares of stock of the resulting association and any acquiree association acquired by the mutual holding company and by any other persons, and that the reorganization has been consummated in accordance with § 239.3 and all other applicable laws and regulations and the Reorganization Notice;

(iii) No later than thirty days after the reorganization, the mutual holding company shall file with the Board an opinion from its independent auditors certifying that the reorganization was consummated in accordance with generally accepted accounting principles; and

(iv) No later than thirty days after the reorganization, the mutual holding company shall file with the Board a certification stating that the mutual holding company will not deviate materially, or cause its subsidiary savings associations to deviate materially, from the business plan submitted in connection with the Reorganization Notice, unless prior written approval from the Board is obtained.

§ 239.5 Membership rights.

(a) *Depositors and borrowers of resulting associations, acquiree associations, and associations in mutual form when acquired.* The charter of a mutual holding company must:

(1) Confer upon existing and future depositors of the resulting association the same membership rights in the mutual holding company as were conferred upon depositors by the charter

of the reorganizing association as in effect immediately prior to the reorganization;

(2) Confer upon existing and future depositors of any acquiree association or any association that is in the mutual form when acquired by the mutual holding company the same membership rights in the mutual holding company as were conferred upon depositors by the charter of the acquired association immediately prior to acquisition, *provided that* if the acquired association is merged into another association from which the mutual holding company draws members, the depositors of the acquired association shall receive the same membership rights as the depositors of the association into which the acquired association is merged;

(3) Confer upon the borrowers of the resulting association who are borrowers at the time of reorganization the same membership rights in the mutual holding company as were conferred upon them by the charter of the reorganizing association immediately prior to reorganization, but shall not confer any membership rights in connection with any borrowings made after the reorganization; and

(4) Confer upon the borrowers of any acquiree association or any association that is in the mutual form when acquired by the mutual holding company who are borrowers at the time of the acquisition the same membership rights in the mutual holding company as were conferred upon them by the charter of the acquired association immediately prior to acquisition, but shall not confer any membership rights in connection with any borrowings made after the acquisition, *provided that* if the acquired association is merged into another association from which the mutual holding company draws members, the borrowers of the acquired association shall instead receive the same grandfathered membership rights as the borrowers of the association into which the acquired association is merged received at the time that association became a subsidiary of the mutual holding company.

(b) *Depositors and borrowers of associations in the stock form when acquired.* A mutual holding company that acquires a savings association in the stock form, other than a resulting association or an acquiree association, shall not confer any membership rights upon the depositors and borrowers of such association, unless such association is merged into an association from which the mutual holding company draws members, in which case the depositors of the stock association shall receive the same membership rights as other depositors of the association into which the stock association is merged.

§ 239.6 Contents of Reorganization Plans.

Each Reorganization Plan shall contain a complete description of all significant terms of the proposed reorganization, shall attach and incorporate any Stock Issuance Plan proposed in connection with the Reorganization Plan, and shall:

(a) Provide for amendment of the charter and bylaws of the reorganizing association to read in the form of the charter and bylaws of a mutual holding company, and attach and incorporate such charter and bylaws;

(b) Provide for the organization of the resulting association, which shall be an interim federal or state subsidiary savings association of the reorganizing association, and attach and incorporate the proposed charter and bylaws of such association;

(c) If the reorganizing association proposes to form a subsidiary holding company, provide for the organization of a subsidiary holding company and attach and incorporate the proposed charter and bylaws of such subsidiary holding company.

(d) Provide for amendment of the charter and bylaws of any acquiree association to read in the form of the charter and bylaws of a state or federal savings association in the stock form, and attach and incorporate such charter and bylaws;

(e) Provide that, upon consummation of the reorganization, substantially all of the assets and liabilities (including all savings accounts, demand accounts, tax and loan accounts, United States Treasury General Accounts, or United States Treasury Time Deposit Open Accounts, as those terms are defined in

this part) of the reorganizing association shall be transferred to the resulting association, which shall thereupon become an operating subsidiary savings association of the mutual holding company;

(f) Provide that all assets, rights, obligations, and liabilities of whatever nature of the reorganizing association that are not expressly retained by the mutual holding company shall be deemed transferred to the resulting association;

(g) Provide that each depositor in the reorganizing association or any acquiree association immediately prior to the reorganization shall upon consummation of the reorganization receive, without payment, an identical account in the resulting association or the acquiree association, as the case may be (Appropriate modifications should be made to this provision if savings associations are being merged as a part of the reorganization);

(h) Provide that the Reorganization Plan as adopted by the boards of directors of the reorganizing association and any acquiree association may be substantively amended by those boards of directors as a result of comments from regulatory authorities or otherwise prior to the solicitation of proxies from the members of the reorganizing association and any acquiree association to vote on the Reorganization Plan and at any time thereafter with the concurrence of the Board; and that the reorganization may be terminated by the board of directors of the reorganizing association or any acquiree association at any time prior to the meeting of the members of the association called to consider the Reorganization Plan and at any time thereafter with the concurrence of the Board;

(i) Provide that the Reorganization Plan shall be terminated if not completed within a specified period of time (The time period shall not be more than 24 months from the date upon which the members of the reorganizing association or the date upon which the members of any acquiree association, whichever is earlier, approve the Reorganization Plan and may not be extended by the reorganizing or acquiree association); and

(j) Provide that the expenses incurred in connection with the reorganization shall be reasonable.

§ 239.7 Acquisition and disposition of savings associations, savings and loan holding companies, and other corporations by mutual holding companies.

(a) *Acquisitions*—(1) *Stock savings associations.* A mutual holding company may not acquire control of a savings association that is in the stock form unless the necessary approvals are obtained from the Board, including approval pursuant to § 238.11 of this chapter.

(2) *Mutual savings associations.* A mutual holding company may not acquire a savings association in the mutual form by merger of such association into any subsidiary savings association of such holding company from which the parent mutual holding company draws members or into an interim subsidiary savings association of the mutual holding company, unless:

(i) The proposed acquisition is approved by a majority of the board of directors of the mutual association;

(ii) The proposed acquisition is submitted to the mutual association's members and is approved by a majority of the total votes of the association's members eligible to be cast at a meeting held at the call of the association's directors in accordance with the procedures prescribed by the association's charter and bylaws;

(iii) The necessary approvals are obtained from the Board, including approval pursuant to § 238.11 of this chapter, and any other approvals required to form an interim association, to amend the charter and bylaws of the association being acquired, and/or to amend the charter and bylaws of the mutual holding company consistent with § 239.6(a); and

(iv) The approval of the members of the mutual holding company is obtained, if the Board advises the mutual holding company in writing that such approval will be required.

(3) *Mutual holding companies.* A mutual holding company that is not a subsidiary holding company may not acquire control of another mutual holding company, including a subsidiary holding company, by merging with or

into such company, unless the necessary approvals are obtained from the Board, including approval pursuant to § 238.11 of this chapter. The approval of the members of the mutual holding companies shall also be obtained if the Board advises the mutual holding companies in writing that such approval will be required.

(4) *Stock holding companies.* A mutual holding company may not acquire control of a savings and loan holding company in the stock form that is not a subsidiary holding company, unless the necessary approvals are obtained from the Board, including approval pursuant to § 238.11 of this chapter. The acquired holding company may be held as a subsidiary of the mutual holding company or merged into the mutual holding company.

(5) *Non-controlling acquisitions of savings association stock.* A mutual holding company may acquire non-controlling amounts of the stock of savings associations and savings and loan holding companies subject to the restrictions imposed by 12 U.S.C. 1467a(e) and (q) and §§ 238.41 and 238.11 of this chapter.

(6) *Other corporations.* A mutual holding company may not acquire control of, or make non-controlling investments in the stock of, any corporation other than a savings association or savings and loan holding company unless:

(i)(A) Such corporation is engaged exclusively in activities that are permissible for mutual holding companies pursuant to § 239.8(a); or

(B) It is lawful for the stock of such corporation to be purchased by a federal savings association under the applicable regulations of the Comptroller of the Currency or by a state savings association under the applicable regulations of the Federal Deposit Insurance Corporation and the laws of any state where any subsidiary savings association of the mutual holding company has its home office; and

(ii) Such corporation is not controlled, directly or indirectly, by a subsidiary savings association of the mutual holding company.

(b) *Dispositions.* (1) A mutual holding company shall provide written notice to the appropriate Reserve Bank at least 30 days prior to the effective date of any direct or indirect transfer of any of the stock that it holds in a subsidiary holding company, a resulting association, an acquiree association, or any subsidiary savings association that was in the mutual form when acquired by the mutual holding company, including stock transferred in connection with a pledge pursuant to § 239.8(b) or any transfer of all or a substantial portion of the assets or liabilities of any such subsidiary holding company or association. Any such disposition shall comply with the requirements of this part, as appropriate, and with any other applicable statute or regulation.

(2) A mutual holding company may, subject to applicable laws and regulations, transfer any or all of the stock or cause or permit the transfer of any or all of the assets and liabilities of:

(i) Any subsidiary savings association that was in the stock form when acquired, provided such association is not a resulting association or an acquiree association;

(ii) Any subsidiary holding company acquired pursuant to paragraph (a)(4) of this section; or

(iii) Any corporation other than a savings association or savings and loan holding company.

(3) A mutual holding company may, subject to applicable laws and regulations, transfer any stock acquired pursuant to paragraph (a)(5) of this section.

(4) No transfer authorized by this section may be made to any insider of the mutual holding company, any associate of an insider of the mutual holding company, or any tax-qualified or non-tax-qualified employee stock benefit plan of the mutual holding company unless the mutual holding company provides notice to the appropriate Reserve Bank at least 30 days prior to the effective date of the proposed transfer. This notice shall be in addition to any other application or notice required under applicable laws or regulations, including those imposed by this part or Regulation LL.

§ 239.8 Operating restrictions.

(a) *Activities restrictions.* A mutual holding company may engage in any business activity specified in 12 U.S.C. 1467a(c)(2) or (c)(9)(A)(ii). In addition,

the business activities of subsidiaries of mutual holding companies may include the activities specified in § 239.7(a)(6). A mutual holding company or its subsidiaries may engage in the foregoing activities only upon compliance with the procedures specified in §§ 238.53(c) or 238.54(b) of this chapter.

(b) *Pledging stock.* (1) No mutual holding company may pledge the stock of its resulting association, an acquiree association, or any subsidiary savings association that was in the mutual form when acquired by the mutual holding company (or its parent mutual holding company), unless the proceeds of the loan secured by the pledge are infused into the association whose stock is pledged. No mutual holding company may pledge the stock of its subsidiary holding company unless the proceeds of the loan secured by the pledge are infused into any subsidiary savings association of the subsidiary holding company that is a resulting association, an acquiree association, or a subsidiary savings association that was in the mutual form when acquired by the subsidiary holding company (or its parent mutual holding company). In the event the subsidiary holding company has more than one subsidiary savings association, the loan proceeds shall, unless otherwise approved by the Board, be infused in equal amounts to each subsidiary savings association. Any amount of the stock of such association or subsidiary holding company may be pledged for these purposes. Nothing in this paragraph shall be deemed to prohibit:

(i) The payment of dividends from a subsidiary savings association to its mutual holding company parent to the extent otherwise permissible; or

(ii) The payment of dividends from a subsidiary holding company to its mutual holding company parent to the extent otherwise permissible; or

(iii) A mutual holding company from pledging the stock of more than one subsidiary savings association provided that the stock pledged of each such subsidiary association is proportionate to the proceeds of the loan infused into each subsidiary association.

(2) Any mutual holding company that fails to make any payment on a loan secured by the pledge of stock pursuant to paragraph (b)(1) of this section on or before the date on which such payment is due shall, on the first day after such payment is due, provide written notice of nonpayment to the appropriate Reserve Bank.

(c) *Restrictions on stock repurchases.* (1) No subsidiary holding company that has any stockholders other than its parent mutual holding company may repurchase any share of stock within one year of its date of issuance (which may include the time period the shares issued by the savings association were outstanding if the subsidiary holding company was formed after the initial issuance by the savings association), unless the repurchase:

(i) Is in compliance with the requirements set forth in § 239.63;

(ii) Is part of a general repurchase made on a pro rata basis pursuant to an offer approved by the Board and made to all stockholders of the association or subsidiary holding company (except that the parent mutual holding company may be excluded from the repurchase with the Board's approval);

(iii) Is limited to the repurchase of qualifying shares of a director; or

(iv) Is purchased in the open market by a tax-qualified or non-tax-qualified employee stock benefit plan of the savings association (or of a subsidiary holding company) in an amount reasonable and appropriate to fund such plan.

(2) No mutual holding company may purchase shares of its subsidiary savings association or subsidiary holding company within one year after a stock issuance, except if the purchase complies with § 239.63. For purposes of this section, the reference in § 239.63 to five percent refers to minority shareholders.

(d) *Restrictions on waiver of dividends.* (1) A mutual holding company may waive the right to receive any dividend declared by a subsidiary of the mutual holding company, if—

(i) No insider of the mutual holding company, associate of an insider, or tax-qualified or non-tax-qualified employee stock benefit plan of the mutual holding company holds any share of the stock in the class of stock to which the waiver would apply; or

(ii) The mutual holding company gives written notice to the Board of the intent of the mutual holding company to waive the right to receive dividends, not later than 30 days before the date of the proposed date of payment of the dividend, and the Board does not object to the waiver.

(2) A notice of a waiver under paragraph (d)(1)(ii) of this section shall include a copy of the resolution of the board of directors of the mutual holding company together with any supporting materials relied upon by the board of directors of the mutual holding company, concluding that the proposed dividend waiver is consistent with the fiduciary duties of the board of directors to the mutual members of the mutual holding company. The resolution shall include:

(i) A description of the conflict of interest that exists because of a mutual holding company director's ownership of stock in the subsidiary declaring dividends and any actions the mutual holding company and board of directors have taken to eliminate the conflict of interest, such as waiver by the directors of their right to receive dividends;

(ii) A finding by the mutual holding company's board of directors that the waiver of dividends is consistent with the board of directors' fiduciary duties despite any conflict of interest;

(iii) If the mutual holding company has pledged the stock of a subsidiary holding company or subsidiary savings association as collateral for a loan made to the mutual holding company, or is subject to any other loan agreement, an affirmation that the mutual holding company is able to meet the terms of the loan agreement; and

(iv) An affirmation that a majority of the mutual members of the mutual holding company eligible to vote have, within the 12 months prior to the declaration date of the dividend by the subsidiary of the mutual holding company, approved a waiver of dividends by the mutual holding company, and any proxy statement used in connection with the member vote contained—

(A) A detailed description of the proposed waiver of dividends by the mutual holding company and the reasons the board of directors requested the waiver of dividends;

(B) The disclosure of any mutual holding company director's ownership of stock in the subsidiary declaring dividends and any actions the mutual holding company and board of directors have taken to eliminate the conflict of interest, such as the directors waiving their right to receive dividends; and

(C) A provision providing that the proxy concerning the waiver of dividends given by the mutual members may be used for no more than 12 months from the date it is given.

(3) The Board may not object to a waiver of dividends under paragraph (d)(1)(ii) of this section if:

(i) The waiver would not be detrimental to the safe and sound operation of the savings association;

(ii) The board of directors of the mutual holding company expressly determines that a waiver of the dividend by the mutual holding company is consistent with the fiduciary duties of the board of directors to the mutual members of the mutual holding company; and

(iii) The mutual holding company has, prior to December 1, 2009—

(A) Reorganized into a mutual holding company under section 10(o) of HOLA;

(B) Issued minority stock either from its mid-tier stock holding company or its subsidiary stock savings association; and

(C) Waived dividends it had a right to receive from the subsidiary stock savings association.

(4) For a mutual holding company that does not meet each of the conditions in paragraph (d)(3) of this section, the Board will not object to a waiver of dividends under paragraph (d)(1)(ii) of this section if—:

(i) The savings association currently operates in a manner consistent with the safe and sound operation of a savings association, and the waiver is not detrimental to the safe and sound operation of the savings association;

(ii) If the mutual holding company has pledged the stock of a subsidiary holding company or subsidiary savings association as collateral for a loan made to the mutual holding company, or is subject to any other loan agreement, an affirmation that the mutual

holding company is able to meet the terms of the loan agreement;

(iii) Within the 12 months prior to the declaration date of the dividend by the subsidiary of the mutual holding company, a majority of the mutual members of the mutual holding company has approved the waiver of dividends by the mutual holding company. Any proxy statement used in connection with the member vote must contain—

(A) A detailed description of the proposed waiver of dividends by the mutual holding company and the reasons the board of directors requested the waiver of dividends;

(B) The disclosure of any mutual holding company director's ownership of stock in the subsidiary declaring dividends and any actions the mutual holding company and board of directors have taken to eliminate the conflict of interest, such as the directors waiving their right to receive dividends; and

(C) A provision providing that the proxy concerning the waiver of dividends given by the mutual members may be used for no more than 12 months from the date it is given;

(iv) The board of directors of the mutual holding company expressly determines that the waiver of dividends is consistent with the board of directors' fiduciary duties despite any conflict of interest;

(v)(A) A majority of the entire board of directors of the mutual holding company approves the waiver of dividends and any director with direct or indirect ownership, control, or the power to vote shares of the subsidiary declaring the dividend, or who otherwise directly or indirectly benefits through an associate from the waiver of dividends, has abstained from the board vote; or

(B) Each officer or director of the mutual holding company or its affiliates, associate of such officer or director, and any tax-qualified or non-tax-qualified employee stock benefit plan in which such officer or director participates that holds any share of the stock in the class of stock to which the waiver would apply waives the right to receive any dividend declared by a subsidiary of the mutual holding company;

(vi) The Board does not object to the amount of dividends declared by a subsidiary of the mutual holding company. In reviewing whether a declaration by a subsidiary of the mutual holding company is appropriate, the Board may consider, among other factors, the reasonableness of the entire dividend distribution declared if the waiver is not approved;

(vii) The waived dividends are excluded from the capital accounts of the subsidiary holding company or savings association, as applicable, for purposes of calculating any future dividend payments;

(viii) The mutual holding company appropriately accounts for all waived dividends in a manner that permits the Board to consider the waived dividends in evaluating the proposed exchange ratio in the event of a full conversion of the mutual holding company to stock form; and

(ix) The mutual holding company complies with such other conditions as the Board may require to prevent conflicts of interest or actions detrimental to the safe and sound operation of the savings association.

(5) *Valuation.* (i) The Board will consider waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form.

(ii) In the case of a savings association that has reorganized into a mutual holding company, has issued minority stock from a mid-tier stock holding company or a subsidiary stock savings association of the mutual holding company, and has waived dividends it had a right to receive from a subsidiary savings association before December 1, 2009, the Board shall not consider waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form.

(e) *Restrictions on issuance of stock to insiders.* A subsidiary of a mutual holding company that is not a savings association or subsidiary holding company may issue stock to any insider, associate of an insider or tax-qualified or non-tax-qualified employee stock benefit plan of the mutual holding company or any subsidiary of the mutual holding company, provided that such persons or plans provide written notice to the appropriate Reserve Bank at

least 30 days prior to the stock issuance, and the Reserve Bank or the Board does not object to the subsequent stock issuance. Subsidiary holding companies may issue stock to such persons only in accordance with § 239.24.

(f) *Applicability of rules governing savings and loan holding companies.* Except as expressly provided in this part, mutual holding companies shall be subject to the provisions of 12 U.S.C. 1467a and 3201 *et seq.* and the provisions of parts 207, 228, and 238 of this chapter.

(g) *Separate vote for charitable organization contribution.* In a mutual holding company stock issuance, a separate vote of a majority of the outstanding shares of common stock held by stockholders other than the mutual holding company or subsidiary holding company must approve any charitable organization contribution.

§ 239.9 Conversion or liquidation of mutual holding companies.

(a) *Conversion*—(1) *Generally.* A mutual holding company may convert to the stock form in accordance with the rules and regulations set forth in subpart E of this part.

(2) Exchange of subsidiary savings association or subsidiary holding company stock. Any stock issued by a subsidiary savings association, or by a subsidiary holding company pursuant to § 239.24, of a mutual holding company to persons other than the parent mutual holding company may be exchanged for the stock issued by the successor to parent mutual holding company in connection with the conversion of the parent mutual holding company to stock form. The parent mutual holding company and the subsidiary holding company must demonstrate to the satisfaction of the Board that the basis for the exchange is fair and reasonable.

(3) If a subsidiary holding company or subsidiary savings association has issued shares to an entity other than the mutual holding company, the conversion of the mutual holding company to stock form may not be consummated unless a majority of the shares issued to entities other than the mutual holding company vote in favor of the conversion. This requirement applies in addition to any otherwise required account holder or shareholder votes.

(b) *Involuntary liquidation.* (1) The Board may file a petition with the federal bankruptcy courts requesting the liquidation of a mutual holding company pursuant to 12 U.S.C. 1467a(o)(9) and title 11, United States Code, upon the occurrence of any of the following events:

(i) The default of the resulting association, any acquiree association, or any subsidiary savings association of the mutual holding company that was in the mutual form when acquired by the mutual holding company;

(ii) The default of the parent mutual holding company or its subsidiary holding company; or

(iii) Foreclosure on any pledge by the mutual holding company of subsidiary savings association stock or subsidiary holding company stock.

(2) Except as provided in paragraph (b)(3) of this section, the net proceeds of any liquidation of any mutual holding company shall be transferred to the members of the mutual holding company and, if applicable, the stock holders of the subsidiary holding company in accordance with the charter of the mutual holding company and, if applicable, the charter of the subsidiary holding company.

(3) If the FDIC incurs a loss as a result of the default of any subsidiary savings association of a mutual holding company and that mutual holding company is liquidated pursuant to paragraph (b)(1) of this section, the FDIC shall succeed to the membership interests of the depositors of such savings association in the mutual holding company to the extent of the FDIC's loss.

(c) *Voluntary liquidation.* The provisions of § 239.16 shall apply to mutual holding companies.

§ 239.10 Procedural requirements.

(a) *Proxies and proxy statements*—(1) *Solicitation of proxies.* The provisions of §§ 239.56 and 239.57(a) through (d) and (f) through (h) shall apply to all solicitations of proxies by any person in connection with any membership vote required by this part. Proxy materials must be in the form specified by the Board and contain the information

specified in §§ 239.57(b) and 239.57(d), to the extent such information is relevant to the action that members are being asked to approve, with such additions, deletions, and other modifications as are required under this part, or as are necessary or appropriate under the disclosure standard set forth in § 239.57(f). File proxies and proxy statements in accordance with § 239.55(c) and address them to the appropriate Reserve Bank. For purposes of this paragraph, the term *conversion*, as it appears in the provisions of part subpart E of this part, refers to *the reorganization*, *the stock issuance*, or *other corporate action*, as appropriate.

(2) *Additional proxy disclosure requirements.* In addition to the requirements in paragraph (a) of this section, all proxies requesting accountholder approval of a mutual holding company reorganization shall address in detail:

(i) The reasons for the reorganization, including the relative advantages and disadvantages of undertaking the transaction proposed instead of a standard conversion;

(ii) Whether management believes the reorganization is in the best interests of the association and its accountholders and the basis of that belief;

(iii) The fiduciary duties owed to accountholders by the association's officers and directors and why the reorganization is in accord with those duties and is otherwise equitable to the accountholders and the association;

(iv) Any compensation agreements that will be entered into by management in connection with the reorganization; and

(v) Whether the mutual holding company intends to waive dividends, the implications to accountholders, and the reasons such waivers are consistent with the fiduciary duties of the directors of the mutual holding company.

(3) *Nonconforming minority stock issuances.* Subsidiary holding companies proposing non-conforming minority stock issuances pursuant to § 239.24(c)(6)(ii) must include in the proxy materials to accountholders seeking approval of a proposed reorganization an additional disclosure statement that serves as a cover sheet that clearly addresses:

(i) The consequences to accountholders of voting to approve a reorganization in which their subscription rights are prioritized differently and potentially eliminated; and

(ii) Any intent by the mutual holding company to waive dividends, and the implications to accountholders.

(4) *Use of ''running'' proxies.* Unless otherwise prohibited, a mutual holding company may make use of any proxy conferring general authority to vote on any and all matters at any meeting of members, provided that the member granting such proxy has been furnished a proxy statement regarding the matters and the member does not grant a later-dated proxy to vote at the meeting at which the matter will be considered or attend such meeting and vote in person, and further provided that ''running'' proxies or similar proxies may not be used to vote for a mutual holding company reorganization, mutual-to-stock conversion undertaken by a mutual holding company, dividend waiver, or any other material transaction. Subject to the limitations set forth in this paragraph, any proxy conferring on the board of directors or officers of a mutual savings association general authority to cast a member's votes on any and all matters presented to the members shall be deemed to cover the member's votes as a member of the mutual holding company and such authority shall be conferred on the board of directors or officers of a mutual holding company.

(b) *Applications under this part.* Except as provided in paragraph (c) of this section, any application, notice or certification required to be filed with the Board under this part must be filed in accordance with § 238.14 of this chapter. The Board will review any filing made under this part in accordance with § 238.14 of this chapter.

(c) *Reorganization Notices and stock issuance applications*—(1) *Contents.* Each Reorganization Notice submitted to the appropriate Reserve Bank pursuant to § 239.3(a) and each application for approval of the issuance of stock submitted to the appropriate Reserve Bank pursuant to § 239.24(a) shall be in the form and contain the information specified by the Board.

(2) *Filing instructions.* Any Reorganization Notice submitted under § 239.3(a) must be filed in accordance with § 238.14 of this chapter. Any stock issuance application submitted pursuant to § 239.24(a) shall be filed in accordance with § 239.55.

(3) *Public notice, public comment, and meetings.* Mutual holding company reorganizations are subject to applicable public notice, public comment, and meeting requirements under the Bank Merger Act regulations at § 238.11(e) of this chapter and the Savings and Loan Holding Company Act regulations at § 238.14 of this chapter.

(d) *Amendments.* Any mutual holding company may amend any notice or application submitted pursuant to this part or file additional information with respect thereto upon request of the Board or upon the mutual holding company's own initiative.

(e) *Time-frames.* All Reorganization Notices and applications filed pursuant to this part must be processed in accordance with the processing procedures at § 238.14 of this chapter. Any related approvals requested in connection with Reorganization Notices or applications for approval of stock issuances (including, without limitation, requests for approval to transfer assets to resulting associations, to acquire acquiree associations, and to organize resulting associations or interim associations, and requests for approval of charters, bylaws, and stock forms) shall be processed pursuant to the procedures specified in this section in conjunction with the Reorganization Notice or stock issuance application to which they pertain, rather than pursuant to any inconsistent procedures specified elsewhere in this chapter. The approval standards for all such related applications, however, shall remain unchanged. The review by the Board of any materials used in connection with the issuance of stock under § 239.24 must not be subject to the applications processing time-frames set forth in §§ 238.14(f) and (g) of this chapter.

(f) *Disclosure.* The rules governing disclosure of any notice or application submitted pursuant to this part, or any public comment submitted pursuant to paragraph (c) of this section, shall be the same as set forth in § 238.14(b) of this chapter for notices, applications, and public comments filed under § 238.14 of this chapter.

(g) *Appeals.* Any party aggrieved by a final action by the Board which approves or disapproves any application or notice pursuant to this part may obtain review of such action in accordance with 12 U.S.C. 1467a(j).

(h) *Federal preemption.* This part preempts state law with regard to the creation and regulation of mutual holding companies.

§ 239.11 Subsidiary holding companies.

(a) *Subsidiary holding companies.* A mutual holding company may establish a subsidiary holding company as a direct subsidiary to hold 100 percent of the stock of its subsidiary savings association. The formation and operation of the subsidiary holding company may not be utilized as a means to evade or frustrate the purposes of this part. The subsidiary holding company may be established either at the time of the initial mutual holding company reorganization or at a subsequent date, subject to the approval of the Board.

(b) *Stock issuances.* §§ 239.24 and 239.25 apply to issuance of stock by a subsidiary holding company. In the case of a stock issuance by a subsidiary holding company, the aggregate amount of outstanding common stock of the association owned or controlled by persons other than the subsidiary holding company's mutual holding company parent at the close of the proposed issuance shall be less than 50 percent of the subsidiary holding company's total outstanding common stock.

(c) *Charters and bylaws for subsidiary holding companies.* The charter and bylaws of a subsidiary holding company shall be in the form set forth in appendices B and D, respectively.

§ 239.12 Communication between members of a mutual holding company.

(a) *Right of communication with other members.* A member of a mutual holding company has the right to communicate, as prescribed in paragraph (b) of this section, with other members of the mutual holding company regarding any matter related to the mutual holding company's affairs, except for ''improper'' communications, as defined in

paragraph (c) of this section. The mutual holding company may not defeat that right by redeeming a savings member's savings account in the subsidiary savings association.

(b) *Member communication procedures.* If a member of a mutual holding company desires to communicate with other members, the following procedures shall be followed:

(1) The member shall give the mutual holding company a written request to communicate;

(2) If the proposed communication is in connection with a meeting of the mutual holding company's members, the request shall be given at least thirty days before the annual meeting or 10 days before a special meeting;

(3) The request shall contain—

(i) The member's full name and address;

(ii) The nature and extent of the member's interest in the mutual holding company at the time the information is given;

(iii) A copy of the proposed communication; and

(iv) If the communication is in connection with a meeting of the members, the date of the meeting;

(4) The mutual holding company shall reply to the request within either—

(i) Fourteen days;

(ii) Ten days, if the communication is in connection with the annual meeting; or

(iii) Three days, if the communication is in connection with a special meeting;

(5) The reply shall provide either—

(i) The number of the mutual holding company's members and the estimated reasonable cost to the mutual holding company of mailing to them the proposed communication; or

(ii) Notification that the mutual holding company has determined not to mail the communication because it is ''improper'', as defined in paragraph (c) of this section;

(6) After receiving the amount of the estimated costs of mailing and sufficient copies of the communication, the mutual holding company shall mail the communication to all members, by a class of mail specified by the requesting member, either—

(i) Within fourteen days;

(ii) Within seven days, if the communication is in connection with the annual meeting;

(iii) As soon as practicable before the meeting, if the communication is in connection with a special meeting; or

(iv) On a later date specified by the member;

(7) If the mutual holding company refuses to mail the proposed communication, it shall return the requesting member's materials together with a written statement of the specific reasons for refusal, and shall simultaneously send to the appropriate Reserve Bank a copy of each of the requesting member's materials, the mutual holding company's written statement, and any other relevant material. The materials shall be sent within:

(i) Fourteen days,

(ii) Ten days if the communication is in connection with the annual meeting, or

(iii) Three days, if the communication is in connection with a special meeting, after the mutual holding company receives the request for communication.

(c) *Improper communication.* A communication is an ''improper communication'' if it contains material which:

(1) At the time and in the light of the circumstances under which it is made:

(i) Is false or misleading with respect to any material fact; or

(ii) Omits a material fact necessary to make the statements therein not false or misleading, or necessary to correct a statement in an earlier communication on the same subject which has become false or misleading;

(2) Relates to a personal claim or a personal grievance, or is solicitous of personal gain or business advantage by or on behalf of any party;

(3) Relates to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the mutual holding company or is not within the control of the mutual holding company; or

(4) Directly or indirectly and without expressed factual foundation:

(i) Impugns character, integrity, or personal reputation,

(ii) Makes charges concerning improper, illegal, or immoral conduct, or

(iii) Makes statements impugning the stability and soundness of the mutual holding company.

§ 239.13 Charters.

(a) *Charters.* The charter of a mutual holding company shall be in the form set forth in appendix A of this part and may be amended pursuant to this paragraph. The Board may amend the form of charter set forth in appendix A to this part.

(b) *Corporate title.* The corporate title of each mutual holding company shall include the term ''mutual'' or the abbreviation ''M.H.C.''

(c) *Availability of charter.* A mutual holding company shall make available to its members at all times in the offices of each subsidiary savings association from which the mutual holding company draws members a true copy of its charter, including any amendments, and shall deliver such a copy to any member upon request.

§ 239.14 Charter amendments.

(a) *General.* In order to adopt a charter amendment, a mutual holding company must comply with the following requirements:

(1) *Board of directors approval.* The board of directors of the mutual holding company must adopt a resolution proposing the charter amendment that states the text of such amendment;

(2) *Form of filing*—(i) *Application requirement.* If the proposed charter amendment would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the mutual holding company, or the removal of incumbent management; or involve a significant issue of law or policy; then, the mutual holding shall submit the charter amendment to the appropriate Reserve Bank for approval. Applications submitted under this paragraph are subject to the processing procedures at § 238.14 of this chapter.

(ii) *Notice requirement.* If the proposed charter amendment does not implicate paragraph (a)(2)(i) of this section and is permissible under all applicable laws, rules and regulations, the mutual holding company shall submit the proposed amendment to the appropriate Reserve Bank at least 30 days prior to the effective date of the proposed charter amendment.

(b) *Approval*—Any charter amendment filed pursuant to paragraph (a)(2)(ii) of this section shall automatically be approved 30 days from the date of filing of such amendment with the appropriate Reserve Bank, provided that the mutual holding company follows the requirements of its charter in adopting such amendment, unless the Reserve Bank or the Board notifies the mutual holding company prior to the expiration of such 30-day period that such amendment is rejected or is deemed to be filed under the provisions of paragraph (a)(2)(i) of this section. Notwithstanding anything in paragraph (a) of this section to the contrary, the following charter amendments, including the adoption of the Federal mutual holding company charter as set forth in appendix A, shall be effective and deemed approved at the time of adoption, if adopted without change and filed with Board, within 30 days after adoption, provided the mutual holding company follows the requirements of its charter in adopting such amendments.

(1) *Title change.* (i) Subject to § 239.13 and this paragraph (b), a mutual holding company may amend its charter by substituting a new corporate title in section 1 of its charter.

(ii) Prior to changing its corporate title, a mutual holding company must file with the Board a written notice indicating the intended change. The Board shall provide to the mutual holding company a timely written acknowledgment stating when the notice was received. If, within 30 days of receipt of notice, the Board does not notify the mutual holding company of its objection to the corporate title change on the grounds that the title misrepresents the nature of the institution or the services it offers, the mutual holding company may change its title by amending its charter in accordance with § 239.14(b) or § 239.22 and the amendment provisions of its charter.

(2) *Maximum number of votes.* A mutual holding company may amend section 5 of its charter by substituting the

maximum number of votes per member to any number from 1 to 1000.

(c) *Reissuance of charter.* A mutual holding company that has amended its charter may apply to have its charter, including the amendments, reissued by the Board. Such request for reissuance should be filed with the appropriate Reserve Bank.

§ 239.15 Bylaws.

(a) *General.* A mutual holding company shall operate under bylaws that contain provisions that comply with all requirements specified by the Board, the provisions of this section, the mutual holding company's charter, and all other applicable laws, rules, and regulations *provided that,* a bylaw provision inconsistent with the provisions of this section may be adopted with the approval of the Board. Bylaws may be adopted, amended or repealed by a majority of the votes cast by the members at a legal meeting or a majority of the mutual holding company's board of directors. Throughout this section, the term ''trustee'' may be substituted for the term ''director'' as relevant.

(b) The following requirements are applicable to mutual holding companies:

(1) *Annual meetings of members.* A mutual holding company shall provide for and conduct an annual meeting of its members for the election of directors and at which any other business of the mutual holding company may be conducted. Such meeting shall be held, as designated by its board of directors, at a location within the state that constitutes the principal place of business of the subsidiary savings association, or at any other convenient place the board of directors may designate, and at a date and time within 150 days after the end of the mutual holding company's fiscal year. At each annual meeting, the officers shall make a full report of the financial condition of the mutual holding company and of its progress for the preceding year and shall outline a program for the succeeding year.

(2) *Special meetings of members.* Procedures for calling any special meeting of the members and for conducting such a meeting shall be set forth in the bylaws. The subject matter of such special meeting must be established in the notice for such meeting. The board of directors of the mutual holding company or the holders of 10 percent or more of the voting capital shall be entitled to call a special meeting. For purposes of this section, ''voting capital'' means FDIC-insured deposits as of the voting record date.

(3) *Notice of meeting of members.* Notice specifying the date, time, and place of the annual or any special meeting and adequately describing any business to be conducted shall be published for two successive weeks immediately prior to the week in which such meeting shall convene in a newspaper of general circulation in the city or county in which the principal place of business of the subsidiary savings association is located, or mailed postage prepaid at least 15 days and not more than 45 days prior to the date on which such meeting shall convene to each of its members of record at the last address appearing on the books of the mutual holding company. A similar notice shall be posted in a conspicuous place in each of the offices of the subsidiary savings association during the 14 days immediately preceding the date on which such meeting shall convene. The bylaws may permit a member to waive in writing any right to receive personal delivery of the notice. When any meeting is adjourned for 30 days or more, notice of the adjournment and reconvening of the meeting shall be given as in the case of the original meeting.

(4) *Fixing of record date.* For the purpose of determining members entitled to notice of or to vote at any meeting of members or any adjournment thereof, or in order to make a determination of members for any other proper purpose, the bylaws shall provide for the fixing of a record date and a method for determining from the books of the subsidiary savings association the members entitled to vote. Such date shall be not more than 60 days or fewer than 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The same determination shall apply to any adjourned meeting.

(5) *Member quorum.* Any number of members present and voting, represented in person or by proxy, at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of the members shall determine any question, unless otherwise required by regulation. At any adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called. Members present at a duly constituted meeting may continue to transact business until adjournment.

(6) *Voting by proxy.* Procedures shall be established for voting at any annual or special meeting of the members by proxy pursuant to the rules and regulations of the Board, including the placing of such proxies on file with the secretary of the mutual holding company, for verification, prior to the convening of such meeting. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the member. All proxies with a term greater than eleven months or solicited at the expense of the subsidiary savings association must run to the board of directors as a whole, or to a committee appointed by a majority of such board.

(7) *Communications between members.* Provisions relating to communications between members shall be consistent with § 239.12. No member, however, shall have the right to inspect or copy any portion of any books or records of a mutual holding company containing:

(i) A list of depositors in or borrowers from the subsidiary savings association;

(ii) Their addresses;

(iii) Individual deposit or loan balances or records; or

(iv) Any data from which such information could be reasonably constructed.

(8) *Number of directors, membership.* The bylaws shall set forth a specific number of directors, not a range. The number of directors shall be not fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the Board. Each director of the mutual holding company shall be a member of the mutual holding company. Directors may be elected for periods of one to three years and until their successors are elected and qualified, but if a staggered board is chosen, provision shall be made for the election of approximately one-third or one-half of the board each year, as appropriate.

(9) *Meetings of the board.* The board of directors shall determine the place, frequency, time, procedure for notice, which shall be at least 24 hours unless waived by the directors, and waiver of notice for all regular and special meetings. The meetings shall be under the direction of a chairman, appointed annually by the board; or in the absence of the chairman, the meetings shall be under the direction of the president. The board also may permit telephonic participation at meetings. The bylaws may provide for action to be taken without a meeting if unanimous written consent is obtained for such action. A majority of the authorized directors shall constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board.

(10) *Officers, employees, and agents.* (i) The bylaws shall contain provisions regarding the officers of the mutual holding company, their functions, duties, and powers. The officers of the mutual holding company shall consist of a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom shall be elected annually by the board of directors. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed in the bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary.

(ii) All officers and agents of the mutual holding company, as between themselves and the mutual holding company, shall have such authority and perform such duties in the management of the mutual holding company as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws. In the absence of any such provision, officers shall have such powers and duties as generally pertain to their respective offices. Any officer

may be removed by the board of directors with or without cause, but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the officer so removed.

(iii) Any indemnification provision must provide that any indemnification is subject to applicable Federal law, rules, and regulations.

(11) *Vacancies, resignation or removal of directors.* Members of the mutual holding company shall elect directors by ballot: Provided, that in the event of a vacancy on the board, the board of directors may, by their affirmative vote, fill such vacancy, even if the remaining directors constitute less than a quorum. A director elected to fill a vacancy shall be elected to serve only until the next election of directors by the members. The bylaws shall set out the procedure for the resignation of a director, which shall be by written notice or by any other procedure established in the bylaws. Directors may be removed only for cause as defined in § 239.41, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

(12) *Powers of the board.* The board of directors shall have the power:

(i) By resolution, to appoint from among its members and remove an executive committee and one or more other committees, which committee[s] shall have and may exercise all the powers of the board between the meetings or the board; but no such committee shall have the authority of the board to amend the charter or bylaws, adopt a plan of merger, consolidation, dissolution, or provide for the disposition of all or substantially all the property and assets of the mutual holding company. Such committee shall not operate to relieve the board, or any member thereof, of any responsibility imposed by law;

(ii) To fix the compensation of directors, officers, and employees; and to remove any officer or employee at any time with or without cause;

(iii) To exercise any and all of the powers of the mutual holding company not expressly reserved by the charter to the members.

(13) *Nominations for directors.* The bylaws shall provide that nominations for directors may be made at the annual meeting by any member and shall be voted upon, except, however, the bylaws may require that nominations by a member must be submitted to the secretary and then prominently posted in the principal place of business, at least 10 days prior to the date of the annual meeting. However, if such provision is made for prior submission of nominations by a member, then the bylaws must provide for a nominating committee, which, except in the case of a nominee substituted as a result of death or other incapacity, must submit nominations to the secretary and have such nominations similarly posted at least 15 days prior to the date of the annual meeting.

(14) *New business.* The bylaws shall provide procedures for the introduction of new business at the annual meeting. Those provisions may require that such new business be stated in writing and filed with the secretary prior to the annual meeting at least 30 days prior to the date of the annual meeting.

(15) *Amendment.* Bylaws may include any provision for their amendment that would be consistent with applicable law, rules, and regulations and adequately addresses its subject and purpose.

(i) Amendments shall be effective:

(A) After approval by a majority vote of the authorized board, or by a majority of the vote cast by the members of the mutual holding company at a legal meeting; and

(B) After receipt of any applicable regulatory approval.

(ii) When a mutual holding company fails to meet its quorum requirement, solely due to vacancies on the board, the bylaws may be amended by an affirmative vote of a majority of the sitting board.

(16) *Miscellaneous.* The bylaws may also address the subject of age limitations for directors or officers as long as they are consistent with applicable Federal law, rules or regulations, and any other subjects necessary or appropriate for effective operation of the mutual holding company.

(c) *Form of filing*—(1) *Application requirement.* (i) Any bylaw amendment shall be submitted to the appropriate Reserve Bank for approval if it would:

(A) Render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the mutual holding company, or the removal of incumbent management;

(B) Involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability; or

(C) Be inconsistent with the requirements of this section or with applicable laws, rules, regulations, or the mutual holding company's charter.

(ii) Applications submitted under paragraph (c)(1)(i) of this section are subject to the processing procedures at § 238.14 of this chapter.

(iii) For purposes of this paragraph (c), bylaw provisions that adopt the language of the model bylaws contained in appendix C to this part, if adopted without change, and filed with Board within 30 days after adoption, are effective upon adoption. The Board may amend the model bylaws provided in appendix C to this part.

(2) *Filing requirement.* If the proposed bylaw amendment does not implicate paragraph (c)(1) or (c)(3) of this section, then the mutual holding company shall submit the amendment to the appropriate Reserve Bank at least 30 days prior to the date the bylaw amendment is to be adopted by the mutual holding company.

(3) *Corporate governance procedures.* A mutual holding company may elect to follow the corporate governance procedures of the laws of the state where the main office of the institution is located, provided that such procedures may be elected only to the extent not inconsistent with applicable Federal statutes, regulations, and safety and soundness, and such procedures are not of the type described in paragraph (c)(1)(i) of this section. If this election is selected, a mutual holding company shall designate in its bylaws the provision or provisions from the body of law selected for its corporate governance procedures, and shall file a copy of such bylaws, which are effective upon adoption, within 30 days after adoption. The submission shall indicate, where not obvious, why the bylaw provisions do not require an application under paragraph (c)(1)(i) of this section.

(d) *Effectiveness.* Any bylaw amendment filed pursuant to paragraph (c)(2) of this section shall automatically be effective 30 days from the date of filing of such amendment, provided that the mutual holding company follows the requirements of its charter and bylaws in adopting such amendment, unless the Board notifies the mutual holding company prior to the expiration of the 30-day period that such amendment is rejected or that such amendment requires an application to be filed pursuant to paragraph (c)(1) of this section.

(e) *Availability of bylaws.* A mutual holding company shall make available to its members at all times in the offices of each subsidiary savings association from which the mutual holding company draws members a true copy of its bylaws, including any amendments, and shall deliver such a copy to any member upon request.

§ 239.16 Voluntary dissolution.

(a) A mutual holding company's board of directors may propose a plan for dissolution of the mutual holding company. All references in this section to mutual holding company shall also apply to a subsidiary holding company organized under this part. The plan may provide for either:

(1) Transfer of all the mutual holding company's assets to another mutual holding company or home-financing institutions under Federal charter either for cash sufficient to pay all obligations of the mutual holding company and retire all outstanding accounts or in exchange for that mutual holding company's payment of all the mutual holding company's outstanding obligations and issuance of share accounts or other evidence of interest to the mutual holding company's members on a *pro rata* basis; or

(2) Dissolution in a manner proposed by the directors which they consider best for all concerned.

(b) The plan, and a statement of reasons for proposing dissolution and for proposing the plan, shall be submitted to the appropriate Reserve Bank for approval. The Board will approve the plan if the Board believes dissolution is advisable and the plan is best for all

concerned. If the Board considers the plan inadvisable, the Board may either make recommendations to the mutual holding company concerning the plan or disapprove it. When the plan is approved by the mutual holding company's board of directors and by the Board, it shall be submitted to the mutual holding company's members at a duly called meeting and, when approved by a majority of votes cast at that meeting, shall become effective. After dissolution in accordance with the plan, a certificate evidencing dissolution, supported by such evidence as the Board may require, shall immediately be filed with the Board. When the Board receives such evidence satisfactory to the Board, it will terminate the corporate existence of the dissolved mutual holding company and the mutual holding company's charter shall thereby be canceled.

Subpart C—Subsidiary Holding Companies

§ 239.20 Scope.

This subpart applies only to a subsidiary holding company of a mutual holding company.

§ 239.21 Charters.

(a) *Charters.* The charter of a subsidiary holding company of a mutual holding company shall be in the form set forth in appendix B of this part and may be amended pursuant to § 239.22. The Board may amend the form of charter provided in appendix B.

(b) *Optional charter provision limiting minority stock ownership.* (1) A subsidiary holding company that engages in its initial minority stock issuance after October 1, 2008 may, before it conducts its initial minority stock issuance, at the time it conducts its initial minority stock issuance, or, subject to the condition below, at any time during the five years following a minority stock issuance that such subsidiary holding company conducts in accordance with the purchase priorities set forth in subpart E of this part, include in its charter the provision set forth in paragraph (b)(2) of this section. For purposes of the charter provision set forth in paragraph (b)(2), the definitions set forth at § 239.22(b)(8) apply. This charter provision expires a maximum of five years from the date of the minority stock issuance. The subsidiary holding company may adopt the charter provision set forth in paragraph (b)(2) of this section after a minority stock issuance only if it provided, in the offering materials related to its previous minority stock issuance or issuances, full disclosure of the possibility that the subsidiary holding company might adopt such a charter provision.

(2) *Beneficial ownership limitation.* No person may directly or indirectly offer to acquire or acquire the beneficial ownership of more than 10 percent of the outstanding stock of any class of voting stock of the subsidiary holding company held by persons other than the subsidiary holding company's mutual holding company parent. This limitation expires on [insert date within five years of minority stock issuance] and does not apply to a transaction in which an underwriter purchases stock in connection with a public offering, or the purchase of stock by an employee stock ownership plan or other tax-qualified employee stock benefit plan which is exempt from the approval requirements under § 238.12(a)(7) of this chapter.

(c) In the event a person acquires stock in violation of this section, all stock beneficially owned in excess of 10 percent shall be considered ''excess stock'' and shall not be counted as stock entitled to vote and shall not be voted by any person or counted as voting stock in connection with any matters submitted to the stockholders for a vote.

§ 239.22 Charter amendments.

(a) *General.* In order to adopt a charter amendment, a subsidiary holding company must comply with the following requirements:

(1) *Board of directors approval.* The board of directors of the subsidiary holding company must adopt a resolution proposing the charter amendment that states the text of such amendment.

(2) *Form of filing*—(i) *Application requirement.* If the proposed charter amendment would render more difficult or discourage a merger, tender

offer, or proxy contest, the assumption of control by a holder of a block of the subsidiary holding company's stock, the removal of incumbent management, or involve a significant issue of law or policy, the subsidiary holding company shall file the proposed amendment with and shall obtain the prior approval of the Board pursuant to § 238.14 of this chapter; and

(ii) *Notice requirement*. If the proposed charter amendment does not implicate paragraph (a)(2)(i) of this section and such amendment is permissible under all applicable laws, rules or regulations, the subsidiary holding company shall submit the proposed amendments to the appropriate Reserve Bank, at least 30 days prior to the date the proposed charter amendment is to be mailed for consideration by the subsidiary holding company's shareholders.

(b) *Approval*. Any charter amendment filed pursuant to paragraph (a)(2)(ii) of this section shall automatically be approved 30 days from the date of filing of such amendment, provided that the subsidiary holding company follows the requirements of its charter in adopting such amendment, unless the Board notifies the mutual holding company prior to the expiration of such 30-day period that such amendment is rejected or is deemed to be filed under the provisions of paragraph (a)(2)(i) of this section. In addition, the following charter amendments, including the adoption of the charter as set forth in Appendix B of this part, shall be approved at the time of adoption, if adopted without change and filed with the Board within 30 days after adoption, provided the subsidiary holding company follows the requirements of its charter in adopting such amendments.

(1) *Title change*. Prior to changing its corporate title, a subsidiary holding company must file with the appropriate Reserve Bank a written notice indicating the intended change. The Reserve Bank shall provide to the subsidiary holding company a timely written acknowledgment stating when the notice was received. If, within 30 days of receipt of notice, the Reserve Bank or the Board does not notify the subsidiary holding company of its objection on the grounds that the title misrepresents the nature of the institution or the services it offers, the subsidiary holding company may change its title by amending section 1 of its charter in accordance with this section and the amendment provisions of its charter.

(2) *Home office*. A subsidiary holding company may amend its charter by substituting a new domicile in section 2 of its charter.

(3) *Number of shares of stock and par value*. A subsidiary holding company may amend Section 5 of its charter to change the number of authorized shares of stock, the number of shares within each class of stock, and the par or stated value of such shares.

(4) *Capital stock*. A subsidiary holding company may amend its charter by revising Section 5 to read as follows:

Section 5. Capital stock. The total number of shares of all classes of capital stock that the subsidiary holding company has the authority to issue is _____, of which _____ shall be common stock of par [or if no par value is specified the stated] value of _____ per share and of which [list the number of each class of preferred and the par or if no par value is specified the stated value per share of each such class]. The shares may be issued from time to time as authorized by the board of directors without further approval of shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares shall be paid in full before their issuance and shall not be less than the par [or stated] value. Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of the subsidiary holding company. The consideration for the shares shall be cash, tangible or intangible property (to the extent direct investment in such property would be permitted), labor, or services actually performed for the subsidiary holding company, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the subsidiary holding company, shall be conclusive. Upon payment of such consideration, such shares shall be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the subsidiary holding company that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend shall be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the subsidiary holding company, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) shall be issued, directly or indirectly, to officers, directors, or controlling persons of the association or subsidiary holding company other than as part of a general public offering or as qualifying shares to a director, unless their issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

Nothing contained in this Section 5 (or in any supplementary sections hereto) shall entitle the holders of any class of a series of capital stock to vote as a separate class or series or to more than one vote per share, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there shall be no such cumulative voting: *Provided,* That this restriction on voting separately by class or series shall not apply:

(i) To any provision which would authorize the holders of preferred stock, voting as a class or series, to elect some members of the board of directors, less than a majority thereof, in the event of default in the payment of dividends on any class or series of preferred stock;

(ii) To any provision that would require the holders of preferred stock, voting as a class or series, to approve the merger or consolidation of the subsidiary holding company with another corporation or the sale, lease, or conveyance (other than by mortgage or pledge) of properties or business in exchange for securities of a corporation other than the subsidiary holding company if the preferred stock is exchanged for securities of such other corporation: *Provided,* That no provision may require such approval for transactions undertaken with the assistance or pursuant to the direction of the Board or the Federal Deposit Insurance Corporation;

(iii) To any amendment which would adversely change the specific terms of any class or series of capital stock as set forth in this Section 5 (or in any supplementary sections hereto), including any amendment which would create or enlarge any class or series ranking prior thereto in rights and preferences. An amendment which increases the number of authorized shares of any class or series of capital stock, or substitutes the surviving subsidiary holding company in a merger or consolidation for the subsidiary holding company, shall not be considered to be such an adverse change.

A description of the different classes and series (if any) of the subsidiary holding company's capital stock and a statement of the designations, and the relative rights, preferences, and limitations of the shares of each class of and series (if any) of capital stock are as follows:

A. *Common stock.* Except as provided in this Section 5 (or in any supplementary sections thereto) the holders of the common stock shall exclusively possess all voting power. Each holder of shares of the common stock shall be entitled to one vote for each share held by each holder, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there shall be no such cumulative voting.

Whenever there shall have been paid, or declared and set aside for payment, to the holders of the outstanding shares of any class of stock having preference over the common stock as to the payment of dividends, the full amount of dividends and of sinking fund, retirement fund, or other retirement payments, if any, to which such holders are respectively entitled in preference to the common stock, then dividends may be paid on the common stock and on any class or series of stock entitled to participate therewith as to dividends out of any assets legally available for the payment of dividends.

In the event of any liquidation, dissolution, or winding up of the subsidiary holding company, the holders of the common stock (and the holders of any class or series of stock entitled to participate with the common stock in the distribution of assets) shall be entitled to receive, in cash or in kind, the assets of the subsidiary holding company available for distribution remaining after: (i) Payment or provision for payment of the subsidiary holding company's debts and liabilities; (ii) distributions or provision for distributions in settlement of its liquidation account; and (iii) distributions or provision for distributions to holders of any class or series of stock having preference over the common stock in the liquidation, dissolution, or winding up of the subsidiary holding company. Each share of common stock shall have the same relative rights as and be identical in all respects with all the other shares of common stock.

B. *Preferred stock.* The subsidiary holding company may provide in supplementary sections to its charter for one or more classes of preferred stock, which shall be separately identified. The shares of any class may be divided into and issued in series, with each series separately designated so as to distinguish the shares thereof from the shares of all other series and classes. The terms of each series shall be set forth in a supplementary section to the charter. All shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

(a) The distinctive serial designation and the number of shares constituting such series;

(b) The dividend rate or the amount of dividends to be paid on the shares of such series, whether dividends shall be cumulative and, if so, from which date(s), the payment date(s) for dividends, and the participating or other special rights, if any, with respect to dividends;

(c) The voting powers, full or limited, if any, of shares of such series;

(d) Whether the shares of such series shall be redeemable and, if so, the price(s) at which, and the terms and conditions on which, such shares may be redeemed;

(e) The amount(s) payable upon the shares of such series in the event of voluntary or involuntary liquidation, dissolution, or winding up of the subsidiary holding company;

(f) Whether the shares of such series shall be entitled to the benefit of a sinking or retirement fund to be applied to the purchase or redemption of such shares, and if so entitled, the amount of such fund and the manner of its application, including the price(s) at which such shares may be redeemed or purchased through the application of such fund;

(g) Whether the shares of such series shall be convertible into, or exchangeable for, shares of any other class or classes of stock of the subsidiary holding company and, if so, the conversion price(s) or the rate(s) of exchange, and the adjustments thereof, if any, at which such conversion or exchange may be made, and any other terms and conditions of such conversion or exchange.

(h) The price or other consideration for which the shares of such series shall be issued; and

(i) Whether the shares of such series which are redeemed or converted shall have the status of authorized but unissued shares of serial preferred stock and whether such shares may be reissued as shares of the same or any other series of serial preferred stock.

Each share of each series of serial preferred stock shall have the same relative rights as and be identical in all respects with all the other shares of the same series.

The board of directors shall have authority to divide, by the adoption of supplementary charter sections, any authorized class of preferred stock into series, and, within the limitations set forth in this section and the remainder of this charter, fix and determine the relative rights and preferences of the shares of any series so established.

Prior to the issuance of any preferred shares of a series established by a supplementary charter section adopted by the board of directors, the subsidiary holding company shall file with the appropriate Reserve Bank a dated copy of that supplementary section of this charter established and designating the series and fixing and determining the relative rights and preferences thereof.

(5) *Limitations on subsequent issuances.* A subsidiary holding company may amend its charter to require shareholder approval of the issuance or reservation of common stock or securities convertible into common stock under circumstances which would require shareholder approval under the rules of the New York or American Stock Exchange if the shares were then listed on the New York or American Stock Exchange.

(6) *Cumulative voting.* A subsidiary holding company may amend its charter by substituting the following sentence for the second sentence in the third paragraph of Section 5: ''Each holder of shares of common stock shall be entitled to one vote for each share held by such holder and there shall be no right to cumulate votes in an election of directors.''

(7) [Reserved]

(8) *Anti-takeover provisions following mutual to stock conversion.* Notwithstanding the law of the state in which the subsidiary holding company is located, a subsidiary holding company may amend its charter by renumbering existing sections as appropriate and adding a new section 8 as follows:

Section 8. Certain Provisions Applicable for Five Years. Notwithstanding anything contained in the subsidiary holding company's charter or bylaws to the contrary, for a period of [specify number of years up to five] years from the date of completion of the conversion of the subsidiary holding company from mutual to stock form, the following provisions shall apply:

A. *Beneficial Ownership Limitation.* No person shall directly or indirectly offer to acquire or acquire the beneficial ownership of more than 10 percent of any class of an equity security of the subsidiary holding company. This limitation shall not apply to a transaction in which the subsidiary holding company forms a holding company without change in the respective beneficial ownership interests of its stockholders other than pursuant to the exercise of any dissenter and appraisal rights, the purchase of shares by underwriters in connection with a public offering, or the purchase of shares by a tax-qualified employee stock benefit plan which is exempt from the approval requirements under § 238.12(a) of this chapter.

In the event shares are acquired in violation of this section 8, all shares beneficially owned by any person in excess of 10 percent shall be considered ''excess shares'' and shall not be counted as shares entitled to vote and

shall not be voted by any person or counted as voting shares in connection with any matters submitted to the stockholders for a vote.

For purposes of this section 8, the following definitions apply:

(1) The term ''person'' includes an individual, a group acting in concert, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization or similar company, a syndicate or any other group formed for the purpose of acquiring, holding or disposing of the equity securities of the subsidiary holding company.

(2) The term ''offer'' includes every offer to buy or otherwise acquire, solicitation of an offer to sell, tender offer for, or request or invitation for tenders of, a security or interest in a security for value.

(3) The term ''acquire'' includes every type of acquisition, whether effected by purchase, exchange, operation of law or otherwise.

(4) The term ''acting in concert'' means (a) knowing participation in a joint activity or conscious parallel action towards a common goal whether or not pursuant to an express agreement, or (b) a combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangements, whether written or otherwise.

B. *Cumulative Voting Limitation.* Stockholders shall not be permitted to cumulate their votes for election of directors.

C. *Call for Special Meetings.* Special meetings of stockholders relating to changes in control of the subsidiary holding company or amendments to its charter shall be called only upon direction of the board of directors.

(c) *Anti-takeover provisions.* The Board may grant approval to a charter amendment not listed in paragraph (b) of this section regarding the acquisition by any person or persons of its equity securities provided that the subsidiary holding company shall file as part of its application for approval an opinion, acceptable to the Board, of counsel independent from the subsidiary holding company that the proposed charter provision would be permitted to be adopted by a corporation chartered by the state in which the principal office of the subsidiary holding company is located. Any such provision must be consistent with applicable statutes, regulations, and Board policies. Further, any such provision that would have the effect of rendering more difficult a change in control of the subsidiary holding company and would require for any corporate action (other than the removal of directors) the affirmative vote of a larger percentage of shareholders than is required by this part, shall not be effective unless adopted by a percentage of shareholder vote at least equal to the highest percentage that would be required to take any action under such provision.

(d) *Reissuance of charter.* A subsidiary holding company that has amended its charter may apply to have its charter, including the amendments, reissued by the Board. Such requests for reissuance should be filed with the appropriate Reserve Bank, and contain signatures required by the charter in appendix B to this part, together with such supporting documents as needed to demonstrate that the amendments were properly adopted.

§ 239.23 Bylaws.

(a) *General.* At its first organizational meeting, the board of directors of a subsidiary holding company shall adopt a set of bylaws for the administration and regulation of its affairs. Bylaws may be adopted, amended or repealed by either a majority of the votes cast by the shareholders at a legal meeting or a majority of the board of directors. The bylaws shall contain sufficient provisions to govern the subsidiary holding company in accordance with the requirements of §§ 239.26, 239.27, 239.28, and 239.29 and shall not contain any provision that is inconsistent with those sections or with applicable laws, rules, regulations or the subsidiary holding company's charter, except that a bylaw provision inconsistent with §§ 239.26, 239.27, 239.28, and 239.29 may be adopted with the approval of the Board.

(b) *Form of filing*—(1) *Application requirement.* (i) Any bylaw amendment shall be submitted to the appropriate Reserve Bank for approval if it would:

(A) Render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a large block of the subsidiary holding company's stock, or the removal of incumbent management; or

(B) Be inconsistent with §§ 239.26, 239.27, 239.28, and 239.29, with applicable

laws, rules, regulations or the subsidiary holding company's charter or involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability.

(ii) Applications submitted under paragraph (b)(1)(i) of this section are subject to the processing procedures under § 238.14 of this chapter;

(iii) For purposes of this paragraph (b), bylaw provisions that adopt the language of the model bylaws contained in appendix D to this part, if adopted without change and filed with Board within 30 days after adoption, are effective upon adoption. The Board may amend the model bylaws provided in appendix D.

(2) *Filing requirement.* If the proposed bylaw amendment does not implicate paragraph (b)(1) or (b)(3) of this section and is permissible under all applicable laws, rules, or regulations, the subsidiary holding company shall submit the amendment to the appropriate Reserve Bank at least 30 days prior to the date the bylaw amendment is to be adopted by the subsidiary holding company.

(3) *Corporate governance procedures.* A subsidiary holding company may elect to follow the corporate governance procedures of: The laws of the state where the main office of the subsidiary holding company is located; Delaware General Corporation law; or The Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not of the type described in paragraph (b)(1)(i) of this section. If this election is selected, a subsidiary holding company shall designate in its bylaws the provision or provisions from the body or bodies of law selected for its corporate governance procedures, and shall file a copy of such bylaws, which are effective upon adoption, within 30 days after adoption. The submission shall indicate, where not obvious, why the bylaw provisions do not require an application under paragraph (b)(1)(i) of this section.

(c) *Effectiveness.* Any bylaw amendment filed pursuant to paragraph (b)(2) of this section shall automatically be effective 30 days from the date of filing of such amendment, provided that the subsidiary holding company follows the requirements of its charter and bylaws in adopting such amendment, unless the Board notifies the subsidiary holding company prior to the expiration of such 30-day period that such amendment is rejected or requires an application to be filed pursuant to paragraph (b)(1) of this section.

(d) *Effect of subsequent charter or bylaw change.* Notwithstanding any subsequent change to its charter or bylaws, the authority of a subsidiary holding company to engage in any transaction shall be determined only by the subsidiary holding company's charter or bylaws then in effect, unless otherwise provided by Federal law or regulation.

§ 239.24 Issuances of stock by subsidiary holding companies of mutual holding companies.

(a) *Requirements.* No subsidiary holding company of a mutual holding company may issue stock to persons other than its mutual holding company parent in connection with a mutual holding company reorganization, or at any time subsequent to the subsidiary holding company's acquisition by the mutual holding company, unless the subsidiary holding company obtains advance approval of each such issuance from the Board. Approval of a mutual holding company reorganization filed pursuant to § 239.3(a) shall be deemed to constitute approval of any stock issuance specifically applied for pursuant to this section in connection with the reorganization, unless otherwise specified by the Board. The Board shall approve any proposed issuance that meets each of the criteria set forth below in paragraphs (a)(1) through (a)(7) of this section.

(1) The proposed issuance is to be made pursuant to a Stock Issuance Plan that contains all the provisions required by § 239.25.

(2) The Stock Issuance Plan is consistent with the terms of the subsidiary holding company's charter (or any proposed amendments thereto), including terms governing the type and amount of stock that may be issued.

(3) The Stock Issuance Plan would provide the subsidiary holding company, its mutual holding company parent, and any subsidiary savings associations of the subsidiary holding company with fully sufficient capital and would not be inequitable or detrimental to the subsidiary holding company or its mutual holding company parent or to members of the mutual holding company parent.

(4) The proposed price or price range of the stock to be issued is reasonable. The Board shall review the reasonableness of the proposed price or price range.

(5) The aggregate amount of outstanding common stock of the subsidiary holding company owned or controlled by persons other than the subsidiary holding company's mutual holding company parent at the close of the proposed issuance shall be less than 50 percent of the subsidiary holding company's total outstanding common stock, unless the subsidiary holding company was a stock holding company when acquired by the mutual holding company, in which case the foregoing restriction shall not apply. Any amount of preferred stock may be issued by any subsidiary holding company of a mutual holding company to persons other than the subsidiary holding company's mutual holding company, consistent with any other applicable laws and regulations.

(6) The subsidiary holding company furnishes the information required by the Board in connection with the proposed issuance.

(7) The proposed stock issuance meets the convenience and needs standard of § 239.55(g).

(8) The proposed issuance complies with all other applicable laws and regulations.

(9) Unless otherwise determined by the Board, the limitations on the minimum and maximum amounts of the estimated price range required by § 239.59(c) shall apply.

(b) *Related approvals.* Approval by the Board of any stock issuance pursuant to this section shall also be deemed to constitute:

(1) Approval of the form of stock certificate proposed to be utilized in connection with the stock issuance, provided such form was included in the application materials filed pursuant to this section; and

(2) Approval of any charter or bylaw amendment required to authorize issuance of the stock, provided such amendment was proposed in the application materials filed pursuant to this section.

(c) *Offering restrictions.* (1) No representations may be made in any manner in connection with the offer or sale of any stock issued pursuant to this section that the price, price range or any other pricing information related to such stock issuance has been approved by the Board or that the stock has been approved or disapproved by the Board or that the Board has endorsed the accuracy or adequacy of any securities offering documents disseminated in connection with such stock.

(2) The sale of minority stock of the subsidiary holding company to be made under the minority stock issuance plan, including any sale in a public offering or direct community marketing, shall be completed as promptly as possible and within 45 calendar days after the last day of the subscription period, unless extended by the Board.

(3) In the offer, sale, or purchase of stock issued pursuant to this section, no person shall:

(i) Employ any device, scheme, or artifice to defraud;

(ii) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(iii) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser or seller.

(4) Prior to the completion of a stock issuance pursuant to this section, no person shall transfer, or enter into any agreement or understanding to transfer, the legal or beneficial ownership of the stock to be issued to any other person.

(5) Prior to the completion of a stock issuance pursuant to this section, no person shall make any offer, or any announcement of any offer, to purchase any stock to be issued, or knowingly acquire any stock in the issuance, in

excess of the maximum purchase limitations established in the Stock Issuance Plan.

(6) All stock issuances pursuant to this section must:

(i) Comply with § 239.59 and, to the extent applicable, the form or forms specified by the Board; and

(ii) Provide that the offering be structured in a manner similar to a standard conversion under subpart E of this part, including the stock purchase priorities accorded members of the issuing subsidiary holding company's mutual holding company, unless the subsidiary holding company would qualify for a supervisory conversion if it were to undertake a conversion under subpart E of this part; or demonstrates to the satisfaction of the Board that a non-conforming issuance would be more beneficial to the savings association and subsidiary holding company compared to a conforming offering, considering, in the aggregate, the effect of each on the savings association and subsidiary holding company's financial and managerial resources and future prospects, the effect of the issuance upon the savings association and subsidiary holding company, the insurance risk to the Deposit Insurance Fund, and the convenience and needs of the community to be served.

(7) Notwithstanding the restrictions in paragraph (c)(6)(ii) of this section, a subsidiary holding company of a mutual holding company may issue stock as part of a stock benefit plan to any insider, associate of an insider, or tax qualified or non-tax qualified employee stock benefit plan of the mutual holding company or subsidiary of the mutual holding company without including the purchase priorities of subpart E of this part.

(8) As part of a reorganization, a reasonable amount of shares or proceeds may be contributed to a charitable organization that complies with §§ 239.64(b) to 239.64(f), provided such contribution does not result in any taxes on excess business holdings under section 4943 of the Internal Revenue Code (26 U.S.C. 4943).

(d) *Procedural and substantive requirements.* The procedural and substantive requirements of subpart E of this part shall apply to all mutual holding company stock issuances and subsidiary holding company stock issuances under this section, unless clearly inapplicable, as determined by the Board. For purposes of this paragraph, the term *conversion* as it appears in the provisions of subpart E of this part shall refer to the stock issuance, and the term *mutual holding company* shall refer to the subsidiary holding company undertaking the stock issuance.

§ 239.25 Contents of Stock Issuance Plans.

(a) *Mandatory provisions.* Each of the provisions mandatory for all stock issuance plans under this paragraph (a) shall be deemed regulatory requirements. Each Stock Issuance Plan shall contain a complete description of all significant terms of the proposed stock issuance (including the information specified in § 239.65(f) to the extent known), shall attach and incorporate the proposed form of stock certificate, the proposed stock order form, and any agreements or other documents defining the rights of the stockholders, and shall:

(1) Provide that the stock shall be sold at a total price equal to the estimated *pro forma* market value of such stock, based upon an independent valuation;

(2) Provide that the aggregate amount of outstanding common stock of the subsidiary holding company owned or controlled by persons other than the subsidiary holding company's mutual holding company parent at the close of the proposed issuance shall be less than fifty percent of the subsidiary holding company's total outstanding common stock (This provision may be omitted if the proposed issuance will be conducted by a subsidiary holding company that was in the stock form when acquired by its mutual holding company parent);

(3) Provide that all employee stock ownership plans or other tax-qualified employee stock benefit plans (collectively, ESOPs) must not encompass, in the aggregate, more than either 4.9 percent of the outstanding shares of the subsidiary holding company's common stock or 4.9 percent of the subsidiary

holding company's stockholders' equity at the close of the proposed issuance;

(4) Provide that all ESOPs and management recognition plans (MRPs) must not encompass, in the aggregate, more than either 4.9 percent of the outstanding shares of the subsidiary holding company's common stock or 4.9 percent of the subsidiary holding company's stockholders' equity at the close of the proposed issuance. However, if the subsidiary holding company's tangible capital equals at least ten percent at the time of implementation of the plan, the Board may permit such ESOPs and MRPs to encompass, in the aggregate, up to 5.88 percent of the outstanding common stock or stockholders' equity at the close of the proposed issuance;

(5) Provide that all MRPs must not encompass, in the aggregate, more than either 1.47 percent of the common stock of the subsidiary holding company or 1.47 percent of the subsidiary holding company's stockholders' equity at the close of the proposed issuance. However, if the subsidiary holding company's tangible capital is at least ten percent at the time of implementation of the plan, the Board may permit MRPs to encompass, in the aggregate, up to 1.96 percent of the outstanding shares of the subsidiary holding company's common stock or 1.96 percent of the savings subsidiary holding company's stockholders' equity at the close of the proposed issuance;

(6) Provide that all stock option plans (Option Plans) must not encompass, in the aggregate, more than either 4.9 percent of the subsidiary holding company's outstanding common stock at the close of the proposed issuance or 4.9 percent of the subsidiary holding company's stockholders' equity at the close of the proposed issuance;

(7) Provide that an ESOP, a MRP or an Option Plan modified or adopted no earlier than one year after the close of: the proposed issuance, or any subsequent issuance that is made in substantial conformity with the purchase priorities § 239.59(a) set forth in subpart E of this part, may exceed the percentage limitations contained in paragraphs (a)(3) through (6) of this section (plan expansion), subject to the following two requirements. First, all common stock awarded in connection with any plan expansion must be acquired for such awards in the secondary market. Second, such acquisitions must begin no earlier than when such plan expansion is permitted to be made;

(8)(i) Provide that the aggregate amount of common stock that may be encompassed under all Option Plans and MRPs, or acquired by all insiders of the subsidiary holding company and subsidiary savings association and associates of insiders of the subsidiary holding company and subsidiary savings association, must not exceed the following percentages of common stock or stockholders' equity of the subsidiary holding company, held by persons other than the subsidiary holding company's mutual holding company parent at the close of the proposed issuance:

Institution size	Officer and director purchases (percent)
$ 50,000,000 or less	35
$ 50,000,001–100,000,000	34
$100,000,001–150,000,000	33
$150,000,001–200,000,000	32
$200,000,001–250,000,000	31
$250,000,001–300,000,000	30
$300,000,001–350,000,000	29
$350,000,001–400,000,000	28
$400,000,001–450,000,000	27
$450,000,001–500,000,000	26
Over $500,000,000	25

(ii) The percentage limitations contained in paragraph 8(i) of this section may be exceeded provided that all stock acquired by insiders and associates of insiders or awarded under all MRPs and Option Plans in excess of those limitations is acquired in the secondary market. If acquired for such awards on the secondary market, such acquisitions must begin no earlier than one year after the close of the proposed issuance or any subsequent issuance that is made in substantial conformity with the purchase priorities set forth in subpart E of this part.

(iii) In calculating the number of shares held by insiders and their associates under this provision, shares awarded but not delivered under an ESOP, MRP, or Option Plan that are attributable to such persons shall not

be counted as being acquired by such persons.

(9) Provide that the amount of common stock that may be encompassed under all Option Plans and MRPs must not exceed, in the aggregate, 25 percent of the outstanding common stock held by persons other than the subsidiary holding company's mutual holding company parent at the close of the proposed issuance;

(10) Provide that the issuance shall be conducted in compliance with, to the extent applicable, the forms required by the Board;

(11) Provide that the sales price of the shares of stock to be sold in the issuance shall be a uniform price determined in accordance with § 239.24;

(12) Provide that, if at the close of the stock issuance the subsidiary holding company has more than thirty-five shareholders of any class of stock, the subsidiary holding company shall promptly register that class of stock pursuant to the Securities Exchange Act of 1934, as amended (15 U.S.C. 78a–78jj), and undertake not to deregister such stock for a period of three years thereafter;

(13) Provide that, if at the close of the stock issuance the subsidiary holding company has more than one hundred shareholders of any class of stock, the subsidiary holding company shall use its best efforts to:

(i) Encourage and assist a market maker to establish and maintain a market for that class of stock; and

(ii) List that class of stock on a national or regional securities exchange or on the NASDAQ quotation system;

(14) Provide that, for a period of three years following the proposed issuance, no insider of the subsidiary holding company or his or her associates shall purchase, without the prior written approval of the Board, any stock of the subsidiary holding company except from a broker dealer registered with the Securities and Exchange Commission, except that the foregoing restriction shall not apply to:

(i) Negotiated transactions involving more than one percent of the outstanding stock in the class of stock; or

(ii) Purchases of stock made by and held by any tax-qualified or non-tax-qualified employee stock benefit plan of the subsidiary holding company even if such stock is attributable to insiders of the subsidiary holding company and subsidiary savings association or their associates;

(15) Provide that stock purchased by insiders of the subsidiary holding company and subsidiary savings association and their associates in the proposed issuance shall not be sold for a period of at least one year following the date of purchase, except in the case of death of the insider or associate;

(16) Provide that, in connection with stock subject to restriction on sale for a period of time:

(i) Each certificate for such stock shall bear a legend giving appropriate notice of such restriction;

(ii) Appropriate instructions shall be issued to the subsidiary holding company's transfer agent with respect to applicable restrictions on transfer of such stock; and

(iii) Any shares issued as a stock dividend, stock split, or otherwise with respect to any such restricted stock shall be subject to the same restrictions as apply to the restricted stock;

(17) Provide that the subsidiary holding company will not offer or sell any of the stock proposed to be issued to any person whose purchase would be financed by funds loaned, directly or indirectly, to the person by the subsidiary holding company;

(18) Provide that, if necessary, the subsidiary holding company's charter will be amended to authorize issuance of the stock and attach and incorporate by reference the text of any such amendment;

(19) Provide that the expenses incurred in connection with the issuance shall be reasonable;

(20) Provide that the Stock Issuance Plan, if proposed as part of a Reorganization Plan, may be amended or terminated in the same manner as the Reorganization Plan. Otherwise, the Stock Issuance Plan shall provide that it may be substantively amended by the board of directors of the issuing subsidiary holding company as a result of comments from regulatory authorities or otherwise prior to approval of the Plan by the Board, and at any time thereafter with the concurrence of the

Board; and that the Stock Issuance Plan may be terminated by the board of directors at any time prior to approval of the Plan by the Board, and at any time thereafter with the concurrence of the Board;

(21) Provide that, unless an extension is granted by the Board, the Stock Issuance Plan shall be terminated if not completed within 90 days of the date of such approval; or

(22) Provide that the subsidiary holding company may make scheduled discretionary contributions to a tax-qualified employee stock benefit plan provided such contributions do not cause the subsidiary holding company to fail to meet any of its regulatory capital requirements.

(b) *Optional provisions.* A Stock Issuance Plan may:

(1) Provide that, in the event the proposed stock issuance is part of a Reorganization Plan, the stock offering may be commenced concurrently with or at any time after the mailing to the members of the reorganizing association and any acquiree association of any proxy statement(s). The offering may be closed before the required membership vote(s), provided the offer and sale of the stock shall be conditioned upon the approval of the Reorganization Plan and Stock Issuance Plan by the members of the reorganizing association and any acquiree association;

(2) Provide that any insignificant residue of stock of the subsidiary holding company not sold in the offering may be sold in such other manner as provided in the Stock Issuance Plan, with the Board's approval;

(3) Provide that the subsidiary holding company may issue and sell, in lieu of shares of its stock, units of securities consisting of stock and long-term warrants or other equity securities, in which event any reference in the provisions of this section and in § 239.24 to stock shall apply to such units of equity securities unless the context otherwise requires; or

(4) Provide that the subsidiary holding company may reserve shares representing up to ten percent of the proposed offering for issuance in connection with an employee stock benefit plan.

(c) *Applicability of provisions of § 239.63(a)(1) to minority stock issuances.* Notwithstanding § 239.24(d), § 239.63(a)(1)(ii) do not apply to minority stock issuances, because the permissible sizes of ESOPs, MRPs, and Option Plans in minority stock issuances are subject to each of the requirements set forth at paragraphs (a)(3) through (a)(9) of this section. Section 239.63(a)(4) through (a)(14), apply for one year after the subsidiary holding company engages in a minority stock issuance that is conducted in accordance with the purchase priorities set forth in subpart E of this part. In addition to the shareholder vote requirement for Option Plans and MRPs set forth at § 239.63(a)(1)(vi), any Option Plans and MRPs put to a shareholder vote after a minority stock issuance that is conducted in accordance with the purchase priorities set forth in subpart E of this part must be approved by a majority of the votes cast by stockholders other than the mutual holding company.

§ 239.26 Shareholders.

(a) *Shareholder meetings.* An annual meeting of the shareholders of the subsidiary holding company for the election of directors and for the transaction of any other business of the subsidiary holding company shall be held annually within 150 days after the end of the subsidiary holding company's fiscal year. Unless otherwise provided in the subsidiary holding company's charter, special meetings of the shareholders may be called by the board of directors or on the request of the holders of 10 percent or more of the shares entitled to vote at the meeting, or by such other persons as may be specified in the bylaws of the subsidiary holding company. All annual and special meetings of shareholders shall be held at such place as the board of directors may determine in the state in which the subsidiary savings association has its principal place of business, or at any other convenient place the board of directors may designate.

(b) *Notice of shareholder meetings.* Written notice stating the place, day, and hour of the meeting and the purpose or purposes for which the meeting is called shall be delivered not fewer

than 20 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chairman of the board, the president, the secretary, or the directors, or other natural persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the mail, addressed to the shareholder at the address appearing on the stock transfer books or records of the subsidiary holding company as of the record date prescribed in paragraph (c) of this section, with postage thereon prepaid. When any shareholders' meeting, either annual or special, is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Notwithstanding anything in this section, however, a subsidiary holding company that is wholly owned shall not be subject to the shareholder notice requirement.

(c) *Fixing of record date.* For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors shall fix in advance a date as the record date for any such determination of shareholders. Such date in any case shall be not more than 60 days and, in case of a meeting of shareholders, not less than 10 days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof.

(d) *Voting lists.* (1) At least 20 days before each meeting of the shareholders, the officer or agent having charge of the stock transfer books for the shares of the subsidiary holding company shall make a complete list of the stockholders of record entitled to vote at such meeting, or any adjournments thereof, arranged in alphabetical order, with the address and the number of shares held by each. This list of shareholders shall be kept on file at the home office of the subsidiary holding company and shall be subject to inspection by any shareholder of record or the stockholder's agent during the entire time of the meeting. The original stock transfer book shall constitute *prima facie* evidence of the stockholders entitled to examine such list or transfer books or to vote at any meeting of stockholders. Notwithstanding anything in this section, however, a subsidiary holding company that is wholly owned shall not be subject to the voting list requirements.

(2) In lieu of making the shareholders list available for inspection by any shareholders as provided in paragraph (d)(1) of this section, the board of directors may perform such acts as required by paragraphs (a) and (b) of Rule 14a–7 of the General Rules and Regulations under the Securities and Exchange Act of 1934 (17 CFR 240.14a–7) as may be duly requested in writing, with respect to any matter which may be properly considered at a meeting of shareholders, by any shareholder who is entitled to vote on such matter and who shall defray the reasonable expenses to be incurred by the subsidiary holding company in performance of the act or acts required.

(e) *Shareholder quorum.* A majority of the outstanding shares of the subsidiary holding company entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the stockholders, unless the vote of a greater number of stockholders voting together or voting by classes is required by law or the charter. Directors, however, are elected by a plurality of the votes cast at an election of directors.

(f) *Shareholder voting*— (1) *Proxies.* Unless otherwise provided in the subsidiary holding company's charter, at

all meetings of shareholders, a shareholder may vote in person or by proxy executed in writing by the shareholder or by a duly authorized attorney in fact. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the shareholder. A proxy may designate as holder a corporation, partnership or company, or other person. Proxies solicited on behalf of the management shall be voted as directed by the shareholder or, in the absence of such direction, as determined by a majority of the board of directors. No proxy shall be valid more than eleven months from the date of its execution except for a proxy coupled with an interest.

(2) *Shares controlled by subsidiary holding company.* Neither treasury shares of its own stock held by the subsidiary holding company nor shares held by another corporation, if a majority of the shares entitled to vote for the election of directors of such other corporation are held by the subsidiary holding company, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting.

(g) *Nominations and new business submitted by shareholders.* Nominations for directors and new business submitted by shareholders shall be voted upon at the annual meeting if such nominations or new business are submitted in writing and delivered to the secretary of the subsidiary holding company at least five days prior to the date of the annual meeting. Ballots bearing the names of all the natural persons nominated shall be provided for use at the annual meeting.

(h) *Informal action by stockholders.* If the bylaws of the subsidiary holding company so provide, any action required to be taken at a meeting of the stockholders, or any other action that may be taken at a meeting of the stockholders, may be taken without a meeting if consent in writing has been given by all the stockholders entitled to vote with respect to the subject matter.

§ 239.27 Board of directors.

(a) *General powers and duties.* The business and affairs of the subsidiary holding company shall be under the direction of its board of directors. The board of directors shall annually elect a chairman of the board from among its members and shall designate the chairman of the board, when present, to preside at its meeting. Directors need not be stockholders unless the bylaws so require.

(b) *Number and term.* The bylaws shall set forth a specific number of directors, not a range. The number of directors shall be not fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the Board. Directors shall be elected for a term of one to three years and until their successors are elected and qualified. If a staggered board is chosen, the directors shall be divided into two or three classes as nearly equal in number as possible and one class shall be elected by ballot annually. In the case of a converting or newly chartered subsidiary holding company where all directors shall be elected at the first election of directors, if a staggered board is chosen, the terms shall be staggered in length from one to three years.

(c) *Regular meetings.* A regular meeting of the board of directors shall be held immediately after, and at the same place as, the annual meeting of shareholders. The board of directors shall determine the place, frequency, time and procedure for notice of regular meetings.

(d) *Quorum.* A majority of the number of directors shall constitute a quorum for the transaction of business at any meeting of the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless a greater number is prescribed by regulation of the Board.

(e) *Vacancies.* Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors although less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected to serve only until the next election of directors by the shareholders. Any directorship to be filled by reason of an increase in the number of directors may be filled by

election by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

(f) *Removal or resignation of directors.* (1) At a meeting of shareholders called expressly for that purpose, any director may be removed only for cause, as defined in § 239.41, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. Subsidiary holding companies may provide for procedures regarding resignations in the bylaws.

(2) If less than the entire board is to be removed, no one of the directors may be removed if the votes cast against the removal would be sufficient to elect a director if then cumulatively voted at an election of the class of directors of which such director is a part.

(3) Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the charter or supplemental sections thereto, the provisions of this section shall apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

(g) *Executive and other committees.* The board of directors, by resolution adopted by a majority of the full board, may designate from among its members an executive committee and one or more other committees each of which, to the extent provided in the resolution or bylaws of the subsidiary holding company, shall have and may exercise all of the authority of the board of directors, except no committee shall have the authority of the board of directors with reference to: the declaration of dividends; the amendment of the charter or bylaws of the subsidiary holding company; recommending to the stockholders a plan of merger, consolidation, or conversion; the sale, lease, or other disposition of all, or substantially all, of the property and assets of the subsidiary holding company otherwise than in the usual and regular course of its business; a voluntary dissolution of the subsidiary holding company; a revocation of any of the foregoing; or the approval of a transaction in which any member of the executive committee, directly or indirectly, has any material beneficial interest. The designation of any committee and the delegation of authority thereto shall not operate to relieve the board of directors, or any director, of any responsibility imposed by law or regulation.

(h) *Notice of special meetings.* Written notice of at least 24 hours regarding any special meeting of the board of directors or of any committee designated thereby shall be given to each director in accordance with the bylaws, although such notice may be waived by the director. The attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting need be specified in the notice or waiver of notice of such meeting. The bylaws may provide for telephonic participation at a meeting.

(i) *Action without a meeting.* Any action required or permitted to be taken by the board of directors at a meeting may be taken without a meeting if a consent in writing, setting forth the actions so taken, shall be signed by all of the directors.

(j) *Presumption of assent.* A director of the subsidiary holding company who is present at a meeting of the board of directors at which action on any subsidiary holding company matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention shall be entered in the minutes of the meeting or unless a written dissent to such action shall be filed with the individual acting as the secretary of the meeting before the adjournment thereof or shall be forwarded by registered mail to the secretary of the subsidiary holding company within five days after the date on which a copy of the minutes of the meeting is received. Such right to dissent shall not apply to a director who voted in favor of such action.

(k) *Age limitation on directors.* A subsidiary holding company may provide a bylaw on age limitation for directors.

Bylaws on age limitations must comply with all Federal laws, rules and regulations.

§ 239.28 Officers.

(a) *Positions.* The officers of the subsidiary holding company shall be a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom shall be elected by the board of directors. The board of directors may also designate the chairman of the board as an officer. The offices of the secretary and treasurer or comptroller may be held by the same individual and the vice president may also be either the secretary or the treasurer or comptroller. The board of directors may designate one or more vice presidents as executive vice president or senior vice president. The board of directors may also elect or authorize the appointment of such other officers as the business of the subsidiary holding company may require. The officers shall have such authority and perform such duties as the board of directors may from time to time authorize or determine. In the absence of action by the board of directors, the officers shall have such powers and duties as generally pertain to their respective offices.

(b) *Removal.* Any officer may be removed by the board of directors whenever in its judgment the best interests of the subsidiary holding company will be served thereby; but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the individual so removed. Employment contracts shall conform with § 239.41.

(c) *Age limitation on officers.* A subsidiary holding company may provide a bylaw on age limitation for officers. Bylaws on age limitations must comply with all Federal laws, rules, and regulations.

§ 239.29 Certificates for shares and their transfer.

(a) *Certificates for shares.* Certificates representing shares of capital stock of the subsidiary holding company shall be in such form as shall be determined by the board of directors and approved by the Board. The certificates shall be signed by the chief executive officer or by any other officer of the subsidiary holding company authorized by the board of directors, attested by the secretary or an assistant secretary, and sealed with the corporate seal or a facsimile thereof. The signatures of such officers upon a certificate may be facsimiles if the certificate is manually signed on behalf of a transfer agent or a registrar other than the subsidiary holding company itself or one of its employees. Each certificate for shares of capital stock shall be consecutively numbered or otherwise identified. The name and address of the person to whom the shares are issued, with the number of shares and date of issue, shall be entered on the stock transfer books of the subsidiary holding company. All certificates surrendered to the subsidiary holding company for transfer shall be cancelled and no new certificate shall be issued until the former certificate for a like number of shares shall have been surrendered and cancelled, except that in the case of a lost or destroyed certificate a new certificate may be issued upon such terms and indemnity to the subsidiary holding company as the board of directors may prescribe.

(b) *Transfer of shares.* Transfer of shares of capital stock of the subsidiary holding company shall be made only on its stock transfer books. Authority for such transfer shall be given only by the holder of record or by a legal representative, who shall furnish proper evidence of such authority, or by an attorney authorized by a duly executed power of attorney and filed with the subsidiary holding company. The transfer shall be made only on surrender for cancellation of the certificate for the shares. The person in whose name shares of capital stock stand on the books of the subsidiary holding company shall be deemed by the subsidiary holding company to be the owner for all purposes.

§ 239.30 Annual reports; books and records.

(a) *Annual reports to stockholders.* A subsidiary holding company not wholly-owned by a holding company shall, within 130 days after the end of its fiscal year, mail to each of its stockholders entitled to vote at its annual

meeting an annual report containing financial statements that satisfy the requirements of rule 14a–3 under the Securities Exchange Act of 1934. (17 CFR 240.14a–3). Concurrently with such mailing a certification of such mailing signed by the chairman of the board, the president or a vice president of the subsidiary holding company, together with a copy of the report, shall be transmitted by the subsidiary holding company to the appropriate Reserve Bank.

(b) *Books and records.* (1) Each subsidiary holding company shall keep correct and complete books and records of account; shall keep minutes of the proceedings of its stockholders, board of directors, and committees of directors; and shall keep at its home office or at the office of its transfer agent or registrar, a record of its stockholders, giving the names and addresses of all stockholders, and the number, class and series, if any, of the shares held by each.

(2) Any stockholder or group of stockholders of a subsidiary holding company, holding of record the number of voting shares of such subsidiary holding company specified below, upon making written demand stating a proper purpose, shall have the right to examine, in person or by agent or attorney, at any reasonable time or times, nonconfidential portions of its books and records of account, minutes and record of stockholders and to make extracts therefrom. Such right of examination is limited to a stockholder or group of stockholders holding of record:

(i) Voting shares having a cost of not less than $100,000 or constituting not less than one percent of the total outstanding voting shares, provided in either case such stockholder or group of stockholders have held of record such voting shares for a period of at least six months before making such written demand, or

(ii) Not less than five percent of the total outstanding voting shares. No stockholder or group of stockholders of a subsidiary holding company shall have any other right under this section or common law to examine its books and records of account, minutes and record of stockholders, except as provided in its bylaws with respect to inspection of a list of stockholders.

(3) The right to examination authorized by paragraph (b)(2) of this section and the right to inspect the list of stockholders provided by a subsidiary holding company's bylaws may be denied to any stockholder or group of stockholders upon the refusal of any such stockholder or group of stockholders to furnish such subsidiary holding company, its transfer agent or registrar an affidavit that such examination or inspection is not desired for any purpose which is in the interest of a business or object other than the business of the subsidiary holding company, that such stockholder has not within the five years preceding the date of the affidavit sold or offered for sale, and does not now intend to sell or offer for sale, any list of stockholders of the subsidiary holding company or of any other corporation, and that such stockholder has not within said five-year period aided or abetted any other person in procuring any list of stockholders for purposes of selling or offering for sale such list.

(4) Notwithstanding any provision of this section or common law, no stockholder or group of stockholders shall have the right to obtain, inspect or copy any portion of any books or records of a subsidiary holding company containing:

(i) A list of depositors in or borrowers from such subsidiary holding company;

(ii) Their addresses;

(iii) Individual deposit or loan balances or records; or

(iv) Any data from which such information could be reasonably constructed.

§ 239.31 Indemnification; employment contracts.

(a) *Restrictions on indemnification.* The provisions of § 239.40 shall apply to subsidiary holding companies.

(b) *Restrictions on employment contracts.* The provisions of § 239.41 and any policies of the Board thereunder shall apply to subsidiary holding companies.

Subpart D—Indemnification; Employment Contracts

§ 239.40 Indemnification of directors, officers and employees.

A mutual holding company shall indemnify its directors, officers, and employees in accordance with the following requirements:

(a) *Definitions and rules of construction.* (1) Definitions for purposes of this section.

(i) *Action* means any judicial or administrative proceeding, or threatened proceeding, whether civil, criminal, or otherwise, including any appeal or other proceeding for review;

(ii) *Court* includes, without limitation, any court to which or in which any appeal or any proceeding for review is brought.

(iii) *Final judgment* means a judgment, decree, or order which is not appealable or as to which the period for appeal has expired with no appeal taken.

(iv) *Settlement* includes entry of a judgment by consent or confession or a plea of guilty or *nolo contendere.*

(2) References in this section to any individual or other person, including any mutual holding company, shall include legal representatives, successors, and assigns thereof.

(b) *General.* Subject to paragraphs (c) and (g) of this section, a mutual holding company shall indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of the mutual holding company, for:

(1) Any amount for which that person becomes liable under a judgment if such action; and

(2) Reasonable costs and expenses, including reasonable attorney's fees, actually paid or incurred by that person in defending or settling such action, or in enforcing his or her rights under this section if he or she attains a favorable judgment in such enforcement action.

(c) *Requirements.* Indemnification shall be made to such period under paragraph (b) of this section only if:

(1) Final judgment on the merits is in his or her favor; or

(2) In case of:

(i) Settlement,

(ii) Final judgment against him or her, or

(iii) Final judgment in his or her favor, other than on the merits, if a majority of the disinterested directors of the mutual holding company determine that he or she was acting in good faith within the scope of his or her employment or authority as he or she could reasonably have perceived it under the circumstances and for a purpose he or she could reasonably have believed under the circumstances was in the best interests of the mutual holding company or its members. However, no indemnification shall be made unless the mutual holding company gives the Board at least 60 days' notice of its intention to make such indemnification. Such notice shall state the facts on which the action arose, the terms of any settlement, and any disposition of the action by a court. Such notice, a copy thereof, and a certified copy of the resolution containing the required determination by the board of directors shall be sent to the appropriate Reserve Bank, who shall promptly acknowledge receipt thereof. The notice period shall run from the date of such receipt. No such indemnification shall be made if the Board advises the mutual holding company in writing, within such notice period, of its objection to the indemnification.

(d) *Insurance.* A mutual holding company may obtain insurance to protect it and its directors, officers, and employees from potential losses arising from claims against any of them for alleged wrongful acts, or wrongful acts, committed in their capacity as directors, officers, or employees. However, no mutual holding company may obtain insurance which provides for payment of losses of any individual incurred as a consequence of his or her willful or criminal misconduct.

(e) *Payment of expenses.* If a majority of the directors of a mutual holding company concludes that, in connection with an action, any person ultimately may become entitled to indemnification under this section, the directors may authorize payment of reasonable costs and expenses, including reasonable attorneys' fees, arising from the defense or settlement of such action.

Nothing in this paragraph shall prevent the directors of a mutual holding company from imposing such conditions on a payment of expenses as they deem warranted and in the interests of the mutual holding company. Before making advance payment of expenses under this paragraph, the mutual holding company shall obtain an agreement that the mutual holding company will be repaid if the person on whose behalf payment is made is later determined not to be entitled to such indemnification.

(f) *Exclusiveness of provisions.* No mutual holding company shall indemnify any person referred to in paragraph (b) of this section or obtain insurance referred to in paragraph (d) of the section other than in accordance with this section. However, a mutual holding company which has a bylaw in effect relating to indemnification of its personnel shall be governed solely by that bylaw, except that its authority to obtain insurance shall be governed by paragraph (d) of this section.

(g) The indemnification provided for in paragraph (b) of this section is subject to and qualified by 12 U.S.C. 1821(k).

§ 239.41 Employment contracts.

(a) *General.* A mutual holding company may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by the respective mutual holding company's board of directors. A mutual holding company shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the mutual holding company or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the mutual holding company. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The mutual holding company's board of directors may terminate the officer or employee's employment at any time, but any termination by the mutual holding company's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the mutual holding company's affairs by a notice served under section 8 (e)(3) or (g)(1) of Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(3) and (g)(1)) the mutual holding company's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the mutual holding company may in its discretion:

(i) Pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and

(ii) Reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the mutual holding company's affairs by an order issued under section 8 (e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (e)(4) or (g)(1)), all obligations of the mutual holding

company under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the subsidiary savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b) shall not affect any vested rights of the contracting parties: *Provided*, that this paragraph (b) need not be included in an employment contract if prior written approval is secured from the Board.

(5) If the mutual holding company is subject to bankruptcy proceedings under title 11 of the United States Code, all obligations of the mutual holding company under the contract shall terminate as of the date that the petition is filed, but vested rights of the contracting parties shall not be affected: *Provided*, that this paragraph (b) need not be included in an employment contract if prior written approval is secured from the Board.

(6) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary to the continued operation of the mutual holding company—

(i) By the Board, at the time the Federal Deposit Insurance Corporation enters into an agreement to provide assistance to or on behalf of the subsidiary savings association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(ii) By the Board, at the time the Board approves a supervisory merger to resolve problems related to operation of the mutual holding company or when the mutual holding company is determined by the Board to be in an unsafe or unsound condition.

Subpart E—Conversions from Mutual to Stock Form

§ 239.50 Purpose and scope.

(a) *General*. This subpart governs how a mutual holding company may convert from the mutual to the stock form of ownership. This subpart supersedes all inconsistent charter and bylaw provisions of mutual holding companies converting to stock form.

(b) *Prescribed forms*. A mutual holding company must use the forms prescribed under this subpart and provide such information as the Board may require under the forms by regulation or otherwise. The forms required under this subpart include: Form AC (Application for Conversion); Form PS (Proxy Statement); Form OC (Offering Circular); and Form OF (Order Form).

(c) *Waivers*. The Board may waive any requirement of this subpart or a provision in any prescribed form. To obtain a waiver, a mutual holding company must file a written request with the Board that:

(1) Specifies the requirement(s) or provision(s) that the mutual holding company wants the Board to waive;

(2) Demonstrates that the waiver is equitable; is not detrimental to the mutual holding company, mutual members, or other mutual holding companies or savings associations; and is not contrary to the public interest; and

(3) Includes an opinion of counsel demonstrating that applicable law does not conflict with the waiver of the requirement or provision.

§ 239.51 Acquiring another insured stock depository institution as part of a conversion.

When a mutual holding company converts to stock form, the subsidiary savings association may acquire for cash or stock another insured depository institution that is already in the stock form of ownership.

§ 239.52 Definitions.

The following definitions apply to this subpart and the forms prescribed under this subpart:

(a) *Association members* or *members* are persons who, under applicable law, are eligible to vote at the meeting on conversion.

(b) *Eligibility record date* is the date for determining eligible account holders. The eligibility record date must be at least one year before the date that the board of directors adopts the plan of conversion.

(c) *Eligible account holders* are any persons holding qualifying deposits on the eligibility record date.

(d) *IRS* is the United States Internal Revenue Service.

(e) *Local community* includes:

(1) Every county, parish, or similar governmental subdivision in which the mutual holding company has a home or branch office;

(2) Each county's, parish's, or subdivision's metropolitan statistical area;

(3) All zip code areas in the mutual holding company's Community Reinvestment Act assessment area; and

(4) Any other area or category the mutual holding company sets out in its plan of conversion, as approved by the Board.

(f) *Mutual holding company* has the same meaning in this subpart as that term is given in subpart A. For purposes of this subpart, references to mutual holding company shall also include a resulting stock holding company, where applicable.

(g) *Offer*, *offer to sell*, or *offer for sale* is an attempt or offer to dispose of, or a solicitation of an offer to buy, a security or interest in a security for value. Preliminary negotiations or agreements with an underwriter, or among underwriters who are or will be in privity of contract with the mutual holding company or resulting stock holding company, are not offers, offers to sell, or offers for sale.

(h) *Proxy soliciting material* includes a proxy statement, form of proxy, or other written or oral communication regarding the conversion.

(i) *Purchase* or *buy* includes every contract to acquire a security or interest in a security for value.

(j) *Qualifying deposit* is the total balance in an account holder's savings accounts at the close of business on the eligibility or supplemental eligibility record date. The mutual holding company's plan of conversion may provide that only savings accounts with total deposit balances of $50 or more will qualify.

(k) *Resulting stock holding company* means the stock savings and loan holding company that is issuing stock in connection with conversion of a mutual holding company pursuant to this subpart.

(l) *Sale* or *sell* includes every contract to dispose of a security or interest in a security for value. An exchange of securities in a merger or acquisition approved by the Board is not a sale.

(m) *Solicitation* and *solicit* is a request for a proxy, whether or not accompanied by or included in a form of proxy; a request to execute, not execute, or revoke a proxy; or the furnishing of a form of proxy or other communication reasonably calculated to cause the members to procure, withhold, or revoke a proxy. Solicitation or solicit does not include providing a form of proxy at the unsolicited request of a member, the acts required to mail communications for members, or ministerial acts performed on behalf of a person soliciting a proxy.

(n) *Subscription offering* is the offering of shares through nontransferable subscription rights to:

(1) Eligible account holders under § 239.59(h);

(2) Tax-qualified employee stock ownership plans under § 239.59(m);

(3) Supplemental eligible account holders under § 239.59(h); and

(4) Other voting members under § 239.59(j).

(o) *Supplemental eligibility record date* is the date for determining supplemental eligible account holders. The supplemental eligibility record date is the last day of the calendar quarter before the Board approves the conversion and will occur only if the Board has not approved the conversion within 15 months of the eligibility record date.

(p) *Supplemental eligible account holders* are any persons, except officers, directors, and their associates of the mutual holding company or subsidiary savings association, holding qualifying deposits on the supplemental eligibility record date.

(q) *Underwriter* is any person who purchases any securities from the mutual holding company or resulting stock holding company with a view to distributing the securities, offers or sells securities for the mutual stock holding company or resulting stock holding company in connection with the securities' distribution, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking. Underwriter does not include a person whose interest is limited to a usual and customary

distributor's or seller's commission from an underwriter or dealer.

§ 239.53 Prior to conversion.

(a) *Pre-filing meeting and consultation.* (1) The mutual holding company's board, or a subcommittee of the board, may meet with the staff of the appropriate Reserve Bank or Board staff before the mutual holding company's board of directors votes on the plan of conversion. At that meeting the mutual holding company may provide the Reserve Bank or Board staff with a written strategic plan that outlines the objectives of the proposed conversion and the intended use of the conversion proceeds.

(2) The mutual holding company should also consult with the Board or appropriate Reserve Bank before it files its application for conversion. The Reserve Bank or Board will discuss the information that the mutual holding company must include in the application for conversion, general issues that the mutual holding company may confront in the conversion process, and any other pertinent issues.

(b) *Business plan.* (1) Prior to filing an application for conversion, the mutual holding company must adopt a business plan reflecting the mutual holding company's intended plans for deployment of the proposed conversion proceeds. The business plan is required, under § 239.55(b), to be included in the mutual holding company's conversion application. At a minimum, the business plan must address:

(i) The subsidiary savings association's projected operations and activities for three years following the conversion. The business plan must describe how the conversion proceeds will be deployed at the savings association (and holding company, if applicable), what opportunities are available to reasonably achieve the planned deployment of conversion proceeds in the relevant proposed market areas, and how its deployment will provide a reasonable return on investment commensurate with investment risk, investor expectations, and industry norms, by the final year of the business plan. The business plan must include three years of projected financial statements. The business plan must provide that the subsidiary savings associations receive at least 50 percent of the net conversion proceeds. The Board may require that a larger percentage of proceeds be contributed to the subsidiary savings associations.

(ii) The mutual holding company's plan for deploying conversion proceeds to meet credit and lending needs in the proposed market areas. The Board strongly discourages business plans that provide for a substantial investment in mortgage securities or other securities, except as an interim measure to facilitate orderly, prudent deployment of proceeds during the three years following the conversion, or as part of a properly managed leverage strategy.

(iii) The risks associated with the plan for deployment of conversion proceeds, and the effect of this plan on management resources, staffing, and facilities.

(iv) The expertise of the mutual holding company and saving association subsidiary's management and board of directors, or that the mutual holding company has planned for adequate staffing and controls to prudently manage the growth, expansion, new investment, and other operations and activities proposed in its business plan.

(2) The mutual holding company may not project returns of capital or special dividends in any part of the business plan. A newly converted company may not plan on stock repurchases in the first year of the business plan.

(c) *Management and board review of business plan.* (1) The chief executive officer and members of the board of directors of the mutual holding company must review, and at least two-thirds of the board of directors must approve, the business plan.

(2) The chief executive officer and at least two-thirds of the board of directors of the mutual holding company must certify that the business plan accurately reflects the intended plans for deployment of conversion proceeds, and that any new initiatives reflected in the business plan are reasonably achievable. The mutual holding company must submit these certifications with its business plan, as part of the conversion application under paragraph (b) of this section.

(d) *Board review of the business plan.* g(1) The Board will review the business plan to determine whether it demonstrates a safe and sound deployment of conversion proceeds, as part of its review of the conversion application. In making its determination, the Board will consider how the mutual holding company has addressed the applicable factors of paragraph (b) of this section. No single factor will be determinative. The Board will review every case on its merits.

(2) The mutual holding company must file its business plan with the appropriate Reserve Bank. The Board or appropriate Reserve Bank may request additional information, if necessary, to support its determination under paragraph (d)(1) of this section. The mutual holding company must file its business plan as a confidential exhibit to the Form AC.

(3) If the Board approves the application for conversion and the mutual holding company completes the conversion, the resulting stock holding company must operate within the parameters of the business plan. The Board must approve any material deviation from the business plan in writing prior to such material deviation.

(e) *Disclosure of business plan.* (1) The mutual holding company may discuss information about the conversion with individuals that it authorizes to prepare documents for the conversion.

(2) Except as permitted under paragraph (e)(1) of this section, the mutual holding company must keep all information about the conversion confidential until the board of directors adopts the plan of conversion.

(3) If the mutual holding company violates this section, the Board may require it to take remedial action. For example, the Board may require the mutual holding company to take any or all of the following actions:

(i) Publicly announce that the mutual holding company is considering a conversion;

(ii) Set an eligibility record date acceptable to the Board;

(iii) Limit the subscription rights of any person who violates or aids in a violation of this section; or

(iv) Take any other action to ensure that the conversion is fair and equitable.

§ 239.54 Plan of conversion.

(a) *Adoption by the board of directors.* Prior to filing an application for conversion, the board of directors of the mutual holding company must adopt a plan of conversion that conforms to §§ 239.59 through 239.62 and 239.63(b). The board of directors must adopt the plan by at least a two-thirds vote. The plan of conversion is required, under § 239.55(b), to be included in the conversion application.

(b) *Contents of the plan of conversion.* The mutual holding company must include the information included in §§ 239.59 through 239.62 and 239.63(b) in the plan of conversion. The Board may require the mutual holding company to delete or revise any provision in the plan of conversion if the Board determines the provision is inequitable; is detrimental to the mutual holding company, the account holders, other mutual holding companies, or other savings associations; or is contrary to public interest.

(c) *Notice of board of directors' approval of the plan of conversion*—(1) *Notice.* The mutual holding company must promptly notify its members that the board of directors adopted a plan of conversion and that a copy of the plan is available for the members' inspection in the mutual holding company's home office and in each of the subsidiary savings association's branch offices. The mutual holding company must mail a letter to each member or publish a notice in the local newspaper in every local community where the savings association has an office. The mutual holding company may also issue a press release. The Board may require broader publication, if necessary, to ensure adequate notice to the members.

(2) *Contents of notice.* The mutual holding company may include any of the following statements and descriptions in the letter, notice, or press release.

(i) The board of directors adopted a proposed plan to convert from mutual to stock form.

(ii) The mutual holding company will send its members a proxy statement with detailed information on the proposed conversion before the mutual holding company convenes a members' meeting to vote on the conversion.

(iii) The members will have an opportunity to approve or disapprove the proposed conversion at a meeting. At least a majority of the eligible votes must approve the conversion.

(iv) The mutual holding company will not vote existing proxies to approve or disapprove the conversion. The mutual holding company will solicit new proxies for voting on the proposed conversion.

(v) The Board must approve the conversion before the conversion will be effective. The members will have an opportunity to file written comments, including objections and materials supporting the objections, with the Board.

(vi) The IRS must issue a favorable tax ruling, or a tax expert must issue an appropriate tax opinion, on the tax consequences of the conversion before the Board will approve the conversion. The ruling or opinion must indicate the conversion will be a tax-free reorganization.

(vii) The Board might not approve the conversion, and the IRS or a tax expert might not issue a favorable tax ruling or tax opinion.

(viii) Savings account holders will continue to hold accounts in the savings association with the same dollar amounts, rates of return, and general terms as existing deposits. The FDIC will continue to insure the accounts.

(ix) The mutual holding company's conversion will not affect borrowers' loans, including the amount, rate, maturity, security, and other contractual terms.

(x) The savings association's business of accepting deposits and making loans will continue without interruption.

(xi) The current management and staff will continue to conduct current services for depositors and borrowers under current policies and in existing offices.

(xii) The subsidiary savings association may continue to be a member of the Federal Home Loan Bank System.

(xiii) The mutual holding company may substantively amend the proposed plan of conversion before the members' meeting.

(xiv) The mutual holding company may terminate the proposed conversion.

(xv) After the Board approves the proposed conversion, the mutual holding company will send proxy materials providing additional information. After the mutual holding company sends proxy materials, members may telephone or write to the mutual holding company with additional questions.

(xvi) The proposed record date for determining the eligible account holders who are entitled to receive subscription rights to purchase the shares.

(xvii) A brief description of the circumstances under which supplemental eligible account holders will receive subscription rights to purchase the shares.

(xviii) A brief description of how voting members may participate in the conversion.

(xix) A brief description of how directors, officers, and employees will participate in the conversion.

(xx) A brief description of the proposed plan of conversion.

(xxi) The par value (if any) and approximate number of shares that will be issued and sold in the conversion.

(3) *Other requirements.* (i) The mutual holding company may not solicit proxies, provide financial statements, describe the benefits of conversion, or estimate the value of the shares upon conversion in the letter, notice, or press release.

(ii) If the mutual holding company responds to inquiries about the conversion, it may address only the matters listed in paragraph (c)(2) of this section.

(d) *Amending a plan of conversion.* The mutual holding company may amend its plan of conversion before it solicits proxies. After the mutual holding company solicits proxies, it may amend the plan of conversion only if the Board concurs.

§ 239.55 Filing requirements.

(a) *Applications under this subpart.* Any filing with the Board required under this subpart must be filed in accordance with § 238.14 of this chapter. The Board will review any filing made

under this subpart in accordance with § 238.14 of this chapter.

(b) *Requirements.*(1) The application for conversion must include all of the following information.

(i) A plan of conversion meeting the requirements of § 239.54(b).

(ii) Pricing materials meeting the requirements paragraph (g)(2) of this section.

(iii) Proxy soliciting materials under § 239.57(d), including:

(A) A preliminary proxy statement with signed financial statements;

(B) A form of proxy meeting the requirements of § 239.57(b); and

(C) Any additional proxy soliciting materials, including press releases, personal solicitation instructions, radio or television scripts that the mutual holding company plans to use or furnish to the members, and a legal opinion indicating that any marketing materials comply with all applicable securities laws.

(iv) An offering circular described in § 239.58(a).

(v) The documents and information required by Form AC. The mutual holding company may obtain Form AC from the appropriate Reserve Bank and the Board's Web site (*http://www.federalreserve.gov*).

(vi) Where indicated, written consents, signed and dated, of any accountant, attorney, investment banker, appraiser, or other professional who prepared, reviewed, passed upon, or certified any statement, report, or valuation for use. See Form AC, instruction B(7).

(vii) The business plan, submitted as a separately bound, confidential exhibit. See paragraph (c) of this section.

(viii) Any additional information the Board requests.

(2) The Board will not accept for filing, and will return, any application for conversion that is improperly executed, materially deficient, substantially incomplete, or that provides for unreasonable conversion expenses.

(c) *Filing an application for conversion.* (1) The mutual holding company must file the application for conversion on Form AC with the appropriate Reserve Bank.

(2) Upon receipt of an application under this subpart, the Reserve Bank will promptly furnish notice and a copy of the application to the primary federal supervisor of any subsidiary savings association. The primary supervisor will have 30 calendar days from the date of the letter giving notice in which to submit its views and recommendations to the Board.

(d) *Confidential treatment of portions of an application for conversion.* (1) The Board makes all filings under this subpart available to the public, but may keep portions of the application for conversion confidential under paragraph (d)(2) of this section.

(2) The mutual holding company may request the Board keep portions of the application confidential. To do so, the mutual holding company must separately bind and clearly designate as ''confidential'' any portion of the application for conversion that the mutual holding company deems confidential. The mutual holding company must provide a written statement specifying the grounds supporting the request for confidentiality. The Board will not treat as confidential the portion of the application describing how the mutual holding company plans to meet the Community Reinvestment Act (CRA) objectives. The CRA portion of the application may not incorporate by reference information contained in the confidential portion of the application.

(3) The Board will determine whether confidential information must be made available to the public under 5 U.S.C. 552 and part 261 of this chapter. The Board will advise the mutual holding company before it makes information the mutual holding company designated as ''confidential'' available to the public.

(e) *Amending an application for conversion.* To amend an application for conversion, the mutual holding company must:

(1) File an amendment with an appropriate facing sheet;

(2) Number each amendment consecutively;

(3) Respond to all issues raised by the Board; and

(4) Demonstrate that the amendment conforms to all applicable regulations.

(f) *Notice of filing of application and comment process*—(1) *Public notice of an*

application for conversion. (i) The mutual holding company must publish a public notice of the application for conversion in accordance with the procedures in § 238.14 of this chapter. The mutual holding company must simultaneously prominently post the notice in its home office and in all of the branch offices of its subsidiary savings associations.

(ii) Promptly after publication, the mutual holding company must file a copy of any public notice and an affidavit of publication from each publisher with the appropriate Reserve Bank.

(iii) If the Board does not accept the application for conversion under § 239.55(g) and requires the mutual holding company to file a new application, the mutual holding company must publish and post a new notice and allow an additional 30 days for comment.

(2) *Public comments*. Commenters may submit comments on the application in accordance with the procedures in § 238.14 of this chapter. A commenter must file any comments with the appropriate Reserve Bank.

(g) *Board review of the application for conversion*—(1) *Board action on a conversion application*. The Board may approve an application for conversion only if:

(i) The conversion complies with this subpart;

(ii) The mutual holding company will meet all applicable regulatory capital requirements after the conversion; and

(iii) The conversion will not result in a taxable reorganization under the Internal Revenue Code of 1986, as amended.

(2) *Board review of appraisal*. The Board will review the appraisal required by paragraph (b)(1)(ii) of this section in determining whether to approve the application. The Board will review the appraisal under the following requirements.

(i) Independent persons experienced and expert in corporate appraisal, and acceptable to the Board, must prepare the appraisal report.

(ii) An affiliate of the appraiser may serve as an underwriter or selling agent, if the mutual holding company ensures that the appraiser is separate from the underwriter or selling agent affiliate and the underwriter or selling agent affiliate does not make recommendations or affect the appraisal.

(iii) The appraiser may not receive any fee in connection with the conversion other than for appraisal services.

(iv) The appraisal report must include a complete and detailed description of the elements of the appraisal, a justification for the appraisal methodology, and sufficient support for the conclusions.

(v) If the appraisal is based on a capitalization of the pro forma income, it must indicate the basis for determining the income to be derived from the sale of shares, and demonstrate that the earnings multiple used is appropriate, including future earnings growth assumptions.

(vi) If the appraisal is based on a comparison of the shares with outstanding shares of existing stock associations, the existing stock associations must be reasonably comparable in size, market area, competitive conditions, risk profile, profit history, and expected future earnings.

(vii) The Board may decline to process the application for conversion and deem it materially deficient or substantially incomplete if the initial appraisal report is materially deficient or substantially incomplete.

(viii) The mutual holding company may not represent or imply that the Board has approved the appraisal.

(3) *Board review of compliance record*. The Board will review the compliance record of the subsidiary savings association under the regulations applicable to the savings association and the business plan to determine how the conversion will affect the convenience and needs of its communities.

(i) Based on this review, the Board may approve the application, deny the application, or approve the application on the condition that the resulting stock holding company will improve the CRA performance or will address the particular credit or lending needs of the communities that it will serve.

(ii) The Board may deny the application if the business plan does not demonstrate that the proposed use of conversion proceeds will help the resulting stock holding company to meet the

credit and lending needs of the communities that the resulting stock holding company will serve.

(4) The Board may request that the mutual holding company amend the application if further explanation is necessary, material is missing, or material must be corrected.

(5) The Board will deny the application if the application does not meet the requirements of this subpart, unless the Board waives the requirement under § 239.50(c).

(h) *Judicial review.* (1) Any person aggrieved by the Board's final action on the application for conversion may ask the court of appeals of the United States for the circuit in which the principal office or residence of such person is located, or the U.S. Court of Appeals for the District of Columbia Circuit, to review the action under 12 U.S.C. 1467a(j), which provisions shall apply in all respects as if such final action were an order, subject to paragraph (h)(2) of this section.

(2) To obtain court review of the action, the aggrieved person must file a written petition requesting that the court modify, terminate, or set aside the final Board action. The aggrieved person must file the petition with the court within the later of 30 days after the Board publishes notice of its final action in the FEDERAL REGISTER or 30 days after the mutual holding company mails the proxy statement to its members under § 239.56(c).

§ 239.56 Vote by members.

(a) *Mutual member approval of the plan of conversion.* (1) After the Board approves the plan of conversion, the mutual holding company must submit the plan of conversion to its members for approval. The mutual holding company must obtain this approval at a meeting of its members.

(2) The members must approve the plan of conversion by a majority of the total outstanding votes.

(3) The members may vote in person or by proxy.

(4) The mutual holding company may notify eligible account holders or supplemental eligible account holders who are not voting members of the proposed conversion. The mutual holding company may include only the information in § 239.54(c) in the notice.

(b) *Eligibility to vote for the plan of conversion.* The mutual holding company determines members' eligibility to vote by setting a voting record date. The mutual holding company must set a voting record date that is not more than 60 days nor less than 20 days before the meeting.

(c) *Notifying members of the meeting.* (1) The mutual holding company must notify the members of the meeting to consider the conversion by sending the members a proxy statement.

(2) The mutual holding company must notify its members 20 to 45 days before the meeting.

(3) The mutual holding company must also notify each beneficial holder of an account at any subsidiary savings association held in a fiduciary capacity:

(i) If the subsidiary savings association is a federal association and the name of the beneficial holder is disclosed on the records of the subsidiary savings association; or

(ii) If the subsidiary savings association is a state-chartered association and the beneficial holder possesses voting rights under state law.

(d) *Submissions to the Board after the members' meeting.* (1) Promptly after the members' meeting, the mutual holding company must file all of the following information with the appropriate Reserve Bank:

(i) A certified copy of each adopted resolution on the conversion.

(ii) The total votes eligible to be cast.

(iii) The total votes represented in person or by proxy.

(iv) The total votes cast in favor of and against each matter.

(v) The percentage of votes necessary to approve each matter.

(vi) An opinion of counsel that the mutual holding company conducted the members' meeting in compliance with all applicable state or federal laws and regulations.

(2) Promptly after completion of the conversion, the mutual holding company must submit to the appropriate Reserve Bank an opinion of counsel that the mutual holding company has

complied with all laws applicable to the conversion.

§ 239.57 Proxy solicitation.

(a) *Applicability of proxy solicitation provisions.* (1) The mutual holding company must comply with these proxy solicitation provisions when the mutual holding company provides proxy solicitation material to members for the meeting to vote on the plan of conversion.

(2) Members of the mutual holding company must comply with these proxy solicitation provisions when they provide proxy solicitation materials to members for the meeting to vote on the conversion, pursuant to paragraph (f) of this section except where:

(i) The member solicits 50 people or fewer and does not solicit proxies on behalf of the mutual holding company; or

(ii) The member solicits proxies through newspaper advertisements after the board of directors adopts the plan of conversion. Any newspaper advertisements may include only the following information:

(A) The name of the mutual holding company;

(B) The reason for the advertisement;

(C) The proposal or proposals to be voted upon;

(D) Where a member may obtain a copy of the proxy solicitation material; and

(E) A request for the members of the mutual holding company to vote at the meeting.

(b) *Form of proxy.* The form of proxy must include all of the following:

(1) A statement in bold face type stating that management is soliciting the proxy.

(2) Blank spaces where the member must date and sign the proxy.

(3) Clear and impartial identification of each matter or group of related matters that members will vote upon. It must include any proposed charitable contribution as an item to be voted on separately.

(4) The phrase ''Revocable Proxy'' in bold face type (at least 18 point).

(5) A description of any charter or state law requirement that restricts or conditions votes by proxy.

(6) An acknowledgment that the member received a proxy statement before he or she signed the form of proxy.

(7) The date, time, and the place of the meeting, when available.

(8) A way for the member to specify by ballot whether he or she approves or disapproves of each matter that members will vote upon.

(9) A statement that management will vote the proxy in accordance with the member's specifications.

(10) A statement in bold face type indicating how management will vote the proxy if the member does not specify a choice for a matter.

(c) *Permissible use of proxies.* (1) The mutual holding company may not use previously executed proxies for the plan of conversion vote. If members consider the plan of conversion at an annual meeting, the mutual holding company may vote proxies obtained through other proxy solicitations only on matters not related to the plan of conversion.

(2) The mutual holding company may vote a proxy obtained under this subpart on matters that are incidental to the conduct of the meeting. The mutual holding company or its management may not vote a proxy obtained under this subpart at any meeting other than the meeting (or any adjournment of the meeting) to vote on the plan of conversion.

(d) *Proxy statement requirements*—(1) *Content requirements.* The mutual holding company must prepare the proxy statement in compliance with this subpart and Form PS. The mutual holding company may obtain Form PS from the appropriate Reserve Bank and the Board's Web site (*http://www.federalreserve.gov*).

(2) *Other requirements.* (i) The Board will review the proxy solicitation material in its review of the application for conversion.

(ii) The mutual holding company must provide a written proxy statement to the members before or at the same time the mutual holding company provides any other soliciting material. The mutual holding company must mail proxy solicitation material to the members no later than ten days after the Board approves the conversion.

(e) *Filing revised proxy materials.* (1) The mutual holding company must file revised proxy materials as an amendment to the application for conversion.

(2) To revise the proxy solicitation materials, the mutual holding company must file:

(i) Revised proxy materials as required by Form PS;

(ii) Revised form of proxy, if applicable; and

(iii) Any additional proxy solicitation material subject to paragraph (d) of this section.

(3) The mutual holding company must clearly indicate changes from the prior filing.

(4) The mutual holding company must file a definitive copy of all proxy solicitation material, in the form in which the mutual holding company furnishes the material to the members. The mutual holding company must file no later than the date that it sends or gives the proxy solicitation material to the members. The mutual holding company must indicate the date that it plans to release the materials.

(5) Unless the Board requests the mutual holding company to do so, the mutual holding company does not have to file copies of replies to inquiries from the members or copies of communications that merely request members to sign and return proxy forms.

(f) *Mailing proxy solicitation material.* (1) The mutual holding company must mail the member's proxy solicitation material if:

(i) The board of directors adopted a plan of conversion;

(ii) A member requests in writing that the mutual holding company mail the proxy solicitation material; and

(iii) The member agrees to defray reasonable expenses of the mutual holding company.

(2) As soon as practicable after the mutual holding company receives a request under paragraph (f)(1) of this section, the mutual holding company must mail or otherwise furnish the following information to the member:

(i) The approximate number of members that the mutual holding company solicited or will solicit, or the approximate number of members of any group of account holders that the member designates; and

(ii) The estimated cost of mailing the proxy solicitation material for the member.

(3) The mutual holding company must mail proxy solicitation material to the designated members promptly after the member furnishes the materials, envelopes (or other containers), and postage (or payment for postage) to the mutual holding company.

(4) The mutual holding company is not responsible for the content of a member's proxy solicitation material.

(5) A member may furnish other members its own proxy solicitation material, subject to the rules in this section.

(g) *Prohibited solicitations*—(1) *False or misleading statements.* (i) No one may use proxy solicitation material for the members' meeting if the material contains any statement which, considering the time and the circumstances of the statement:

(A) Is false or misleading with respect to any material fact;

(B) Omits any material fact that is necessary to make the statements not false or misleading; or

(C) Omits any material fact that is necessary to correct a statement in an earlier communication that has become false or misleading.

(ii) No one may represent or imply that the Board determined that the proxy solicitation material is accurate, complete, not false or not misleading, or passed upon the merits of or approved any proposal.

(2) *Other prohibited solicitations.* No person may solicit:

(i) An undated or post-dated proxy;

(ii) A proxy that states it will be dated after the date it is signed by a member;

(iii) A proxy that is not revocable at will by the member; or

(iv) A proxy that is part of another document or instrument.

(3) If a solicitation violates this section, the Board may require remedial measures, including:

(i) Correction of the violation by a retraction and a new solicitation;

(ii) Rescheduling the members' meeting; or

(iii) Any other actions necessary to ensure a fair vote.

(4) The Board may also bring an enforcement action against the violator for violations of this section.

(h) *Re-soliciting proxies.* If the mutual holding company amends its application for conversion, the Board may require it to re-solicit proxies for the members' meeting as a condition of approval of the amendment.

§ 239.58 Offering circular.

(a) *Filing requirements.* (1) The mutual holding company must prepare and file the offering circular with the appropriate Reserve Bank in compliance with this subpart and Form OC. The mutual holding company may obtain Form OC from the Reserve Bank and the Board's Web site (*http://www.federalreserve.gov*).

(2) The mutual holding company must condition the stock offering upon member approval of the plan of conversion.

(3) The Board will review the Form OC and may comment on the included disclosures and financial statements.

(4) The mutual holding company must file a revised offering circular, final offering circular, and any post-effective amendment to the final offering circular.

(5) The Board will not approve the adequacy or accuracy of the offering circular or the disclosures.

(b) *Distribution of the offering circular.* (1) The mutual holding company may distribute a preliminary offering circular at the same time as or after the mutual holding company mails the proxy statement to its members.

(2) The mutual holding company must distribute the offering circular in accordance with this subpart and with all applicable securities laws.

(3) The mutual holding company must distribute the offering circular to persons listed in the plan of conversion no later than ten days after the Board approves the conversion.

(c) *Post-effective amendments to the offering circular.* (1) The mutual holding company must file a post-effective amendment to the offering circular with the Board when a material event or change of circumstance occurs.

(2) After the Securities and Exchange Commission declares the post-effective amendment effective, the mutual holding company must immediately deliver the amendment to each person who subscribed for or ordered shares in the offering.

(3) The post-effective amendment must indicate that each person may increase, decrease, or rescind their subscription or order.

(4) The post-effective offering period must remain open no less than 10 days nor more than 20 days, unless the Board approves a longer rescission period.

§ 239.59 Offers and sales of stock.

(a) *Purchase priorities.* The mutual holding company must offer to sell the conversion shares in the following order:

(1) Eligible account holders.

(2) Tax-qualified employee stock ownership plans.

(3) Supplemental eligible account holders.

(4) Other voting members who have subscription rights.

(5) The community, the community and the general public, or the general public.

(b) *Offering conversion shares.* (1) The mutual holding company may offer to sell the conversion shares if the Board approves the conversion, subject to compliance with requirements of the Securities and Exchange Commission.

(2) The offer may commence at the same time as the proxy solicitation of the members begins.

(c) *Pricing conversion shares.* (1) The conversion shares must be sold at a uniform price per share and at a total price that is equal to the estimated pro forma market value of the shares after conversion.

(2) The maximum price must be no more than 15 percent above the midpoint of the estimated price range in the offering circular.

(3) The minimum price must be no more than 15 percent below the midpoint of the estimated price range in the offering circular.

(4) If the Board permits, the maximum price of conversion shares sold may be increased. The maximum price, as adjusted, must be no more than 15 percent above the maximum price computed under paragraph (c)(2) of this section.

(5) The maximum price must be between $5 and $50 per share.

(6) The mutual holding company must include the estimated price in any preliminary offering circular.

(d) *Selling conversion shares.* (1) The mutual holding company must distribute order forms to all eligible account holders, supplemental eligible account holders, and other voting members to enable them to subscribe for the conversion shares they are permitted under the plan of conversion. The mutual holding company may either send the order forms with the offering circular or after it distributes the offering circular.

(2) The mutual holding company may sell the conversion shares in a community offering, a public offering, or both. The mutual holding company may begin the community offering, the public offering, or both at any time during the subscription offering or upon conclusion of the subscription offering.

(3) The mutual holding company may pay underwriting commissions (including underwriting discounts). The Board may object to the payment of unreasonable commissions. The mutual holding company may reimburse an underwriter for accountable expenses in a subscription offering if the public offering is limited. If no public offering occurs, the mutual holding company may pay an underwriter a consulting fee. The Board may object to the payment of unreasonable consulting fees.

(4) If the mutual holding company conducts the community offering, the public offering, or both at the same time as the subscription offering, it must fill all subscription orders first.

(5) The mutual holding company must prepare the order form in compliance with this subpart and Form OF. The mutual holding company may obtain Form OF from the Reserve Bank and from the Board's Web site (www.federalreserve.gov).

(e) *Prohibited sales practices.* (1) In connection with offers, sales, or purchases of conversion shares under this subpart, the mutual holding company and its directors, officers, agents, or employees may not:

(i) Employ any device, scheme, or artifice to defraud;

(ii) Obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary to make the statements, in light of the circumstances under which they were made, not misleading; or

(iii) Engage in any act, transaction, practice, or course of business that operates or would operate as a fraud or deceit upon a purchaser or seller.

(2) During the conversion, no person may:

(i) Transfer, or enter into any agreement or understanding to transfer, the legal or beneficial ownership of subscription rights for the conversion shares or the underlying securities to the account of another;

(ii) Make any offer, or any announcement of an offer, to purchase any of the conversion shares from anyone but the mutual holding company; or

(iii) Knowingly acquire more than the maximum purchase allowable under the plan of conversion.

(3) The restrictions in paragraphs (e)(2)(i) and (e)(2)(ii) of this section do not apply to offers for more than 10 percent of any class of conversion shares by:

(i) An underwriter or a selling group, acting on behalf of the mutual holding company or resulting stock holding company, that makes the offer with a view toward public resale; or

(ii) One or more of the tax-qualified employee stock ownership plans so long as the plan or plans do not beneficially own more than 25 percent of any class of the equity securities in the aggregate.

(4) Any person that violates the restrictions in paragraphs (e)(2)(i) and (e)(2)(ii) of this section may face prosecution or other legal action.

(f) *Payment for conversion shares.* (1) A subscriber may purchase conversion shares with cash, by a withdrawal from a savings account, or a withdrawal from a certificate of deposit. If a subscriber purchases conversion shares by a withdrawal from a certificate of deposit, the mutual holding company or its subsidiary savings association may not assess a penalty for the withdrawal.

(2) The mutual holding company may not extend credit to any person to purchase the conversion shares.

(g) *Interest on payments for conversion shares.* (1) The mutual holding company or its subsidiary savings association must pay interest from the date it receives a payment for conversion shares until the date it completes or terminates the conversion. The mutual holding company or its subsidiary savings association must pay interest at no less than the passbook rate for amounts paid in cash, check, or money order.

(2) If a subscriber withdraws money from a savings account to purchase conversion shares, the mutual holding company or its subsidiary savings association must pay interest on the payment until the mutual holding company completes or terminates the conversion as if the withdrawn amount remained in the account.

(3) If a depositor fails to maintain the applicable minimum balance requirement because he or she withdraws money from a certificate of deposit to purchase conversion shares, the mutual holding company or its subsidiary savings association may cancel the certificate and pay interest at no less than the passbook rate on any remaining balance.

(h) *Subscription rights for each eligible account holder and each supplemental eligible account holder.* (1) The mutual holding company must give each eligible account holder subscription rights to purchase conversion shares in an amount equal to the greater of:

(i) The maximum purchase limitation established for the community offering or the public offering under paragraph (p) of this section;

(ii) One-tenth of one percent of the total stock offering; or

(iii) Fifteen times the following number: The total number of conversion shares that the mutual holding company will issue, multiplied by the following fraction: the numerator is the total qualifying deposit of the eligible account holder, and the denominator is the total qualifying deposits of all eligible account holders. The mutual holding company must round down the product of this multiplied fraction to the next whole number.

(2) The mutual holding company must give subscription rights to purchase shares to each supplemental eligible account holder in the same amount as described in paragraph (h)(1) of this section, except that the mutual holding company must compute the fraction described in paragraph (h)(1)(iii) of this section as follows: the numerator is the total qualifying deposit of the supplemental eligible account holder, and the denominator is the total qualifying deposits of all supplemental eligible account holders.

(i) *Officers, directors, and their associates as eligible account holders.* The officers, directors, and their associates of the mutual holding company and subsidiary savings association may be eligible account holders. However, if an officer, director, or his or her associate receives subscription rights based on increased deposits in the year before the eligibility record date, the mutual holding company must subordinate subscription rights for these deposits to subscription rights exercised by other eligible account holders.

(j) *Other voting members eligible to purchase conversion shares.* (1) The mutual holding company must give rights to purchase the conversion shares in the conversion to voting members who are neither eligible account holders nor supplemental eligible account holders. The mutual holding company must allocate rights to each voting member that are equal to the greater of:

(i) The maximum purchase limitation established for the community offering and the public offering under paragraph (p) of this section; or

(ii) One-tenth of one percent of the total stock offering.

(2) The mutual holding company must subordinate the voting members' rights to the rights of eligible account holders, tax-qualified employee stock ownership plans, and supplemental eligible account holders.

(k) *Purchase limitations for officers, directors, and their associates.* (1) When the mutual holding company converts, the officers, directors, and their associates of the mutual holding company and subsidiary savings association may not purchase, in the aggregate, more than the following percentage of the total stock offering:

Institution size	Officer and director purchases (percent)
$50,000,000 or less	35
$50,000,001–100,000,000	34
$100,000,001–150,000,000	33
$150,000,001–200,000,000	32
$200,000,001–250,000,000	31
$250,000,001–300,000,000	30
$300,000,001–350,000,000	29
$350,000,001–400,000,000	28
$400,000,001–450,000,000	27
$450,000,001–500,000,000	26
Over $500,000,000	25

(2) The purchase limitations in this section do not apply to shares held in tax-qualified employee stock benefit plans that are attributable to the officers, directors, and their associates.

(l) *Allocating conversion shares in the event of oversubscription.* (1) If the conversion shares are oversubscribed by the eligible account holders, the mutual holding company must allocate shares among the eligible account holders so that each, to the extent possible, may purchase 100 shares.

(2) If the conversion shares are oversubscribed by the supplemental eligible account holders, the mutual holding company must allocate shares among the supplemental eligible account holders so that each, to the extent possible, may purchase 100 shares.

(3) If a person is an eligible account holder and a supplemental eligible account holder, the mutual holding company must include the eligible account holder's allocation in determining the number of conversion shares that the mutual holding company may allocate to the person as a supplemental eligible account holder.

(4) For conversion shares that the mutual holding company does not allocate under paragraphs (l)(1) and (l)(2) of this section, the mutual holding company must allocate the shares among the eligible or supplemental eligible account holders equitably, based on the amounts of qualifying deposits. The mutual holding company must describe this method of allocation in its plan of conversion.

(5) If shares remain after the mutual holding company has allocated shares as provided in paragraphs (l)(1) and (l)(2) of this section, and if the voting members oversubscribe, the mutual holding company must allocate the conversion shares among those members equitably. The mutual holding company must describe the method of allocation in its plan of conversion.

(m) *Employee stock ownership plan purchase of conversion shares.* (1) The tax-qualified employee stock ownership plan of the mutual holding company may purchase up to 10 percent of the total offering of the conversion shares.

(2) If the Board approves a revised stock valuation range as described in paragraph (c)(5) of this section, and the final conversion stock valuation range exceeds the former maximum stock offering range, the mutual holding company may allocate conversion shares to the tax-qualified employee stock ownership plan, up to the 10 percent limit in paragraph (m)(1) of this section.

(3) If the tax-qualified employee stock ownership plan is not able to or chooses not to purchase stock in the offering, it may, with prior Board approval and appropriate disclosure in the offering circular, purchase stock in the open market, or purchase authorized but unissued conversion shares.

(4) The mutual holding company may include stock contributed to a charitable organization in the conversion in the calculation of the total offering of conversion shares under paragraphs (m)(1) and (m)(2) of this section, unless the Board objects on supervisory grounds.

(n) *Purchase limitations.* (1) The mutual holding company may limit the number of shares that any person, group of associated persons, or persons otherwise acting in concert, may subscribe to up to five percent of the total stock sold.

(2) If the mutual holding company sets a limit of five percent under paragraph (n)(1) of this section, it may modify that limit with Board approval to provide that any person, group of associated persons, or persons otherwise acting in concert subscribing for five percent, may purchase between five and ten percent as long as the aggregate amount that the subscribers purchase does not exceed 10 percent of the total stock offering.

(3) The mutual holding company may require persons exercising subscription rights to purchase a minimum number

of conversion shares. The minimum number of shares must equal the lesser of the number of shares obtained by a $500 subscription or 25 shares.

(4) In setting purchase limitations under this section, the mutual holding company may not aggregate conversion shares attributed to a person in the tax-qualified employee stock ownership plan with shares purchased directly by, or otherwise attributable to, that person.

(o) *Purchase preference for persons in the local community.* (1) In the subscription offering, subject to the purchase priorities set forth in paragraph (a) of this section, the mutual holding company may give a purchase preference to eligible account holders, supplemental eligible account holders, and voting members residing in the local community.

(2) In the community offering, the mutual holding company must give a purchase preference to natural persons residing in the local community.

(p) *Conditions on community offerings and public offerings.* (1) If the mutual holding company offers conversion shares in a community offering, a public offering, or both, it must offer and sell the stock to achieve a widespread distribution of the stock.

(2) If the mutual holding company offers shares in a community offering, a public offering, or both, it must first fill orders for the stock up to a maximum of two percent of the conversion stock on a basis that will promote a widespread distribution of stock. The mutual holding company must allocate any remaining shares on an equal number of shares per order basis until it fills all orders.

§ 239.60 Completion of the offering.

(a) *Deadline for completing the sale of stock.* The mutual holding company must complete all sales of the stock within 45 calendar days after the last day of the subscription period, unless the offering is extended under paragraph (b) of this section.

(b) *Offering period extension.* (1) The mutual holding company must request, in writing, an extension of any offering period.

(2) The Board may grant extensions of time to sell the shares. The Board will not grant any single extension of more than 90 days.

(3) If the Board grants the request for an extension of time, the mutual holding company must provide a post-effective amendment to the offering circular under § 239.58(c) to each person who subscribed for or ordered stock. The amendment must indicate that the Board extended the offering period and that each person who subscribed for or ordered stock may increase, decrease, or rescind their subscription or order within the time remaining in the extension period.

§ 239.61 Completion of the conversion.

(a) *Completion of the conversion.* (1) In the plan of conversion, the mutual holding company must set a date by which the conversion must be completed. This date must not be more than 24 months from the date that the members approve the plan of conversion. The date, once set, may not be extended by the mutual holding company or by the Board. The mutual holding company must terminate the conversion if it is not completed by that date.

(2) The conversion is complete on the date that the mutual holding company accepts the offers for stock of the resulting stock holding company.

(b) *Termination of the conversion.* (1) The members may terminate the conversion by failing to approve the conversion at the members' meeting.

(2) The mutual holding company may terminate the conversion before the members' meeting.

(3) The mutual holding company may terminate the conversion after the members' meeting only if the Board concurs.

(c) *Voting rights for stockholders following conversion.* The resulting stock holding company must provide the stockholders with exclusive voting rights.

(d) *Rights of savings account holders.* The resulting stock holding company must provide a liquidation account for each eligible and supplemental eligible account holder under § 239.62(a)(1)–(3).

§ 239.62 Liquidation accounts.

(a) *Liquidation account.* (1) A liquidation account represents the potential interest of eligible account holders and

supplemental eligible account holders in the mutual holding company's net worth at the time of conversion. The resulting stock holding company must maintain a sub-account to reflect the interest of each account holder.

(2) Before the resulting stock holding company may provide a liquidation distribution to common stockholders, the resulting stock holding company must give a liquidation distribution to those eligible account holders and supplemental eligible account holders who hold savings accounts from the time of conversion until liquidation.

(3) The resulting stock holding company may not record the liquidation account in the financial statements. The resulting stock holding company must disclose the liquidation account in the footnotes to the financial statements.

(4) The initial balance of the liquidation account is the net worth in the statement of financial condition included in the final offering circular.

(b) *Liquidation sub-accounts.* (1)(i) The resulting stock holding company determines the initial sub-account balance for a savings account held by an eligible account holder by multiplying the initial balance of the liquidation account by the following fraction: The numerator is the qualifying deposit in the savings account on the eligibility record date. The denominator is total qualifying deposits of all eligible account holders on that date.

(ii) The resulting stock holding company determines the initial sub-account balance for a savings account held by a supplemental eligible account holder by multiplying the initial balance of the liquidation account by the following fraction: The numerator is the qualifying deposit in the savings account on the supplemental eligibility record date. The denominator is total qualifying deposits of all supplemental eligible account holders on that date.

(iii) If an account holder holds a savings account on the eligibility record date and a separate savings account on the supplemental eligibility record date, the resulting stock holding company must compute separate sub-accounts for the qualifying deposits in the savings account on each record date.

(2) The resulting stock holding company may not increase the initial sub-account balances. The resulting stock holding company must decrease the initial balance under § 239.62(d) as depositors reduce or close their accounts.

(c) *Retention of voting rights based on liquidation sub-accounts.* Eligible account holders or supplemental eligible account holders do not retain any voting rights based on their liquidation sub-accounts.

(d) *Adjusting liquidation sub-accounts.* (1)(i) The resulting stock holding company must reduce the balance of an eligible account holder's or supplemental eligible account holder's sub-account if the deposit balance in the account holder's savings account at the close of business on any annual closing date, which for purposes of this section is the fiscal year end, after the relevant eligibility record dates is less than:

(A) The deposit balance in the account holder's savings account at the close of business on any other annual closing date after the relevant eligibility record date; or

(B) The qualifying deposits in the account holder's savings account on the relevant eligibility record date.

(ii) The reduction must be proportionate to the reduction in the deposit balance.

(2) If the resulting stock holding company reduces the balance of a liquidation sub-account, the resulting stock holding company may not subsequently increase it if the deposit balance increases.

(3) The resulting stock holding company is not required to adjust the liquidation account and sub-account balances at each annual closing date if it maintains sufficient records to make the computations if a liquidation subsequently occurs.

(4) The resulting stock holding company must maintain the liquidation sub-account for each account holder as long as the account holder maintains an account with the same social security number or tax identification number, as applicable.

(5) If there is a complete liquidation, the resulting stock holding company must provide each account holder with a liquidation distribution in the amount of the sub-account balance.

(e) *Liquidation defined.* (1) For purposes of this subpart, a liquidation is a sale of the assets and settlement of the liabilities with the intent to cease operations and close. Upon liquidation, the resulting stock holding company must return the charter to the governmental agency that issued it. The government agency must cancel the charter.

(2) A merger, consolidation, or similar combination or transaction with another depository institution, is not a liquidation. If the resulting stock holding company is involved in such a transaction, the surviving institution must assume the liquidation account.

(f) *Effect of liquidation on net worth.* The liquidation account does not affect the net worth.

§ 239.63 Post-conversion.

(a) *Management stock benefit plans.* (1) During the 12 months after the conversion, the resulting stock holding company may implement a stock option plan (Option Plan), an employee stock ownership plan or other tax-qualified employee stock benefit plan (collectively, ESOP), and a management recognition plan (MRP), provided the resulting stock holding company meets all of the following requirements.

(i) The resulting stock holding company discloses the plans in the proxy statement and offering circular and indicates in the offering circular that there will be a separate shareholder vote on the Option Plan and the MRP at least six months after the conversion. No shareholder vote is required to implement the ESOP. The ESOP must be tax-qualified.

(ii) The Option Plan does not exceed more than ten percent of the number of shares that the resulting stock holding company issued in the conversion.

(iii)(A) The ESOP and MRP do not exceed, in the aggregate, more than ten percent of the number of shares that the resulting stock holding company issued in the conversion. If the resulting stock holding company has tangible capital of ten percent or more following the conversion, the Board may permit the ESOP and MRP to represent, in the aggregate, up to 12 percent of the number of shares issued in the conversion; and

(B) The MRP does not exceed more than three percent of the number of shares that the resulting stock holding company issued in the conversion. If the resulting stock holding company has tangible capital of ten percent or more after the conversion, the Board may permit the MRP to represent up to four percent of the number of shares that the resulting stock holding company issued in the conversion.

(iv) No individual receives more than 25 percent of the shares under any plan.

(v) The directors who are not the officers do not receive more than five percent of the shares of the MRP or Option Plan individually, or 30 percent of any such plan in the aggregate.

(vi) The shareholders approve each of the Option Plan and the MRP by a majority of the total votes eligible to be cast at a duly called meeting before the resulting stock holding company establishes or implements the plan. The resulting stock holding company may not hold this meeting until six months after the conversion.

(vii) When the resulting stock holding company distributes proxies or related material to shareholders in connection with the vote on a plan, the resulting stock holding company states that the plan complies with Board regulations and that the Board does not endorse or approve the plan in any way. The resulting stock holding company may not make any written or oral representations to the contrary.

(viii) The resulting stock holding company does not grant stock options at less than the market price at the time of grant.

(ix) The resulting stock holding company does not fund the Option Plan or the MRP at the time of the conversion.

(x) The plan does not begin to vest earlier than one year after shareholders approve the plan, and does not vest at a rate exceeding 20 percent per year.

(xi) The plan permits accelerated vesting only for disability or death, or if the resulting stock holding company undergoes a change of control.

(xii) The plan provides that the executive officers or directors must exercise or forfeit their options in the

event the institution becomes critically undercapitalized under the applicable regulatory capital requirements, is subject to Board enforcement action, or receives a capital directive under § 263.83 of this chapter.

(xiii) The resulting stock holding company files a copy of the proposed Option Plan or MRP with the Board and certifies to the Board that the plan approved by the shareholders is the same plan that the resulting stock holding company filed with, and disclosed in, the proxy materials distributed to shareholders in connection with the vote on the plan.

(xiv) The resulting stock holding company files the plan and the certification with the Board within five calendar days after the shareholders approve the plan.

(2) The resulting stock holding company may provide dividend equivalent rights or dividend adjustment rights to allow for stock splits or other adjustments to the stock in the ESOP, MRP, and Option Plan.

(3) The restrictions in paragraph (a)(1) of this section do not apply to plans implemented more than 12 months after the conversion, provided that materials pertaining to any shareholder vote regarding such plans are not distributed within the 12 months after the conversion. If a plan adopted in conformity with paragraph (a)(1) of this section is amended more than 12 months following the conversion, the shareholders must ratify any material deviations to the requirements in paragraph (a)(1) of this section.

(b) *Restrictions on the sale of conversion shares by directors, officers, and their associates.* (1) Directors and officers who purchase conversion shares may not sell the shares for one year after the date of purchase, except that in the event of the death of the officer or director, the successor in interest may sell the shares.

(2) The resulting stock holding company must include notice of the restriction described in paragraph (b)(1) of this section on each certificate of stock that a director or officer purchases during the conversion or receives in connection with a stock dividend, stock split, or otherwise with respect to such restricted shares.

(3) The resulting stock holding company must instruct the stock transfer agent about the transfer restrictions in this section.

(4) For three years after the resulting stock holding company converts, the officers, directors, and their associates may purchase stock of the resulting stock holding company only from a broker or dealer registered with the Securities and Exchange Commission. However, the officers, directors, and their associates may engage in a negotiated transaction involving more than one percent of the outstanding stock, and may purchase stock through any of the management or employee stock benefit plans.

(c) *Repurchase of conversion shares.* (1) The resulting stock holding company may not repurchase its shares in the first year after the conversion except:

(i) In extraordinary circumstances, the resulting stock holding company may make open market repurchases of up to five percent of the outstanding stock in the first year after the conversion if the resulting stock holding company files a notice under paragraph (d)(1) of this section and the Board does not disapprove the repurchase. The Board will not approve such repurchases unless the repurchase meets the standards in paragraph (d)(3) of this section, and the repurchase is consistent with paragraph (c)(3) of this section.

(ii) The resulting stock holding company may repurchase qualifying shares of a director or conduct a Board approved repurchase pursuant to an offer made to all shareholders of the stock holding company.

(iii) Repurchases to fund management recognition plans that have been ratified by shareholders do not count toward the repurchase limitations in this section. Repurchases in the first year to fund such plans require prior written notification to the Board.

(iv) Purchases to fund tax qualified employee stock benefit plans do not count toward the repurchase limitations in this section.

(2) After the first year, the resulting stock holding company may repurchase

the shares, subject to all other applicable regulatory and supervisory restrictions and paragraph (c)(3) of this section.

(3) All stock repurchases are subject to the following restrictions.

(i) The resulting stock holding company may not repurchase the shares if the repurchase will reduce its applicable capital levels below the amount required for the liquidation account under § 239.62(a). The resulting stock holding company must comply with the capital distribution requirements of this subpart.

(ii) The restrictions on share repurchases apply to a charitable organization under § 239.64(b). The resulting stock holding company must aggregate purchases of shares by the charitable organization with the repurchases.

(d) *Board review of repurchase of conversion shares.* (1) To repurchase stock in the first year following conversion, other than repurchases under paragraphs (c)(1)(iii) or (c)(1)(iv) of this section, the resulting stock holding company must file a written notice with the appropriate Reserve Bank. The resulting stock holding company must provide the following information:

(i) The proposed repurchase program;

(ii) The effect of the repurchases on the regulatory capital and other capital levels; and

(iii) The purpose of the repurchases and, if applicable, an explanation of the extraordinary circumstances necessitating the repurchases.

(2) The resulting stock holding company must file the notice with the appropriate Reserve Bank at least thirty days before the resulting stock holding company begins the repurchase program. The Board may extend its review of the notice for an additional sixty days.

(3) The resulting stock holding company may not repurchase the shares if the Board objects to the repurchase program. The Board will not object to the repurchase program if:

(i) The repurchase program will not adversely affect the financial condition of the resulting savings association;

(ii) The resulting stock holding company submits sufficient information to evaluate the proposed repurchases;

(iii) The resulting stock holding company demonstrate extraordinary circumstances and a compelling and valid business purpose for the share repurchases; and

(iv) The repurchase program would not be contrary to other applicable regulations.

(e) *Declaring and paying dividends following conversion.* The resulting stock holding company may declare or pay a dividend on its shares after it converts if:

(1) The dividend will not reduce the regulatory capital below the amount required for the liquidation account under § 239.62(a);

(2) The resulting stock holding company complies with all applicable regulatory capital requirements after it declares or pays dividends;

(3) The resulting stock holding company complies with the capital distribution requirements under this subpart; and

(4) The resulting stock holding company does not return any capital, other than ordinary dividends, to purchasers during the term of the business plan submitted with the conversion.

(f) *Eligibility to acquire shares after conversion.* (1) For three years after the resulting stock holding company converts, no person may, directly or indirectly, acquire or offer to acquire the beneficial ownership of more than ten percent of any class of the equity securities without the Board's prior written approval. If a person violates this prohibition, the resulting stock holding company may not permit the person to vote shares in excess of ten percent, and may not count the shares in excess of ten percent in any shareholder vote.

(2) A person acquires beneficial ownership of more than ten percent of a class of shares when he or she holds any combination of the stock or revocable or irrevocable proxies under circumstances that give rise to a conclusive control determination or rebuttable control determination under §§ 238.21(a) and (d) of this chapter. The Board will presume that a person has acquired shares if the acquiror entered into a binding written agreement for the transfer of shares. For purposes of this section, an offer is made when it is

communicated. An offer does not include non-binding expressions of understanding or letters of intent regarding the terms of a potential acquisition.

(3) Notwithstanding the restrictions in this section:

(i) Paragraphs (f)(1) and (f)(2) of this section do not apply to any offer with a view toward public resale made exclusively to the resulting stock holding company, to the underwriters, or to a selling group acting on behalf of the resulting savings association.

(ii) Unless the Board objects in writing, any person may offer or announce an offer to acquire up to one percent of any class of shares. In computing the one percent limit, the person must include all of his or her acquisitions of the same class of shares during the prior 12 months.

(iii) A corporation whose ownership is, or will be, substantially the same as the ownership may acquire or offer to acquire more than ten percent of the common stock, if it makes the offer or acquisition more than one year after the resulting stock holding company converts.

(iv) One or more of the tax-qualified employee stock benefit plans may acquire the shares, if the plan or plans do not beneficially own more than 25 percent of any class of shares of the resulting savings association in the aggregate.

(v) An acquiror does not have to file a separate application to obtain Board approval under paragraph (f)(1) of this section, if the acquiror files an application under part 238 of this chapter that specifically addresses the criteria listed under paragraph (f)(4) of this section and the resulting stock holding company does not oppose the proposed acquisition.

(4) The Board may deny an application under paragraph (f)(1) of this section if the proposed acquisition:

(i) Is contrary to the purposes of this subpart;

(ii) Is manipulative or deceptive;

(iii) Subverts the fairness of the conversion;

(iv) Is likely to injure the resulting stock holding company;

(v) Is inconsistent with the plan to meet the credit and lending needs of the proposed market area;

(vi) Otherwise violates laws or regulations; or

(vii) Does not prudently deploy the conversion proceeds.

(g) *Additional requirements that apply following conversion.* After conversion, the resulting stock holding company must:

(1) Promptly register the shares under the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj, as amended). The resulting stock holding company may not deregister the shares for three years.

(2) Encourage and assist a market maker to establish and to maintain a market for the shares. A market maker for a security is a dealer who:

(i) Regularly publishes bona fide competitive bid and offer quotations for the security in a recognized interdealer quotation system;

(ii) Furnishes bona fide competitive bid and offer quotations for the security on request; or

(iii) May effect transactions for the security in reasonable quantities at quoted prices with other brokers or dealers.

(3) Use the best efforts to list the shares on a national or regional securities exchange or on the National Association of Securities Dealers Automated Quotation system.

(4) File all post-conversion reports that the Board requires.

§ 239.64 Contributions to charitable organizations.

(a) *Forming a charitable organization as part of a conversion.* When a mutual holding company converts to the stock form, it may form a charitable organization. Its contributions to the charitable organization are governed by the requirements of paragraphs (b) through (f) of this section.

(b) *Donating conversion shares or conversion proceeds to a charitable organization.* Some of the conversion shares or proceeds may be contributed to a charitable organization if:

(1) The plan of conversion provides for the proposed contribution;

(2) The members approve the proposed contribution; and

(3) The IRS either has approved, or approves within two years after formation, the charitable organization as a

tax-exempt charitable organization under the Internal Revenue Code.

(c) *Member approval of charitable contributions.* At the meeting to consider conversion of the mutual holding company, the members must separately approve by at least a majority of the total eligible votes, a contribution of conversion shares or proceeds. If the mutual holding company has a subsidiary holding company with minority shareholders, or if the subsidiary savings association has minority shareholders, and the mutual holding company is adding a charitable contribution as part of a second step stock conversion, it must also have the minority shareholders separately approve the charitable contribution by a majority of their total eligible votes.

(d) *Charitable organization contribution limits.* A reasonable amount of conversion shares or proceeds may be contributed to a charitable organization, if the contribution will not exceed limits for charitable deductions under the Internal Revenue Code and the Board does not object on supervisory grounds. If the mutual holding company or resulting stock holding company is well-capitalized pursuant to § 238.62 of this chapter, the Board generally will not object if it contributes an aggregate amount of eight percent or less of the conversion shares or proceeds.

(e) *Charitable organization requirements.* The charitable organization's charter (or trust agreement) and gift instrument must provide that:

(1) The charitable organization's primary purpose is to serve and make grants in the local community;

(2) As long as the charitable organization controls shares, it must vote those shares in the same ratio as all other shares voted on each proposal considered by the shareholders;

(3) For at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for an independent director (or trustee) from the local community. This director may not be the officer, director, or employee, or the affiliate's officer, director, or employee, and should have experience with local community charitable organizations and grant making; and

(4) For at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for a director from the board of directors or the board of directors of an acquiror or resulting institution in the event of a merger or acquisition of the organization.

(5) The Board may examine the charitable organization at the charitable organization's expense;

(6) The charitable organization must comply with all supervisory directives that the Board imposes;

(7) The charitable organization must annually provide the Board with a copy of the annual report that the charitable organization submitted to the IRS;

(8) The charitable organization must operate according to written policies adopted by its board of directors (or board of trustees), including a conflict of interest policy; and

(9) The charitable organization may not engage in self-dealing, and must comply with all laws necessary to maintain its tax-exempt status under the Internal Revenue Code.

(f) *Conflicts of interest involving the directors of the mutual holding company or resulting stock holding company.* (1) An individual who is the director, officer, or employee, or a person who has the power to direct the management or policies, or otherwise owes a fiduciary duty to the mutual holding company or resulting stock holding company and who will serve as an officer, director, or employee of the charitable organization, is subject to the following obligations:

(i) The individual must not advance their own personal or business interests, or those of others with whom the individual has a personal or business relationship, at the expense of the mutual holding company or resulting stock holding company;

(ii) If the individual has an interest in a matter or transaction before the board of directors, the individual must:

(A) Disclose to the board all material nonprivileged information relevant to the board's decision on the matter or transaction, including the existence, nature and extent of the individual's interests, and the facts known to the

individual as to the matter or transaction under consideration;

(B) Refrain from participating in the board's discussion of the matter or transaction; and

(C) Recuse themselves from voting on the matter or transaction (if the individual is a director). *See* Form AC, which provides further information or operating plans and conflict of interest plans. The mutual holding company may obtain Form AC from the appropriate Reserve Bank and the Board's Web site at *http://www.federalreserve.gov*.

(2) Before the board of directors may adopt a plan of conversion that includes a charitable organization, the mutual holding company must identify the directors that will serve on the charitable organization's board. These directors may not participate in the board's discussions concerning contributions to the charitable organization, and may not vote on the matter.

(3) The stock certificates of shares contributed to the charitable organization or that the charitable organization otherwise acquires must bear the following legend: ''The board of directors must consider the shares that this stock certificate represents as voted in the same ratio as all other shares voted on each proposal considered by the shareholders, as long as the shares are controlled by the charitable organization.''

(4) As long as the charitable organization controls shares, the resulting stock holding company must consider those shares as voted in the same ratio as all of the shares voted on each proposal considered by the shareholders.

(5) After the stock offering is complete, the resulting stock holding company must submit an executed copy of the following documents to the appropriate Reserve Bank: the charitable organization's charter and bylaws (or trust agreement), operating plan (within six months after the stock offering), conflict of interest policy, and the gift instrument for the contributions of either stock or cash to the charitable organization.

§ 239.65 Voluntary supervisory conversions.

(a) *Voluntary supervisory conversion.* (1) The mutual holding company must comply with this section and § 239.66 to engage in a voluntary supervisory conversion. This subpart applies to all voluntary supervisory conversions under sections 10(o)(7) and 10(p) of the Home Owners' Loan Act (12 U.S.C. 1467a(o) and (p)).

(2) Sections 239.50 through 239.64 also apply to a voluntary supervisory conversion, unless a requirement is clearly inapplicable.

(b) *Conducting a voluntary supervisory conversion.* In conducting a voluntary supervisory conversion, the mutual holding company may:

(1) Sell its shares to the public;

(2) Convert into stock form by merging into a state-chartered corporation; or

(3) Sell its shares directly to an acquiror, who may be an individual, company, depository institution, or depository institution holding company.

(c) *Member rights in a voluntary supervisory conversion.* Members of the mutual holding company do not have the right to approve or participate in a voluntary supervisory conversion, and will not have any legal or beneficial ownership interests in the converted association, unless the Board provides otherwise. The members may have interests in a liquidation account, if one is established.

(d) *Eligibility for a voluntary supervisory conversion.* A mutual holding company may be eligible to engage in a voluntary supervisory conversion if:

(1) Either the mutual holding company or its subsidiary savings association is significantly undercapitalized under applicable regulatory capital requirements (or the mutual holding company or its subsidiary savings association is undercapitalized under applicable regulatory capital requirements and a standard conversion that would make it adequately capitalized is not feasible) and will be a viable entity following the conversion;

(2) Severe financial conditions threaten stability of the mutual holding company, and a conversion is likely to improve its financial condition.

(e) A mutual holding company or its subsidiary savings association will be a viable entity following the conversion if it satisfies all of the following:

(1) It will be adequately capitalized as a result of the conversion;

(2) It, the proposed conversion, and its acquiror(s) comply with applicable supervisory policies;

(3) The transaction is in the best interest of the mutual holding company and its subsidiary savings associations, and the best interest of the Deposit Insurance Fund and the public; and

(4) The transaction will not injure or be detrimental to the mutual holding company and its subsidiary savings associations, the Deposit Insurance Fund, or the public interest.

(f) *Plan of voluntary supervisory conversion*. A majority of the board of directors of the mutual holding company must approve a plan of voluntary supervisory conversion. The mutual holding company must include all of the following information in the plan of voluntary supervisory conversion.

(1) The name and address of the mutual holding company.

(2) The name, address, date and place of birth, and social security number or tax identification number, as applicable, of each proposed purchaser of conversion shares and a description of that purchaser's relationship to the mutual holding company.

(3) The title, per-unit par value, number, and per-unit and aggregate offering price of shares that the mutual holding company will issue.

(4) The number and percentage of shares that each investor will purchase.

(5) The aggregate number and percentage of shares that each director, officer, and any affiliates or associates of the director or officer will purchase.

(6) A description of any liquidation account.

(7) Certified copies of all resolutions of the board of directors relating to the conversion.

(g) *Voluntary supervisory conversion application*. The mutual holding company must include all of the following information and documents in a voluntary supervisory conversion application to the Board under this subpart:

(1) *Eligibility*. (i) Evidence establishing that the mutual holding company meets the eligibility requirements under paragraph (d) of this section.

(ii) An opinion of qualified, independent counsel or an independent, certified public accountant regarding the tax consequences of the conversion, or an IRS ruling indicating that the transaction qualifies as a tax-free reorganization.

(2) *Plan of conversion*. A plan of voluntary supervisory conversion that complies with paragraph (e) of this section.

(3) *Business plan*. A business plan that complies with § 239.53(b), when required by the Board.

(4) *Financial data*. (i) The most recent audited financial statements and Thrift Financial Report. The mutual holding company must explain how its current capital levels or the capital levels of its subsidiary savings associations make it eligible to engage in a voluntary supervisory conversion under paragraph (d) of this section.

(ii) A description of the estimated conversion expenses.

(iii) Evidence supporting the value of any non-cash asset contributions. Appraisals must be acceptable to the Board and the non-cash asset must meet all other Board policy guidelines.

(iv) Pro forma financial statements that reflect the effects of the transaction. The mutual holding company must identify the tangible, core, and risk-based capital levels and show the adjustments necessary to compute the capital levels. The mutual holding company must prepare the pro forma statements in conformance with Board regulations and policy.

(5) *Proposed documents*. (i) The proposed charter and bylaws.

(ii) The proposed stock certificate form.

(6) *Agreements*. (i) A copy of any agreements between the mutual holding company and proposed purchasers.

(ii) A copy and description of all existing and proposed employment contracts. The mutual holding company must describe the term, salary, and severance provisions of the contract, the identity and background of the officer or employee to be employed, and

the amount of any conversion shares to be purchased by the officer or employee or his or her affiliates or associates.

(7) *Related applications.* (i) All filings required under the securities offering rules of subpart E of this part.

(ii) Any required Holding Company Act application or Control Act notice under part 238 of this chapter.

(iii) A subordinated debt application, if applicable.

(iv) Applications for permission to organize a stock savings and loan holding company and for approval of a merger.

(v) A statement describing any other applications required under federal or state banking laws for all transactions related to the conversion, copies of all dispositive documents issued by regulatory authorities relating to the applications, and, if requested by the Board, copies of the applications and related documents.

(8) *Waiver request.* A description of any of the features of the application that do not conform to the requirements of this subpart, including any request for waiver of any of these requirements.

(h) *Offers and sales of stock.* If the mutual holding company converts under this subpart, the conversion shares must be offered and sold in compliance with § 239.59.

(i) *Post-conversion acquisition of shares.* For three years after the completion of a voluntary supervisory conversion, neither the resulting stock holding company nor the principal shareholder(s) may acquire shares from minority shareholders without the Board's prior approval.

§ 239.66 Board review of the voluntary supervisory conversion application.

(a) *Board review of a voluntary supervisory conversion application.* The Board will generally approve the application to engage in a voluntary supervisory conversion unless it determines:

(1) The mutual holding company does not meet the eligibility requirements for a voluntary supervisory conversion under §§ 239.65(d) or because the proceeds from the sale of the conversion stock, less the expenses of the conversion, would be insufficient to satisfy any applicable viability requirement;

(2) The transaction is detrimental to or would cause potential injury to the mutual holding company, its subsidiary savings association, or the Deposit Insurance Fund or is contrary to the public interest;

(3) The mutual holding company or the acquiror, or the controlling parties or directors and officers of the mutual holding company or the acquiror, have engaged in unsafe or unsound practices in connection with the voluntary supervisory conversion; or

(4) The mutual holding company fails to justify an employment contract incidental to the conversion, or the employment contract will be an unsafe or unsound practice or represent a sale of control. In a voluntary supervisory conversion, the Board generally will not approve employment contracts of more than one year for the existing management.

(b) *Conditions the Board may impose on an approval.* (1) The Board will condition approval of a voluntary supervisory conversion application on all of the following.

(i) The conversion stock sale must be complete within three months after the Board approves the application. The Board may grant an extension for good cause.

(ii) The mutual holding company and the resulting stock holding company must comply with all filing requirements of subpart E of this part.

(iii) The mutual holding company must submit an opinion of independent legal counsel indicating that the sale of the shares complies with all applicable state securities law requirements.

(iv) The mutual holding company and the resulting stock holding company must comply with all applicable laws, rules, and regulations.

(v) The mutual holding company and the resulting stock holding company must satisfy any other requirements or conditions the Board may impose.

(2) The Board may condition approval of a voluntary supervisory conversion application on either of the following:

(i) The mutual holding company and the resulting stock holding company must satisfy any conditions and restrictions the Board imposes to prevent

unsafe or unsound practices, to protect the Deposit Insurance Fund and the public interest, and to prevent potential injury or detriment to the mutual holding company before and after the conversion. The Board may impose these conditions and restrictions on the mutual holding company and the resulting stock holding company (before and after the conversion), the acquiror, controlling parties, or directors and officers of the mutual holding company or the acquiror; or

(ii) The mutual holding company or the resulting stock holding company must infuse a larger amount of capital, if necessary, for safety and soundness reasons.

APPENDIX A TO PART 239—MUTUAL HOLDING COMPANY MODEL CHARTER

FEDERAL MUTUAL HOLDING COMPANY CHARTER

Section 1: Corporate title. The name of the mutual holding company is ____(the ''Mutual Holding Company'').

Section 2: Duration. The duration of the Mutual Holding Company is perpetual.

Section 3: Purpose and powers. The purpose of the Mutual Holding Company is to pursue any or all of the lawful objectives of a federal mutual savings and loan holding company chartered under section 10(o) of the Home Owners' Loan Act, 12 U.S.C. 1467a(o), and to exercise all of the express, implied, and incidental powers conferred thereby and all acts amendatory thereof and supplemental thereto, subject to the Constitution and the laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Federal Reserve Board (''Board'').

Section 4: Capital. The Mutual Holding Company shall have no capital stock.

Section 5: Members. [The content of this section 5 shall be identical to the content of the parallel section in the charter of the reorganizing association, with the following exceptions: (A) Any provisions conferring membership rights upon borrowers of the reorganizing association shall be eliminated and replaced with provisions grandfathering those rights in accordance with 12 CFR 239.5; and (B) appropriate changes shall be made to indicate that membership rights in the mutual holding company derive from deposit accounts in and, to the extent of any grandfather provisions, borrowings from the resulting association. Set forth below is an example of how section 5 should appear in the charter of a mutual holding company formed by a reorganizing association whose charter conforms to the model charter prescribed for federal mutual savings associations for calendar year 1989. Additional changes to this section 5 may be required whenever a mutual holding company reorganization involves an acquiree association, or a mutual holding company makes a post-reorganization acquisition of a mutual savings association, so as to preserve the membership rights of the members of the acquired association consistent with 12 CFR 239.5.]

All holders of the savings, demand, or other authorized accounts of ____[insert the name of the resulting association] (the ''Association'') are members of the Mutual Holding Company. With respect to all questions requiring action by the members of the Mutual Holding Company, each holder of an account in the Association shall be permitted to cast one vote for each $100, or fraction thereof, of the withdrawal value of the member's account. In addition, borrowers from the Association as of ____[insert the date of the reorganization or any earlier date as of which new borrowings ceased to result in membership rights] shall be entitled to one vote for the period of time during which such borrowings are in existence. [The foregoing sentence should be included only if the charter of the reorganizing association confers voting rights on any borrowers.] No member, however, shall cast more than one thousand votes. All accounts shall be nonassessable.

Section 6. Directors. The Mutual Holding Company shall be under the direction of a board of directors. The authorized number of directors shall not be fewer than five nor more than fifteen, as fixed in the Mutual Holding Company's bylaws, except that the number of directors may be decreased to a number less than five or increased to a number greater than fifteen with the prior approval of the Board.

Section 7: Capital, surplus, and distribution of earnings. [The content of this section 7 shall be identical to the content of the parallel section in the charter of the reorganizing association, except for changes made to indicate that distribution rights in the mutual holding company derive from deposit accounts in the resulting association, any changes required to provide that the Board shall be the approving authority in instances where the charter requires regulatory approval of distributions, and any other changes necessary to accommodate the mutual holding company format. Set forth below is an example of how section 7 should appear in the charter of a mutual holding company formed by a reorganizing association whose charter conforms to the model charter prescribed for federal mutual savings associations for calendar year 1989. Additional changes to this section 7 may be required whenever a mutual holding company reorganization involves an acquiree association, or a mutual holding company makes a

post-reorganization acquisition of a mutual savings association, so as to preserve the membership rights of the members of the acquired association consistent with 12 CFR 239.5].

The Mutual Holding Company shall distribute net earnings to account holders of the Association on such basis and in accordance with such terms and conditions as may from time to time be authorized by the Board, provided that the Mutual Holding Company may establish minimum account balance requirements for account holders to be eligible for distributions of earnings.

All holders of accounts of the Association shall be entitled to equal distribution of the assets of the Mutual Holding Company, *pro rata* to the value of their accounts in the Association, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the Mutual Holding Company.

Section 8. Amendment. Adoption of any preapproved charter amendment shall be effective after such preapproved amendment has been approved by the members at a legal meeting. Any other amendment, addition, change, or repeal of this charter must be approved by the Board prior to approval by the members at a legal meeting and shall be effective upon filing with the Board in accordance with regulatory procedures.

Attest: _____
Secretary of the Association
By: _____
President or Chief Executive Officer of the Association
By: _____
Secretary of the Board of Governors of the Federal Reserve System
Effective Date: _____

APPENDIX B TO PART 239—SUBSIDIARY HOLDING COMPANY OF A MUTUAL HOLDING COMPANY MODEL CHARTER

FEDERAL MHC SUBSIDIARY HOLDING COMPANY CHARTER

Section 1. Corporate title. The full corporate title of the mutual holding company (''MHC'') subsidiary holding company is XXX.

Section 2. Domicile. The domicile of the MHC subsidiary holding company shall be in the city of __, in the State of __.

Section 3. Duration. The duration of the MHC subsidiary holding company is perpetual.

Section 4. Purpose and powers. The purpose of the MHC subsidiary holding company is to pursue any or all of the lawful objectives of a federal mutual holding company chartered under section 10(o) of the Home Owners' Loan Act, 12 U.S.C. 1467a(o), and to exercise all of the express, implied, and incidental powers conferred thereby and by all acts amendatory thereof and supplemental thereto, subject to the Constitution and laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Board of Governors of the Federal Reserve System (''Board'').

Section 5. Capital stock. The total number of shares of all classes of the capital stock that the MHC subsidiary holding company has the authority to issue is __, all of which shall be common stock of par [or if no par is specified then shares shall have a stated] value of __ per share. The shares may be issued from time to time as authorized by the board of directors without the approval of its shareholders, except as otherwise provided in this section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares shall be paid in full before their issuance and shall not be less than the par [or stated] value. Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of the MHC subsidiary holding company. The consideration for the shares shall be cash, tangible or intangible property (to the extent direct investment in such property would be permitted to the MHC subsidiary holding company), labor, or services actually performed for the MHC subsidiary holding company, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the MHC subsidiary holding company, shall be conclusive. Upon payment of such consideration, such shares shall be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the MHC subsidiary holding company that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend shall be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the MHC subsidiary holding company, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) shall be issued, directly or indirectly, to officers, directors, or controlling persons (except for shares issued to the parent mutual holding company) of the MHC subsidiary holding company other than as part of a general public offering or as qualifying shares to a director, unless the issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

The holders of the common stock shall exclusively possess all voting power. Each holder of shares of common stock shall be entitled to one vote for each share held by such holder, except as to the cumulation of

votes for the election of directors, unless the charter provides that there shall be no such cumulative voting. Subject to any provision for a liquidation account, in the event of any liquidation, dissolution, or winding up of the MHC subsidiary holding company, the holders of the common stock shall be entitled, after payment or provision for payment of all debts and liabilities of the MHC subsidiary holding company, to receive the remaining assets of the MHC subsidiary holding company available for distribution, in cash or in kind. Each share of common stock shall have the same relative rights as and be identical in all respects with all the other shares of common stock.

Section 6. Preemptive rights. Holders of the capital stock of the MHC subsidiary holding company shall not be entitled to preemptive rights with respect to any shares of the MHC subsidiary holding company which may be issued.

Section 7. Directors. The MHC subsidiary holding company shall be under the direction of a board of directors. The authorized number of directors, as stated in the MHC subsidiary holding company's bylaws, shall not be fewer than five nor more than fifteen except when a greater or lesser number is approved by the Board, or his or her delegate.

Section 8. Amendment of charter. Except as provided in Section 5, no amendment, addition, alteration, change or repeal of this charter shall be made, unless such is proposed by the board of directors of the MHC subsidiary holding company, approved by the shareholders by a majority of the votes eligible to be cast at a legal meeting, unless a higher vote is otherwise required, and approved or preapproved by the Board.

Attest: _____
Secretary of the Subsidiary Holding Company
By: _____
President or Chief Executive Officer of the Subsidiary Holding Company
By: _____
Secretary of the Board of Governors of the Federal Reserve System
Effective Date: _____

APPENDIX C TO PART 239—MUTUAL HOLDING COMPANY MODEL BYLAWS

MODEL BYLAWS FOR MUTUAL HOLDING COMPANIES

The term ''trustees'' may be substituted for the term ''directors.''

1. Annual meeting of members. The annual meeting of the members of the mutual holding company for the election of directors and for the transaction of any other business of the mutual holding company shall be held, as designated by the board of directors, at a location within the state that constitutes the principal place of business of the mutual holding company, or at any other convenient place the board of directors may designate, at (insert date and time within 150 days after the end of the mutual holding company's fiscal year, if not a legal holiday, or if a legal holiday then on the next succeeding day not a legal holiday). At each annual meeting, the officers shall make a full report of the financial condition of the mutual holding company and of its progress for the preceding year and shall outline a program for the succeeding year.

2. Special meetings of members. Special meetings of the members of the mutual holding company may be called at any time by the president or the board of directors and shall be called by the president, a vice president, or the secretary upon the written request of members of record, holding in the aggregate at least one-tenth of the voting capital of the mutual holding company. Such written request shall state the purpose of the meeting and shall be delivered at the principal place of business of the mutual holding company addressed to the president. For purposes of this section, ''voting capital'' means FDIC-insured deposits as of the voting record date. Annual and special meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order or any other set of written procedures agreed to by the board of directors.

3. Notice of meeting of members. Notice of each meeting shall be either published once a week for the two successive calendar weeks (in each instance on any day of the week) immediately prior to the week in which such meeting shall convene, in a newspaper printed in the English language and of general circulation in the city or county in which the principal place of business of the mutual holding company is located, or mailed postage prepaid at least (insert number no less than 15) days and not more than (insert number not more than 45) days prior to the date on which such meeting shall convene, to each of its members of record at the last address appearing on the books of the mutual holding company. Such notice shall state the name of the mutual holding company, the place of the meeting, the date and time when it shall convene, and the matters to be considered. A similar notice shall be posted in a conspicuous place in each of the offices of the mutual holding company during the 14 days immediately preceding the date on which such meeting shall convene. If any member, in person or by authorized attorney, shall waive in writing notice of any meeting of members, notice thereof need not be given to such member. When any meeting is adjourned for 30 days or more, notice of the adjournment and reconvening of the meeting shall be given as in the case of the original meeting.

4. Fixing of record date. For the purpose of determining members entitled to notice of or

to vote at any meeting of members or any adjournment thereof, or in order to make a determination of members for any other proper purpose, the board of directors shall fix in advance a record date for any such determination of members. Such date shall be not more than 60 days nor fewer than 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The member entitled to participate in any such action shall be the member of record on the books of the mutual holding company on such record date. The number of votes which each member shall be entitled to cast at any meeting of the members shall be determined from the books of the mutual holding company as of such record date. Any member of such record date who ceases to be a member prior to such meeting shall not be entitled to vote at that meeting. The same determination shall apply to any adjourned meeting.

5. Member quorum. Any number of members present and voting, represented in person or by proxy, at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of the members shall determine any question, unless otherwise required by regulation. Directors, however, are elected by a plurality of the votes cast at an election of directors. At any adjourned meeting any business may be transacted which might have been transacted at the meeting as originally called. Members present at a duly constituted meeting may continue to transact business until adjournment.

6. Voting by proxy. Voting at any annual or special meeting of the members may be by proxy pursuant to the rules and regulations of the Board of Governors of the Federal Reserve System (Board), provided, that no proxies shall be voted at any meeting unless such proxies shall have been placed on file with the secretary of the mutual holding company, for verification, prior to the convening of such meeting. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the member. All proxies with a term greater than eleven months or solicited at the expense of the mutual holding company must run to the board of directors as a whole, or to a committee appointed by a majority of such board. Accounts held by an administrator, executor, guardian, conservator or receiver may be voted in person or by proxy by such person. Accounts held by a trustee may be voted by such trustee either in person or by proxy, in accordance with the terms of the trust agreement, but no trustee shall be entitled to vote accounts without a transfer of such accounts into the trustee name. Accounts held in trust in an IRA or Keogh Account, however, may be voted by the mutual holding company if no other instructions are received. Joint accounts shall be entitled to no more than 1000 votes, and any owner may cast all the votes unless the mutual holding company has otherwise been notified in writing.

7. Communication between members. Communication between members shall be subject to any applicable rules or regulations of the Board. No member, however, shall have the right to inspect or copy any portion of any books or records of a mutual holding company containing: (i) a list of depositors in or borrowers from such mutual holding company; (ii) their addresses; (iii) individual deposit or loan balances or records; or (iv) any data from which such information could reasonably be constructed.

8. Number of directors, membership. The number of directors shall be ____[not fewer than five nor more than fifteen], except where authorized by the Board. Each director shall be a member of the mutual holding company. Directors shall be elected for periods of one to three years and until their successors are elected and qualified, but if a staggered board is chosen, provision shall be made for the election of approximately one-third or one-half of the board each year, as appropriate.

9. Meetings of the board. The board of directors shall meet regularly without notice at the principal place of business of the mutual holding company at least once each month at an hour and date fixed by resolution of the board, provided that the place of meeting may be changed by the directors. Special meetings of the board may be held at any place specified in a notice of such meeting and shall be called by the secretary upon the written request of the chairman or of three directors. All special meetings shall be held upon at least 24 hours written notice to each director unless notice is waived in writing before or after such meeting. Such notice shall state the place, date, time, and purposes of such meeting. A majority of the authorized directors shall constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board. Action may be taken without a meeting if unanimous written consent is obtained for such action. The board may also permit telephonic participation at meetings. The meetings shall be under the direction of a chairman, appointed annually by the board, or in the absence of the chairman, the meetings shall be under the direction of the president.

10. Officers, employees, and agents. Annually at the meeting of the board of directors of the mutual holding company following the annual meeting of the members of the mutual holding company, the board shall elect a president, one or more vice presidents, a secretary, and a treasurer or comptroller: Provided, that the offices of president and

secretary may not be held by the same person and a vice president may also be the treasurer or comptroller. The board may appoint such additional officers, employees, and agents as it may from time to time determine. The term of office of all officers shall be one year or until their respective successors are elected and qualified. Any officer may be removed at any time by the board with or without cause, but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the person so removed. In the absence of designation from time to time of powers and duties by the board, the officers shall have such powers and duties as generally pertain to their respective offices. Any indemnification by the mutual holding company of the mutual holding company's personnel is subject to any applicable rules or regulations of the Board.

11. Vacancies, resignation or removal of directors. Members of the mutual holding company shall elect directors by ballot: Provided, that in the event of a vacancy on the board between meetings of members, the board of directors may, by their affirmative vote, fill such vacancy, even if the remaining directors constitute less than a quorum. A director elected to fill a vacancy shall be elected to serve only until the next election of directors by the members. Any director may resign at any time by sending a written notice of such resignation to the mutual holding company delivered to the secretary. Unless otherwise specified therein such resignation shall take effect upon receipt by the secretary. More than three consecutive absences from regular meetings of the board, unless excused by resolution of the board, shall automatically constitute a resignation, effective when such resignation is accepted by the board. At a meeting of members called expressly for that purpose, directors or the entire board may be removed, only with cause, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

12. Powers of the board. The board of directors shall have the power: (a) By resolution, to appoint from among its members and remove an executive committee, which committee shall have and may exercise the powers of the board between the meetings of the board, but no such committee shall have the authority of the board to amend the charter or bylaws, adopt a plan of merger, consolidation, dissolution, or provide for the disposition of all or substantially all the property and assets of the mutual holding company. Such committee shall not operate to relieve the board, or any member thereof, of any responsibility imposed by law; (b) To appoint and remove by resolution the members of such other committees as may be deemed necessary and prescribe the duties thereof; (c) To fix the compensation of directors, officers, and employees; and to remove any officer or employee at any time with or without cause; (d) To limit payments on capital which may be accepted; and (e) To exercise any and all of the powers of the mutual holding company not expressly reserved by the charter to the members.

13. Execution of instruments, generally. All documents and instruments or writings of any nature shall be signed, executed, verified, acknowledged, and delivered by such officers, agents, or employees of the mutual holding company or any one of them and in such manner as from time to time may be determined by resolution of the board. All notes, drafts, acceptances, checks, endorsements, and all evidences of indebtedness of the mutual holding company whatsoever shall be signed by such officer or officers or such agent or agents of the mutual holding company and in such manner as the board may from time to time determine. Endorsements for deposit to the credit of the mutual holding company in any of its duly authorized depositories shall be made in such manner as the board may from time to time determine. Proxies to vote with respect to shares or accounts of other mutual holding companies or stock of other corporations owned by, or standing in the name of, the mutual holding company may be executed and delivered from time to time on behalf of the mutual holding company by the president or a vice president and the secretary or an assistant secretary of the mutual holding company or by any other persons so authorized by the board.

14. Nominating committee. The chairman, at least 30 days prior to the date of each annual meeting, shall appoint a nominating committee of three individuals who are members of the mutual holding company. Such committee shall make nominations for directors in writing and deliver to the secretary such written nominations at least 15 days prior to the date of the annual meeting, which nominations shall then be posted in a prominent place in the principal place of business for the 15-day period prior to the date of the annual meeting, except in the case of a nominee substituted as a result of death or other incapacity. Provided such committee is appointed and makes such nominations, no nominations for directors except those made by the nominating committee shall be voted upon at the annual meeting unless other nominations by members are made in writing and delivered to the secretary of the mutual holding company at least 10 days prior to the date of the annual meeting, which nominations shall then be posted in a prominent place in the principal place of business for the 10-day period prior to the date of the annual meeting, except in the case of a nominee substituted as a result of death or other incapacity. Ballots bearing the names of all individuals nominated by

the nominating committee and by other members prior to the annual meeting shall be provided for use by the members at the annual meeting. If at any time the chairman shall fail to appoint such nominating committee, or the nominating committee shall fail or refuse to act at least 15 days prior to the annual meeting, nominations for directors may be made at the annual meeting by any member and shall be voted upon.

15. New business. Any new business to be taken up at the annual meeting, including any proposal to increase or decrease the number of directors of the mutual holding company, shall be stated in writing and filed with the secretary of the mutual holding company at least 30 days before the date of the annual meeting, and all business so stated, proposed, and filed shall be considered at the annual meeting; but no other proposal shall be acted upon at the annual meeting. Any member may make any other proposal at the annual meeting and the same may be discussed and considered; but unless stated in writing and filed with the secretary 30 days before the meeting, such proposal shall be laid over for action at an adjourned, special, or regular meeting of the members taking place at least 30 days thereafter. This provision shall not prevent the consideration and approval or disapproval at the annual meeting of the reports of officers and committees, but in connection with such reports no new business shall be acted upon at such annual meeting unless stated and filed as herein provided.

16. Seal. The seal shall be two concentric circles between which shall be the name of the mutual holding company. The year of incorporation, the word ''Incorporated'' or an emblem may appear in the center.

17. Amendment. Adoption of any bylaw amendment pursuant to §239.15 of the Board's regulations, as long as consistent with applicable law, rules and regulations, and which adequately addresses the subject and purpose of the stated by law section, shall be effective after (i) approval of the amendment by a majority vote of the authorized board, or by a vote of the members of the mutual holding company at a legal meeting; and (ii) receipt of any applicable regulatory approval. When a mutual holding company fails to meet its quorum requirement solely due to vacancies on the board, the bylaws may be amended by an affirmative vote of a majority of the sitting board.

18. Age limitations. [Bylaws on age limitations must comply with all Federal laws, such as the Age Discrimination in Employment Act and the Employee Retirement Income Security Act.]

(a) Directors. No individual ____ years of age shall be eligible for election, reelection, appointment, or reappointment to the board of the mutual holding company. No director shall serve as such beyond the annual meeting of the mutual holding company immediately following the director becoming ____(fill in age used above), except that a director serving on ____(fill in bylaw adoption date) may complete the term as director. This age limitation does not apply to an advisory director.

(b) Officers. No individual ____ years of age shall be eligible for election, reelection, appointment, or reappointment as an officer of the mutual holding company. No officer shall serve beyond the annual meeting of the mutual holding company immediately following the officer becoming ____(fill in age used above), except that an officer serving on ____(fill in bylaw adoption date) may complete the term. However, an officer shall, at the option of the board, retire at age ____ if the officer has served in an executive or high policy-making post for at least two years immediately prior to retirement and is immediately entitled to nonforfeitable annual retirement benefits of at least ____.

APPENDIX D TO PART 239—SUBSIDIARY HOLDING COMPANY OF A MUTUAL HOLDING COMPANY MODEL BYLAWS

MHC SUBSIDIARY HOLDING COMPANY BYLAWS

ARTICLE I—HOME OFFICE

The home office of the Subsidiary Holding Company shall be at _____. [set forth the full address] in the County of _____, in the State of _____.

ARTICLE II—SHAREHOLDERS

Section 1. Place of Meetings. All annual and special meetings of shareholders shall be held at the home office of the Subsidiary Holding Company or at such other convenient place as the board of directors may determine.

Section 2. Annual Meeting. A meeting of the shareholders of the Subsidiary Holding Company for the election of directors and for the transaction of any other business of the Subsidiary Holding Company shall be held annually within 150 days after the end of the Subsidiary Holding Company's fiscal year on the ____of ____ if not a legal holiday, and if a legal holiday, then on the next day following which is not a legal holiday, at ____, or at such other date and time within such 150-day period as the board of directors may determine.

Section 3. Special Meetings. Special meetings of the shareholders for any purpose or purposes, unless otherwise prescribed by the regulations of the Board of Governors of the Federal Reserve System (''Board''), may be called at any time by the chairman of the board, the president, or a majority of the board of directors, and shall be called by the chairman of the board, the president, or the

secretary upon the written request of the holders of not less than one-tenth of all of the outstanding capital stock of the Subsidiary Holding Company entitled to vote at the meeting. Such written request shall state the purpose or purposes of the meeting and shall be delivered to the home office of the Subsidiary Holding Company addressed to the chairman of the board, the president, or the secretary.

Section 4. Conduct of Meetings. Annual and special meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order unless otherwise prescribed by regulations of the Board or these bylaws or the board of directors adopts another written procedure for the conduct of meetings. The board of directors shall designate, when present, either the chairman of the board or president to preside at such meetings.

Section 5. Notice of Meetings. Written notice stating the place, day, and hour of the meeting and the purpose(s) for which the meeting is called shall be delivered not fewer than 20 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chairman of the board, the president, or the secretary, or the directors calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the mail, addressed to the shareholder at the address as it appears on the stock transfer books or records of the Subsidiary Holding Company as of the record date prescribed in section 6 of this article II with postage prepaid. When any shareholders' meeting, either annual or special, is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. It shall not be necessary to give any notice of the time and place of any meeting adjourned for less than 30 days or of the business to be transacted at the meeting, other than an announcement at the meeting at which such adjournment is taken.

Section 6. Fixing of Record Date. For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors shall fix in advance a date as the record date for any such determination of shareholders. Such date in any case shall be not more than 60 days and, in case of a meeting of shareholders, not fewer than 10 days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment.

Section 7. Voting Lists. At least 20 days before each meeting of the shareholders, the officer or agent having charge of the stock transfer books for shares of the Subsidiary Holding Company shall make a complete list of the shareholders of record entitled to vote at such meeting, or any adjournment thereof, arranged in alphabetical order, with the address and the number of shares held by each. This list of shareholders shall be kept on file at the home office of the Subsidiary Holding Company and shall be subject to inspection by any shareholder of record or the shareholder's agent at any time during usual business hours for a period of 20 days prior to such meeting. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to inspection by any shareholder of record or any shareholder's agent during the entire time of the meeting. The original stock transfer book shall constitute prima facie evidence of the shareholders entitled to examine such list or transfer books or to vote at any meeting of shareholders. In lieu of making the shareholder list available for inspection by shareholders as provided in the preceding paragraph, the board of directors may elect to follow the procedures prescribed in §239.26(d) of the Board's regulations as now or hereafter in effect.

Section 8. Quorum. A majority of the outstanding shares of the Subsidiary Holding Company entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. If less than a majority of the outstanding shares is represented at a meeting, a majority of the shares so represented may adjourn the meeting from time to time without further notice. At such adjourned meeting at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the meeting as originally notified. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to constitute less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number of shareholders voting together or voting by classes is required by law or the charter. Directors, however, are elected by a plurality of the votes cast at an election of directors.

Section 9. Proxies. At all meetings of shareholders, a shareholder may vote by proxy executed in writing by the shareholder or by his or her duly authorized attorney in fact. Proxies may be given telephonically or electronically as long as the holder uses a

procedure for verifying the identity of the shareholder. Proxies solicited on behalf of the management shall be voted as directed by the shareholder or, in the absence of such direction, as determined by a majority of the board of directors. No proxy shall be valid more than eleven months from the date of its execution except for a proxy coupled with an interest.

Section 10. Voting of Shares in the Name of Two or More Persons. When ownership stands in the name of two or more persons, in the absence of written directions to the Subsidiary Holding Company to the contrary, at any meeting of the shareholders of the Subsidiary Holding Company any one or more of such shareholders may cast, in person or by proxy, all votes to which such ownership is entitled. In the event an attempt is made to cast conflicting votes, in person or by proxy, by the several persons in whose names shares of stock stand, the vote or votes to which those persons are entitled shall be cast as directed by a majority of those holding such and present in person or by proxy at such meeting, but no votes shall be cast for such stock if a majority cannot agree.

Section 11. Voting of Shares by Certain Holders. Shares standing in the name of another corporation may be voted by any officer, agent, or proxy as the bylaws of such corporation may prescribe, or, in the absence of such provision, as the board of directors of such corporation may determine. Shares held by an administrator, executor, guardian, or conservator may be voted by him or her, either in person or by proxy, without a transfer of such shares into his or her name. Shares standing in the name of a trustee may be voted by him or her, either in person or by proxy, but no trustee shall be entitled to vote shares held by him or her without a transfer of such shares into his or her name. Shares held in trust in an IRA or Keogh Account, however, may by voted by the Subsidiary Holding Company if no other instructions are received. Shares standing in the name of a receiver may be voted by such receiver, and shares held by or under the control of a receiver may be voted by such receiver without the transfer into his or her name if authority to do so is contained in an appropriate order of the court or other public authority by which such receiver was appointed. A shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred. Neither treasury shares of its own stock held by the Subsidiary Holding Company nor shares held by another corporation, if a majority of the shares entitled to vote for the election of directors of such other corporation are held by the Subsidiary Holding Company, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting. [If charter authorizes cumulative voting, the following Section 12 shall apply, otherwise renumber Sections 13–16 as Sections 12–15.]

Section 12. Cumulative Voting. Every shareholder entitled to vote at an election for directors shall have the right to vote, in person or by proxy, the number of shares owned by the shareholder for as many persons as there are directors to be elected and for whose election the shareholder has a right to vote, or to cumulate the votes by giving one candidate as many votes as the number of such directors to be elected multiplied by the number of shares shall equal or by distributing such votes on the same principle among any number of candidates.

Section 13. Inspectors of Election. In advance of any meeting of shareholders, the board of directors may appoint any individual other than nominees for office as inspectors of election to act at such meeting or any adjournment. The number of inspectors shall be either one or three. Any such appointment shall not be altered at the meeting. If inspectors of election are not so appointed, the chairman of the board or the president may, or on the request of not fewer than 10 percent of the votes represented at the meeting shall, make such appointment at the meeting. If appointed at the meeting, the majority of the votes present shall determine whether one or three inspectors are to be appointed. In case any individual appointed as inspector fails to appear or fails or refuses to act, the vacancy may be filled by appointment by the board of directors in advance of the meeting or at the meeting by the chairman of the board or the president. Unless otherwise prescribed by regulations of the Board, the duties of such inspectors shall include: determining the number of shares and the voting power of each share, the shares represented at the meeting, the existence of a quorum, and the authenticity, validity and effect of proxies; receiving votes, ballots, or consents; hearing and determining all challenges and questions in any way arising in connection with the rights to vote; counting and tabulating all votes or consents; determining the result; and such acts as may be proper to conduct the election or vote with fairness to all shareholders.

Section 14. Nominating Committee. The board of directors shall act as a nominating committee for selecting the management nominees for election as directors. Except in the case of a nominee substituted as a result of the death or other incapacity of a management nominee, the nominating committee shall deliver written nominations to the secretary at least 20 days prior to the date of the annual meeting. Upon delivery, such nominations shall be posted in a conspicuous

place in each office of the Subsidiary Holding Company. No nominations for directors except those made by the nominating committee shall be voted upon at the annual meeting unless other nominations by shareholders are made in writing and delivered to the secretary of the Subsidiary Holding Company at least five days prior to the date of the annual meeting. Upon delivery, such nominations shall be posted in a conspicuous place in each office of the Subsidiary Holding Company. Ballots bearing the names of all persons nominated by the nominating committee and by shareholders shall be provided for use at the annual meeting. However, if the nominating committee shall fail or refuse to act at least 20 days prior to the annual meeting, nominations for directors may be made at the annual meeting by any shareholder entitled to vote and shall be voted upon.

Section 15. New Business. Any new business to be taken up at the annual meeting shall be stated in writing and filed with the secretary of the Subsidiary Holding Company at least five days before the date of the annual meeting, and all business so stated, proposed, and filed shall be considered at the annual meeting; but no other proposal shall be acted upon at the annual meeting. Any shareholder may make any other proposal at the annual meeting and the same may be discussed and considered, but unless stated in writing and filed with the secretary at least five days before the meeting, such proposal shall be laid over for action at an adjourned, special, or annual meeting of the shareholders taking place 30 days or more thereafter. This provision shall not prevent the consideration and approval or disapproval at the annual meeting of reports of officers, directors, and committees; but in connection with such reports, no new business shall be acted upon at such annual meeting unless stated and filed as herein provided.

Section 16. Informal Action by Shareholders. Any action required to be taken at a meeting of the shareholders, or any other action which may be taken at a meeting of shareholders, may be taken without a meeting if consent in writing, setting forth the action so taken, shall be given by all of the shareholders entitled to vote with respect to the subject matter.

ARTICLE III—BOARD OF DIRECTORS

Section 1. General Powers. The business and affairs of the Subsidiary Holding Company shall be under the direction of its board of directors. The board of directors shall annually elect a chairman of the board and a president from among its members and shall designate, when present, either the chairman of the board or the president to preside at its meetings.

Section 2. Number and Term. The board of directors shall consist of ____ [not fewer than five nor more than fifteen] members, and shall be divided into three classes as nearly equal in number as possible. The members of each class shall be elected for a term of three years and until their successors are elected and qualified. One class shall be elected by ballot annually.

Section 3. Regular Meetings. A regular meeting of the board of directors shall be held without other notice than this bylaw following the annual meeting of shareholders. The board of directors may provide, by resolution, the time and place, for the holding of additional regular meetings without other notice than such resolution. Directors may participate in a meeting by means of a conference telephone or similar communications device through which all individuals participating can hear each other at the same time. Participation by such means shall constitute presence in person for all purposes.

Section 4. Qualification. Each director shall at all times be the beneficial owner of not less than 100 shares of capital stock of the Subsidiary Holding Company unless the Subsidiary Holding Company is a wholly owned subsidiary of a holding company.

Section 5. Special Meetings. Special meetings of the board of directors may be called by or at the request of the chairman of the board, the president, or one-third of the directors. The persons authorized to call special meetings of the board of directors may fix any place, within the Subsidiary Holding Company's normal lending territory, as the place for holding any special meeting of the board of directors called by such persons. Members of the board of directors may participate in special meetings by means of conference telephone or similar communications equipment by which all persons participating in the meeting can hear each other. Such participation shall constitute presence in person for all purposes.

Section 6. Notice. Written notice of any special meeting shall be given to each director at least 24 hours prior thereto when delivered personally or by telegram or at least five days prior thereto when delivered by mail at the address at which the director is most likely to be reached. Such notice shall be deemed to be delivered when deposited in the mail so addressed, with postage prepaid if mailed, when delivered to the telegraph company if sent by telegram, or when the Subsidiary Holding Company receives notice of delivery if electronically transmitted. Any director may waive notice of any meeting by a writing filed with the secretary. The attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor

the purpose of, any meeting of the board of directors need be specified in the notice of waiver of notice of such meeting.

Section 7. Quorum. A majority of the number of directors fixed by section 2 of this article III shall constitute a quorum for the transaction of business at any meeting of the board of directors; but if less than such majority is present at a meeting, a majority of the directors present may adjourn the meeting from time to time. Notice of any adjourned meeting shall be given in the same manner as prescribed by section 5 of this article III.

Section 8. Manner of Acting. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless a greater number is prescribed by regulation of the Board or by these bylaws.

Section 9. Action Without a Meeting. Any action required or permitted to be taken by the board of directors at a meeting may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the directors.

Section 10. Resignation. Any director may resign at any time by sending a written notice of such resignation to the home office of the Subsidiary Holding Company addressed to the chairman of the board or the president. Unless otherwise specified, such resignation shall take effect upon receipt by the chairman of the board or the president. More than three consecutive absences from regular meetings of the board of directors, unless excused by resolution of the board of directors, shall automatically constitute a resignation, effective when such resignation is accepted by the board of directors.

Section 11. Vacancies. Any vacancy occurring on the board of directors may be filled by the affirmative vote of a majority of the remaining directors although less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected to serve only until the next election of directors by the shareholders. Any directorship to be filled by reason of an increase in the number of directors may be filled by election by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

Section 12. Compensation. Directors, as such, may receive a stated salary for their services. By resolution of the board of directors, a reasonable fixed sum, and reasonable expenses of attendance, if any, may be allowed for attendance at each regular or special meeting of the board of directors. Members of either standing or special committees may be allowed such compensation for attendance at committee meetings as the board of directors may determine.

Section 13. Presumption of Assent. A director of the Subsidiary Holding Company who is present at a meeting of the board of directors at which action on any Subsidiary Holding Company matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention shall be entered in the minutes of the meeting or unless he or she shall file a written dissent to such action with the individual acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the Subsidiary Holding Company within five days after the date a copy of the minutes of the meeting is received. Such right to dissent shall not apply to a director who voted in favor of such action.

Section 14. Removal of Directors. At a meeting of shareholders called expressly for that purpose, any director may be removed only for cause by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. If less than the entire board is to be removed, no one of the directors may be removed if the votes cast against the removal would be sufficient to elect a director if then cumulatively voted at an election of the class of directors of which such director is a part. [If cumulative voting has been deleted, the preceding sentence should be deleted.] Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the charter or supplemental sections thereto, the provisions of this section shall apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

ARTICLE IV—EXECUTIVE AND OTHER COMMITTEES

Section 1. Appointment. The board of directors, by resolution adopted by a majority of the full board, may designate the chief executive officer and two or more of the other directors to constitute an executive committee. The designation of any committee pursuant to this Article IV and the delegation of authority shall not operate to relieve the board of directors, or any director, of any responsibility imposed by law or regulation.

Section 2. Authority. The executive committee, when the board of directors is not in session, shall have and may exercise all of the authority of the board of directors except to the extent, if any, that such authority shall be limited by the resolution appointing the executive committee; and except also that the executive committee shall not have the authority of the board of directors with reference to: the declaration of dividends; the amendment of the charter or bylaws of the Subsidiary Holding Company, or recommending to the shareholders a plan of merger, consolidation, or conversion; the

sale, lease, or other disposition of all or substantially all of the property and assets of the Subsidiary Holding Company otherwise than in the usual and regular course of its business; a voluntary dissolution of the Subsidiary Holding Company; a revocation of any of the foregoing; or the approval of a transaction in which any member of the executive committee, directly or indirectly, has any material beneficial interest.

Section 3. Tenure. Subject to the provisions of section 8 of this article IV, each member of the executive committee shall hold office until the next regular annual meeting of the board of directors following his or her designation and until a successor is designated as a member of the executive committee.

Section 4. Meetings. Regular meetings of the executive committee may be held without notice at such times and places as the executive committee may fix from time to time by resolution. Special meetings of the executive committee may be called by any member thereof upon not less than one day's notice stating the place, date, and hour of the meeting, which notice may be written or oral. Any member of the executive committee may waive notice of any meeting and no notice of any meeting need be given to any member thereof who attends in person. The notice of a meeting of the executive committee need not state the business proposed to be transacted at the meeting.

Section 5. Quorum. A majority of the members of the executive committee shall constitute a quorum for the transaction of business at any meeting thereof, and action of the executive committee must be authorized by the affirmative vote of a majority of the members present at a meeting at which a quorum is present.

Section 6. Action Without a Meeting. Any action required or permitted to be taken by the executive committee at a meeting may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the members of the executive committee.

Section 7. Vacancies. Any vacancy in the executive committee may be filled by a resolution adopted by a majority of the full board of directors.

Section 8. Resignations and Removal. Any member of the executive committee may be removed at any time with or without cause by resolution adopted by a majority of the full board of directors. Any member of the executive committee may resign from the executive committee at any time by giving written notice to the president or secretary of the Subsidiary Holding Company. Unless otherwise specified, such resignation shall take effect upon its receipt; the acceptance of such resignation shall not be necessary to make it effective. No notice of any meeting need be given to any member thereof who attends in person. The notice of a meeting of the executive committee need not state the business proposed to be transacted at the meeting.

Section 9. Procedure. The executive committee shall elect a presiding officer from its members and may fix its own rules of procedure, which shall not be inconsistent with these bylaws. It shall keep regular minutes of its proceedings and report the same to the board of directors for its information at the meeting held next after the proceedings shall have occurred.

Section 10. Other Committees. The board of directors may by resolution establish an audit, loan, or other committee composed of directors as they may determine to be necessary or appropriate for the conduct of the business of the Subsidiary Holding Company and may prescribe the duties, constitution, and procedures thereof.

ARTICLE V—OFFICERS

Section 1. Positions. The officers of the Subsidiary Holding Company shall be a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom shall be elected by the board of directors. The board of directors may also designate the chairman of the board as an officer. The offices of the secretary and treasurer or comptroller may be held by the same individual and a vice president may also be either the secretary or the treasurer or comptroller. The board of directors may designate one or more vice presidents as executive vice president or senior vice president. The board of directors may also elect or authorize the appointment of such other officers as the business of the Subsidiary Holding Company may require. The officers shall have such authority and perform such duties as the board of directors may from time to time authorize or determine. In the absence of action by the board of directors, the officers shall have such powers and duties as generally pertain to their respective offices.

Section 2. Election and Term of Office. The officers of the Subsidiary Holding Company shall be elected annually at the first meeting of the board of directors held after each annual meeting of the shareholders. If the election of officers is not held at such meeting, such election shall be held as soon thereafter as possible. Each officer shall hold office until a successor has been duly elected and qualified or until the officer's death, resignation, or removal in the manner hereinafter provided. Election or appointment of an officer, employee, or agent shall not of itself create contractual rights. The board of directors may authorize the Subsidiary Holding Company to enter into an employment contract with any officer in accordance with regulations of the Board; but no such contract shall impair the right of the board of directors to remove any officer at any time

in accordance with section 3 of this article V.

Section 3. Removal. Any officer may be removed by the board of directors whenever in its judgment the best interests of the Subsidiary Holding Company will be served thereby, but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the officer so removed.

Section 4. Vacancies. A vacancy in any office because of death, resignation, removal, disqualification, or otherwise may be filled by the board of directors for the unexpired portion of the term.

Section 5. Remuneration. The remuneration of the officers shall be fixed from time to time by the board of directors.

ARTICLE VI—CONTRACTS, LOANS, CHECKS, AND DEPOSITS

Section 1. Contracts. To the extent permitted by regulations of the Board, and except as otherwise prescribed by these bylaws with respect to certificates for shares, the board of directors may authorize any officer, employee, or agent of the Subsidiary Holding Company to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Subsidiary Holding Company. Such authority may be general or confined to specific instances.

Section 2. Loans. No loans shall be contracted on behalf of the Subsidiary Holding Company and no evidence of indebtedness shall be issued in its name unless authorized by the board of directors. Such authority may be general or confined to specific instances.

Section 3. Checks; Drafts. *etc.* All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of the Subsidiary Holding Company shall be signed by one or more officers, employees or agents of the Subsidiary Holding Company in such manner as shall from time to time be determined by the board of directors.

Section 4. Deposits. All funds of the Subsidiary Holding Company not otherwise employed shall be deposited from time to time to the credit of the Subsidiary Holding Company in any duly authorized depositories as the board of directors may select.

ARTICLE VII—CERTIFICATES FOR SHARES AND THEIR TRANSFER

Section 1. Certificates for Shares. Certificates representing shares of capital stock of the Subsidiary Holding Company shall be in such form as shall be determined by the board of directors and approved by the Board. Such certificates shall be signed by the chief executive officer or by any other officer of the Subsidiary Holding Company authorized by the board of directors, attested by the secretary or an assistant secretary, and sealed with the corporate seal or a facsimile thereof. The signatures of such officers upon a certificate may be facsimiles if the certificate is manually signed on behalf of a transfer agent or a registrar other than the Subsidiary Holding Company itself or one of its employees. Each certificate for shares of capital stock shall be consecutively numbered or otherwise identified. The name and address of the person to whom the shares are issued, with the number of shares and date of issue, shall be entered on the stock transfer books of the Subsidiary Holding Company. All certificates surrendered to the Subsidiary Holding Company for transfer shall be canceled and no new certificate shall be issued until the former certificate for a like number of shares has been surrendered and canceled, except that in the case of a lost or destroyed certificate, a new certificate may be issued upon such terms and indemnity to the Subsidiary Holding Company as the board of directors may prescribe.

Section 2. Transfer of Shares. Transfer of shares of capital stock of the Subsidiary Holding Company shall be made only on its stock transfer books. Authority for such transfer shall be given only by the holder of record or by his or her legal representative, who shall furnish proper evidence of such authority, or by his or her attorney authorized by a duly executed power of attorney and filed with the Subsidiary Holding Company. Such transfer shall be made only on surrender for cancellation of the certificate for such shares. The person in whose name shares of capital stock stand on the books of the Subsidiary Holding Company shall be deemed by the Subsidiary Holding Company to be the owner for all purposes.

ARTICLE VIII—FISCAL YEAR

The fiscal year of the Subsidiary Holding Company shall end on the _____of_____each year. The appointment of accountants shall be subject to annual ratification by the shareholders.

ARTICLE IX—DIVIDENDS

Subject to the terms of the Subsidiary Holding Company's charter and the regulations and orders of the Board, the board of directors may, from time to time, declare, and the Subsidiary Holding Company may pay, dividends on its outstanding shares of capital stock.

ARTICLE X—CORPORATE SEAL

The board of directors shall provide a Subsidiary Holding Company seal, which shall be two concentric circles between which shall be the name of the Subsidiary Holding Company. The year of incorporation or an emblem may appear in the center.

ARTICLE XI—AMENDMENTS

These bylaws may be amended in a manner consistent with regulations of the Board and shall be effective after: (i) approval of the amendment by a majority vote of the authorized board of directors, or by a majority vote of the votes cast by the shareholders of the Subsidiary Holding Company at any legal meeting, and (ii) receipt of any applicable regulatory approval. When a Subsidiary Holding Company fails to meet its quorum requirements, solely due to vacancies on the board, then the affirmative vote of a majority of the sitting board will be required to amend the bylaws.

PART 243—RESOLUTION PLANS

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243.1 Authority and scope.
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243.9 Enforcement.

AUTHORITY: 12 U.S.C. 5365.

SOURCE: 76 FR 67340, Nov. 1, 2011, unless otherwise noted.

§ 243.1 Authority and scope.

(a) *Authority*. This part is issued pursuant to section 165(d)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the *Dodd-Frank Act*) (Pub. L. 111–203, 124 Stat. 1376, 1426–1427), 12 U.S.C. 5365(d)(8), which requires the Board of Governors of the Federal Reserve System (*Board*) and the Federal Deposit Insurance Corporation (*Corporation*) to jointly issue rules implementing the provisions of section 165(d) of the Dodd-Frank Act.

(b) *Scope*. This part applies to each covered company and establishes rules and requirements regarding the submission and content of a resolution plan, as well as procedures for review by the Board and Corporation of a resolution plan.

§ 243.2 Definitions.

For purposes of this part:

(a) *Bankruptcy Code* means Title 11 of the United States Code.

(b) *Company* means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization, but does not include any organization, the majority of the voting securities of which are owned by the United States.

(c) *Control*. A company controls another company when the first company, directly or indirectly, owns, or holds with power to vote, 25 percent or more of any class of the second company's outstanding voting securities.

(d) *Core business lines* means those business lines of the covered company, including associated operations, services, functions and support, that, in the view of the covered company, upon failure would result in a material loss of revenue, profit, or franchise value.

(e) *Council* means the Financial Stability Oversight Council established by section 111 of the Dodd-Frank Act (12 U.S.C. 5321).

(f) *Covered company*—(1) *In general*. A ''covered company'' means:

(i) Any nonbank financial company supervised by the Board;

(ii) Any bank holding company, as that term is defined in section 2 of the Bank Holding Company Act, as amended (12 U.S.C. 1841), and the Board's Regulation Y (12 CFR part 225), that has $50 billion or more in total consolidated assets, as determined based on the average of the company's four most recent Consolidated Financial Statements for Bank Holding Companies as reported on the Federal Reserve's Form FR Y–9C (''FR Y–9C''); and

(iii) Any foreign bank or company that is a bank holding company or is treated as a bank holding company under section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), and that has $50 billion or more in total consolidated assets, as determined based on the foreign bank's or company's most recent annual or, as applicable, the average of the four most recent quarterly Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y–7Q (''FR Y–7Q'').

(2) Once a covered company meets the requirements described in paragraph (f)(1)(ii) or (iii) of this section, the company shall remain a covered company for purposes of this part unless and until the company has less than $45 billion in total consolidated assets, as determined based on the—

(i) Average total consolidated assets as reported on the company's four most recent FR Y–9Cs, in the case of a covered company described in paragraph (f)(1)(ii) of this section; or

(ii) Total consolidated assets as reported on the company's most recent annual FR Y–7Q, or, as applicable, average total consolidated assets as reported on the company's four most recent quarterly FR Y–7Qs, in the case of a covered company described in paragraph (f)(1)(iii) of this section. Nothing in this paragraph (f)(2) shall preclude a company from becoming a covered company pursuant to paragraph (f)(1) of this section.

(3) *Multi-tiered holding company*. In a multi-tiered holding company structure, covered company means the top-tier of the multi-tiered holding company only.

(4) *Asset threshold for bank holding companies and foreign banking organizations*. The Board may, pursuant to a recommendation of the Council, raise any asset threshold specified in paragraph (f)(1)(ii) or (iii) of this section.

(5) *Exclusion*. A bridge financial company chartered pursuant to 12 U.S.C. 5390(h) shall not be deemed to be a covered company hereunder.

(g) *Critical operations* means those operations of the covered company, including associated services, functions and support, the failure or discontinuance of which, in the view of the covered company or as jointly directed by the Board and the Corporation, would pose a threat to the financial stability of the United States.

(h) *Depository institution* has the same meaning as in section 3(c)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(1)) and includes a state-licensed uninsured branch, agency, or commercial lending subsidiary of a foreign bank.

(i) *Foreign banking organization* means—

(1) A foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that:

(i) Operates a branch, agency, or commercial lending company subsidiary in the United States;

(ii) Controls a bank in the United States; or

(iii) Controls an Edge corporation acquired after March 5, 1987; and

(2) Any company of which the foreign bank is a subsidiary.

(j) *Foreign-based company* means any covered company that is not incorporated or organized under the laws of the United States.

(k) *Functionally regulated subsidiary* has the same meaning as in section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5)).

(l) *Material entity* means a subsidiary or foreign office of the covered company that is significant to the activities of a critical operation or core business line (as defined in this part).

(m) *Material financial distress* with regard to a covered company means that:

(1) The covered company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;

(2) The assets of the covered company are, or are likely to be, less than its obligations to creditors and others; or

(3) The covered company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

(n) *Nonbank financial company supervised by the Board* means a nonbank financial company or other company that the Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

(o) *Rapid and orderly resolution* means a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code that can be accomplished within a

reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States.

(p) *Subsidiary* means a company that is controlled by another company, and an indirect subsidiary is a company that is controlled by a subsidiary of a company.

(q) *United States* means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 243.3 Resolution plan required.

(a) *Initial and annual resolution plans required.* (1) Each covered company shall submit its initial resolution plan to the Board and the Corporation on or before the date set forth below (''Initial Submission Date''):

(i) July 1, 2012, with respect to any covered company that, as of the effective date of this part, had $250 billion or more in total nonbank assets (or, in the case of a covered company that is a foreign-based company, in total U.S. nonbank assets);

(ii) July 1, 2013, with respect to any covered company that is not described in paragraph (a)(1)(i) of this section, and that, as of the effective date of this part had $100 billion or more in total nonbank assets (or, in the case of a covered company that is a foreign-based company, in total U.S. nonbank assets); and

(iii) December 31, 2013, with respect to any other covered company that is a covered company as of the effective date of this part but that is not described in paragraph (a)(1)(i) or (ii) of this section.

(2) A company that becomes a covered company after the effective date of this part shall submit its initial resolution plan no later than the next July 1 following the date the company becomes a covered company, provided such date occurs no earlier than 270 days after the date on which the company became a covered company.

(3) After filing its initial resolution plan pursuant to paragraph (a)(1) or (2) of this section, each covered company shall annually submit a resolution plan to the Board and the Corporation on or before each anniversary date of its Initial Submission Date.

(4) Notwithstanding anything to the contrary in this paragraph (a), the Board and Corporation may jointly determine that a covered company shall file its initial or annual resolution plan by a date other than as provided in this paragraph (a). The Board and the Corporation shall provide a covered company with written notice of a determination under this paragraph (a)(4) no later than 180 days prior to the date on which the Board and Corporation jointly determined to require the covered company to submit its resolution plan.

(b) *Authority to require interim updates and notice of material events*—(1) *In general.* The Board and the Corporation may jointly require that a covered company file an update to a resolution plan submitted under paragraph (a) of this section, within a reasonable amount of time, as jointly determined by the Board and Corporation. The Board and the Corporation shall make a request pursuant to this paragraph (b)(1) in writing, and shall specify the portions or aspects of the resolution plan the covered company shall update.

(2) *Notice of material events.* Each covered company shall provide the Board and the Corporation with a notice no later than 45 days after any event, occurrence, change in conditions or circumstances, or other change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the covered company. Such notice should describe the event, occurrence or change and explain why the event, occurrence or change may require changes to the resolution plan. The covered company shall address any event, occurrence or change with respect to which it has provided notice pursuant to this paragraph (b)(2) in the following resolution plan submitted by the covered company.

(3) *Exception.* A covered company shall not be required to file a notice under paragraph (b)(2) of this section if the date on which the covered company would be required to submit the notice under paragraph (b)(2) would be within 90 days prior to the date on which the

covered company is required to file an annual resolution plan under paragraph (a) of this section.

(c) *Authority to require more frequent submissions or extend time period.* The Board and Corporation may jointly:

(1) Require that a covered company submit a resolution plan more frequently than required pursuant to paragraph (a) of this section; and

(2) Extend the time period that a covered company has to submit a resolution plan or a notice following material events under paragraphs (a) and (b) of this section.

(d) *Access to information.* In order to allow evaluation of the resolution plan, each covered company must provide the Board and the Corporation such information and access to personnel of the covered company as the Board and the Corporation jointly determine during the period for reviewing the resolution plan is necessary to assess the credibility of the resolution plan and the ability of the covered company to implement the resolution plan. The Board and the Corporation will rely to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company.

(e) *Board of directors approval of resolution plan.* Prior to submission of a resolution plan under paragraph (a) of this section, the resolution plan of a covered company shall be approved by:

(1) The board of directors of the covered company and noted in the minutes; or

(2) In the case of a foreign-based covered company only, a delegee acting under the express authority of the board of directors of the covered company to approve the resolution plan.

(f) *Resolution plans provided to the Council.* The Board shall make the resolution plans and updates submitted by the covered company pursuant to this section available to the Council upon request.

§ 243.4 Informational content of a resolution plan.

(a) *In general*—(1) *Domestic covered companies.* Except as otherwise provided in paragraph (a)(3) of this section, the resolution plan of a covered company that is organized or incorporated in the United States shall include the information specified in paragraphs (b) through (i) of this section with respect to the subsidiaries and operations that are domiciled in the United States as well as the foreign subsidiaries, offices, and operations of the covered company.

(2) *Foreign-based covered companies.* Except as otherwise provided in paragraph (a)(3) of the section, the resolution plan of a covered company that is organized or incorporated in a jurisdiction other than the United States (other than a bank holding company) or that is a foreign banking organization shall include:

(i) The information specified in paragraphs (b) through (i) of this section with respect to the subsidiaries, branches and agencies, and critical operations and core business lines, as applicable, that are domiciled in the United States or conducted in whole or material part in the United States. With respect to the information specified in paragraph (g) of this section, the resolution plan of a foreign-based covered company shall also identify, describe in detail, and map to legal entity the interconnections and interdependencies among the U.S. subsidiaries, branches and agencies, and critical operations and core business lines of the foreign-based covered company and any foreign-based affiliate; and

(ii) A detailed explanation of how resolution planning for the subsidiaries, branches and agencies, and critical operations and core business lines of the foreign-based covered company that are domiciled in the United States or conducted in whole or material part in the United States is integrated into the foreign-based covered company's overall resolution or other contingency planning process.

(3) *Tailored resolution plan*—(i) *Eligible covered company.*—Paragraph (a)(3)(ii) of this section applies to any covered company that as of December 31 of the calendar year prior to the date its resolution plan is required to be submitted under this part—

(A) Has less than $100 billion in total nonbank assets (or, in the case of a covered company that is a foreign-based company, in total U.S. nonbank assets); and

(B) The total insured depository institution assets of which comprise 85 percent or more of the covered company's total consolidated assets (or, in the case of a covered company that is a foreign-based company, the assets of the U.S. insured depository institution operations, branches, and agencies of which comprise 85 percent or more of such covered company's U.S. total consolidated assets).

(ii) *Tailored resolution plan elements.* A covered company described in paragraph (a)(3)(i) of this section may file a resolution plan that is limited to the following items—

(A) An executive summary, as specified in paragraph (b) of this section;

(B) The information specified in paragraphs (c) through (f) and paragraph (h) of this section, but only with respect to the covered company and its nonbanking material entities and operations;

(C) The information specified in paragraphs (g) and (i) of this section with respect to the covered company and all of its insured depository institutions (or, in the case of a covered company that is a foreign-based company, the U.S. insured depository institutions, branches, and agencies) and nonbank material entities and operations. The interconnections and interdependencies identified pursuant to (g) of this section shall be included in the analysis provided pursuant to paragraph (c) of this section.

(iii) *Notice.* A covered company that meets the requirements of paragraph (a)(3)(i) of this section and that intends to submit a resolution plan pursuant to this paragraph (a)(3), shall provide the Board and Corporation with written notice of such intent and its eligibility under paragraph (a)(3)(i) no later than 270 days prior to the date on which the covered company is required to submit its resolution plan. Within 90 of receiving such notice, the Board and Corporation may jointly determine that the covered company must submit a resolution plan that meets some or all of the requirements as set forth in paragraph (a)(1) or (2) of this section, as applicable.

(4) *Required and prohibited assumptions.* In preparing its plan for rapid and orderly resolution in the event of material financial distress or failure required by this part, a covered company shall:

(i) Take into account that such material financial distress or failure of the covered company may occur under the baseline, adverse and severely adverse economic conditions provided to the covered company by the Board pursuant to 12 U.S.C. 5365(i)(1)(B); provided, however, a covered company may submit its initial resolution plan assuming the baseline conditions only, or, if a baseline scenario is not then available, a reasonable substitute developed by the covered company; and

(ii) Not rely on the provision of extraordinary support by the United States or any other government to the covered company or its subsidiaries to prevent the failure of the covered company.

(b) *Executive summary.* Each resolution plan of a covered company shall include an executive summary describing:

(1) The key elements of the covered company's strategic plan for rapid and orderly resolution in the event of material financial distress at or failure of the covered company.

(2) Material changes to the covered company's resolution plan from the company's most recently filed resolution plan (including any notices following a material event or updates to the resolution plan).

(3) Any actions taken by the covered company since filing of the previous resolution plan to improve the effectiveness of the covered company's resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to effective and timely execution of the resolution plan.

(c) *Strategic analysis.* Each resolution plan shall include a strategic analysis describing the covered company's plan for rapid and orderly resolution in the event of material financial distress or failure of the covered company. Such analysis shall—

(1) Include detailed descriptions of the—

(i) Key assumptions and supporting analysis underlying the covered company's resolution plan, including any assumptions made concerning the economic or financial conditions that

would be present at the time the covered company sought to implement such plan;

(ii) Range of specific actions to be taken by the covered company to facilitate a rapid and orderly resolution of the covered company, its material entities, and its critical operations and core business lines in the event of material financial distress or failure of the covered company;

(iii) Funding, liquidity and capital needs of, and resources available to, the covered company and its material entities, which shall be mapped to its critical operations and core business lines, in the ordinary course of business and in the event of material financial distress at or failure of the covered company;

(iv) Covered company's strategy for maintaining operations of, and funding for, the covered company and its material entities, which shall be mapped to its critical operations and core business lines;

(v) Covered company's strategy in the event of a failure or discontinuation of a material entity, core business line or critical operation, and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States; provided, however, if any such material entity is subject to an insolvency regime other than the Bankruptcy Code, a covered company may exclude that entity from its strategic analysis unless that entity either has $50 billion or more in total assets or conducts a critical operation; and

(vi) Covered company's strategy for ensuring that any insured depository institution subsidiary of the covered company will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the covered company (other than those that are subsidiaries of an insured depository institution);

(2) Identify the time period(s) the covered company expects would be needed for the covered company to successfully execute each material aspect and step of the covered company's plan;

(3) Identify and describe any potential material weaknesses or impediments to effective and timely execution of the covered company's plan;

(4) Discuss the actions and steps the covered company has taken or proposes to take to remediate or otherwise mitigate the weaknesses or impediments identified by the covered company, including a timeline for the remedial or other mitigatory action; and

(5) Provide a detailed description of the processes the covered company employs for:

(i) Determining the current market values and marketability of the core business lines, critical operations, and material asset holdings of the covered company;

(ii) Assessing the feasibility of the covered company's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations, or other similar actions contemplated in the covered company's resolution plan; and

(iii) Assessing the impact of any sales, divestitures, restructurings, recapitalizations, or other similar actions on the value, funding, and operations of the covered company, its material entities, critical operations and core business lines.

(d) *Corporate governance relating to resolution planning*. Each resolution plan shall:

(1) Include a detailed description of:

(i) How resolution planning is integrated into the corporate governance structure and processes of the covered company;

(ii) The covered company's policies, procedures, and internal controls governing preparation and approval of the covered company's resolution plan;

(iii) The identity and position of the senior management official(s) of the covered company that is primarily responsible for overseeing the development, maintenance, implementation, and filing of the covered company's resolution plan and for the covered company's compliance with this part; and

(iv) The nature, extent, and frequency of reporting to senior executive officers and the board of directors of

the covered company regarding the development, maintenance, and implementation of the covered company's resolution plan;

(2) Describe the nature, extent, and results of any contingency planning or similar exercise conducted by the covered company since the date of the covered company's most recently filed resolution plan to assess the viability of or improve the resolution plan of the covered company; and

(3) Identify and describe the relevant risk measures used by the covered company to report credit risk exposures both internally to its senior management and board of directors, as well as any relevant risk measures reported externally to investors or to the covered company's appropriate Federal regulator.

(e) *Organizational structure and related information*. Each resolution plan shall—

(1) Provide a detailed description of the covered company's organizational structure, including:

(i) A hierarchical list of all material entities within the covered company's organization (including legal entities that directly or indirectly hold such material entities) that:

(A) Identifies the direct holder and the percentage of voting and nonvoting equity of each legal entity and foreign office listed; and

(B) The location, jurisdiction of incorporation, licensing, and key management associated with each material legal entity and foreign office identified;

(ii) A mapping of the covered company's critical operations and core business lines, including material asset holdings and liabilities related to such critical operations and core business lines, to material entities;

(2) Provide an unconsolidated balance sheet for the covered company and a consolidating schedule for all material entities that are subject to consolidation by the covered company;

(3) Include a description of the material components of the liabilities of the covered company, its material entities, critical operations and core business lines that, at a minimum, separately identifies types and amounts of the short-term and long-term liabilities, the secured and unsecured liabilities, and subordinated liabilities;

(4) Identify and describe the processes used by the covered company to:

(i) Determine to whom the covered company has pledged collateral;

(ii) Identify the person or entity that holds such collateral; and

(iii) Identify the jurisdiction in which the collateral is located, and, if different, the jurisdiction in which the security interest in the collateral is enforceable against the covered company;

(5) Describe any material off-balance sheet exposures (including guarantees and contractual obligations) of the covered company and its material entities, including a mapping to its critical operations and core business lines;

(6) Describe the practices of the covered company, its material entities and its core business lines related to the booking of trading and derivatives activities;

(7) Identify material hedges of the covered company, its material entities, and its core business lines related to trading and derivative activities, including a mapping to legal entity;

(8) Describe the hedging strategies of the covered company;

(9) Describe the process undertaken by the covered company to establish exposure limits;

(10) Identify the major counterparties of the covered company and describe the interconnections, interdependencies and relationships with such major counterparties;

(11) Analyze whether the failure of each major counterparty would likely have an adverse impact on or result in the material financial distress or failure of the covered company; and

(12) Identify each trading, payment, clearing, or settlement system of which the covered company, directly or indirectly, is a member and on which the covered company conducts a material number or value amount of trades or transactions. Map membership in each such system to the covered company's material entities, critical operations and core business lines.

(f) *Management information systems*. (1) Each resolution plan shall include—

(i) A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, accounting, and financial and regulatory reporting, used by the covered company and its material entities. The description of each system or application provided shall identify the legal owner or licensor, the use or function of the system or application, service level agreements related thereto, any software and system licenses, and any intellectual property associated therewith;

(ii) A mapping of the key management information systems and applications to the material entities, critical operations and core business lines of the covered company that use or rely on such systems and applications;

(iii) An identification of the scope, content, and frequency of the key internal reports that senior management of the covered company, its material entities, critical operations and core business lines use to monitor the financial health, risks, and operation of the covered company, its material entities, critical operations and core business lines; and

(iv) A description of the process for the appropriate supervisory or regulatory agencies to access the management information systems and applications identified in paragraph (f) of this section; and

(v) A description and analysis of—

(A) The capabilities of the covered company's management information systems to collect, maintain, and report, in a timely manner to management of the covered company, and to the Board, the information and data underlying the resolution plan; and

(B) Any deficiencies, gaps or weaknesses in such capabilities, and a description of the actions the covered company intends to take to promptly address such deficiencies, gaps, or weaknesses, and the time frame for implementing such actions.

(2) The Board will use its examination authority to review the demonstrated capabilities of each covered company to satisfy the requirements of paragraph (f)(1)(v) of this section. The Board will share with the Corporation information regarding the capabilities of the covered company to collect, maintain, and report in a timely manner information and data underlying the resolution plan.

(g) *Interconnections and interdependencies.* To the extent not elsewhere provided, identify and map to the material entities the interconnections and interdependencies among the covered company and its material entities, and among the critical operations and core business lines of the covered company that, if disrupted, would materially affect the funding or operations of the covered company, its material entities, or its critical operations or core business lines. Such interconnections and interdependencies may include:

(1) Common or shared personnel, facilities, or systems (including information technology platforms, management information systems, risk management systems, and accounting and recordkeeping systems);

(2) Capital, funding, or liquidity arrangements;

(3) Existing or contingent credit exposures;

(4) Cross-guarantee arrangements, cross-collateral arrangements, cross-default provisions, and cross-affiliate netting agreements;

(5) Risk transfers; and

(6) Service level agreements.

(h) *Supervisory and regulatory information.* Each resolution plan shall—

(1) Identify any:

(i) Federal, state, or foreign agency or authority (other than a Federal banking agency) with supervisory authority or responsibility for ensuring the safety and soundness of the covered company, its material entities, critical operations and core business lines; and

(ii) Other Federal, state, or foreign agency or authority (other than a Federal banking agency) with significant supervisory or regulatory authority over the covered company, and its material entities and critical operations and core business lines.

(2) Identify any foreign agency or authority responsible for resolving a foreign-based material entity and critical operations or core business lines of the covered company; and

(3) Include contact information for each agency identified in paragraphs (h)(1) and (2) of this section.

(i) *Contact information*. Each resolution plan shall identify a senior management official at the covered company responsible for serving as a point of contact regarding the resolution plan of the covered company, and include contact information (including phone number, email address, and physical address) for a senior management official of the material entities of the covered company.

(j) *Inclusion of previously submitted resolution plan informational elements by reference*. An annual submission of or update to a resolution plan submitted by a covered company may include by reference informational elements (but not strategic analysis or executive summary elements) from a resolution plan previously submitted by the covered company to the Board and the Corporation, provided that:

(1) The resolution plan seeking to include informational elements by reference clearly indicates:

(i) The informational element the covered company is including by reference; and

(ii) Which of the covered company's previously submitted resolution plan(s) originally contained the information the covered company is including by reference; and

(2) The covered company certifies that the information the covered company is including by reference remains accurate.

(k) *Exemptions*. The Board and the Corporation may jointly exempt a covered company from one or more of the requirements of this section.

§ 243.5 Review of resolution plans; resubmission of deficient resolution plans.

(a) *Acceptance of submission and review*. (1) The Board and Corporation shall review a resolution plan submitted under section this subpart within 60 days.

(2) If the Board and Corporation jointly determine within the time described in paragraph (a)(1) of this section that a resolution plan is informationally incomplete or that substantial additional information is necessary to facilitate review of the resolution plan:

(i) The Board and Corporation shall jointly inform the covered company in writing of the area(s) in which the resolution plan is informationally incomplete or with respect to which additional information is required; and

(ii) The covered company shall resubmit an informationally complete resolution plan or such additional information as jointly requested to facilitate review of the resolution plan no later than 30 days after receiving the notice described in paragraph (a)(2)(i) of this section, or such other time period as the Board and Corporation may jointly determine.

(b) *Joint determination regarding deficient resolution plans*. If the Board and Corporation jointly determine that the resolution plan of a covered company submitted under § 243.3(a) is not credible or would not facilitate an orderly resolution of the covered company under the Bankruptcy Code, the Board and Corporation shall jointly notify the covered company in writing of such determination. Any joint notice provided under this paragraph shall identify the aspects of the resolution plan that the Board and Corporation jointly determined to be deficient.

(c) *Resubmission of a resolution plan*. Within 90 days of receiving a notice of deficiencies issued pursuant to paragraph (b) of this section, or such shorter or longer period as the Board and Corporation may jointly determine, a covered company shall submit a revised resolution plan to the Board and Corporation that addresses the deficiencies jointly identified by the Board and Corporation, and that discusses in detail:

(1) The revisions made by the covered company to address the deficiencies jointly identified by the Board and the Corporation;

(2) Any changes to the covered company's business operations and corporate structure that the covered company proposes to undertake to facilitate implementation of the revised resolution plan (including a timeline for the execution of such planned changes); and

(3) Why the covered company believes that the revised resolution plan

is credible and would result in an orderly resolution of the covered company under the Bankruptcy Code.

(d) *Extensions of time.* Upon their own initiative or a written request by a covered company, the Board and Corporation may jointly extend any time period under this section. Each extension request shall be supported by a written statement of the covered company describing the basis and justification for the request.

§ 243.6 Failure to cure deficiencies on resubmission of a resolution plan.

(a) *In general.* The Board and Corporation may jointly determine that a covered company or any subsidiary of a covered company shall be subject to more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the covered company or the subsidiary if:

(1) The covered company fails to submit a revised resolution plan under § 243.5(c) within the required time period; or

(2) The Board and the Corporation jointly determine that a revised resolution plan submitted under § 243.5(c) does not adequately remedy the deficiencies jointly identified by the Board and the Corporation under § 243.5(b).

(b) *Duration of requirements or restrictions.* Any requirements or restrictions imposed on a covered company or a subsidiary thereof pursuant to paragraph (a) of this section shall cease to apply to the covered company or subsidiary, respectively, on the date that the Board and the Corporation jointly determine the covered company has submitted a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation under § 243.5(b).

(c) *Divestiture.* The Board and Corporation, in consultation with the Council, may jointly, by order, direct the covered company to divest such assets or operations as are jointly identified by the Board and Corporation if:

(1) The Board and Corporation have jointly determined that the covered company or a subsidiary thereof shall be subject to requirements or restrictions pursuant to paragraph (a) of this section; and

(2) The covered company has failed, within the 2-year period beginning on the date on which the determination to impose such requirements or restrictions under paragraph (a) of this section was made, to submit a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation under § 243.5(b); and

(3) The Board and Corporation jointly determine that the divestiture of such assets or operations is necessary to facilitate an orderly resolution of the covered company under the Bankruptcy Code in the event the company was to fail.

§ 243.7 Consultation.

Prior to issuing any notice of deficiencies under § 243.5(b), determining to impose requirements or restrictions under § 243.6(a), or issuing a divestiture order pursuant to § 243.6(c) with respect to a covered company that is likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary of the covered company, the Board—

(a) Shall consult with each Council member that primarily supervises any such subsidiary; and

(b) May consult with any other Federal, state, or foreign supervisor as the Board considers appropriate.

§ 243.8 No limiting effect or private right of action; confidentiality of resolution plans.

(a) *No limiting effect on bankruptcy or other resolution proceedings.* A resolution plan submitted pursuant to this part shall not have any binding effect on:

(1) A court or trustee in a proceeding commenced under the Bankruptcy Code;

(2) A receiver appointed under Title II of the Dodd-Frank Act (12 U.S.C. 5381 *et seq.*);

(3) A bridge financial company chartered pursuant to 12 U.S.C. 5390(h); or

(4) Any other authority that is authorized or required to resolve a covered company (including any subsidiary or affiliate thereof) under any other provision of Federal, state, or foreign law.

(b) *No private right of action.* Nothing in this part creates or is intended to create a private right of action based on a resolution plan prepared or submitted under this part or based on any action taken by the Board or the Corporation with respect to any resolution plan submitted under this part.

(c) *Form of resolution plans.* Each resolution plan of a covered company shall be divided into a public section and a confidential section. Each covered company shall segregate and separately identify the public section from the confidential section. The public section shall consist of an executive summary of the resolution plan that describes the business of the covered company and includes, to the extent material to an understanding of the covered company:

(1) The names of material entities;

(2) A description of core business lines;

(3) Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources;

(4) A description of derivative activities and hedging activities;

(5) A list of memberships in material payment, clearing and settlement systems;

(6) A description of foreign operations;

(7) The identities of material supervisory authorities;

(8) The identities of the principal officers;

(9) A description of the corporate governance structure and processes related to resolution planning;

(10) A description of material management information systems; and

(11) A description, at a high level, of the covered company's resolution strategy, covering such items as the range of potential purchasers of the covered company, its material entities and core business lines.

(d) *Confidential treatment of resolution plans.* (1) The confidentiality of resolution plans and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261), and the Corporation's Disclosure of Information Rules (12 CFR part 309).

(2) Any covered company submitting a resolution plan or related materials pursuant to this part that desires confidential treatment of the information under 5 U.S.C. 552(b)(4), the Board's Rules Regarding Availability of Information (12 CFR part 261), and the Corporation's Disclosure of Information Rules (12 CFR part 309) may file a request for confidential treatment in accordance with those rules.

(3) To the extent permitted by law, information comprising the Confidential Section of a resolution plan will be treated as confidential.

(4) To the extent permitted by law, the submission of any nonpublic data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject. Privileges that apply to resolution plans and related materials are protected pursuant to Section 18(x) of the FDI Act, 12 U.S.C. 1828(x).

§ 243.9 Enforcement.

The Board and Corporation may jointly enforce an order jointly issued by the Board and Corporation under § 243.6(a) or 243.6(c) of this part. The Board, in consultation with the Corporation, may take any action to address any violation of this part by a covered company under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

PART 250—MISCELLANEOUS INTERPRETATIONS

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AUTHORITY: 12 U.S.C. 78, 248(i), 371c(f) and 371c–1(e).

SOURCE: 33 FR 9866, July 10, 1968, unless otherwise noted.

INTERPRETATIONS

§ 250.141 Member bank purchase of stock of "operations subsidiaries."

(a) The Board of Governors has reexamined its position that the so-called ''stock-purchase prohibition'' of section 5136 of the Revised Statutes (12 U.S.C. 24), which is made applicable to member State banks by the 20th paragraph of section 9 of the Federal Reserve Act (12 U.S.C. 335), forbids the purchase by a member bank ''for its own account of any shares of stock of any corporation'' (the statutory language), except as specifically permitted by provisions of Federal law or as comprised within the concept of ''such incidental powers as shall be necessary to carry on the business of banking'', referred to in the first sentence of paragraph ''Seventh'' of R.S. 5136.

(b) In 1966 the Board expressed the view that said incidental powers do not permit member banks to purchase stock of ''operations subsidiaries''—that is, organizations designed to serve, in effect, as separately-incorporated departments of the bank, performing, at locations at which the bank is authorized to engage in business, functions that the bank is empowered to perform directly. (See 1966 Federal Reserve Bulletin 1151.)

(c) The Board now considers that the incidental powers clause permits a bank to organize its operations in the manner that it believes best facilitates the performance thereof. One method of organization is through departments; another is through separate incorporation of particular operations. In other words, a wholly owned subsidiary corporation engaged in activities that the bank itself may perform is simply a convenient alternative organizational arrangement.

(d) Reexamination of the apparent purposes and legislative history of the stock-purchase prohibition referred to above has led the Board to conclude that such prohibition should not be interpreted to preclude a member bank from adopting such an organizational arrangement unless its use would be inconsistent with other Federal law, either statutory or judicial.

(e) In view of the relationship between the operation of certain subsidiaries and the branch banking laws, the Board has also reexamined its rulings on what constitutes ''money lent'' for the purposes of section 5155 of the Revised Statutes (12 U.S.C. 36), which provides that ''The term*branch* * * * shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent.''[1]

(f) The Board noted in its 1967 interpretation that offices that are open to the public and staffed by employees of the bank who regularly engage in soliciting borrowers, negotiating terms, and processing applications for loans (so-called *loan production offices*) constitute branches. (1967 Federal Reserve Bulletin 1334.) The Board also noted that later in that year it considered the question whether a bank holding company may acquire the stock of a so-called *mortgage company* on the basis that the company would be engaged in ''furnishing services to or performing services for such bank holding company or its banking subsidiaries'' (the so-called *servicing exemption* of section 4(c)(1)(C) of the Bank Holding Company Act; 12 U.S.C. 1843). In concluding affirmatively, the Board stated that ''the appropriate test for determining whether the company may be considered as within the servicing exemption is whether the company will perform as principal any banking activities—such as receiving deposits, paying checks, extending credit, conducting a trust department, and the like. In other words, if the mortgage company is to act merely as an adjunct to a bank for the purpose of facilitating the bank's operations, the company may appropriately be considered as within the scope of the servicing exemption.'' (1967 Federal Reserve Bulletin 1911; 12 CFR 225.122.)

(g) The Board believes that the purposes of the branch banking laws and the servicing exemption are related. Generally, what constitutes a branch does not constitute a servicing organization and, vice versa, an office that only performs servicing functions should not be considered a branch. (See 1958 Federal Reserve Bulletin 431, last paragraph; 12 CFR 225.104(e).) When viewed together, the above-cited interpretations on loan production offices and mortgage companies represent a departure from this principle. In reconsidering the laws involved, the Board has concluded that a test similar to that adopted with respect to the servicing exemption under the Bank Holding Company Act is appropriate for use in determining whether or not what constitutes *money [is] lent* at a particular office, for the purpose of the Federal branch banking laws.

(h) Accordingly, the Board considers that the following activities, individually or collectively, do not constitute the lending of money within the meaning of section 5155 of the revised statutes: Soliciting loans on behalf of a bank (or a branch thereof), assembling credit information, making property inspections and appraisals, securing title information, preparing applications for loans (including making recommendations with respect to action thereon), soliciting investors to purchase loans from the bank, seeking to have such investors contract with the bank for the servicing of such loans, and other similar agent-type activities. When loans are approved and funds disbursed solely at the main office or a branch of the bank, an office at which only preliminary and servicing steps are taken is not a place where *money [is] lent*. Because preliminary and servicing steps of the kinds described do not constitute the performance of significant banking functions of the type that Congress contemplated should be performed only at governmentally approved offices, such office is accordingly not a branch.

(i) To summarize the foregoing, the Board has concluded that, insofar as Federal law is concerned, a member

[1] In the Board's judgment, the statutory enumeration of three specific functions that establish branch status is not meant to be exclusive but to assure that offices at which any of these functions is performed are regarded as branches by the bank regulatory authorities. In applying the statute the emphasis should be to assure that significant banking functions are made available to the public only at governmentally authorized offices.

bank may purchase for its own account shares of a corporation to perform, at locations at which the bank is authorized to engage in business, functions that the bank is empowered to perform directly. Also, a member bank may establish and operate, at any location in the United States, a *loan production office* of the type described herein. Such offices may be established and operated by the bank either directly, or indirectly through a wholly-owned subsidiary corporation.

(j) This interpretation supersedes both the Board's 1966 ruling on *operations subsidiaries* and its 1967 ruling on *loan production offices*, referred to above.

(12 U.S.C. 24, 36, 321, 335)

[33 FR 11813, Aug. 21, 1968; 43 FR 53414, Nov. 16, 1978]

§ 250.142 Meaning of "obligor or maker" in determining limitation on securities investments by member State banks.

(a) From time to time the New York State Dormitory Authority offers issues of bonds with respect to each of which a different educational institution enters into an agreement to make *rental* payments to the Authority sufficient to cover interest and principal thereon when due. The Board of Governors of the Federal Reserve System has been asked whether a member State bank may invest up to 10 percent of its capital and surplus in each such issue.

(b) Paragraph Seventh of section 5136 of the U.S. Revised Statutes (12 U.S.C. 24) provides that ''In no event shall the total amount of the investment securities of any one obligor or maker, held by [a national bank] for its own account, exceed at any time 10 per centum of its capital stock * * * and surplus fund''. That limitation is made applicable to member State banks by the 20th paragraph of section 9 of the Federal Reserve Act (12 U.S.C. 335).

(c) The Board considers that, within the meaning of these provisions of law, *obligor* does not include any person that acts solely as a conduit for transmission of funds received from another source, irrespective of a promise by such person to pay principal or interest on the obligation. While an obligor does not cease to be such merely because a third person has agreed to pay the obligor amounts sufficient to cover principal and interest on the obligations when due, a person that promises to pay an obligation, but as a practical matter has no resources with which to assume payment of the obligation except the amounts received from such third person, is not an *obligor* within the meaning of section 5136.

(d) Review of the New York Dormitory Authority Act (N.Y. Public Authorities Law sections 1675–1690), the Authority's interpretation thereof, and materials with respect to the Authority's ''Revenue Bonds, Mills College of Education Issue, Series A'' indicates that the Authority is not an *obligor* on those and similar bonds. Although the Authority promises to make all payments of principal and interest, a bank that invests in such bonds cannot be reasonably considered as doing so in reliance on the promise and responsibility of the Authority. Despite the Authority's obligation to make payments on the bonds, if the particular college fails to perform its agreement to make rental payments to the Authority sufficient to cover all payments of bond principal and interest when due, as a practical matter the sole source of funds for payments to the bondholder is the particular college. The Authority has general borrowing power but no resources from which to assure repayment of any borrowing except from the particular colleges, and rentals received from one college may not be used to service bonds issued for another.

(e) Accordingly, the Board has concluded that each college for which the Authority issues obligations is the sole *obligor* thereon. A member State bank may therefore invest an amount up to 10 percent of its capital and surplus in the bonds of a particular college that are eligible investments under the Investment Securities Regulation of the Comptroller of the Currency (12 CFR Part 1), whether issued directly or indirectly through the Dormitory Authority.

(12 U.S.C. 24, 335)

§ 250.143 Member bank purchase of stock of foreign operations subsidiaries.

(a) In a previous interpretation, the Board determined that a State member bank would not violate the ''stock-purchase prohibition'' of section 5136 of the Revised Statutes (12 U.S.C. 24 ¶7) by purchasing and holding the shares of a corporation which performs ''at locations at which the bank is authorized to engage in business, functions that the bank is empowered to perform directly''.[1] (1968 *Federal Reserve Bulletin* 681, 12 CFR 250.141). The Board of Governors has been asked by a State member bank whether, under that interpretation, the bank may establish such a so-called *operations subsidiary* outside the United States.

(b) In the above interpretation the Board viewed the creation of a wholly-owned subsidiary which engaged in activities that the bank itself could perform directly as an alternative organizational arrangement that would be permissible for member banks unless ''its use would be inconsistent with other Federal law, either statutory or judicial''.

(c) In the Board's judgment, the use by member banks of operations subsidiaries outside the United States would be clearly inconsistent with the statutory scheme of the Federal Reserve Act governing the foreign investments and operations of member banks. It is clear that Congress has given member banks the authority to conduct operations and make investments outside the United States only through gradually adopting a series of specific statutory amendments to the Federal Reserve Act, each of which has been carefully drawn to give the Board approval, supervisory, and regulatory authority over those operations and investments.

(d) As part of the original Federal Reserve Act, national banks were, with the Board's permission, given the power to establish foreign branches.[2] In 1916, Congress amended the Federal Reserve Act to permit national banks to invest in international or foreign banking corporations known as *Agreement* Corporations, because such corporations were required to enter into an agreement or understanding with the Board to restrict their operations. Subject to such limitations or restrictions as the Board may prescribe, such Agreement corporations may principally engage in international or foreign banking, or banking in a dependency or insular possession of the United States, either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions of the United States. In 1919 the enactment of section 25(a) of the Federal Reserve Act (the ''Edge Act'') permitted national banks to invest in federally chartered international or foreign banking corporations (so-called Edge Corporations) which may engage in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions. Edge Corporations may only purchase and hold stock in certain foreign subsidiaries with the consent of the Board. And in 1966, Congress amended section 25 of the Federal Reserve Act to allow national banks to invest directly in the shares of a foreign bank. In the Board's judgment,

[1] National banking associations are prohibited by section 5136 of the Revised Statutes from purchasing and holding shares of any corporation except those corporations whose shares are specifically made eligible by statute. This prohibition is made applicable to State member banks by section 9 ¶20 of the Federal Reserve Act (12 U.S.C. 335).

[2] Under section 9 of the Federal Reserve Act, State member banks, subject, of course, to any necessary approval from their State banking authority, may establish foreign branches on the same terms and subject to the same limitations and restrictions as are applicable to the establishment of branches by national banks (12 U.S.C. 321). State member banks may also purchase and hold shares of stock in Edge or Agreement Corporations and foreign banks because national banks, as a result of specific statutory exceptions to the stock purchase prohibitions of section 5136, can purchase and hold stock in these Corporations or banks.

the above statutory scheme of the Federal Reserve Act evidences a clear Congressional intent that member banks may only purchase and hold stock in subsidiaries located outside the United States through the prescribed statutory provisions of sections 25 and 25(a) of the Federal Reserve Act. It is through these statutorily prescribed forms of organization that member banks must conduct their operations outside the United States.

(e) To summarize, the Board has concluded that a member bank may only organize and operate *operations subsidiaries* at locations in the United States. Investments by member banks in foreign subsidiaries must be made either with the Board's permission under section 25 of the Federal Reserve Act or, with the Board's consent, through an Edge Corporation subsidiary under section 25(a) of the Federal Reserve Act or through an Agreement Corporation subsidiary under section 25 of the Federal Reserve Act. In addition, it should be noted that bank holding companies may acquire the shares of certain foreign subsidiaries with the Board's approval under section 4(c)(13) of the Bank Holding Company Act. These statutory sections taken together already give member banks a great deal of organizational flexibility in conducting their operations abroad.

(Interprets and applies 12 U.S.C. 24, 335)

[40 FR 12252, Mar. 18, 1975]

§ 250.160 Federal funds transactions.

(a) It is the position of the Board of Governors of the Federal Reserve System that, for purposes of provisions of law administered by the Board, a transaction in Federal funds involves a loan on the part of the *selling* bank and a borrowing on the part of the *purchasing* bank.

(b) [Reserved]

(12 U.S.C. 371c)

[33 FR 9866, July 10, 1968, as amended at 67 FR 76622, Dec. 12, 2002]

§ 250.163 Inapplicability of amount limitations to "ineligible acceptances."

(a) Since 1923, the Board has been of the view that ''the acceptance power of State member banks is not necessarily confined to the provisions of section 13 (of the Federal Reserve Act), inasmuch as the laws of many States confer broader acceptance powers upon their State banks, and certain State member banks may, therefore, legally make acceptances of kinds which are not eligible for rediscount, but which may be eligible for purchase by Federal reserve banks under section 14.'' 1923 FR bulletin 316, 317.

(b) In 1963, the Comptroller of the Currency ruled that ''[n]ational banks are not limited in the character of acceptances which they may make in financing credit transactions, and bankers' acceptances may be used for such purpose, since the making of acceptances is an essential part of banking authorized by 12 U.S.C. 24.'' *Comptroller's manual* 7.7420. Therefore, national banks are authorized by the Comptroller to make acceptances under 12 U.S.C. 24, although the acceptances are not the type described in section 13 of the Federal Reserve Act.

(c) A review of the legislative history surrounding the enactment of the acceptance provisions of section 13, reveals that Congress believed in 1913, that it was granting to national banks a power which they would not otherwise possess and had not previously possessed. See remarks of Congressmen Phelan, Helvering, Saunders, and Glass, 51 *Cong. Rec.* 4676, 4798, 4885, and 5064 (September 10, 12, 13, and 17 of 1913). Nevertheless, the courts have long recognized the evolutionary nature of banking and of the scope of the ''incidental powers'' clause of 12 U.S.C. 24. See *Merchants Bank* v. *State Bank*, 77 U.S. 604 (1870) (upholding the power of a national bank to certify a check under the ''incidental powers'' clause of 12 U.S.C. 24).

(d) It now appears that, based on the Board's 1923 ruling, and the Comptroller's 1963 ruling, both State member banks and national banks may make acceptances which are not of the type described in section 13 of the Federal Reserve Act. Yet, this appears to be a development that Congress did not contemplate when it drafted the acceptance provisions of section 13.

(e) The question is presented whether the amount limitations of section 13 should apply to acceptances made by a

member bank that are not of the type described in section 13. (The amount limitations are of two kinds:

(1) A limitation on the amount that may be accepted for any one customer, and

(2) A limitation on the aggregate amount of acceptances that a member bank may make.)

In interpreting any Federal statutory provision, the primary guide is the intent of Congress, yet, as noted earlier, Congress did not contemplate in 1913, the development of so-called ''ineligible acceptances.'' (Although there is some indication that Congress did contemplate State member banks' making acceptances of a type not described in section 13 [remarks of Congressman Glass, 51 *Cong. Rec.* 5064], the primary focus of congressional attention was on the acceptance powers of national banks.) In the absence of an indication of congressional intent, we are left to reach an interpretation that is in harmony with the language of the statutory provisions and with the purposes of the Federal Reserve Act.

(f) Section 13 authorizes acceptances of two types. The seventh paragraph of section 13 (12 U.S.C. 372) authorizes certain acceptances that arise out of specific transactions in goods. (These acceptances are sometimes referred to as ''commercial acceptances.'') The 12th paragraph of section 13 authorizes member banks to make acceptances ''for the purpose of furnishing dollar exchange as required by the usages of trade'' in foreign transactions. (Such acceptances are referred to as ''dollar exchange acceptances.'') In the 12th paragraph, there is a 10 percent limit on the amount of dollar exchange acceptances that may be accepted for any one customer (unless adequately secured) and a limitation on the aggregate amount of dollar exchange acceptances that a member bank may make. (The 12th paragraph, in imposing these limitations, refers to the acceptance of ''such drafts or bills of exchange referred to (in) this paragraph.'') Similarly, the seventh paragraph imposes on commercial acceptances a parallel 10 percent per-customer limitation, and limitations on the aggregate amount of commercial acceptances. (In the case of the aggregate limitations, the seventh paragraph states that ''no bank shall accept such bills to an amount'' in excess of the aggregate limit; the reference to ''such bills'' makes clear that the limitation is only in respect of drafts or bills of exchange of the specific type described in the seventh paragraph.)

(g) Based on the language and parallel structure of the 7th and 12th paragraphs of section 13, and in the absence of a statement of congressional intent in the legislative history, the Board concludes that the per-customer and aggregate limitations of the 12th paragraph apply only to acceptances of the type described in that paragraph (dollar exchange acceptances), and the per-customer and aggregate limitations of the 7th paragraph (12 U.S.C. 372) apply only to acceptances of the type described in that paragraph.

(Interprets and applies 12 U.S.C. 372 and the 12th paragraph of sec. 13 of the Federal Reserve Act, which paragraph is omitted from the United States Code)

[38 FR 13728, May 25, 1973]

§ 250.164 Bankers' acceptances.

(a) Section 207 of the Bank Export Services Act (title II of Pub. L. 97–290) (''BESA'') raised the limits on the aggregate amount of eligible bankers' acceptances (''BAs'') that may be created by an individual member bank from 50 per cent (or 100 per cent with the permission of the Board) of its paid up and unimpaired capital stock and surplus (''capital'') to 150 per cent (or 200 per cent with the permission of the Board) of its capital. Section 207 also prohibits a member bank from creating eligible BAs for any one person in the aggregate in excess of 10 per cent of the institution's capital. This section of the BESA applies the same limits applicable to member banks to U.S. branches and agencies of foreign banks that are subject to reserve requirements under section 7 of the International Banking Act of 1978 (12 U.S.C. 3105). The Board is clarifying the proper meaning of the seventh paragraph of section 13 of the Federal Reserve Act, as amended by the BESA.

(b)(1) This section of the BESA provides that any portion of an eligible BA created by an institution subject to the BA limitations contained therein

(''covered bank'') that is conveyed through a participation to another covered bank shall not be included in the calculation of the creating bank's BA limits. The amount of the participation is to be applied to the calculation of the BA limits applicable to the covered bank receiving the participation. Although a covered bank that has reached its 150 or 200 percent limit can continue to create eligible acceptances by conveying participations to other covered banks, Congress has in effect imposed an aggregate limit on the eligible acceptances that may be created by *all* covered banks equal to the sum of 150 or 200 percent of the capital of all covered banks.

(2) The Board has clarified that under the statute an eligible BA created by a covered bank that is conveyed through a participation to an institution that is *not* subject to the limitations of this section of the BESA continues to be included in the calculation of the limits applicable to the creating covered bank. This will ensure that the total amount of eligible BAs that may be created by covered banks does not exceed the limitations established by Congress. In addition, this ensures that participations in acceptances are not used as a device for the avoidance of reserve requirements. Finally, this promotes the Congressional intent, with respect to covered banks, that foreign and domestic banks be on an equal footing and under the same legal requirements.

(3) In addition, the amount of a participation received by a covered bank from an institution not covered by the limitations of the Act is to be included in the calculation of the limits applicable to the covered bank receiving the participation. This result is based upon the language of the statute which includes within a covered bank's limits on eligible BAs outstanding the amount of participations received by the covered bank. This provision reflects Congressional intent that a covered bank not be obligated on eligible bankers' acceptances, and participations therein, for an amount in excess of 150 or 200 percent of the institution's capital.

(c) The statute also provides that eligible acceptances growing out of domestic transactions are not to exceed 50 percent of the aggregate of all eligible acceptances authorized for covered banks. The Board has clarified that this 50 percent limitation is applicable to the maximum permissible amount of eligible BAs (150 or 200 percent of capital), regardless of the bank's amount of eligible acceptances outstanding. The statutory language prior to the BESA amendment made clear that covered banks could issue eligible acceptances growing out of domestic transactions up to 50 percent of the amount of the total permissible eligible acceptances the bank could issue. The legislative history of the BESA indicates no intent to change this domestic acceptance limitation.

(d) The statute also provides that for the purpose of the limitations applicable to U.S. branches and agencies of foreign banks, a branch's or agency's capital is to be calculated as the dollar equivalent of the capital stock and surplus of the parent foreign bank as determined by the Board. The Board has clarified that for purposes of calculating the BA limits applicable to U.S. branches and agencies of foreign banks, the identity of the parent foreign bank is generally the same as for reserve requirement purposes; that is, the bank entity that owns the branch or agency most directly. The Board has also clarified that the procedures currently used for purposes of reporting to the Board on the Annual Report of Foreign Banking Organizations, Form FR Y–7, are also to be used in the calculation of the acceptance limits applicable to U.S. branches and agencies of foreign banks. (The FR Y–7 generally requires financial statements prepared in accordance with local accounting practices and an explanation of the accounting terminology and the major features of the accounting standards used in the preparation of the financial statements.) Conversions to the dollar equivalent of the worldwide capital of the foreign bank should be made periodically, but in no event less frequently than quarterly. In this regard, the Board recognizes the need to be flexible in dealing with the effect of foreign exchange rate fluctuations on the calculation of the worldwide capital of the parent foreign bank. Each

foreign bank is to be responsible for coordinating the BA activity of its U.S. branches and agencies (including the aggregation of such activity) and establishing procedures that ensure that examiners will be able readily to determine compliance with the BESA limits.

(Sec. 13, Federal Reserve Act (12 U.S.C. 372))

[48 FR 28975, June 24, 1983]

§ 250.165 Bankers' acceptances: definition of participations.

(a)(1) Section 207 of the Bank Export Services Act (Title II of Pub. L. 97–290) (''BESA'') raised the limits on the aggregate amount of eligible bankers' acceptances (''BAs'') that may be created by a member bank from 50 percent (or 100 percent with the permission of the Board) of its paid up and unimpaired capital stock and surplus (''capital'') to 150 percent (or 200 percent with the permission of the Board) of its capital. Section 207 also prohibits a member bank from creating eligible BAs for any one person in the aggregate in excess of 10 percent of the institution's capital. Eligible BAs growing out of domestic transactions are not to exceed 50 percent of the aggregate of all eligible acceptances authorized for a member bank. This section of the BESA applies the same limits applicable to member banks to U.S. branches and agencies of foreign banks that are subject to reserve requirements under section 7 of the International Banking Act of 1978 (12 U.S.C. 3105).[1]

(2) This section of the BESA also provides that any portion of an eligible BA created by a covered bank (''senior bank'') that is conveyed through a ''participation agreement'' to another covered bank (''junior bank'') shall *not* be included in the calculation of the senior bank's bankers' acceptance limits established by section 207 of BESA.[2] However, the amount of the participation *is* to be included in the BA limits applicable to the junior bank. The language of the statute does not define what constitutes a participation agreement for purposes of the applicability of the BESA limitations. However, the statute does authorize the Board to further define any of the terms used in section 207 of the BESA (12 U.S.C. 372(g)). The Board is clarifying the term participation for purposes of the BA limitations of the BESA.

(b) The legislative history of section 207 of the BESA indicates that Congress intended that the junior bank be obligated to the senior bank in the event that the account party defaults on its obligation to pay, but that the junior bank need not also be obligated to pay the holder of the acceptance at the time the BA is presented for payment. H. Rep. No. 97–629, 97th Cong., 2nd Sess. 15 (1982); 128 *Cong. Rec.* H 4647 (daily ed. July 27, 1982) (remarks by Rep. Barnard): and 128 *Cong. Rec.* H 8462 (daily ed. October 1, 1982) (remarks by Rep. Barnard). The legislative history also indicates that Congress intended that eligible BAs in which participations had been conveyed not be required to indicate the name(s) (or interest(s)) of the junior bank(s) on the acceptance in order for the BA to be excluded from the BESA limitations applicable to the senior bank. 128 *Cong.* Rec. S 12237 (daily ed. September 24, 1982) (remarks of Senators Heinz and Garn): and 128 *Cong. Rec.* H 4647 (daily ed. July 27, 1982) (remarks of Rep. Barnard).

(c)(1) In view of Congressional intent with regard to what constitutes a participation in an eligible BA, the Board has determined that, for purposes of the BESA limits, a participation must satisfy the following two *minimum* requirements:

(i) A written agreement entered into between the junior and senior bank under which the junior bank acquires the senior bank's claim against the account party to the extent of the amount of the participation that is enforceable in the event that the account

[1] The institutions subject to the BA limitations of BESA will hereinafter be referred to as ''covered banks.''

[2] The use of the terms *senior bank* and *junior bank* has no implications regarding priority of claims. These terms merely represent a shorthand method of identifying the depository institution that has created the acceptance and conveyed the participation (senior bank) and the depository institution that has received the participation (junior bank).

party fails to perform in accordance with the terms of the acceptance; and

(ii) The agreement between the junior and senior bank provides that the senior bank obtains a claim against the junior bank to the extent of the amount of the participation that is enforceable in the event the account party fails to perform in accordance with the terms of the acceptance.

(2) Consistent with Congressional intent, the minimum requirements do not require the junior bank to be obligated to pay the holder of the acceptance at the time the BA is presented for payment. Similarly, the minimum requirements do not require the name(s) or interest(s) of the junior bank(s) to appear on the face of the acceptance.

(3) An eligible BA that is conveyed through a participation that does not satisfy these minimum requirements would continue to be included in the BA limits applicable to the senior bank. Further, an eligible BA conveyed to a covered bank through a participation that provided for additional rights and obligations among the parties would be excluded from the BESA limitations of the senior bank provided the minimum requirements were satisfied.

(4) A participation structured pursuant to these minimum requirements would be as follows: Upon the conveyance of the participation, the senior bank retains its entire obligation to pay the holder of the BA at maturity. The senior bank has a claim against the junior bank to the extent of the amount of the participation that is enforceable in the event the account party fails to perform in accordance with the terms of the acceptance. Similarly, the junior bank has a corresponding claim against the account party to the extent of the amount of the participation that is enforceable in the event the account party fails to perform in accordance with the terms of the acceptance.

(d)(1) The Board is not requiring the senior bank and the account party specifically to agree that the senior bank's rights are assignable because the Board believes such rights to be assignable even in the absence of an explicit agreement.

(2) The junior and senior banks may contract among themselves as to which party(ies) have the responsibility for administering the arrangement, enforcing claims, or exercising remedies.

(e) The Board recognizes that both the junior bank's claim on the account party and the senior bank's claim on the junior bank involve risk. Therefore, it is essential that these risks be assessed by the banks involved in accordance with prudent and sound banking practices. The examiners will in the normal course of the examination process review the risk assessment procedures instituted by the banks. The junior bank should review the creditworthiness of each account party when the junior bank acquires a participation and the senior bank should review on an ongoing basis the creditworthiness of the junior bank. Junior bank agreement to rely exclusively upon the credit judgment of the senior bank and purchase on an ongoing basis from the senior bank all participations in BAs regardless of the identity of the account party is not appropriate in view of the risks involved. However, in those cases involving a participation between a parent bank and its Edge affiliate where the credit review for both entities is performed by the parent bank, the Edge Corporation should maintain documentation indicating that it concurs with the parent bank's analysis and that the acceptance participation is appropriate for inclusion in the Edge Corporation's portfolio.

(f) Similarly, the Board has determined that it is appropriate to include the risks incurred by the senior bank in assessing the senior bank's capital and the risks incurred by the junior bank in assessing the junior bank's capital.

(g) In view of this clarification of the issues relating to participations in BAs, the Board encourages the private sector to develop standardized forms for BAs and participations therein that clearly delineate the rights and responsibilities of the relevant parties.

(Sec. 13, Federal Reserve Act (12 U.S.C. 372))

[48 FR 57109, Dec. 28, 1983]

§ 250.166 Treatment of mandatory convertible debt and subordinated notes of state member banks and bank holding companies as "capital".

(a) *General.* Under the Board's risk-based capital guidelines, state member banks and bank holding companies may include in Tier 2 capital subordinated debt and mandatory convertible debt that meets certain criteria. The purpose of this interpretation is to clarify these criteria. This interpretation should be read with those guidelines, particularly with paragraphs II.c. through II.e. of appendix A of 12 CFR part 208 if the issuer is a state member bank and with paragraphs II.A.2.c. and II.A.2.d. of appendix A of 12 CFR part 225 if the issuer is a bank holding company.

(b) *Criteria for subordinated debt included in capital*—(1) *Characteristics.* To be included in Tier 2 capital under the Board's risk-based capital guidelines for state member banks and bank holding companies, subordinated debt must be subordinated in right of payment to the claims of the issuer's general creditors[1] and, for banks, to the claims of depositors as well; must be unsecured; must state clearly on its face that it is not a deposit and is not insured by a federal agency; must have a minimum average maturity of five years;[2] must not contain provisions that permit debtholders to accelerate payment of principal prior to maturity except in the event of bankruptcy of or the appointment of a receiver for the issuing organization; must not contain or be covered by any covenants, terms, or restrictions that are inconsistent with safe and sound banking practice; and must not be credit sensitive.

(2) *Acceleration clauses*—(i) In order to be included in Tier 2 capital, the appendices provide that subordinated debt instruments must have an original weighted average maturity of at least five years. For this purpose, maturity is defined as the earliest possible date on which the holder can put the instrument back to the issuing banking organization. Since acceleration clauses permit the holder to put the debt back upon the occurrence of certain events, which could happen at any time after the instrument is issued, subordinated debt that includes provisions permitting acceleration upon events other than bankruptcy or reorganization under Chapters 7 (Liquidation) and 11 (Reorganization) of the Bankruptcy Code, in the case of a bank holding company, or insolvency—i.e., the appointment of a receiver—in the case of a state member bank, does not qualify for inclusion in Tier 2 capital.

(ii) Further, subordinated debt whose terms provide for acceleration upon the occurrence of events other than bankruptcy or the appointment of a receiver does not qualify as Tier 2 capital. For example, the terms of some subordinated debt issues would permit debtholders to accelerate repayment if the issuer failed to pay principal or interest on the subordinated debt issue when due (or within a certain timeframe after the due date), failed to make mandatory sinking fund deposits, defaulted on any other debt, failed to honor covenants, or if an institution affiliated with the issuer entered into bankruptcy or receivership. Some banking organizations have also issued, or proposed to issue, subordinated debt that would allow debtholders to accelerate repayment if, for example, the banking organization failed to maintain certain prescribed minimum capital ratios or rates of return, or if the amount of nonperforming assets or charge-offs of the banking organization exceeded a certain level.

(iii) These and other similar acceleration clauses raise significant supervisory concerns because repayment of the debt could be accelerated at a time when an organization may be experiencing financial difficulties. Acceleration of the debt could restrict the ability of the organization to resolve its problems in the normal course of business and could cause the organization involuntarily to enter into bankruptcy or receivership. Furthermore, since

[1] The risk-based capital guidelines for bank holding companies state that bank holding company debt must be subordinated to all senior indebtedness of the company. To meet this requirement, the debt should be subordinated to all general creditors.

[2] The ''average maturity'' of an obligation or issue repayable in scheduled periodic payments shall be the weighted average of the maturities of all such scheduled payments.

such acceleration clauses could allow the holders of subordinated debt to be paid ahead of general creditors or depositors, their inclusion in a debt issue throws into question whether the debt is, in fact, subordinated.

(iv) Subordinated debt issues whose terms state that the debtholders may accelerate the repayment of principal only in the event of bankruptcy or receivership of the issuer do not permit the holders of the debt to be paid before general creditors or depositors and do not raise supervisory concerns because the acceleration does not occur until the institution has failed. Accordingly, debt issues that permit acceleration of principal only in the event of bankruptcy (liquidation or reorganization) in the case of bank holding companies and receivership in the case of banks may generally be classified as capital.

(3) *Provisions inconsistent with safe and sound banking practices*—(i) The risk-based capital guidelines state that instruments included in capital may not contain or be covered by any covenants, terms, or restrictions that are inconsistent with safe and sound banking practice. As a general matter, capital instruments should not contain terms that could adversely affect liquidity or unduly restrict management's flexibility to run the organization, particularly in times of financial difficulty, or that could limit the regulator's ability to resolve problem bank situations. For example, some subordinated debt includes covenants that would not allow the banking organization to make additional secured or senior borrowings. Other covenants would prohibit a banking organization from disposing of a major subsidiary or undergoing a change in control. Such covenants could restrict the banking organization's ability to raise funds to meet its liquidity needs. In addition, such terms or conditions limit the ability of bank supervisors to resolve problem bank situations through a change in control.

(ii) Certain other provisions found in subordinated debt may provide protection to investors in subordinated debt without adversely affecting the overall benefits of the instrument to the organization. For example, some instruments include covenants that may require the banking organization to:

(A) Maintain an office or agency where securities may be presented,

(B) Hold payments on the securities in trust,

(C) Preserve the rights and franchises of the company,

(D) Pay taxes and assessments before they become delinquent,

(E) Provide an annual statement of compliance on whether the company has observed all conditions of the debt agreement, or

(F) Maintain its properties in good condition. Such covenants, as long as they do not unduly restrict the activity of the banking organization, generally would be acceptable in qualifying subordinated debt, provided that failure to meet them does not give the holders of the debt the right to accelerate the debt.[3]

(4) *Credit sensitive features.* Credit sensitive subordinated debt (including mandatory convertible securities) where payments are tied to the financial condition of the borrower generally do not qualify for inclusion in capital. Interest rate payments may be linked to the financial condition of an institution through various ways, such as through an auction rate mechanism, a preset schedule that either mandates interest rate increases as the credit rating of the institution declines or automatically increases them over the passage of time,[4] or that raises the interest rate if payment is not made in a

[3] This notice does not attempt to list or address all clauses included in subordinated debt; rather, it is intended to give general supervisory guidance regarding the types of clauses that could raise supervisory concerns. Issuers of subordinated debt may need to consult further with Federal Reserve staff about other subordinated debt provisions not specifically discussed above to determine whether such provisions are appropriate in a debt capital instrument.

[4] Although payments on debt whose interest rate increases over time on the surface may not appear to be directly linked to the financial condition of the issuing organization, such debt (sometimes referred to as expanding or exploding rate debt) has a strong potential to be credit sensitive in substance. Organizations whose financial condition has strengthened are more likely to be able to refinance the debt at a rate lower than that

Continued

timely fashion.[5] As the financial condition of an organization declines, it is faced with higher and higher payments on its credit sensitive subordinated debt at a time when it most needs to conserve its resources. Thus, credit sensitive debt does not provide the support expected of a capital instrument to an institution whose financial condition is deteriorating; rather, the credit sensitive feature can accelerate depletion of the institution's resources and increase the likelihood of default on the debt.

(c) *Criteria for mandatory convertible debt included in capital.* Mandatory convertible debt included in capital must meet all the criteria cited above for subordinated debt with the exception of the minimum maturity requirement.[6] Since mandatory convertible debt eventually converts to an equity instrument, it has no minimum maturity requirement. Such debt, however, is subject to a maximum maturity requirement of 12 years.

(d) *Previously issued subordinated debt.* Subordinated debt including mandatory convertible debt that has been issued prior to the date of this interpretation and that contains provisions permitting acceleration for reasons other than bankruptcy or receivership of the issuing institution; includes other questionable terms or conditions; or that is credit sensitive will not automatically be excluded from capital. Rather, such debt will be considered on a case-by-case basis to determine whether it qualifies as Tier 2 capital. As a general matter, subordinated debt issued prior to the release of this interpretation and containing such provisions or features may qualify as Tier 2 capital so long as these terms:

(1) have been commonly used by banking organizations,

(2) do not provide an unreasonably high degree of protection to the holder in cases not involving bankruptcy or receivership, and

(3) do not effectively allow the holder to stand ahead of the general creditors of the issuing institution in cases of bankruptcy or receivership.

Subordinated debt containing provisions that permit the holders of the debt to accelerate payment of principal when the banking organization begins to experience difficulties, for example, when it fails to meet certain financial ratios, such as capital ratios or rates of return, does not meet these three criteria. Consequently, subordinated debt issued prior to the release of this interpretation containing such provisions may not be included within Tier 2 capital.

(e) *Limitations on the amount of subordinated debt in capital*—(1) *Basic limitation.* The amount of subordinated debt an institution may include in Tier 2 capital is limited to 50 percent of the amount of the institution's Tier 1 capital. The amount of a subordinated debt issue that may be included in Tier 2 capital is discounted as it approaches maturity; one-fifth of the original amount of the instrument, less any redemptions, is excluded each year from Tier 2 capital during the last five years prior to maturity. If the instrument has a serial redemption feature such that, for example, half matures in seven years and half matures in ten years, the issuing organization should begin discounting the seven-year portion after two years and the ten-year portion after five years.

(2) *Treatment of debt with dedicated proceeds.* If a banking organization has issued common or preferred stock and dedicated the proceeds to the redemption of a mandatory convertible debt security, that portion of the security covered by the amount of the proceeds

mandated by the preset increase, whereas institutions whose condition has deteriorated are less likely to be able to do so. Moreover, just when these latter institutions would be in the most need of conserving capital, they would be under strong pressure to redeem the debt as an alternative to paying higher rates and, thus, would accelerate depletion of their resources.

[5] While such terms may be acceptable in perpetual preferred stock qualifying as Tier 2 capital, it would be inconsistent with safe and sound banking practice to include debt with such terms in Tier 2 capital. The organization does not have the option, as it does with auction rate preferred stock issues, of eliminating the higher payments on the subordinated debt without going into default.

[6] Mandatory convertible debt is subordinated debt that contains provisions committing the issuing organization to repay the principal from the proceeds of future equity issues.

so dedicated is considered to be ordinary subordinated debt for capital purposes, provided the proceeds are not placed in a sinking fund, trust fund, or similar segregated account or are not used in the interim for some other purpose. Thus, dedicated portions of mandatory convertible debt securities are subject, like other subordinated debt, to the 50 percent sublimit within Tier 2 capital, as well as to discounting in the last five years of life. Undedicated portions of mandatory convertible debt may be included in Tier 2 capital without any sublimit and are not subject to discounting.

(3) *Treatment of debt with segregated funds.* In some cases, the provisions in mandatory convertible debt issues may require the issuing banking organization to set up a sinking fund, trust fund, or similar segregated account to hold the proceeds from the sale of equity securities dedicated to pay off the principal of the mandatory convertible debt at maturity. The portion of mandatory convertibles covered by the amount of proceeds deposited in such a segregated fund is considered secured and, thus, may not be included in capital at all, let alone be treated as subordinated debt that is subject to the 50 percent sublimit within Tier 2 capital. The maintenance of such separate segregated funds for the redemption of mandatory convertible debt exceeds the requirements of appendix B to Regulation Y. Accordingly, if a banking organization, with the agreement of its debtholders, seeks Federal Reserve approval to eliminate such a fund, approval normally would be given unless supervisory concerns warrant otherwise.

(f) *Redemption of subordinated debt prior to maturity*—(1) *By state member banks.* State member banks must obtain approval from the appropriate Reserve Bank prior to redeeming before maturity subordinated debt or mandatory convertible debt included in capital.[7] A Reserve Bank will not approve such early redemption unless it is satisfied that the capital position of the bank will be adequate after the proposed redemption.

(2) *By bank holding companies.* While bank holding companies are not formally required to obtain approval prior to redeeming subordinated debt, the risk-based capital guidelines state that bank holding companies should consult with the Federal Reserve before redeeming any capital instruments prior to stated maturity. This also applies to any redemption of mandatory convertible debt with proceeds of an equity issuance that were dedicated to the redemption of that debt. Accordingly, a bank holding company should consult with its Reserve Bank prior to redeeming subordinated debt or dedicated portions of mandatory convertible debt included in capital. A Reserve Bank generally will not acquiesce to such a redemption unless it is satisfied that the capital position of the bank holding company would be adequate after the proposed redemption.

(3) *Special concerns involving mandatory convertible debt.* Consistent with appendix B to Regulation Y, bank holding companies wishing to redeem before maturity undedicated portions of mandatory convertible debt included in capital are required to receive prior Federal Reserve approval, unless the redemption is effected with the proceeds from the sale or common or perpetual preferred stock. An organization planning to effect such a redemption with the proceeds from the sale of common or perpetual preferred stock is advised to consult informally with its Reserve Bank in order to avoid the possibility of taking an action that could result in weakening its capital position. A Reserve Bank will not approve the redemption of mandatory convertible securities, or acquiesce in such a redemption effected with the sale of common or perpetual preferred stock, unless it is satisfied that the capital position of the bank holding company

[7] Some agreements governing mandatory convertible debt issued prior to the risk-based capital guidelines provide that the bank may redeem the notes if they no longer count as primary capital as defined in appendix B to Regulation Y. Such a provision does not obviate the requirement to receive Federal Reserve approval prior to redemption.

will be satisfactory after the redemption.[8]

[57 FR 40598, Sept. 4, 1992]

§ 250.180 Reports of changes in control of management.

(a) Under a statute enacted September 12, 1964 (Pub. L. 88–593; 78 Stat. 940) all insured banks are required to report promptly (1) changes in the outstanding voting stock of the bank which will result in control or in a change in control of the bank and (2) any instances where the bank makes a loan or loans, secured, or to be secured, by 25 percent or more of the outstanding voting stock of an insured bank.

(b) Reports concerning changes in control of a State member bank are to be made by the president or other chief executive officer of the bank, and shall be submitted to the Federal Reserve Bank of its district.

(c) Reports concerning loans by an insured bank on the stock of a State member bank are to be made by the president or other chief executive officer of the lending bank, and shall be submitted to the Federal Reserve Bank of the State member bank on the stock of which the loan was made.

(d) Paragraphs 3 and 4 of this legislation specify the information required in the reports which, in cases involving State member banks, should be addressed to the Vice President in Charge of Examinations of the appropriate Federal Reserve Bank.

(12 U.S.C. 1817)

§ 250.181 Reports of change in control of bank management incident to a merger.

(a) A State member bank has inquired whether Pub. L. 88–593 (78 Stat. 940) requires reports of change in control of bank management in situations where the change occurs as an incident in a merger.

(b) Under the Bank Merger Act of 1960 (12 U.S.C. 1828(c)), no bank with Federal deposit insurance may merge or consolidate with, or acquire the assets of, or assume the liability to pay deposits in, any other insured bank without prior approval of the appropriate Federal bank supervisory agency. Where the bank resulting from any such transaction is a State member bank, the Board of Governors is the agency that must pass on the transaction. In the course of consideration of such an application, the Board would, of necessity, acquire knowledge of any change in control of management that might result. Information concerning any such change in control of management is supplied with each merger application and, in the circumstances, it is the view of the Board that the receipt of such information in connection with a merger application constitutes compliance with Pub. L. 88–593. However, once a merger has been approved and completely effectuated, the resulting bank would thereafter be subject to the reporting requirements of Pub. L. 88–593.

(12 U.S.C. 1817)

§ 250.182 Terms defining competitive effects of proposed mergers.

Under the Bank Merger Act (12 U.S.C. 1828(c)), a Federal Banking agency receiving a merger application must request the views of the other two banking agencies and the Department of Justice on the competitive factors involved. Standard descriptive terms are used by the Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency. The terms and their definitions are as follows:

(a) The term *monopoly* means that the proposed transaction must be disapproved in accordance with 12 U.S.C. 1828(c)(5)(A).

(b) The term *substantially adverse* means that the proposed transaction would have anticompetitive effects which preclude approval unless the anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of

[8] The guidance contained in this paragraph applies to mandatory convertible debt issued prior to the risk-based capital guidelines that state that the banking organization may redeem the notes if they no longer count as primary capital as defined in appendix B to Regulation Y. Such provisions do not obviate the need to consult with, or obtain approval from, the Federal Reserve prior to redemption of the debt.

the community to be served as specified in 12 U.S.C. 1828(c)(5)(B).

(c) The term *adverse* means that proposed transaction would have anticompetitive effects which would be material to the decision but which would not preclude approval.

(d) The term *no significant effect* means that the anticompetitive effects of the proposed transaction, if any, would not be material to the decision.

(12 U.S.C. 1828(c))

[45 FR 45257, July 3, 1980]

§ 250.200 Investment in bank premises by holding company banks.

(a) The Board of Governors has been asked whether, in determining under section 24A of the Federal Reserve Act (12 U.S.C. 371d) how much may be invested in bank premises without prior Board approval, a State member bank, which is owned by a registered bank holding company, is required to include indebtedness of a corporation, wholly owned by the holding company, that is engaged in holding premises of banks in the holding company system.

(b) Section 24A provides, in part, as follows:

> Hereafter * * * no State member bank, without the approval of the Board of Governors of the Federal Reserve System, shall (1) invest in bank premises, or in the stock, bonds, debentures, or other such obligations of any corporation holding the premises of such bank or (2) make loans to or upon the security of the stock of any such corporation, if the aggregate of all such investments and loans, together with the amount of any indebtedness incurred by any such corporation which is an affiliate of the bank, as defined in section 2 of the Banking Act of 1933, as amended [12 U.S.C. 221a], will exceed the amount of the capital stock of such banks.

(c) A corporation that is owned by a holding company is an ''affiliate of each of the holding company's majority-owned banks as that term is defined in said section 2. Therefore, under the explicit provisions of section 24A, each State member bank, any part of whose premises is owned by such an affiliate, must include the affiliate's total indebtedness in determining whether a proposed premises investment by the bank would cause the aggregate figure to exceed the amount of the bank's capital stock, so that the Board's prior approval would be required. Where the affiliate holds the premises of a number of the holding company's banks, the amount of the affiliate's indebtedness may be so large that Board approval is required for every proposed investment in bank premises by each majority-owned State member bank, to which the entire indebtedness of the affiliate is required to be attributed. The Board believes that, in these circumstances, individual approvals are not essential to effectuate the purpose of section 24A, which is to safeguard the soundness and liquidity of member banks, and that the protection sought by Congress can be achieved by a suitably circumscribed general approval.

(d) Accordingly the Board hereby grants general approval for any investment or loan (as described in section 24A) by any State member bank, the majority of the stock of which is owned by a registered bank holding company, if the proposed investment or loan will not cause either (1) all such investments and loans by the member bank (together with the indebtedness of any bank premises subsidiary thereof) to exceed 100 percent of the bank's capital stock, or (2) the aggregate of such investments and loans by all of the holding company's subsidiary banks (together with the indebtedness of any bank premises affiliates thereof) to exceed 100 percent of the aggregate capital stock of said banks.

(12 U.S.C. 221a, 371d)

§ 250.220 Whether member bank acting as trustee is prohibited by section 20 of the Banking Act of 1933 from acquiring majority of shares of mutual fund.

(a) The Board recently considered whether section 20 of the Banking Act of 1933 (12 U.S.C. 377) would prohibit a member bank, while acting as trustee of a tax exempt employee benefit trust or trusts, from, under the following circumstances, acquiring a majority of the shares of an open-end investment company (''Fund'') registered under the Investment Company Act of 1940, or more than 50 percent of the number of Fund's shares voted at the preceding election of directors of the Fund.

(b) The bank has acted as trustee, since December 1963, pursuant to a trust agreement with a county medical society to administer its group retirement program, under which individual members of the society could participate in accordance with the provisions of the Self-Employed Individuals Tax Retirement Act of 1962 (commonly referred to as ''H.R. 10'').

(c) Under the trust agreement as presently constituted, each employer, who is a participating member of the medical society, directs the bank to invest his contributions to the retirement plan in such proportions as he may elect in insurance or annuity contracts or in a diversified portfolio of securities and other property. The diversified portfolio held by the bank is invested and administered by the bank solely at the direction of a committee of the medical society.

(d) It has now been proposed that the trust agreement be amended to provide that all investments constituting the trust fund, apart from insurance and annuity contracts, will be made exclusively in shares of a single open-end investment company to be named in the trust agreement and that the assets constituting the diversified portfolio now held by the bank, as trustee, will be exchanged for the Fund's shares. The bank will, in addition to holding the shares of the Fund, allocate income and dividends to the accounts of the various participants in the retirement program, invest and reinvest income and dividends, and perform other ministerial functions.

(e) In addition, it is proposed to amend the trust agreement so that voting of the shares held by the bank as trustee will be controlled exclusively by the participants. Under the proposed amendment, the bank will sign all proxies prior to mailing them to the participants,

> it being intended that the Participant(s) shall vote the proxies notwithstanding the fact that the Trustee is the owner of the shares * * *.

(f) The bank believes that amendments are now under consideration that will also require investment of the assets of these plans exclusively in the Fund's shares. Accordingly, the bank may eventually own the Fund's shares in several separate trust accounts and in an aggregate amount equal to a majority of the Fund's shares.

(g) Section 20 of the Banking Act of 1933 provides in relevant part that

> no member bank shall be affiliated in any manner described in section 2(b) hereof with any corporation * * * engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks * * * or other securities: * * *.

(h) Section 2(b) defines the term *affiliate* to include

> any corporation, business trust, association or other similar organization (1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; * * *.

(i) The Board has previously taken the position, in an interpretation involving the term *affiliate* under the Banking Act of 1933, that it would not require a member bank to obtain and publish a report of a corporation the majority of the stock of which is held by the member bank as executor or trustee, provided that the member bank holds such stock subject to control by a court or by a beneficiary or other principal and that the member bank may not lawfully exercise control of such stock independently of any order or direction of a court, beneficiary or other principal. 1933 Federal Reserve Bulletin 651. The rationale of that interpretation—which was reaffirmed by the Board in 1957—would appear to be equally applicable to the facts in the present case. In the circumstances, and on the basis of the Board's understanding that the bank will not vote any of Fund's shares or control in any manner the election of any of its directors, trustees, or other persons exercising similar functions, the Board has concluded that the situation in question would not fall within the purpose or coverage of section 20 of the Banking Act of 1933 and, therefore, would not involve a violation of the statute.

§ 250.221 Issuance and sale of short-term debt obligations by bank holding companies.

(a) The opinion of the Board of Governors of the Federal Reserve System has been requested recently with respect to the proposed sale of ''thrift notes'' by a bank holding company for the purpose of supplying capital to its wholly-owned nonbanking subsidiaries.

(b) The thrift notes would bear the name of the holding company, which in the case presented, was substantially similar to the name of its affiliated banks. It was proposed that they be issued in denominations of $50 to $100 and initially be of 12-month or less maturities. There would be no maximum amount of the issue. Interest rates would be variable according to money market conditions but would presumably be at rates somewhat above those permitted by Regulation Q ceilings. There would be no guarantee or indemnity of the notes by any of the banks in the holding company system and, if required to do so, the holding company would place on the face of the notes a negative representation that the purchase price was not a deposit, nor an indirect obligation of banks in the holding company system, nor covered by deposit insurance.

(c) The notes would be generally available for sale to members of the public, but only at offices of the holding company and its nonbanking subsidiaries. Although offices of the holding company may be in the same building or quarters as its banking offices, they would be physically separated from the banking offices. Sales would be made only by officers or employees of the holding company and its nonbanking subsidiaries. Initially, the notes would only be offered in the State in which the holding company was principally doing business, thereby complying with the exemption provided by section 3(a)(11) of the Securities Act of 1933 (15 U.S.C. 77c) for ''intra-state'' offerings. If it was decided to offer the notes on an interstate basis, steps would be taken to register the notes under the Securities Act of 1933. Funds from the sale of the notes would be used only to supply the financial needs of the nonbanking subsidiaries of the holding company. These nonbank subsidiaries are, at present, a small loan company, a mortgage banking company and a factoring company. In no instance would the proceeds from the sale of the notes be used in the bank subsidiaries of the holding company nor to maintain the availability of funds in its bank subsidiaries.

(d) The sale of the thrift notes, in the specific manner proposed, is an activity described in section 20 of the Banking Act of 1933 (12 U.S.C. 377), that is, ''the issue, flotation, underwriting, public sale or distribution * * * of * * * notes, or other securities''. Briefly stated, this statute prohibits a member bank to be affiliated with a company ''engaged principally'' in such activity. Since the continued issuance and sale of such securities would be necessary to permit maintenance of the holding company's activities without substantial contraction and would be an integral part of its operations, the Board concluded that the issuance and sale of such notes would constitute a principal activity of a holding company within the spirit and purpose of the statute. (For prior Board decisions in this connection, see 1934 Federal Reserve Bulletin 485, 12 CFR 218.104, 12 CFR 218.105 and 12 CFR 218.101.)

(e) In reaching this conclusion, the Board distinguished the proposed activity from the sale of short-term notes commonly known as *commercial paper*, which is a recognized form of financing for bank holding companies. For purposes of this interpretation, *commercial paper* may be defined as notes, with maturities not exceeding nine months, the proceeds of which are to be used for current transactions, which are usually sold to sophisticated institutional investors, rather than to members of the general public, in minimum denominations of $10,000 (although sometimes they may be sold in minimum denominations of $5,000). Commercial paper is exempt from registration under the Securities Act of 1933 by reason of the exemption provided by section 3(a)(3) thereof (15 U.S.C. 77c). That exemption is inapplicable where the securities are sold to the general public (17 CFR 231.4412). The reasons for such exemption, taken together with the abuses that gave rise to the passage of the Banking Act of 1933 (''the Glass-

Steagall Act''), have led the Board to conclude that the issuance of commercial paper by a bank holding company is not an activity intended to be included within the scope of section 20.

(Interprets and applies 12 U.S.C. 377 and 1843)

[Reg. Y, 38 FR 35231, Dec. 26, 1973]

§ 250.260 Miscellaneous interpretations; gold coin and bullion.

The Board has received numerous inquiries from member banks relating to the repeal of the ban on ownership of gold by United States citizens. Listed below are questions and answers which affect member banks and relate to the responsibilities of the Federal Reserve System.

(a) May gold in the form of coins or bullion be counted as vault cash in order to satisfy reserve requirements? No. Section 19(c) of the Federal Reserve Act requires that reserve balances be satisfied either by a balance maintained at the Federal Reserve Bank or by vault cash, consisting of United States currency and coin. Gold in bullion form is not United States currency. Since the bullion value of United States gold coins far exceeds their face value, member banks would not in practice distribute them over the counter at face value to satisfy customer demands.

(b) Will the Federal Reserve Banks perform services for member banks with respect to gold, such as safekeeping or assaying? No.

(c) Will a Federal Reserve Bank accept gold as collateral for an advance to a member bank under section 10(b) of the Federal Reserve Act? No.

[39 FR 45254, Dec. 31, 1974]

INTERPRETATIONS OF SECTION 32 OF THE GLASS-STEAGALL ACT

§ 250.400 Service of open-end investment company.

An open-end investment company is defined in section 5(a)(1) of the Investment Company Act of 1940 as a company ''which is offering for sale or has outstanding any redeemable security of which it is the issuer.'' Section 2(a)(31) of said act provides that a *redeemable security* means ''any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.''

It is customary for such companies to have but one class of securities, namely, capital stock, and it is apparent that the more or less continued process of redemption of the stock issued by such a company would restrict and contract its activities if it did not continue to issue its stock. Thus, the issuance and sale of its stock is essential to the maintenance of the company's size and to the continuance of operations without substantial contraction, and therefore the issue and sale of its stock constitutes one of the primary activities of such a company.

Accordingly, it is the opinion of the Board that if such a company is issuing or offering its redeemable stock for sale, it is ''primarily engaged in the issue * * * public sale, or distribution, * * * of securities'' and that section 32 of the Banking Act of 1933, as amended, prohibits an officer, director or employee of any such company from serving at the same time as an officer, director or employee of any member bank. It is the Board's view that this is true even though the shares are sold to the public through independent organizations with the result that the investment company does not derive any direct profit from the sales.

If, however, the company has ceased to issue or offer any of its stock for sale, the company would not be engaged in the issue or distribution of its stock, and, therefore, the prohibition contained in section 32 would be inapplicable unless the company were primarily engaged in the underwriting, public sale or distribution of securities other than its own stock.

[16 FR 4963, May 26, 1951. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.401 Director serving member bank and closed-end investment company being organized.

(a) The Board has previously expressed the opinion (§ 218.101) that section 32 of the Banking Act of 1933 (12 U.S.C. 78) is applicable to a director of a member bank serving as a director of an open-end investment company, because the more or less continued process of redemption of the stock issued by such company makes the issuance and sale of its stock essential to the maintenance of the company's size and to the continuance of operations, with the result that the issuance and sale of its stock constitutes one of the primary activities of such a company. The Board also stated that if the company had ceased to issue or offer any of its stock for sale, the company would not be engaged in the issuance or distribution of its stock and therefore the prohibitions of section 32 would not be applicable. Subsequently, the Board expressed the opinion that section 32 would not be applicable in the case of a closed-end investment company.

(b) The Board has recently stated that it believed that a closed-end company which was in process of organization and was actively engaged in issuing and selling its shares was in the same position relative to section 32 as an open-end company, and that the section would be applicable while this activity continued.

[25 FR 3464, Apr. 21, 1960. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.402 Service as officer, director, or employee of licensee corporation under the Small Business Investment Act of 1958.

(a) The Board of Governors has been requested to express an opinion whether § 218.1 would prohibit an officer, director, or employee of a member bank from serving at the same time as an officer, director, or employee of a Licensee corporation under the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*). It is understood that a Licensee would be authorized to engage only in the activities set forth in the statute, namely, to provide capital and long-term loan funds to small business concerns.

(b) In the opinion of the Board, a corporation engaged exclusively in the enumerated activities would not be ''primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities.'' Accordingly, the prohibition of § 218.1 would not apply to serving as an officer, director, or employee of either a small business investment company organized under the Small Business Investment Act of 1958, or an investment company chartered under the laws of a State solely for the purpose of operating under the Small Business Investment Act of 1958.

[25 FR 4427, May 19, 1960. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.403 Service of member bank and real estate investment company.

(a) The Board recently considered two inquiries regarding the question whether proposed real estate investment companies would be subject to the provisions of sections 20 and 32 of the Banking Act of 1933 (12 U.S.C. 377 and 78). These sections relate to affiliations between member banks and companies engaged principally in the issue, flotation, underwriting, public sale or distribution of stocks, bonds, or similar securities, and interlocking directorates between member banks and companies primarily so engaged. In both instances the companies, after their organization, would engage only in the business of financing real estate development or investing in real estate interests, and not in the type of business described in the statute. However, each of the companies, in the process of its organization, would issue its own stock. In one instance, it appeared that the stock would be issued over a period of from 30 to 60 days; in the other instance it was stated that the stock would be sold by a firm of underwriters and that distribution was expected to be completed in not more than a few days.

(b) On the basis of the facts stated, the Board concluded that the companies involved would not be subject to sections 20 and 32 of the Banking Act of 1933, since they would not be principally or primarily engaged in the

business of issuing or distributing securities but would only be issuing their own stock for a period ordinarily required for corporate organization. The Board stated, however, that if either of the companies should subsequently issue additional shares frequently and in substantial amounts relative to the size of the company's capital structure, it would be necessary for the Board to reconsider the matter.

(c) Apart from the legal question, the Board noted that an arrangement of the kind proposed could involve some dangers to an affiliated bank because the relationship might tend to impair the independent judgment that should be exercised by the bank in appraising its credits and might cause the company to be so identified in the minds of the public with the bank that any financial reverses suffered by the company might affect the confidence of the public in the bank.

(d) Because of the foregoing conclusion that the companies would not be subject to sections 20 and 32, it seems advisable to clarify § 218.102, in which the Board took the position that a closed-end investment company which was in process of organization and was actively engaged in issuing and selling its shares was subject to section 32 as long as this activity continued. That interpretation should be regarded as applicable only where the circumstances are such as to indicate that the issuance of the company's stock is a primary or principal activity of the company. For example, such circumstances might exist where the initial stock of a company is actively issued over a period of time longer than that ordinarily required for corporate organization, or where, subsequent to organization, the company issues its own stock frequently and in substantial amounts relative to the total amount of shares outstanding.

[26 FR 868, Jan. 28, 1961. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.404 Serving as director of member bank and corporation selling own stock.

(a) The Board recently considered the question whether section 32 of the Banking Act of 1933 (12 U.S.C. 78) would be applicable to the service of a director of a corporation which planned to acquire or organize, as proceeds from the sale of stock became available, subsidiaries to operate in a wide variety of fields, including manufacturing, foreign trade, leasing of heavy equipment, and real estate development. The corporation had a paid-in capital of about $60,000 and planned to sell additional shares at a price totaling $10 million, with the proviso that if less than $3 million worth were sold by March 1962, the funds subscribed would be refunded. It thus appeared to be contemplated that the sale of stock would take at least a year, and there appeared to be no reason for believing that, if the venture proved successful, additional shares would not be offered so that the corporation could continue to expand.

(b) The Board concluded that section 32 would be applicable, stating that although § 218.102, as clarified by § 218.104, related to closed-end investment companies, the rationale of that interpretation is applicable to corporations generally.

[26 FR 2456, Mar. 23, 1961. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.405 No exception granted a special or limited partner.

(a) The Board has been asked on several occasions whether section 32 of the Banking Act of 1933 (12 U.S.C. 78) is applicable to a director, officer, or employee of a member bank who is a special or limited partner in a firm primarily engaged in the business described in that section.

(b) Since the Board cannot issue an individual permit, it can exempt a limited or special partner only by amending part 218 (Regulation R). After the statute was amended in 1935 so as to make it applicable to a *partner*, the Board carefully considered the desirability of making such an exception. On several subsequent occasions it has reconsidered the question. In each instance the Board has decided that in view of a limited partner's interest in the underwriting and distributing business, it should not make the exception.

[27 FR 7954, Aug. 10, 1962. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.406 Serving member bank and investment advisor with mutual fund affiliation.

(a) The opinion of the Board of Governors of the Federal Reserve System has been requested with respect to service as vice president of a corporation engaged in supplying investment advice and management services to mutual funds and others (''Manager'') and as director of a member bank.

(b) Section 32 of the Banking Act of 1933 (12 U.S.C. 78), forbids any officer, director, or employee of any corporation ''primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities * * *'' to serve at the same time as an officer, director, or employee of a member bank.

(c) Manager has for several years served a number of different open-end or mutual funds, as well as individuals, institutions, and other clients, as an investment advisor and manager. However, it appears that Manager has a close relationship with two of the mutual funds which it serves. A wholly owned subsidiary of Manager (''Distributors''), serves as distributor for the two mutual funds and has no other function. In addition, the chairman and treasurer of Manager, as well as the president, assistant treasurer, and a director of Manager, are officers and directors of Distributors and trustees of both funds. It appears also that a director of Manager is president and director of Distributors, while the clerk of Manager is also clerk of Distributors. Manager, Distributors and both funds are listed at the same address in the local telephone directory.

(d) While the greater part of the total annual income of Manager during the past five years has derived from ''individuals, institutions, and other clients'', it appears that a substantial portion has been attributable to the involvement with the two funds in question. During each of the last four years, that portion has exceeded a third of the total income of Manager, and in 1962 it reached nearly 40 percent.

(e) The Board has consistently held that an open-end or mutual fund is engaged in the activities described in section 32, so long as it is issuing its securities for sale, since it is apparent that the more or less continued process of redemption of the stock issued by such a company would restrict and contract its activities if it did not continue to issue the stock. Clearly, a corporation that is engaged in underwriting or selling open-end shares, is so engaged.

(f) In connection with incorporated manager-advisors to open-end or mutual funds, the Board has expressed the view in a number of cases that where the corporation served a number of different clients, and the corporate structure was not interlocked with that of mutual fund and underwriter in such a way that it could be regarded as being controlled by or substantially one with them, it should not be held to be ''primarily engaged'' in section 32 activities. On the other hand, where a manager-advisor was created for the sole purpose of serving a particular fund, and its activities were limited to that function, the Board has regarded the group as a single entity for purposes of section 32.

(g) In the present case, the selling organization is a wholly-owned subsidiary of the advisor-manager, hence subject to the parent's control. Stock of the subsidiary will be voted according to decisions by the parent's board of directors, and presumably will be voted for a board of directors of the subsidiary which is responsive to policy lines laid down by the parent. Financial interests of the parent are obviously best served by an aggressive selling policy, and, in fact, both the share and the absolute amount of the parent's income provided by the two funds have shown a steady increase over recent years. The fact that dividends from Distributors have represented a relatively small proportion of the income of Manager, and that there were, indeed, no dividends in 1961 or 1962, does not support a contrary argument, in view of the steady increase in total income of Manager from the funds and Distributors taken as a whole.

(h) In view of all these facts, the Board has concluded that the separate corporate entities of Manager and Distributors should be disregarded and Distributors viewed as essentially a

selling arm of Manager. As a result of this conclusion, section 32 would forbid interlocking service as an officer of Manager and a director of a member bank.

[28 FR 13437, Dec. 12, 1963. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.407 Interlocking relationship involving securities affiliate of brokerage firm.

(a) The Board of Governors was asked recently whether section 32 of the Banking Act of 1933 (''section 32''), 12 U.S.C. 78, prohibits the interlocking service of X as a director of a member bank of the Federal Reserve System and as a partner in a New York City brokerage firm (''Partnership'') having a corporation affiliate (''Corporation'') engaged in business of the kinds described in section 32 (''section 32 business'').

(b) Section 32, subject to an exception not applicable here, provides that

> No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank * * *.

(c) From the information submitted it appears that Partnership, a member firm of the New York Stock Exchange, is the successor of two prior partnerships, in one of which X had been a partner. This prior partnership had been found not to be ''primarily engaged'' in section 32 business. The other prior partnership, however, had been so engaged. By arrangement between the two prior firms, Corporation was formed chiefly for the purpose of carrying on the section 32 business of the prior firm that had been ''primarily engaged'' in that business, which business was transferred to Corporation. The two prior firms were then merged and the stock of Corporation was acquired by all the partners of Partnership, other than X, in proportion to the respective partnership interests of the stockholding partners. The information submitted indicated also that two of the three directors and ''some'' of the principal officers of Corporation are partners in Partnership, although X is not a director or officer of Corporation.

(d) It is understood that the practice of forming corporate affiliates of brokerage firms, in order that the affiliate may carry on the securities business (such as section 32 business) with limited liability and other advantages, has become rather widespread in recent years. Accordingly, other cases may arise where a partner in such a firm may desire to serve at the same time as director of a member bank.

(e) On the basis of the information presented the Board concluded that X in his capacity as an ''individual'', was not engaged in section 32 business. However, as that information showed Corporation to be ''primarily engaged'' in section 32 business, the Board stated that a finding that Partnership and Corporation were one entity for the purposes of the statute would mean that X would be forbidden to serve both the member bank and Partnership, if the one entity were so engaged.

(f) Paragraph .15 of Rule 321 of the New York Stock Exchange governing the formation and conduct of affiliated companies of member organizations states that:

> Since Rule 314 provides that each member and allied member in a member organization must have a fixed interest in its entire business, it follows that the fixed interest of each member and allied member must extend to the member organization's corporate affiliate. When any of the corporate affiliate's participating stock is owned by the members and allied members in the member organization, such holdings must at all times be distributed among such members and allied members in approximately the same proportions as their respective interests in the profits of the member organization. When a member or allied member's interest in the member organization is changed, a corresponding change must be made in his participating interest in the affiliate.

(g) Although it was understood that X had received special permission from the Exchange not to own any of the stock of Corporation, it appeared to the Board that Rule 321.15 would apply to the remaining partners. Moreover, other paragraphs of the rule forbid transfers of the stock, except under

certain circumstances to limited classes of persons, such as employees of the organization or estates of decedent partners, without permission of the Exchange.

(h) The information supplied to the Board clearly indicated that Corporation was formed in order to provide Partnership with an ''underwriting arm''. Under Rule 321 of the Exchange, the partners (other than X) are required to own stock in Corporation because of their partnership interest, would be required to surrender that stock on leaving the partnership, and incoming partners would be required to acquire such stock. Furthermore, Rule 321 speaks of a corporate affiliate, such as Corporation, as a part of the ''entire business'' of a member organization.

(i) On the basis of the foregoing, the Board concluded that Partnership and Corporation must be regarded as a single entity or enterprise for purposes of section 32.

(j) The remaining question was whether the enterprise, as a whole, should be regarded as ''primarily engaged'' in section 32 business. The Information presented stated that the total dollar volume of section 32 business of Corporation during the first eleven months of its operation was $89 million. The gross income from section 32 business was less than half a million, and represented about 7.9 percent of the income of Partnership. The Board was advised that the relatively low amount of income from section 32 business of Corporation as due to special costs, and to the condition of the market for municipal and State bonds during the past year, a field in which Corporation specializes. Corporation is listed in a standard directory of securities dealers, and holds itself out as having separate departments to deal with the principal underwriting areas in which it functions.

(k) In view of the above information, the Board concluded that the enterprise consisting of Partnership and Corporation was ''primarily engaged'' in section 32 business. Accordingly, the Board stated that the partners in Partnership, including X, were forbidden by that section and by this part 218 (Reg. R), issued pursuant to the statute, to serve as officers, directors, or employees of any member banks.

[29 FR 5315, Apr. 18, 1964. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.408 Short-term negotiable notes of banks not securities under section 32, Banking Act of 1933.

(a) The Board of Governors has been asked whether short-term unsecured negotiable notes of the kinds issued by some of the large banks in this country as a means of obtaining funds are ''other similar securities'' within the meaning of section 32, Banking Act of 1933 (12 U.S.C. 78) and this part.

(b) Section 32 forbids certain interlocking relationships between banks which are members of the Federal Reserve System and individuals or organizations ''primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities * * *.'' Therefore, if such notes are securities similar to stocks or bonds, any dealing therein would be an activity covered in section 32 and would have to be taken into consideration in determining whether the individual or organization involved was ''primarily engaged'' in such activities.

(c) The Board has concluded that such short-term notes of the kind described above are not ''other similar securities'' within the meaning of section 32 and this part.

[29 FR 16065, Dec. 2, 1964. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.409 Investment for own account affects applicability of section 32.

(a) The Board of Governors has been presented with the question whether a certain firm is primarily engaged in the activities described in section 32 of the Banking Act of 1933. If the firm is so engaged, then the prohibitions of section 32 forbids a limited partner to serve as employee of a member bank.

(b) The firm describes the bulk of its business, producing roughly 60 percent of its income, as ''investing for its own account.'' However, it has a seat on the local stock exchange, and acts as specialist and odd-lot dealer on the floor of the exchange, an activity responsible for some 30 percent of its volume

and profits. The firm's ''off-post trading,'' apart from the investment account, gives rise to about 5 percent of its total volume and 10 percent of its profits. Gross volume has risen from $4 to $10 million over the past 3 years, but underwriting has accounted for no more than one-half of 1 percent of that amount.

(c) Section 32 provides that

> No officer, director, or employee of any corporation or unincorporated association, no partner, or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale, or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time (sic) as an officer, director, or employee of any member bank * * *

(d) In interpreting this language, the Board has consistently held that underwriting, acting as a dealer, or generally speaking, selling, or distributing securities as a principal, is covered by the section, while acting as broker or agent is not.

(e) In one type of situation, however, although a firm was engaged in selling securities as principal, on its own behalf, the Board held that section 32 did not apply. In these cases, the firm alleged that it bought and sold securities purely for investment purposes. Typically, those cases involved personal holding companies or small family investment companies. Securities had been purchased only for members of a restricted family group, and had been held for relatively long periods of time.

(f) The question now before the Board is whether a similar exception can apply in the case of the investment account of a professional dealer. In order to answer this question, it is necessary to analyze, in the light of applicable principles under the statute, the three main types of activity in which the firm has been engaged, (1) acting as specialist and odd-lot dealer, (2) off-post trading as an ordinary dealer, and (3) investing for its own account.

(g) On several occasions, the Board has held that, to the extent the trading of a specialist or odd-lot dealer is limited to that required for him to perform his function on the floor of the exchange, he is acting essentially in an agency capacity. In a letter of September 13, 1934, the Board held that the business of a specialist was not of the kind described in the (unamended) section on the understanding that

> * * * in acting as specialists on the New York Curb Exchange, it is necessary for the firm to buy and sell odd lots and * * * in order to protect its position after such transactions have been made, the firm sells or buys shares in lots of 100 or multiples thereof in order to reduce its position in the stock in question to the smallest amount possible by this method. It appears therefore that, in connection with these transactions, the firm is neither trading in the stock in question or taking a position in it except to the extent made necessary by the fact that it deals in odd lots and cannot complete the transactions by purchases and sales on the floor of the exchange except to the nearest 100 share amount.

(h) While subsequent amendments to section 32 to some extent changed the definition of the kinds of securities business that would be covered by the section, the amendments were designed so far as is relevant to the present question, to embody existing interpretations of the Board. Accordingly, to the extent that the firm's business is described by the above letter of the Board, it should not be considered to be of a kind described in section 32.

(i) Turning to the firm's off-post trading, the Board is inclined to agree with the view that this is sufficient to make the case a borderline one under the statute. In the circumstances, the Board might prefer to postpone making a determination until figures for 1965 could be reviewed, particularly in the light of the recent increase in total volume, if it were not for the third category, the firm's own investment account.

(j) While this question has not been squarely presented to it in the past, the Board is of the opinion that when a firm is doing any significant amount of business as a dealer or underwriter, then investments for the firm's own account should be taken into consideration in determining whether the firm is ''primarily engaged'' in the activities described in section 32. The division into dealing for one's own account, and dealing with customers, is a highly subjective one, and although a particular firm or individual may be quite scrupulous in separating the two,

the opportunity necessarily exists for the kind of abuse at which the statute is directed. The Act is designed to prevent situations from arising in which a bank director, officer, or employee could influence the bank or its customers to invest in securities in which his firm has an interest, regardless of whether he, as an individual, is likely to do so. In the present case, when these activities are added to the firm's ''off-post trading'', the firm clearly falls within the statutory definition.

(k) For the reasons just discussed, the Board concludes that the firm must be considered to be primarily engaged in activities described in section 32, and that the prohibitions of the section forbid a limited partner in that firm to serve as employee of a member bank.

(12 U.S.C. 248(i))

[30 FR 7743, June 16, 1965. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.410 Interlocking relationships between bank and its commingled investment account.

(a) The Board of Governors was asked recently whether the establishment of a proposed ''Commingled Investment Account'' (''Account'') by a national bank would involve a violation of section 32 of the Banking Act of 1933 in view of the interlocking relationships that would exist between the bank and Account.

(b) From the information submitted, it was understood that Account would comprise a commingled fund, to be operated under the effective control of the bank, for the collective investment of sums of money that might otherwise be handled individually by the bank as managing agent. It was understood further that the Comptroller of the Currency had taken the position that Account would be an eligible operation for a national bank under his Regulation 9, ''Fiduciary Powers of National Banks and Collective Investment Funds'' (part 9 of this title). The bank had advised the Board that the Securities and Exchange Commission was of the view that Account would be a ''registered investment company'' within the meaning of the Investment Company Act of 1940, and that participating interests in Account would be ''securities'' subject to the registration requirements of the Securities Act of 1933.

(c) The information submitted showed also that the minimum individual participation that would be permitted in Account would be $10,000, while the maximum acceptable individual investment would be half a million dollars; that there would be no ''load'' or payment by customers for the privilege of investing in Account; and that:

> The availability of the Commingled Account would not be given publicity by the Bank except in connection with the promotion of its fiduciary services in general and the Bank would not advertise or publicize the Commingled Account as such. Participations in the Commingled Account are to be made available only on the premises of the Bank (including its branches), or to persons who are already customers of the Bank in other connections, or in response to unsolicited requests.

(d) Such information indicated further that participations would be received by the bank as agent, under a broad authorization signed by the customer, substantially equivalent to the power of attorney under which customers currently deposit their funds for individual investment, and that the participations would not be received ''in trust.''

(e) The Board understood that Account would be required to comply with certain requirements of the Federal securities laws not applicable to an ordinary common trust fund operated by a bank. In particular, supervision of Account would be in the hands of a committee to be initially appointed by the bank, but subsequently elected by participants having a majority of the units of participation in Account. At least one member of the committee would be entirely independent of the bank, but the remaining members would be officers in the trust department of the bank.

(f) The committee would make a management agreement with the bank under which the bank would be responsible for managing Account's investments, have custody of its assets, and maintain its books and records. The management agreement would be renewed annually if approved by the committee, including a ''majority'' of the independent members, or by a vote

of participants having a majority of the units of participation. The agreement would be terminable on 60 days' notice by the committee, by such a majority of the participants, or by the bank, and would terminate automatically if assigned by the bank.

(g) It was understood also that the bank would receive as annual compensation for its services one-half of one percent of Account's average net assets. Account would also pay for its own independent professional services, including legal, auditing, and accounting services, as well as the cost of maintaining its registration and qualification under the Federal securities laws.

(h) Initially, the assets of Account would be divided into units of participation of an arbitrary value, and each customer would be credited with a number of units proportionate to his investment. Subsequently, the assets of Account would be valued at regular intervals, and divided by the number of units outstanding. New investors would receive units at their current value, determined in this way, according to the amount invested. Each customer would receive a receipt evidencing the number of units to which he was entitled. The receipts themselves would be nontransferable, but it would be possible for a customer to arrange with Account for the transfer of his units to someone else. A customer could terminate his participation at any time and withdraw the current value of his units.

(i) Section 32 of the Banking Act of 1933 provides in relevant part that:

> No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve [at] the same time as an officer, director, or employee of any member bank * * *.

(j) The Board concluded, based on its understanding of the proposal and on the general principles that have been developed in respect to the application of section 32, that the bank and Account would constitute a single entity for the purposes of section 32, at least so long as the operation of Account conformed to the representations made by the bank and outlined herein. Accordingly, the Board said that section 32 would not forbid officers of the bank to serve on Account's committee, since Account would be regarded as nothing more than an arm or department of the bank.

(k) In conclusion, the Board called attention to section 21 of the Banking Act of 1933 which, briefly, forbids a securities firm or organization to engage in the business of receiving deposits, subject to certain exceptions. However, since section 21 is a criminal statute, the Board has followed the policy of not expressing views as to its meaning. (1934 Federal Reserve Bulletin 41, 543.) The Board, therefore, expressed no position with respect to whether the section might be held applicable to the establishment and operation of the proposed ''Commingled Investment Account.''

(12 U.S.C. 248(i))

[30 FR 12836, Oct. 8, 1965. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.411 Interlocking relationships between member bank and variable annuity insurance company.

(a) The Board has recently been asked to consider whether section 32 of the Banking Act of 1933 (12 U.S.C. 78) and this part prohibit interlocking service between member banks and (1) the board of managers of an accumulation fund, registered under the Investment Company Act of 1940 (15 U.S.C. 80), that sells variable annuities and (2) the board of directors of the insurance company, of which the accumulation fund is a ''separate account,'' but as to which the insurance company is the sponsor, investment advisor, underwriter, and distributor. Briefly, a variable annuity is one providing for annuity payment varying in accordance with the changing values of a portfolio of securities.

(b) Section 32 provides in relevant part that:

> No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or

through syndicate participation, of stocks, bonds, or other similar securities, shall serve [at] the same time as an officer, director, or employee of any member bank * * *.

(c) For many years, the Board's position has been that an open-end investment company (or mutual fund) is ''primarily engaged in the issue * * * public sale, or distribution * * * of securities'' since the issuance and sale of its stock is essential to the maintenance of the company's size and to the continuance of its operations without substantial contraction, and that section 32 of the Banking Act of 1933 prohibits an officer, director, or employee of any such company from serving at the same time as an officer, director, or employee of any member bank. (1951 Federal Reserve Bulletin 645; § 218.101.)

(d) For reasons similar to those stated by the U.S. Supreme Court in Securities and Exchange Commission *v.* Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959), the Board concluded that there is no meaningful basis for distinguishing a variable annuity interest from a mutual fund share for section 32 purposes and that, therefore, variable annuity interests should also be regarded as ''other similar securities'' within the prohibition of the statute and regulation.

(e) The Board concluded also that, since the accumulation fund, like a mutual fund, must continually issue and sell its investment units in order to avoid the inevitable contraction of its activities as it makes annuity payments or redeems variable annuity units, the accumulation fund is ''primarily engaged'' for section 32 purposes. The Board further concluded that the insurance company was likewise ''primarily engaged'' for the purposes of the statute since it had no significant revenue producing operations other than as underwriter and distributor of the accumulation fund's units and investment advisor to the fund.

(f) Although it was clear, therefore, that section 32 prohibits any officers, directors, and employees of member banks from serving in any such capacity with the insurance company or accumulation fund, the Board also considered whether members of the board of managers of the accumulation fund are ''officers, directors, or employees'' within such prohibition. The functions of the board of managers, who are elected by the variable annuity contract owners, are, with the approval of the variable annuity contract owners, to select annually an independent public accountant, execute annually an agreement providing for investment advisory services, and recommend any changes in the fundamental investment policy of the accumulation fund. In addition, the Board of managers has sole authority to execute an agreement providing for sales and administrative services and to authorize all investments of the assets of the accumulation fund in accordance with its fundamental investment policy. In the opinion of the Board of Governors, the board of managers of the accumulation fund performs functions essentially the same as those performed by classes of persons as to whom the prohibition of section 32 was specifically directed and, accordingly, are within the prohibitions of the statute.

(12 U.S.C. 248(i))

[33 FR 12886, Sept. 12, 1968. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.412 Interlocking relationships between member bank and insurance company-mutual fund complex.

(a) The Board has been asked whether section 32 of the Banking Act of 1933 and this part prohibited interlocking service between member banks and (1) the advisory board of a newly organized open-end investment company (mutual fund), (2) the fund's incorporated investment manager-advisor, (3) the insurance company sponsoring and apparently controlling the fund.

(b) X Fund, Inc. (''Fund''), the mutual fund, was closely related to X Life Insurance Company (''Insurance Company''), as well as to the incorporated manager and investment advisor to Fund (''Advisors''), and the corporation serving as underwriter for Fund (''Underwriters''). The same persons served as principal officers and directors of Insurance Company, Fund, Advisors, and Underwriters. In addition, several directors of member banks served as directors of Insurance Company and of

Advisors and as members of the Advisory Board of Fund, and additional directors of member banks had been named only as members of the Advisory Board. All outstanding shares of Advisors and of Underwriters were apparently owned by Insurance Company.

(c) Section 32 provides in relevant part that:

> No officer, director, or employee of any corporation * * * primarily engaged in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve [at] the same time as an officer, director, or employee of any member bank * * *.

(d) The Board of Governors reaffirmed its earlier position that an open-end investment company is ''primarily engaged'' in activities described in section 32 ''even though the shares are sold to the public through independent organizations with the result that the investment company does not derive any direct profit from the sales.'' (1951 Federal Reserve Bulletin 654, § 218.101.) Accordingly, the Board concluded that Fund must be regarded as so engaged, even though its shares were underwritten and distributed by Underwriters.

(e) As directors of the member banks involved in the inquiry were not officers, directors, or employees of either Fund or Underwriters, the relevant questions were whether—(1) Advisors, and (2) Insurance Company, should be regarded as being functionally and structurally so closely allied with Fund that they should be treated as one with it in determining the applicability of section 32. An additional question was whether members of the Advisory Board are ''officers, directors, or employees'' of Fund within the prohibition of the statute.

(f) Interlocking service with Advisory Board: The function of the Advisory Board was merely to make suggestions and to counsel with Fund's Board of Directors in regard to investment policy. The Advisory Board had no authority to make binding recommendations in any area, and it did not serve in any sense as a check on the authority of the Board of Directors. Indeed, the Fund's bylaws provided that the Advisory Board ''shall have no power or authority to make any contract or incur any liability whatever or to take any action binding upon the Corporation, the Officers, the Board of Directors or the Stockholders.'' Members of the Advisory Board were appointed by the Board of Directors of Fund, which could remove any member of the Advisory Board at any time. None of the principal officers of Fund or of Underwriters were members of the Advisory Board; and the compensation of its members was expected to be nominal.

(g) The Board of Governors concluded that members of the Advisory Board need not be regarded as ''officers, directors, or employees'' of Fund or of Underwriters for purposes of section 32, and that the statute, therefore, did not prohibit officers, directors, or employees of member banks from serving as members of the Advisory Board.

(h) Interlocking service with Advisors: The principal officers and several of the directors of Advisors were identical with both those of Fund and of Underwriters. Entire management and investment responsibility for Fund had been placed, by contract, with Advisors, subject only to a review authority in the Board of Directors of Fund. Advisors also supplied office space for the conduct of Fund's affairs, and compensated members of the Advisory Board who are also officers or directors of Advisors. Moreover, it appeared that Advisors was created for the sole purpose of servicing Fund, and its activities were to be limited to that function.

(i) In the view of the Board of Governors, the structural and functional identity of Fund and Advisors was such that they were to be regarded as a single entity for purposes of section 32, and, accordingly, officers, directors, and employees of member banks were prohibited by section 32 from serving in any such capacity with such entity.

(j) Interlocking service with Insurance Company: It was clear that Insurance Company was not as yet ''primarily engaged'' in business of a kind described in section 32 with respect to the shares of the newly created Fund sponsored by Insurance Company, since the issue and sale of such shares had not yet commenced. Nor did it appear that Insurance Company would be so

engaged in the preliminary stages of Fund's existence, when the disproportion between the insurance business of Insurance Company and the sale of Fund shares would be very great. However, it was also clear that if Fund was successfully launched, its activities would rather quickly reach a stage where a serious question would arise as to the applicability of the section 32 prohibition.

(k) An estimate supplied to the Board indicated that 100,000 shares of Fund might be sold annually to produce, based on then current values, annual gross sales receipts of over $1 million. Insurance Company's total gross income for its last fiscal year was almost $10 million. On this basis, about one-tenth of the annual gross income of the Insurance Company-Fund complex (more than one-tenth, if income from investments of Insurance Company was eliminated) would be derived from sales of Fund shares. Although total sales of shares of Fund during the first year might not approximate expectations, it was assumed that if the estimate or projection was correct, the annual rate of sale might well rise to that level before the end of the first year of operation.

(l) It appeared that net income of Insurance Company from Fund's operations would be minimal for the foreseeable future. However, it was understood that Insurance Company's chief reason for launching Fund was to provide salesmen for Insurance Company (who were to be the only sellers of shares of Fund, and most of whom, Insurance Company hoped, would qualify to sell those shares), with a ''package'' of mutual fund shares and life insurance policies that would provide increased competitive strength in a highly competitive field.

(m) The Board concluded that Insurance Company would be ''primarily engaged'' in issuing or distributing shares of Fund within the meaning of section 32 by not later than the time of realization of the aforementioned estimated annual rate of sale, and possibly before. As indicated in Board of Governors v. Agnew, 329 U.S. 441 at 446, the prohibition of the statute applies if the section 32 business involved is a ''substantial'' activity of the company.

(n) This, the Board observed, was not to suggest that officers, directors, or employees of Insurance Company who are also directors of member banks would be likely, as individuals, to use their positions with the banks to further sales of Fund's shares. However, as the Supreme Court pointed out in the Agnew case, section 32 is a ''preventive or prophylactic measure.'' The fact that the individuals involved ''have been scrupulous in their relationships'' to the banks in question ''is immaterial.''

(12 U.S.C. 248(i))

[33 FR 13001, Sept. 14, 1968. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.413 "Bank-eligible" securities activities.

Section 32 of the Glass-Steagall Act (12 U.S.C. 78) prohibits any officer, director, or employee of any corporation or unincorporated association, any partner or employee of any partnership, and any individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, from serving at the same time as an officer, director, or employee of any member bank of the Federal Reserve System. The Board is of the opinion that to the extent that a company, other entity or person is engaged in securities activities that are expressly authorized for a state member bank under section 16 of the Glass-Steagall Act (12 U.S.C. 24(7), 335), the company, other entity or individual is not engaged in the types of activities described in section 32. In addition, a securities broker who is engaged solely in executing orders for the purchase and sale of securities on behalf of others in the open market is not engaged in the business referred to in section 32.

[Reg. R, 61 FR 57289, Nov. 6, 1996]

PART 261—RULES REGARDING AVAILABILITY OF INFORMATION

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AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 248(i) and (k), 321 *et seq.*, 611 *et seq.*, 1442, 1467a, 1817(a)(2)(A), 1817(a)(8), 1818(u) and (v), 1821(o), 1821(t), 1830, 1844, 1951 *et seq.*, 2601, 2801 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3401 *et seq.;* 15 U.S.C. 77uuu(b), 78q(c)(3); 29 U.S.C. 1204; 31 U.S.C. 5301 *et seq.;* 42 U.S.C. 3601; 44 U.S.C. 3510.

SOURCE: 53 FR 20815, June 7, 1988, unless otherwise noted.

Subpart A—General Provisions

SOURCE: 62 FR 54359, Oct. 20, 1997, unless otherwise noted.

§ 261.1 Authority, purpose, and scope.

(a) *Authority.* (1) This part is issued by the Board of Governors of the Federal Reserve System (the Board) pursuant to the Freedom of Information Act, 5 U.S.C. 552; Sections 9, 11, and 25A of the Federal Reserve Act, 12 U.S.C. 248(i) and (k), 321 *et seq.*, (including 326), 611 *et seq.;* Section 22 of the Federal Home Loan Bank Act, 12 U.S.C 1442; section 10 of the Home Owners' Loan Act, 12 U.S.C. 1467a; the Federal Deposit Insurance Act, 12 U.S.C. 1817(a)(2)(A), 1817(a)(8), 1818(u) and (v), 1821(o); section 5 of the Bank Holding Company Act, 12 U.S.C. 1844; the Bank Secrecy Act, 12 U.S.C. 1951 *et seq.*, and Chapter 53 of Title 31; the Home Mortgage Disclosure Act, 12 U.S.C. 2801 *et seq.;* the Community Reinvestment Act, 12 U.S.C. 2901 *et seq.;* the International Banking Act, 12 U.S.C. 3101 *et seq.;* the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.;* the Securities and Exchange Commission Authorization Act, 15 U.S.C. 77uuu(b), 78q(c)(3); the Employee Retirement Income Security Act, 29 U.S.C. 1204; the Money Laundering Suppression Act, 31 U.S.C. 5301, the Fair Housing Act, 42 U.S.C. 3601; the Paperwork Reduction Act, 44 U.S.C. 3510; and any other applicable law that establishes a basis for the exercise of governmental authority by the Board.

(2) This part establishes mechanisms for carrying out the Board's statutory responsibilities under statutes in paragraph (a)(1) of this section to the extent those responsibilities require the disclosure, production, or withholding of information. In this regard, the Board has determined that the Board, or its delegees, may disclose exempt information of the Board, in accordance with the procedures set forth in this part, whenever it is necessary or appropriate to do so in the exercise of any of the Board's supervisory or regulatory authorities, including but not limited to, authority granted to the Board in the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, the Bank Holding Company Act, 12 U.S.C. 1841 *et seq.*, the Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.*, and the International Banking Act, 12 U.S.C. 3101 *et seq*. The Board has determined that all such disclosures, made in accordance with the rules and procedures specified in this part, are authorized by law.

(3) The Board has also determined that it is authorized by law to disclose information to a law enforcement or other federal or state government agency that has the authority to request and receive such information in

carrying out its own statutory responsibilities, or in response to a valid order of a court of competent jurisdiction or of a duly constituted administrative tribunal.

(b) *Purpose*. This part sets forth the categories of information made available to the public, the procedures for obtaining documents and records, the procedures for limited release of exempt and confidential supervisory information, and the procedures for protecting confidential business information.

(c) *Scope*. (1) This subpart A contains general provisions and definitions of terms used in this part.

(2) Subpart B of this part implements the Freedom of Information Act (FOIA) (5 U.S.C. 552).

(3) Subpart C of this part sets forth:

(i) The kinds of exempt information made available to supervised institutions, supervisory agencies, law enforcement agencies, and others in certain circumstances;

(ii) The procedures for disclosure; and

(iii) The procedures with respect to subpoenas, orders compelling production, and other process.

[62 FR 54359, Oct. 20, 1997; 62 FR 62508, Nov. 24, 1997, as amended at 76 FR 56600, Sept. 13, 2011]

§ 261.2 Definitions.

For purposes of this part:

(a) *Board's official files* means the Board's central records.

(b) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(c)(1) *Confidential supervisory information* means:

(i) Exempt information consisting of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports;

(ii) Information gathered by the Board in the course of any investigation, suspicious activity report, cease-and-desist orders, civil money penalty enforcement orders, suspension, removal or prohibition orders, or other orders or actions under the Financial Institutions Supervisory Act of 1966, Public Law 89–695, 80 Stat. 1028 (codified as amended in scattered sections of 12 U.S.C.), the Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.*, the Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.*, the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, the International Banking Act of 1978, Public Law 95–369, 92 Stat. 607 (codified as amended in scattered sections of 12 U.S.C.), and the International Lending Supervision Act of 1983, 12 U.S.C. 3901 *et seq.;* except—

(A) Such final orders, amendments, or modifications of final orders, or other actions or documents that are specifically required to be published or made available to the public pursuant to 12 U.S.C. 1818(u), or other applicable law, including the record of litigated proceedings; and

(B) The public section of Community Reinvestment Act examination reports, pursuant to 12 U.S.C. 2906(b); and

(iii) Any documents prepared by, on behalf of, or for the use of the Board, a Federal Reserve Bank, a federal or state financial institutions supervisory agency, or a bank or bank holding company or other supervised financial institution.

(2) *Confidential supervisory information* does not include documents prepared by a supervised financial institution for its own business purposes and that are in its possession.

(d) *Direct costs* mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating documents in response to a request made under § 261.12.

(e) *Duplication* refers to the process of making a copy of a document in response to a request for disclosure of records or for inspection of original records that contain exempt material or that otherwise cannot be inspected directly. Among others, such copies may take the form of paper, microform, audiovisual materials, or machine-readable documentation (e.g., magnetic tape or disk).

(f) *Educational institution* refers to a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, graduate higher education, professional education, or an institution

of vocational education, which operates a program of scholarly research.

(g) *Exempt information* means information that is exempt from disclosure under § 261.14.

(h) *Noncommercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis (as that term is used in this section) and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(i)(1) *Records of the Board* include:

(i) In written form, or in nonwritten or machine-readable form; all information coming into the possession and under the control of the Board, any Board member, any Federal Reserve Bank, or any officer, employee, or agent of the Board or of any Federal Reserve Bank, in the performance of functions for or on behalf of the Board that constitute part of the Board's official files; or

(ii) That are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business.

(2) *Records of the Board* does not include personal files of Board members and employees; tangible exhibits, formulas, designs, or other items of valuable intellectual property; extra copies of documents and library and museum materials kept solely for reference or exhibition purposes; unaltered publications otherwise available to the public in Board publications, libraries, or established distribution systems.

(j) *Report of examination* means the report prepared by the Board, or other federal or state financial institution supervisory agency, concerning the examination of a financial institution, and includes reports of inspection and reports of examination of U.S. branches or agencies of foreign banks and representative offices of foreign organizations, and other institutions examined by the Federal Reserve System.

(k) *Report of inspection* means a report prepared by the Board concerning its inspection of a bank holding company and its bank and nonbank subsidiaries or other supervised financial institution.

(l) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.

(1) The term ''news'' means information that is about current events or that would be of current interest to the public.

(2) Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public.

(3) ''Freelance'' journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though they are not actually employed by it.

(m)(1) *Review* refers to the process of examining documents, located in response to a request for access, to determine whether any portion of a document is exempt information. It includes doing all that is necessary to excise the documents and otherwise to prepare them for release.

(2) *Review* does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(n)(1) *Search* means a reasonable search, by manual or automated means, of the Board's official files and any other files containing Board records as seem reasonably likely in the particular circumstances to contain information of the kind requested. For purposes of computing fees under § 261.17, search time includes all time spent looking for material that is responsive to a request, including line-by-line identification of material within documents. Such activity is distinct from ''review'' of material to determine whether the material is exempt from disclosure.

(2) *Search* does not mean or include research, creation of any document, or extensive modification of an existing program or system that would significantly interfere with the operation of

the Board's automated information systems.

(o) *Supervised financial institution* includes a bank, bank holding company (including subsidiaries), savings and loan holding company (including nondepository subsidiaries), U.S. branch or agency of a foreign bank, or any other institution that is supervised by the Board.

[62 FR 54359, Oct. 20, 1997, as amended at 76 FR 56601, Sept. 13, 2011]

§ 261.3 Custodian of records; certification; service; alternative authority.

(a) *Custodian of records.* The Secretary of the Board (Secretary) is the official custodian of all Board records, including records that are in the possession or control of the Board, any Federal Reserve Bank, or any Board or Reserve Bank employee.

(b) *Certification of record.* The Secretary may certify the authenticity of any Board record, or any copy of such record, for any purpose, and for or before any duly constituted federal or state court, tribunal, or agency.

(c) *Service of subpoenas or other process.* Subpoenas or other judicial or administrative process, demanding access to any Board records or making any claim against the Board, shall be addressed to and served upon the Secretary of the Board at the Board's office at 20th and C Streets, N.W., Washington, D.C. 20551. Neither the Board nor the Secretary are agents for service of process on behalf of any employee in respect of purely private legal disputes, except as specifically provided by law.

(d) *Alternative authority.* Any action or determination required or permitted by this part to be done by the Secretary, the General Counsel, or the Director of any Division may be done by any employee who has been duly designated for this purpose by the Secretary, General Counsel, or the appropriate Director.

Subpart B—Published Information and Records Available to Public; Procedures for Requests

SOURCE: 62 FR 54359, 54361, Oct. 20, 1997, unless otherwise noted.

§ 261.10 Published information.

(a) FEDERAL REGISTER. The Board publishes in the FEDERAL REGISTER for the guidance of the public:

(1) Descriptions of the Board's central and field organization;

(2) Statements of the general course and method by which the Board's functions are channeled and determined, including the nature and requirements of procedures;

(3) Rules of procedure, descriptions of forms available and the place where they may be obtained, and instructions on the scope and contents of all papers, reports, and examinations;

(4) Substantive rules, interpretations of general applicability, and statements of general policy;

(5) Every amendment, revision, or repeal of the foregoing in paragraphs (a)(1) through (a)(4) of this section;

(6) Notices of proposed rulemaking;

(7) Notices of applications received under the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*), the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*), and the Change in Bank Control Act (12 U.S.C. 1817);

(8) Notices of all Board meetings, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b);

(9) Notices identifying the Board's systems of records, pursuant to the Privacy Act of 1974 (5 U.S.C. 552a); and

(10) Notices of agency data collection forms being reviewed under the Paperwork Reduction Act (5 U.S.C. 3501 *et seq.*).

(b) *Board's Reports to Congress.* The Board's annual report to Congress pursuant to the Federal Reserve Act (12 U.S.C. 247), which is made public upon its submission to Congress, contains a full account of the Board's operations during the year, the policy actions by the Federal Open Market Committee, an economic review of the year, and legislative recommendations to Congress. The Board also makes periodic

reports to Congress under certain statutes, including but not limited to the Freedom of Information Act (5 U.S.C. 552); the Government in the Sunshine Act (5 U.S.C. 552b); the Full Employment and Balanced Growth Act of 1978 (12 U.S.C. 225a); and the Privacy Act (5 U.S.C. 552a).

(c) *Federal Reserve Bulletin*. This publication is issued monthly and contains economic and statistical information, articles relating to the economy or Board activities, and descriptions of recent actions by the Board.

(d) *Other published information*. Among other things, the Board publishes the following information:

(1) *Weekly publications*. The Board issues the following publications weekly:

(i) A statement showing the condition of each Federal Reserve Bank and a consolidated statement of the condition of all Federal Reserve Banks, pursuant to 12 U.S.C. 248(a);

(ii) An index of applications received and the actions taken on the applications, as well as other matters issued, adopted, or promulgated by the Board; and

(iii) A statement showing changes in the structure of the banking industry resulting from mergers and the establishment of branches.

(2) *Press releases*. The Board frequently issues statements to the press and public regarding monetary and credit actions, regulatory actions, actions taken on certain types of applications, and other matters.

(3) *Call Report and other data*. Certain data from Reports of Condition and Income submitted to the Board are available through the National Technical Information Service and may be obtained by the procedure described in § 261.11(c)(2).

(4) *Federal Reserve Regulatory Service*. This is a multivolume looseleaf service published by the Board, containing statutes, regulations, interpretations, rulings, staff opinions, and procedural rules under which the Board operates. Portions of the service are also published as separate looseleaf handbooks relating to consumer and community affairs, monetary policy and reserve requirements, payments systems, and securities credit transactions. The service and each handbook contain subject and citation indexes, are updated monthly, and may be subscribed to on a yearly basis.

(e) *Index to Board actions*. The Board's Freedom of Information Office maintains an index to Board actions, which is updated weekly and provides identifying information about any matters issued, adopted, and promulgated by the Board since July 4, 1967. Copies of the index may be obtained upon request to the Freedom of Information Office subject to the current schedule of fees in § 261.17.

(f) *Obtaining Board publications*. The Publications Services Section maintains a list of Board publications that are available to the public. In addition, a partial list of publications is published in the *Federal Reserve Bulletin*. All publications issued by the Board, including available back issues, may be obtained from Publications Services, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 (pedestrian entrance is on C Street, N.W.). Subscription or other charges may apply to some publications.

[62 FR 54359, 54361, Oct. 20, 1997, as amended at 76 FR 56601, Sept. 13, 2011]

§ 261.11 Records available for public inspection and copying.

(a) *Types of records made available*. Unless they were published promptly and made available for sale or without charge, the following records shall be made available for inspection and copying at the Freedom of Information Office:

(1) Final opinions, including concurring and dissenting opinions, as well as final orders and written agreements, made in the adjudication of cases;

(2) Statements of policy and interpretations adopted by the Board that are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect the public;

(4) Copies of all records released to any person under § 261.12 that, because of the nature of their subject matter, the Board has determined are likely to be requested again;

(5) A general index of the records referred to in paragraph (a)(4) of this section; and

(6) The public section of Community Reinvestment Act examination reports.

(b) *Reading room procedures.* (1) Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 (the pedestrian entrance is on C Street, N.W.).

(2) The Board may determine that certain classes of publicly available filings shall be made available for inspection and copying only at the Federal Reserve Bank where those records are filed.

(c) *Electronic records.* (1) Except as set forth in paragraph (c)(2) of this section, information available under this section that was created by the Board on or after November 1, 1996, shall also be available on the Board's internet site (which can be found at *http://www.bog.frb.fed.us*).

(2) *NTIS.* The publicly available portions of Reports of Condition and Income of individual banks and certain other data files produced by the Board are distributed by the National Technical Information Service. Requests for these public reports should be addressed to: Sales Office, National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161, (703) 487–4650.

(3) *Privacy protection.* The Board may delete identifying details from any record to prevent a clearly unwarranted invasion of personal privacy.

§ 261.12 Records available to public upon request.

(a) *Types of records made available.* All records of the Board that are not available under §§ 261.10 and 261.11 shall be made available upon request, pursuant to the procedures and exceptions in this Subpart B.

(b) *Procedures for requesting records.* (1) A request for identifiable records shall reasonably describe the records in a way that enables the Board's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board's operations.

(2) The request shall be submitted in writing to the Freedom of Information Office, Board of Governors of the Federal Reserve System, 20th & C Street, N.W., Washington, D.C. 20551; or sent by facsimile to the Freedom of Information Office, (202) 872–7562 or 7565. The request shall be clearly marked *FREEDOM OF INFORMATION ACT REQUEST.*

(3) A request may not be combined with any other request to the Board except for a request under 12 CFR 261a.3(a) (Rules Regarding Access to and Review of Personal Information under the Privacy Act of 1974) and a request made under § 261.22(b).

(c) *Contents of request.* The request shall contain the following information:

(1) The name and address of the requester, and the telephone number at which the requester can be reached during normal business hours;

(2) Whether the requested information is intended for commercial use, and whether the requester is an educational or noncommercial scientific institution, or news media representative;

(3) A statement agreeing to pay the applicable fees, or a statement identifying any desired fee limitation, or a request for a waiver or reduction of fees that satisfies § 261.17(f); and

(4) If the request is being made in connection with on-going litigation, a statement indicating whether the requester will seek discretionary release of exempt information from the General Counsel upon denial of the request by the Secretary. A requester who intends to make such a request to the General Counsel may also address the factors set forth in § 261.22(b).

(d) *Defective requests.* The Board need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this section. The Board may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

(e) *Oral requests*. The Freedom of Information Office may honor an oral request for records, but if the requester is dissatisfied with the Board's response and wishes to seek review, the requester must submit a written request, which shall be treated as an initial request.

[62 FR 54362, Oct. 20, 1997; 62 FR 62508, Nov. 24, 1997]

§ 261.13 Processing requests.

(a) *Receipt of requests*. Upon receipt of any request that satisfies § 261.12(b), the Freedom of Information Office shall assign the request to the appropriate processing schedule, pursuant to paragraph (b) of this section. The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency or by a Federal Reserve Bank, is the date the Freedom of Information Office actually receives the request.

(b) *Multitrack processing*. (1) The Board provides different levels of processing for categories of requests under this section. Requests for records that are readily identifiable by the Freedom of Information Office and that have already been cleared for public release may qualify for fast-track processing. All other requests shall be handled under normal processing procedures, unless expedited processing has been granted pursuant to paragraph (c)(2) of this section.

(2) The Freedom of Information Office will make the determination whether a request qualifies for fast-track processing. A requester may contact the Freedom of Information Office to learn whether a particular request has been assigned to fast-track processing. If the request has not qualified for fast-track processing, the requester will be given an opportunity to limit the request in order to qualify for fast-track processing. Limitations of requests must be in writing.

(c) *Expedited processing*. When a person requesting expedited access to records has demonstrated a compelling need for the records, or when the Board has determined to expedite the response, the Board shall process the request as soon as practicable.

(1) To demonstrate a compelling need for expedited processing, the requester shall provide a certified statement, a sample of which may be obtained from the Freedom of Information Office. The statement, which must be certified to be true and correct to the best of the requester's knowledge and belief, shall demonstrate that:

(i) The failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The requester is a representative of the news media, as defined in § 261.2, and there is urgency to inform the public concerning actual or alleged Board activity.

(2) In response to a request for expedited processing, the Secretary shall notify a requester of the determination within ten calendar days of receipt of the request. If the Secretary denies a request for expedited processing, the requester may file an appeal pursuant to the procedures set forth in paragraph (i) of this section, and the Board shall respond to the appeal within ten working days after the appeal was received by the Board.

(d) *Priority of responses*. The Secretary will assign responsible staff to process particular requests. The Freedom of Information Office will normally process requests in the order they are received in the separate processing tracks, except when expedited processing is granted. However, in the Secretary's discretion, or upon a court order in a matter to which the Board is a party, a particular request may be processed out of turn.

(e) *Time limits*. The time for response to requests shall be 20 working days, except:

(1) In the case of expedited treatment under paragraph (c) of this section;

(2) Where the running of such time is suspended for payment of fees pursuant to § 261.17(b)(2);

(3) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B). In such circumstances, the time limit may be extended for a period of time not to exceed:

(i) 10 working days as provided by written notice to the requester, setting forth the reasons for the extension and

the date on which a determination is expected to be dispatched; or

(ii) Such alternative time period as mutually agreed to by the Freedom of Information Office and the requester when the Freedom of Information Office notifies the requester that the request cannot be processed in the specified time limit.

(f) *Response to request*. In response to a request that satisfies § 261.12(b), an appropriate search shall be conducted of records of the Board in existence on the date of receipt of the request, and a review made of any responsive information located. The Secretary shall notify the requester of:

(1) The Board's determination of the request;

(2) The reasons for the determination;

(3) The amount of information withheld;

(4) The right of the requester to appeal to the Board any denial or partial denial, as specified in paragraph (i) of this section; and

(5) In the case of a denial of a request, the name and title or position of the person responsible for the denial.

(g) *Referral to another agency*. To the extent a request covers documents that were created by, obtained from, or classified by another agency, the Board may refer the request to that agency for a response and inform the requester promptly of the referral.

(h) *Providing responsive records*. (1) Copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the Freedom of Information Office or makes other acceptable arrangements, or the Board deems it appropriate to send the documents by another means.

(2) The Board shall provide a copy of the record in any form or format requested if the record is readily reproducible by the Board in that form or format, but the Board need not provide more than one copy of any record to a requester.

(i) *Appeal of denial of request*. Any person denied access to Board records requested under § 261.12 may file a written appeal with the Board, as follows:

(1) The appeal shall prominently display the phrase *FREEDOM OF INFORMATION ACT APPEAL* on the first page, and shall be addressed to the Freedom of Information Office, Board of Governors of the Federal Reserve System, 20th & C Street, N.W., Washington, D.C. 20551; or sent by facsimile to the Freedom of Information Office, (202) 872–7562 or 7565.

(2) An initial request for records may not be combined in the same letter with an appeal.

(3) The appeal shall be filed within 10 working days of the date on which the denial was issued, or the date on which documents in partial response to the request were transmitted to the requester, whichever is later. The Board may consider an untimely appeal if:

(i) It is accompanied by a written request for leave to file an untimely appeal; and

(ii) The Board determines, in its discretion and for good and substantial cause shown, that the appeal should be considered.

(4) The Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal by the Freedom of Information Office, and the determination letter shall notify the appealing party of the right to seek judicial review.

(5) The Secretary may reconsider a denial being appealed if intervening circumstances or additional facts not known at the time of the denial come to the attention of the Secretary while an appeal is pending.

§ 261.14 Exemptions from disclosure.

(a) *Types of records exempt from disclosure*. Pursuant to 5 U.S.C. 552(b), the following records of the Board are exempt from disclosure under this part:

(1) *National defense*. Any information that is specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to the Executive Order.

(2) *Internal personnel rules and practices*. Any information related solely to the internal personnel rules and practices of the Board.

(3) *Statutory exemption*. Any information specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), if the statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) *Trade secrets; commercial or financial information*. Any matter that is a trade secret or that constitutes commercial or financial information obtained from a person and that is privileged or confidential.

(5) *Inter- or intra-agency memorandums*. Information contained in inter- or intra-agency memorandums or letters that would not be available by law to a party (other than an agency) in litigation with an agency, including, but not limited to:

(i) Memorandums;

(ii) Reports;

(iii) Other documents prepared by the staffs of the Board, Federal Reserve Banks, or the Office of Thrift Supervision (including documents transferred to the Board pursuant to section 323(b)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5433)); and

(iv) Records of deliberations of the Board and of discussions at meetings of the Board, any Board committee, or Board staff, that are not subject to 5 U.S.C. 552b (the Government in the Sunshine Act).

(6) *Personnel and medical files*. Any information contained in personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) *Information compiled for law enforcement purposes*. Any records or information compiled for law enforcement purposes, to the extent permitted under 5 U.S.C. 552(b)(7); including information relating to administrative enforcement proceedings of the Board.

(8) *Examination, inspection, operating, or condition reports, and confidential supervisory information*. Any matter that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, including a state financial institution supervisory agency.

(b) *Segregation of nonexempt information*. The Board shall provide any reasonably segregable portion of a record that is requested after deleting those portions that are exempt under this section.

(c) *Discretionary release*. (1) Except where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board or designated Board members, the Secretary of the Board, the General Counsel of the Board, the Director of the Division of Banking Supervision and Regulation, or the appropriate Federal Reserve Bank, acting pursuant to this part or 12 CFR part 265, determines that such disclosure would be in the public interest.

(2) The Board may make any exempt information furnished in connection with an application for Board approval of a transaction available to the public in accordance with § 261.12, and without prior notice and to the extent it deems necessary, may comment on such information in any opinion or statement issued to the public in connection with a Board action to which such information pertains.

(d) *Delayed release*. Publication in the FEDERAL REGISTER or availability to the public of certain information may be delayed if immediate disclosure would likely:

(1) Interfere with accomplishing the objectives of the Board in the discharge of its statutory functions;

(2) Interfere with the orderly conduct of the foreign affairs of the United States;

(3) Permit speculators or others to gain unfair profits or other unfair advantages by speculative trading in securities or otherwise;

(4) Result in unnecessary or unwarranted disturbances in the securities markets;

(5) Interfere with the orderly execution of the objectives or policies of other government agencies; or

(6) Impair the ability to negotiate any contract or otherwise harm the

commercial or financial interest of the United States, the Board, any Federal Reserve Bank, or any department or agency of the United States.

(e) *Prohibition against disclosure*. Except as provided in this part, no officer, employee, or agent of the Board or any Federal Reserve Bank shall disclose or permit the disclosure of any unpublished information of the Board to any person (other than Board or Reserve Bank officers, employees, or agents properly entitled to such information for the performance of official duties).

[62 FR 54359, 54361, Oct. 20, 1997, as amended at 76 FR 56601, Sept. 13, 2011]

§ 261.15 Request for confidential treatment.

(a) *Submission of request*. Any submitter of information to the Board who desires confidential treatment pursuant to 5 U.S.C. 552(b)(4) and § 261.14 (a)(4) shall file a request for confidential treatment with the Board (or in the case of documents filed with a Federal Reserve Bank, with that Federal Reserve Bank) at the time the information is submitted or a reasonable time after submission.

(b) *Form of request*. Each request for confidential treatment shall state in reasonable detail the facts supporting the request and its legal justification. Conclusory statements that release of the information would cause competitive harm generally will not be considered sufficient to justify confidential treatment.

(c) *Designation and separation of confidential material*. All information considered confidential by a submitter shall be clearly designated *CONFIDENTIAL* in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential information from other material may result in release of the nonsegregated material to the public without notice to the submitter.

(d) *Exceptions*. This section does not apply to:

(1) Data collected on forms that are approved pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and are deemed confidential by the Board. Any such form deemed confidential by the Board shall so indicate on the face of the form or in its instructions. The data may, however, be disclosed in aggregate form in such a manner that individual company data is not disclosed or derivable.

(2) Any comments submitted by a member of the public on applications and regulatory proposals being considered by the Board, unless the Board or the Secretary determines that confidential treatment is warranted.

(3) A determination by the Board to comment upon information submitted to the Board in any opinion or statement issued to the public as described in § 261.14(c).

(e) *Special procedures*. The Board may establish special procedures for particular documents, filings, or types of information by express provisions in this part or by instructions on particular forms that are approved by the Board. These special procedures shall take precedence over this section.

§ 261.16 Request for access to confidential commercial or financial information.

(a) *Request for confidential information*. A request by a submitter for confidential treatment of any information shall be considered in connection with a request for access to that information. At their discretion, appropriate Board or staff members (including Federal Reserve Bank staff) may act on the request for confidentiality prior to any request for access to the documents.

(b) *Notice to the submitter*. When a request for access is received pursuant to the Freedom of Information Act (5 U.S.C. 552):

(1) The Secretary shall notify a submitter of the request, if:

(i) The submitter requested confidential treatment of the information pursuant to 5 U.S.C. 552(b)(4); and

(ii) The request by the submitter for confidential treatment was made within 10 years preceding the date of the request for access.

(2) Absent a request for confidential treatment, the Secretary may notify a submitter of a request for access to information provided by the submitter if the Secretary reasonably believes that disclosure of the information may

cause substantial competitive harm to the submitter.

(3) The notice given to the submitter shall:

(i) Be given as soon as practicable after receipt of the request for access;

(ii) Describe the request; and

(iii) Give the submitter a reasonable opportunity, not to exceed ten working days from the date of notice, to submit written objections to disclosure of the information.

(c) *Exceptions to notice to submitter.* Notice to the submitter need not be given if:

(1) The Secretary determines that the request for access should be denied;

(2) The requested information lawfully has been made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The submitter's claim of confidentiality under 5 U.S.C. 552(b)(4) appears obviously frivolous or has already been denied by the Secretary, except that in this last instance the Secretary shall give the submitter written notice of the determination to disclose the information at least five working days prior to disclosure.

(d) *Notice to requester.* At the same time the Secretary notifies the submitter, the Secretary also shall notify the requester that the request is subject to the provisions of this section.

(e) *Written objections by submitter.* Upon receipt of notice of a request for access to its information, the submitter may provide written objections to release of the information. Such objections shall state whether the information was provided voluntarily or involuntarily to the Board.

(1) If the information was voluntarily provided to the Board, the submitter shall provide detailed facts showing that the information is customarily withheld from the public.

(2) If the information was not provided voluntarily to the Board, the submitter shall provide detailed facts and arguments showing:

(i) The likelihood of substantial harm that would be caused to the submitter's competitive position; or

(ii) That release of the information would impair the Board's ability to obtain necessary information in the future.

(f) *Determination by Secretary.* The Secretary's determination whether or not to disclose any information for which confidential treatment has been requested pursuant to this section shall be communicated to the submitter and the requester immediately. If the Secretary determines to disclose the information and the submitter has objected to such disclosure pursuant to paragraph (e) of this section, the Secretary shall provide the submitter with the reasons for disclosure, and shall delay disclosure for ten working days from the date of the determination.

(g) *Notice of lawsuit.* (1) The Secretary shall promptly notify any submitter of information covered by this section of the filing of any suit against the Board to compel disclosure of such information.

(2) The Secretary shall promptly notify the requester of any suit filed against the Board to enjoin the disclosure of any documents requested by the requester.

§ 261.17 Fee schedules; waiver of fees.

(a) *Fee schedules.* The fees applicable to a request for records pursuant to §§ 261.11 and 261.12 are set forth in appendix A to this section. These fees cover only the full allowable direct costs of search, duplication, and review. No fees will be charged where the average cost of collecting the fee (calculated at $5.00) exceeds the amount of the fee.

(b) *Payment procedures.* The Secretary may assume that a person requesting records pursuant to § 261.12 will pay the applicable fees, unless the request includes a limitation on fees to be paid or seeks a waiver or reduction of fees pursuant to paragraph (f) of this section.

(1) *Advance notification of fees.* If the estimated charges are likely to exceed $100, the Freedom of Information Office shall notify the requester of the estimated amount, unless the requester has indicated a willingness to pay fees as high as those anticipated. Upon receipt of such notice, the requester may confer with the Freedom of Information Office to reformulate the request to lower the costs. The time period for responding to requests under § 261.13(e),

and the processing of the request will be suspended until the requester agrees to pay the applicable fees.

(2) *Advance payment.* The Secretary may require advance payment of any fee estimated to exceed $250. The Secretary may also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. The time period for responding to requests under § 261.13(e), and the processing of the request will be suspended until the Freedom of Information Office receives the required payment.

(3) *Late charges.* The Secretary may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717 and accrues from the date of the billing.

(c) *Categories of uses.* The fees assessed depend upon the intended use for the records requested. In determining which category is appropriate, the Secretary shall look to the intended use set forth in the request for records. Where a requester's description of the use is insufficient to make a determination, the Secretary may seek additional clarification before categorizing the request.

(1) *Commercial use.* The fees for search, duplication, and review apply when records are requested for commercial use.

(2) *Educational, research, or media use.* The fees for duplication apply when records are not sought for commercial use, and the requester is a representative of the news media or an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research. The first 100 pages of duplication, however, will be provided free.

(3) *All other uses.* For all other requests, the fees for document search and duplication apply. The first two hours of search time and the first 100 pages of duplication, however, will be provided free.

(d) *Nonproductive search.* Fees for search and review may be charged even if no responsive documents are located or if the request is denied.

(e) *Aggregated requests.* A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Secretary reasonably believes that a requester is separating a request into a series of requests for the purpose of evading the assessment of fees, the Secretary may aggregate any such requests and charge accordingly. It is considered reasonable for the Secretary to presume that multiple requests of this type made within a 30-day period have been made to avoid fees.

(f) *Waiver or reduction of fees.* A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in § 261.13(e), shall not begin until a waiver has been granted; or if the waiver is denied, until the requester has agreed to pay the applicable fees.

(1) *Standards for determining waiver or reduction.* The Secretary shall grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the following factors shall be considered:

(i) Whether the subject of the records concerns the operations or activities of the government;

(ii) Whether disclosure of the information is likely to contribute significantly to public understanding of government operations or activities;

(iii) Whether the requester has the intention and ability to disseminate the information to the public;

(iv) Whether the information is already in the public domain;

(v) Whether the requester has a commercial interest that would be furthered by the disclosure; and, if so,

(vi) Whether the magnitude of the identified commercial interest of the

requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(2) *Contents of request for waiver*. A request for a waiver or reduction of fees shall include:

(i) A clear statement of the requester's interest in the documents;

(ii) The use proposed for the documents and whether the requester will derive income or other benefit for such use;

(iii) A statement of how the public will benefit from such use and from the Board's release of the documents;

(iv) A description of the method by which the information will be disseminated to the public; and

(v) If specialized use of the information is contemplated, a statement of the requester's qualifications that are relevant to that use.

(3) *Burden of proof*. The burden shall be on the requester to present evidence or information in support of a request for a waiver or reduction of fees.

(4) *Determination by Secretary*. The Secretary shall make a determination on the request for a waiver or reduction of fees and shall notify the requester accordingly. A denial may be appealed to the Board in accordance with § 261.13(i).

(g) *Employee requests*. In connection with any request by an employee, former employee, or applicant for employment, for records for use in prosecuting a grievance or complaint of discrimination against the Board, fees shall be waived where the total charges (including charges for information provided under the Privacy Act of 1974 (5 U.S.C. 552a) are $50 or less; but the Secretary may waive fees in excess of that amount.

(h) *Special services*. The Secretary may agree to provide, and set fees to recover the costs of, special services not covered by the Freedom of Information Act, such as certifying records or information and sending records by special methods such as express mail or overnight delivery.

APPENDIX A TO § 261.17—FREEDOM OF INFORMATION FEE SCHEDULE

Duplication:	
Photocopy, per standard page	$0.10
Paper copies of microfiche, per frame	.10
Duplicate microfiche, per microfiche	.35
Search and review:	
Clerical/Technical, hourly rate	20.00
Professional/Supervisory, hourly rate	38.00
Manager/Senior Professional, hourly rate	65.00
Computer search and production:	
Computer operator search, hourly rate	32.00
Tapes (cassette) per tape	6.00
Tapes (cartridge), per tape	9.00
Tapes (reel), per tape	18.00
Diskettes (3½″), per diskette	4.00
Diskettes (5¼″), per diskette	5.00
Computer Output (PC), per minute	.10
Computer Output (mainframe)	(1)

[1] Actual cost.

[62 FR 54365, Oct. 20, 1997; 62 FR 62508, Nov. 24, 1997]

Subpart C—Confidential Information Made Available to Supervised Institutions, Financial Institution Supervisory Agencies, Law Enforcement Agencies, and Others in Certain Circumstances

§ 261.20 Confidential supervisory information made available to supervised financial institutions and financial institution supervisory agencies.

(a) *Disclosure of confidential supervisory information to supervised financial institutions*. Confidential supervisory information concerning a supervised bank, bank holding company (including subsidiaries), U.S. branch or agency of a foreign bank, savings and loan holding company (including subsidiaries), or other institution examined by the Federal Reserve System (''supervised financial institution'') may be made available by the Board or the appropriate Federal Reserve Bank to the supervised financial institution.

(b) *Disclosure of confidential supervisory information by supervised financial institution*—(1) *Parent bank holding company, parent savings and loan holding company, directors, officers, and employees*. Any supervised financial institution lawfully in possession of confidential supervisory information of the Board pursuant to this section may

disclose such information, or portions thereof, to its directors, officers, and employees, and to its parent bank holding company or parent savings and loan holding company and its directors, officers, and employees.

(2) *Certified public accountants and legal counsel.* Any supervised financial institution lawfully in possession of confidential supervisory information of the Board pursuant to this section may disclose such information, or portions thereof, to any certified public accountant or legal counsel employed by the supervised financial institution, subject to the following conditions:

(i) Certified public accountants or legal counsel shall review the confidential supervisory information only on the premises of the supervised financial institution, and shall not make or retain any copies of such information;

(ii) The certified public accountants or legal counsel shall not disclose the confidential supervisory information for any purpose without the prior written approval of the Board's General Counsel except as necessary to provide advice to the supervised financial institution, its parent bank holding company, or the officers, directors, and employees of such supervised financial institution and parent bank holding company.

(c) *Disclosure upon request to Federal financial institution supervisory agencies.* Upon requests, the Director of the Division of Banking Supervision and Regulation or the appropriate Federal Reserve Bank, may make available to the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board and their regional offices and representatives, confidential supervisory information and other appropriate information (such as confidential operating and condition reports) relating to a bank, bank holding company (including subsidiaries), savings and loan holding company (including subsidiaries), U.S. branch or agency of a foreign bank, or other supervised financial institution.

(d) *Disclosure upon request to state financial institution supervisory agencies.* Upon requests, the Director of the Division of Banking Supervision and Regulation or the appropriate Federal Reserve Bank may make available confidential supervisory information and other appropriate information (such as confidential operating and condition reports) relating to a bank, bank holding company (including subsidiaries), savings and loan holding company (including subsidiaries), U.S. branch or agency of a foreign bank, or other supervised financial institution to:

(e) *Discretionary disclosures.* The Board may determine, from time to time, to authorize other disclosures of confidential information as necessary.

(f) *Conditions and limitations.* The Board may impose any conditions or limitations on disclosure under this section that it determines are necessary to effect the purposes of this regulation.

(g) *Other disclosure prohibited.* All confidential supervisory information or other information made available under this section shall remain the property of the Board. No supervised financial institution, financial institution supervisory agency, person, or any other party to whom the information is made available, or any other officer, director, employee or agent thereof, may disclose such information without the prior written permission of the Board's General Counsel except in published statistical material that does not disclose, either directly or when used in conjunction with publicly available information, the affairs of any individual, corporation, or other entity. No person obtaining access to confidential supervisory information pursuant to this section may make a personal copy of any such information; and no person may remove confidential supervisory information from the premises of the institution or agency in possession of such information except as permitted by specific language in this regulation or by the Board.

(h) *Disclosure of Foreign Bank Confidential Report of Operations*—(1) *Availability of Foreign Bank Confidential Report of Operations to Bank Supervisory Agencies.* Notwithstanding any other provision of this regulation, any Confidential Report of Operations (Form F.R. 2068) of a foreign banking organization may, upon written request to

and approval by the Director of the Division of Banking Supervision and Regulation (or his delegee), and with the concurrence of the General Counsel (or his delegee), be made available for inspection to another bank supervisory authority having general supervision of any United States branch, agency, subsidiary bank or commercial lending company of the foreign banking organization, only for use where necessary in the performance of official duties. These reports shall be made available for inspection by authorized persons only on Federal Reserve premises under the same procedures as apply to personnel of the Federal Reserve System. All reports made available under this paragraph shall remain the property of the Board; and no person, agency or authority who obtains access to any such report, or any officer, director, or employee thereof, shall publish, publicize, or otherwise disclose any information contained in the report to any person.

(2) *Restrictions on disclosure by Federal Reserve System employees.* It is the Board's policy that the confidentiality of a foreign banking organization's Confidential Report of Operations (Form F.R. 2068) should be maintained at all times. Except as provided by paragraph (h)(1) of this section, information submitted to the Board as part of any Confidential Report of Operations is not available for public inspection by any person other than an officer, employee, or agent of the Board or of a Federal Reserve Bank properly entitled to such information in the performance of such person's official duties. Any employee that violates this section by releasing such a report to any unauthorized person may be subject to disciplinary action under 12 CFR 264.735–5 (Rules of Employee Responsibilities and Conduct).

[53 FR 20815, June 7, 1988. Redesignated at 62 FR 54359, Oct. 20, 1997, as amended at 76 FR 56601, Sept. 13, 2011]

§ 261.21 Confidential information made available to law enforcement agencies and other nonfinancial institution supervisory agencies.

(a) *Disclosure upon request.* Upon written request, the Board may make available to appropriate law enforcement agencies and to other nonfinancial institution supervisory agencies for use where necessary in the performance of official duties, reports of examination and inspection, confidential supervisory information, and other confidential documents and information of the Board concerning banks, bank holding companies and their subsidiaries, U.S. branches and agencies of foreign banks, savings and loan holding companies and their subsidiaries, and other examined institutions.

(b) *Eligibility.* Federal, state, and local law enforcement agencies and other nonfinancial institution supervisory agencies may file written requests with the Board for access to confidential documents and information under this section of the regulation. Properly accredited foreign law enforcement agencies and other foreign government agencies may also file written requests with the Board.

(c) *Contents of request.* To obtain access to confidential documents or information under this section of the regulation, the head of the law enforcement agency or nonfinancial institution supervisory agency (or their designees) shall address a letter request to the Board's General Counsel, specifying:

(1) The particular information, kinds of information, and where possible, the particular documents to which access is sought;

(2) The reasons why such information cannot be obtained from the examined institution in question rather than from the Board;

(3) A statement of the law enforcement purpose or other purpose for which the information shall be used;

(4) Whether the requested disclosure is permitted or restricted in any way by applicable law or regulation;

(5) A commitment that the information requested shall not be disclosed to any person outside the agency without the written permission of the Board or its General Counsel; and

(6) If the document or information requested includes customer account information subject to the Right to Financial Privacy Act, as amended (12 U.S.C. 3401 *et seq.*), a statement that such customer account information need not be provided, or a statement as

to why the Act does not apply to the request, or a certification that the requesting agency has complied with the requirements of the Act.

(d) *Action on request.* (1) The General Counsel shall review each request and may approve the request upon determining that:

(i) The request complies with this section;

(ii) The information is needed in connection with a formal investigation or other official duties of the requesting agency;

(iii) Satisfactory assurances of confidentiality have been given; and

(iv) No law prohibits the requested disclosure.

(2) The General Counsel may impose any conditions or limitations on disclosure that the General Counsel determines to be necessary to effect the purposes of this regulation or to insure compliance with applicable laws or regulations.

(e) *Federal and state grand jury, criminal trial, and government administrative subpoenas.* The Board's General Counsel shall review and may approve the disclosure of confidential information pursuant to Federal and state grand jury, criminal trial, and government administrative subpoenas. The General Counsel may impose such conditions or limitations on disclosure under this section that the General Counsel determines are necessary to effect the purposes of this regulation, to insure compliance with applicable laws or regulations, or to protect the confidentiality of the Board's information.

(f) *Requests for testimony or interviews.* Government agencies seeking to obtain testimony or interviews from current and former Federal Reserve System staff concerning any confidential information of the Board shall use the procedures set out in paragraph (c) of this section.

(g) *Other disclosure prohibited.* All reports and information made available under this section remain the property of the Board, and except as otherwise provided in this regulation, no person, agency, or authority to whom the information is made available, or any officer, director, or employee thereof, may disclose any such information except in published statistical material that does not disclose, either directly or when used in conjunction with publicly available information, the affairs of any individual or corporation.

[53 FR 20815, June 7, 1988. Redesignated at 62 FR 54359, Oct. 20, 1997, as amended at 76 FR 56601, Sept. 13, 2011]

§ 261.22 Other disclosure of confidential supervisory information.

(a) *Board policy.* It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged. Accordingly, the Board will not normally disclose this information to the public. The Board, when considering a request for disclosure of confidential supervisory information under this section, will not authorize disclosure unless the person requesting disclosure is able to show a substantial need for such information that outweighs the need to maintain confidentiality.

(b) *Requests for disclosure*—(1) *Requests from litigants for information or testimony.* Any person (except agencies identified in §§ 261.20 and 261.21 of this regulation) seeking access to confidential supervisory information or seeking to obtain the testimony of present or former Board or Reserve Bank employees on matters involving confidential supervisory information of the Board, whether by deposition or otherwise, for use in litigation before a court, board, commission, or agency, shall file a written request with the General Counsel of the Board. The request shall describe:

(i) The particular information, kinds of information, and where possible, the particular documents to which access is sought;

(ii) The judicial or administrative action for which the confidential supervisory information is sought;

(iii) The relationship of the confidential supervisory information to the issues or matters raised by the judicial or administrative action;

(iv) The requesting person's need for the information;

(v) The reason why the requesting person cannot obtain the information sought from any other source; and

(vi) A commitment to obtain a protective order acceptable to the Board

from the judicial or administrative tribunal hearing the action preserving the confidentiality of any information that is provided.

(2) *All other requests.* Any other person (except agencies identified in §§ 261.20 and 261.21 of this regulation) seeking access to confidential supervisory information for any other purpose shall file a written request with the General Counsel of the Board. A request under this paragraph (b)(2) shall describe the purpose for which such disclosure is sought.

(c) *Action on request*—(1) *Determination of approval.* The General Counsel of the Board may approve a request made under this section provided that he or she determines that:

(i) The person making the request has shown a substantial need for confidential supervisory information that outweighs the need to maintain confidentiality; and

(ii) Disclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.

(2) *Conditions or limitations.* The General Counsel of the Board may, in approving a request, impose such conditions or limitations on use of any information disclosed as is deemed necessary to protect the confidentiality of the Board's information.

(d) *Exhaustion of administrative remedies for discovery purposes in civil, criminal, or administrative action.* Action on a request under this section by the General Counsel of the Board shall exhaust administrative remedies for discovery purposes in any civil, criminal, or administrative proceeding. A request made pursuant to § 261.12 of this regulation does not exhaust administrative remedies for discovery purposes. Therefore, it is not necessary to file a request pursuant to § 261.12 to exhaust administrative remedies under this section.

(e) *Other disclosure prohibited.* All confidential supervisory information made available under this section shall remain the property of the Board. Any person in possession of such information shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval.

[53 FR 20815, June 7, 1988. Redesignated at 62 FR 54359, Oct. 20, 1997; corrected at 62 FR 62508, Nov. 24, 1997]

§ 261.23 Subpoenas, orders compelling production, and other process.

(a) *Advice by person served.* Any person (including any officers, employee, or agent of the Board or any Federal Reserve Bank) who has documents or information of the Board that may not be disclosed and who is served with a subpoena, order, or other judicial or administrative process requiring his or her personal attendance as a witness or requiring the production of documents or information in any proceeding, shall:

(1) Promptly inform the Board's General Counsel of the service and all relevant facts, including the documents and information requested, and any facts of assistance to the Board in determining whether the material requested should be made available; and

(2) At the appropriate time inform the court or tribunal that issued the process and the attorney for the party at whose instance the process was issued of the substance of these rules.

(b) *Appearance by person served.* Unless the Board has authorized disclosure of the information requested, any person who has Board information that may not be disclosed, and who is required to respond to a subpoena or other legal process, shall attend at the time and place required and decline to disclose or to give any testimony with respect to the information, basing such refusal upon the provisions of this regulation. If the court or other body orders the disclosure of the information or the giving of testimony, the person having the information shall continue to decline to disclose the information and shall promptly report the facts to the Board for such action as the Board may deem appropriate.

[53 FR 20815, June 7, 1988. Redesignated at 62 FR 54359, Oct. 20, 1997]

PART 261a—RULES REGARDING ACCESS TO PERSONAL INFORMATION UNDER THE PRIVACY ACT 1974

Subpart A—General Provisions

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261a.11 Restrictions on disclosure.
261a.12 Exempt records.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 75 FR 63704, Oct. 18, 2010, unless otherwise noted.

Subpart A—General Provisions

§261a.1 Authority, purpose and scope.

(a) *Authority*. This part is issued by the Board of Governors of the Federal Reserve System (the Board) pursuant to the Privacy Act of 1974 (5 U.S.C. 552a).

(b) *Purpose and scope*. This part implements the provisions of the Privacy Act of 1974 with regard to the maintenance, protection, disclosure, and amendment of records contained within systems of records maintained by the Board. It sets forth the procedures for requests for access to, or amendment of, records concerning individuals that are contained in systems of records maintained by the Board.

§261a.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Business day* means any day except Saturday, Sunday or a legal Federal holiday.

(b) *Guardian* means the parent of a minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction.

(c) *Individual* means a natural person who is either a citizen of the United States or an alien lawfully admitted for permanent residence.

(d) *Maintain* includes maintain, collect, use, or disseminate.

(e) *Record* means any item, collection, or grouping of information about an individual maintained by the Board that contains the individual's name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint, voice print, or photograph.

(f) *Routine use* means, with respect to disclosure of a record, the use of such record for a purpose that is compatible with the purpose for which it was collected or created.

(g) *System of records* means a group of any records under the control of the Board from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

(h) *You* means an individual making a request under the Privacy Act.

(i) *We* means the Board.

§261a.3 Custodian of records; delegations of authority.

(a) *Custodian of records*. The Secretary of the Board is the official custodian of all Board records.

(b) *Delegated authority of the Secretary*. The Secretary of the Board is authorized to—

(1) Respond to requests for access to, accounting of, or amendment of records contained in a system of records, except for requests regarding systems of records maintained by the Board's Office of Inspector General (OIG);

(2) Approve the publication of new systems of records and amend existing systems of records, except those systems of records exempted pursuant to §261a.12(b), (c) and (d); and

(3) File any necessary reports related to the Privacy Act.

(c) *Delegated authority of designee.* Any action or determination required or permitted by this part to be done by the Secretary of the Board may be done by a Deputy or Associate Secretary or other responsible employee of the Board who has been duly designated for this purpose by the Secretary.

(d) *Delegated authority of Inspector General.* The Inspector General is authorized to respond to requests for access to, accounting of, or amendment of records contained in a system of records maintained by the OIG.

§ 261a.4 Fees.

(a) *Copies of records.* We will provide you with copies of the records you request under § 261a.5 of this part at the same cost we charge for duplication of records and/or production of computer output under the Board's Rules Regarding Availability of Information, 12 CFR Part 261.

(b) *No fee.* We will not charge you a fee if:

(1) Your total charges are less than $5, or

(2) You are a Board employee or former employee, or an applicant for employment with the Board, and you request records pertaining to you.

Subpart B—Procedures for Requests by Individuals to Whom Record Pertains

§ 261a.5 Request for access to records.

(a) *Procedures for making request.* (1) Except as provided in paragraph (a)(2) or (f) of this section, if you (or your guardian) want to learn of the existence of, or to gain access to, your record in a system of records, you may submit a request in writing to the Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

(2) If you request information contained in a system of records maintained by the Board's OIG, you may submit the request in writing to the Inspector General, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

(b) *Contents of request.* Except for requests made under paragraph (f) of this section, your written request must include–

(1) A statement that the request is made pursuant to the Privacy Act of 1974;

(2) The name of the system of records you believe contains the record you request, or a concise description of that system of records;

(3) Information necessary to verify your identity pursuant to paragraph (c) of this section; and

(4) Any other information that might assist us in identifying the record you seek (*e.g.*, maiden name, dates of employment, *etc.*).

(c) *Verification of identity.* We will require proof of your identity, and we reserve the right to determine whether the proof you submit is adequate. In general, we will consider the following to be adequate proof of identity:

(1) If you are a current or former Board employee, your Board identification card; or

(2) If you are not a current or former Board employee, either

(i) Two forms of identification, including one photo identification, or

(ii) A notarized statement attesting to your identity.

(d) *Verification of identity not required.* We will not require verification of identity when the records you seek are available to any person under the Freedom of Information Act (5 U.S.C. 552).

(e) *Request for accounting of previous disclosures.* You may request an accounting of previous disclosures of records pertaining to you in a system of records as provided in 5 U.S.C. 552a(c).

(f) *Requests Made by Board Employees.* Unless the Secretary provides and you are notified otherwise, if you are a current or former Board employee, you also may request access to your record in a system of records by appearing in person before or writing directly to the Board office that maintains the record.

§ 261a.6 Board procedures for responding to request for access.

(a) *Compliance with Freedom of Information Act.* We will handle every request made pursuant to § 261a.5 of this part (other than requests submitted under § 261a.5(f) that were granted) as a request for information pursuant to the Freedom of Information Act. The time limits set forth in paragraph (b) of this section and the fees specified in § 261a.4 of this part will apply to such requests.

(b) *Time for response.* We will acknowledge every request made pursuant to § 261a.5 of this part within 20 business days from receipt of the request and will, where practicable, respond to each request within that 20-day period. When a full response is not practicable within the 20-day period, we will respond as promptly as possible.

(c) *Disclosure.* (1) When we disclose information in response to your request, except for information maintained by the Board's OIG, we will make the information available for inspection and copying during regular business hours at the Board's Freedom of Information Office, or we will mail it to you on your request. For requests made under paragraph § 261a.5(f), you may request that the information be provided orally or in person.

(2) When the information to be disclosed is maintained by the Board's OIG, the OIG will make the information available for inspection and copying or will mail it to you on request.

(3) You may bring with you anyone you choose to see the requested material. All visitors to the Board's buildings must comply with the Board's security procedures.

(d) *Denial of request.* If we deny a request made pursuant to § 261a.5 of this part, we will tell you the reason(s) for denial and the procedures for appealing the denial. If a request made under paragraph § 261a.5(f) is denied, in whole or in part, the Board office that denied your request will simultaneously notify the Secretary of the Board of its action.

§ 261a.7 Special procedures for medical records.

If you request medical or psychological records pursuant to § 261a.5, we will disclose them directly to you unless the Chief Privacy Officer, in consultation with the Board's physician or Employee Assistance Program counselor, determines that such disclosure could have an adverse effect on you. If the Chief Privacy Officer makes that determination, we will provide the information to a licensed physician or other appropriate representative that you designate, who may disclose those records to you in a manner he or she deems appropriate.

§ 261a.8 Request for amendment of record.

(a) *Procedures for making request.*

(1) If you wish to amend a record that pertains to you in a system of records, you may submit the request in writing to the Secretary of the Board (or to the Inspector General for records in a system of records maintained by the OIG) in an envelope clearly marked ''Privacy Act Amendment Request.''

(2) Your request for amendment of a record must—

(i) Identify the system of records containing the record for which amendment is requested;

(ii) Specify the portion of that record requested to be amended; and

(iii) Describe the nature of and reasons for each requested amendment.

(3) We will require you to verify your identity under the procedures set forth in § 261a.5(c) of this part, unless you have already done so in a related request for access or amendment.

(b) *Burden of proof.* Your request for amendment of a record must tell us why you believe the record is not accurate, relevant, timely, or complete. You have the burden of proof for demonstrating the appropriateness of the requested amendment, and you must provide relevant and convincing evidence in support of your request.

§ 261a.9 Board review of request for amendment of record.

(a) *Time limits.* We will acknowledge your request for amendment of your record within 10 business days after we

receive your request. In the acknowledgment, we may request additional information necessary for a determination on the request for amendment. We will make a determination on a request to amend a record promptly.

(b) *Contents of response to request for amendment.* When we respond to a request for amendment, we will tell you whether your request is granted or denied. If we grant your request, we will take the necessary steps to amend your record and, when appropriate and possible, notify prior recipients of the record of our action. If we deny the request, in whole or in part, we will tell you—

(1) Why we denied the request (or portion of the request);

(2) That you have a right to appeal; and

(3) How to file an appeal.

§ 261a.10 Appeal of adverse determination of request for access or amendment.

(a) *Appeal.* You may appeal a denial of a request made pursuant to § 261a.5 or § 261a.8 of this part within 10 business days after we notify you that we denied your request. Your appeal must—

(1) Be made in writing with the words ''PRIVACY ACT APPEAL'' written prominently on the first page and addressed to the Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551;

(2) Specify the background of the request; and

(3) Provide reasons why you believe the initial denial is in error.

(b) *Determination.* We will make a determination on your appeal within 30 business days from the date we receive it, unless we extend the time for good cause.

(1) If we grant your appeal regarding a request for amendment, we will take the necessary steps to amend your record and, when appropriate and possible, notify prior recipients of the record of our action.

(2) If we deny your appeal, we will inform you of such determination, tell you our reasons for the denial, and tell you about your rights to file a statement of disagreement and to have a court review our decision.

(c) *Statement of disagreement.* (1) If we deny your appeal regarding a request for amendment, you may file a concise statement of disagreement with the denial. We will maintain your statement with the record you sought to amend and any disclosure of the record will include a copy of your statement of disagreement.

(2) When practicable and appropriate, we will provide a copy of the statement of disagreement to any prior recipients of the record.

Subpart C—Disclosure of Records

§ 261a.11 Restrictions on disclosure.

We will not disclose any record about you contained in a system of records to any person or agency without your prior written consent unless the disclosure is authorized by 5 U.S.C. 552a(b).

§ 261a.12 Exempt records.

(a) *Information compiled for civil action.* This regulation does not permit you to have access to any information compiled in reasonable anticipation of a civil action or proceeding.

(b) *Law enforcement information.* Pursuant to 5 U.S.C. 552a(k)(2), we have determined that it is necessary to exempt the systems of records listed below from the requirements of the Privacy Act concerning access to records, accounting of disclosures of records, maintenance of only relevant and necessary information in files, and certain publication provisions, respectively, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f), and §§ 261a.5, 261a.7, and 261a.8 of this part. The exemption applies only to the extent that a system of records contains investigatory materials compiled for law enforcement purposes.

(1) BGFRS–1 Recruiting and Placement Records

(2) BGFRS–2 Personnel Security Systems

(3) BGFRS–4 General Personnel Records

(4) BGFRS–5 EEO Discrimination Complaint File

(5) BGFRS–18 Consumer Complaint Information

(6) BGFRS–21 Supervisory Enforcement Actions and Special Examinations Tracking System
(7) BGFRS–31 Protective Information System
(8) BGFRS–32 Visitor Registration System
(9) BGFRS–36 Federal Reserve Application Name Check System
(10) BGFRS–37 Electronic Applications
(11) BGFRS/OIG–1 OIG Investigative Records

(c) *Confidential references.* Pursuant to 5 U.S.C. 552a(k)(5), we have determined that it is necessary to exempt the systems of records listed below from the requirements of the Privacy Act concerning access to records, accounting of disclosures of records, maintenance of only relevant and necessary information in files, and certain publication provisions, respectively, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f), and §§ 261a.5, 261a.7, and 261a.8 of this part. The exemption applies only to the extent that a system of records contains investigatory material compiled to determine an individual's suitability, eligibility, and qualifications for Board employment or access to classified information, and the disclosure of such material would reveal the identity of a source who furnished information to the Board under a promise of confidentiality.

(1) BGFRS–1 Recruiting and Placement Records
(2) BGFRS–2 Personnel Security Systems
(3) BGFRS–4 General Personnel Records
(4) BGFRS–10 General Files on Board Members
(5) BGFRS–11 Official General Files
(6) BGFRS–13 Federal Reserve System Bank Supervision Staff Qualifications
(7) BGFRS–14 General File on Federal Reserve Bank and Branch Directors
(8) BGFRS–25 Multi-Rater Feedback Records
(9) BGFRS/OIG–1 OIG Investigative Records
(10) BGFRS/OIG–2 OIG Personnel Records

(d) *Criminal law enforcement information.* Pursuant to 5 U.S.C. 552a(j)(2), we have determined that the OIG Investigative Records (BGFRS/OIG–1) are exempt from the Privacy Act, except the provisions regarding disclosure, the requirement to keep an accounting, certain publication requirements, certain requirements regarding the proper maintenance of systems of records, and the criminal penalties for violation of the Privacy Act, respectively, 5 U.S.C. 552a(b), (c)(1), and (2), (e)(4)(A) through (F), (e)(6), (e)(7), (e)(9), (e)(10), (e)(11) and (i).

PART 261b—RULES REGARDING PUBLIC OBSERVATION OF MEETINGS

Sec.
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AUTHORITY: 5 U.S.C. 552b.

SOURCE: 42 FR 13297, Mar. 10, 1977, unless otherwise noted.

§ 261b.1 Basis and scope.

This part is issued by the Board of Governors of the Federal Reserve System (''the Board'') under section 552b of title 5 of the United States Code, the Government in the Sunshine Act (''the Act''), to carry out the policy of the Act that the public is entitled to the fullest practicable information regarding the decision making processes of the Board while at the same time preserving the rights of individuals and the ability of the Board to carry out its responsibilities. These regulations fulfill the requirement of subsection (g) of the Act that each agency subject to the provisions of the Act shall promulgate regulations to implement the open

meeting requirements of subsections (b) through (f) of the Act.

§ 261b.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) The term *agency* means the Board and subdivisions thereof.

(b) The term *subdivision* means any group composed of two or more Board members that is authorized to act on behalf of the Board.

(c) The term *meeting* means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official Board business, but does not include (1) deliberations required or permitted by subsections (d) or (e) of the Act, or (2) the conduct or disposition of official agency business by circulating written material to individual members.

(d) The term *number of individual agency members required to take action on behalf of the agency* means in the case of the Board, a majority of its members except that (1) Board determination of the ratio of reserves against deposits under section 19(b) of the Federal Reserve Act requires the vote of four members, (2) Board action with respect to advances, discounts and rediscounts under sections 10(a), 11(b), and 13(3) of the Federal Reserve Act requires the vote of five members and (3) Board action with respect to the percentage of individual member bank capital and surplus which may be represented by loans secured by stock and bond collateral under section 11(m) of the Federal Reserve Act requires the vote of six members. In the case of subdivisions of the Board, the term means the number of members constituting a quorum of the designated subdivision.

(e) The term *member* means a member of the Board appointed under section 10 of the Federal Reserve Act. In the case of certain Board proceedings pursuant to 12 U.S.C. 1818(e), the Comptroller of the Currency is entitled to sit as a member of the Board and for these proceedings he shall be deemed a *member* for the purposes of this part. In the case of any subdivision of the Board, the term *member* means a member of the Board designated to serve on that subdivision.

(f) The term *public observation* means that the public shall have the right to listen and observe but not to record any of the meetings by means of cameras or electronic or other recording devices unless approval in advance is obtained from the Public Affairs Office of the Board and shall not have the right to participate in the meeting, unless participation is provided for in the Board's Rules of Procedure.

(g) The term *Federal agency* means an *agency* as defined in 5 U.S.C. 551(1).

(h) *Committee* means the Action Committee established pursuant to 12 CFR 265.1a(c).

[42 FR 13297, Mar. 10, 1977, as amended at 43 FR 34481, Aug. 4, 1978]

§ 261b.3 Conduct of agency business.

Members shall not jointly conduct or dispose of official agency business other than in accordance with this part.

§ 261b.4 Meetings open to public observation.

(a) Except as provided in § 261b.5, every portion of every meeting of the agency shall be open to public observation.

(b) Copies of staff documents considered in connection with agency discussion of agenda items for a meeting that is open to public observation shall be made available for distribution to members of the public attending the meeting, in accordance with the provisions of 12 CFR part 261.

(c) The agency will maintain a complete electronic recording adequate to record fully the proceedings of each meeting or portion of a meeting open to public observation. Cassettes will be available for listening in the Freedom of Information Office, and copies may be ordered for $5 per cassette by telephoning or by writing Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

(d) The agency will maintain mailing lists of names and addresses of all persons who wish to receive copies of agency announcements of meetings open to public observation. Requests for announcements may be made by

telephoning or by writing Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

[44 FR 11750, Mar. 2, 1979]

§ 261b.5 Exemptions.

(a) Except in a case where the agency finds that the public interest requires otherwise, the agency may close a meeting or a portion or portions of a meeting under the procedures specified in § 261b.7 or § 261b.8 of this part, and withhold information under the provisions of §§ 261b.6, 261b.7, 261b.8, or 261b.11 of this part, where the agency properly determines that such meeting or portion or portions of its meeting or the disclosure of such information is likely to:

(1) Disclose matters that are (i) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy, and (ii) in fact properly classified pursuant to such Executive order;

(2) Relate solely to internal personnel rules and practices;

(3) Disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5 of the United States Code), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would—

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by a Federal agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Board or other Federal agency responsible for the regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would—

(i) Be likely to (A) lead to significant speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution; or

(ii) Be likely to significantly frustrate implementation of a proposed action, except that paragraph (a)(9)(ii) of this section shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) Specifically concern the issuance of a subpoena, participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5 of the United States Code or otherwise involving a determination on the record after opportunity for a hearing.

§ 261b.6 Public announcement of meetings.

(a) Except as otherwise provided by the Act, public announcement of meetings open to public observation and meetings to be partially or completely closed to public observation pursuant to § 261b.8 of this part will be made at least one week in advance of the meeting. Except to the extent such information is determined to be exempt from disclosure under § 261b.5 of this part, each such public announcement will state the time, place and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated to respond to requests for information about the meeting.

(b) If a majority of the members of the agency determines by a recorded vote that agency business requires that a meeting covered by paragraph (a) of this section be called at a date earlier than that specified in paragraph (a) of this section, the agency will make a public announcement of the information specified in paragraph (a) of this section at the earliest practicable time.

(c) Changes in the subject matter of a publicly announced meeting, or in the determination to open or close a publicly announced meeting or any portion of a publicly announced meeting to public observation, or in the time or place of a publicly announced meeting made in accordance with the procedures specified in § 261b.9 of this part will be publicly announced at the earliest practicable time.

(d) Public announcements required by this section will be posted at the Board's Public Affairs Office and Freedom of Information Office and may be made available by other means or at other locations as may be desirable.

(e) Immediately following each public announcement required by this section, notice of the time, place and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding announcements and the name and telephone number of the official designated by the Board to respond to requests about the meeting, shall also be submitted for publication in the FEDERAL REGISTER.

§ 261b.7 Meetings closed to public observation under expedited procedures.

(a) Since the Board and the Committee qualifies for the use of expedited procedures under subsection (d)(4) of the Act, meetings or portions thereof exempt under paragraph (a)(4), (a)(8), (a)(9)(i) or (a)(10) of § 261b.5 of this part, will be closed to public observation under the expedited procedures of this section. Following are examples of types of items that, absent compelling contrary circumstances, will qualify for these exemptions: Matters relating to a specific bank or bank holding company, such as bank branches or mergers, bank holding company formations, or acquisition of an additional bank or acquisition or de novo undertaking of a permissible nonbanking activity; matters relating to a specific savings and loan holding company or its subsidiaries, such as acquisitions, reorganizations, savings and loan holding company formations, conversions, or acquisition or de novo undertaking of a permissible activity; bank regulatory matters, such as applications for membership, issuance of capital notes and investment in bank premises; foreign banking matters; bank supervisory and enforcement matters, such as cease-and-desist and officer removal proceedings; monetary policy matters, such as discount rates, use of the discount window, changes in the limitations on payment of interest on time and savings accounts, and changes in reserve requirements or margin regulations.

(b) At the beginning of each meeting, a portion or portions of which is closed to public observation under expedited procedures pursuant to this section, a recorded vote of the members present will be taken to determine whether a majority of the members of the agency votes to close such meeting of portions of such meeting to public observation.

(c) A copy of the vote, reflecting the vote of each member, and except to the extent such information is determined to be exempt from disclosure under § 261b.5, a public announcement of the time, place and subject matter of the meeting or each closed portion thereof, will be made available at the earliest practicable time at the Board's Public

Affairs Office and Freedom of Information Office.

[42 FR 13297, Mar. 10, 1977, as amended at 43 FR 34481, Aug. 4, 1978; 76 FR 56601, Sept. 13, 2011]

§ 261b.8 Meetings closed to public observation under regular procedures.

(a) A meeting or a portion of a meeting will be closed to public observation under regular procedures, or information as to such meeting or portion of a meeting will be withheld only by recorded vote of a majority of the members of the agency when it is determined that the meeting or the portion of the meeting or the withholding of information qualifies for exemption under § 261b.5. Votes by proxy are not allowed.

(b) Except as provided in subsection (c) of this section, a separate vote of the members of the agency will be taken with respect to the closing or the withholding of information as to each meeting or portion thereof which is proposed to be closed to public observation or with respect to which information is proposed to be withheld pursuant to this section.

(c) A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to public observation or with respect to any information concerning such series of meetings proposed to be withheld, so long as each meeting or portion thereof in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series.

(d) Whenever any person's interests may be directly affected by a portion of a meeting for any of the reasons referred to in exemption (a)(5), (a)(6) or (a)(7) of § 261b.5 of this part, such person may request in writing to the Secretary of the Board that such portion of the meeting be closed to public observation. The Secretary, or in his or her absence, the Acting Secretary of the Board, will transmit the request to the members and upon the request of any one of them a recorded vote will be taken whether to close such meeting to public observation.

(e) Within one day of any vote taken pursuant to paragraphs (a) through (d) of this section, the agency will make publicly available at the Board's Public Affairs Office and Freedom of Information Office a written copy of such vote reflecting the vote of each member on the question. If a meeting or a portion of a meeting is to be closed to public observation, the agency, within one day of the vote taken pursuant to paragraphs (a) through (d) of this section, will make publicly available at the Board's Public Affairs Office and Freedom of Information Office a full, written explanation of its action closing the meeting or portion of the meeting together with a list of all persons expected to attend the meeting and their affiliation, except to the extent such information is determined by the agency to be exempt from disclosure under subsection (c) of the Act and § 261b.5 of this part.

(f) Any person may request in writing to the Secretary of the Board that an announced closed meeting, or portion of the meeting, be held open to public observation. The Secretary, or in his or her absence, the Acting Secretary of the Board, will transmit the request to the members of the Board and upon the request of any member a recorded vote will be taken whether to open such meeting to public observation.

[42 FR 13297, Mar. 10, 1977, as amended at 44 FR 11750, Mar. 2, 1979]

§ 261b.9 Changes with respect to publicly announced meeting.

The subject matter of a meeting or the determination to open or close a meeting or a portion of a meeting to public observation may be changed following public announcement under § 261b.6 only if a majority of the members of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible. Public announcement of such change and the vote of each member upon such change will be made pursuant to § 261b.6(c). Changes in time, including postponements and cancellations of a publicly announced meeting or portion of a meeting or changes in the place of a publicly announced meeting will be publicly announced pursuant to

§ 261b.6(c) by the Secretary of the Board or, in the Secretary's absence, the Acting Secretary of the Board.

§ 261b.10 Certification of General Counsel.

Before every meeting or portion of a meeting closed to public observation under § 261b.7 or 261b.8 of this part, the General Counsel, or in the General Counsel's absence, the Acting General Counsel, shall publicly certify whether or not in his or her opinion the meeting may be closed to public observation and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting and the persons present, will be retained for the time prescribed in § 261b.11(d).

§ 261b.11 Transcripts, recordings, and minutes.

(a) The agency will maintain a complete transcript or electronic recording or transcription thereof adequate to record fully the proceedings of each meeting or portion of a meeting closed to public observation pursuant to exemption (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7) or (a)(9)(ii) of § 261b.5 of this part. Transcriptions of recordings will disclose the identity of each speaker.

(b) The agency will maintain either such a transcript, recording or transcription thereof, or a set of minutes that will fully and clearly describe all matters discussed and provide a full and accurate summary of any actions taken and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote (reflecting the vote of each member on the question), for meetings or portions of meetings closed to public observation pursuant to exemptions (a)(8), (a)(9)(A) or (a)(10) of § 261b.5 of this part. The minutes will identify all documents considered in connection with any action taken.

(c) Transcripts, recordings or transcriptions thereof, or minutes will promptly be made available to the public in the Freedom of Information Office except for such item or items of such discussion or testimony as may be determined to contain information that may be withheld under subsection (c) of the Act and § 261b.5 of this part.

(d) A complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording or verbatim copy of a transcription thereof of each meeting or portion of a meeting closed to public observation will be maintained for a period of at least two years or one year after the conclusion of any agency proceeding with respect to which the meeting or portion thereof was held, whichever occurs later.

§ 261b.12 Procedures for inspection and obtaining copies of transcriptions and minutes.

(a) Any person may inspect or copy a transcript, a recording or transcription of a recording, or minutes described in § 261b.11(c) of this part.

(b) Requests for copies of transcripts, recordings or transcriptions of recordings, or minutes described in § 261b.11(c) of this part shall specify the meeting or the portion of meeting desired and shall be submitted in writing to the Secretary of the Board, Board of Governors of the Federal Reserve System, Washington, DC 20551. Copies of documents identified in minutes may be made available to the public upon request under the provisions of 12 CFR part 261 (Rules Regarding Availability of Information).

§ 261b.13 Fees.

(a) Copies of transcripts, recordings or transcriptions of recordings, or minutes requested pursuant to section § 261b.12(b) of this part will be provided at the cost of 10¢ per standard page for photocopying or at a cost not to exceed the actual cost of printing, typing, or otherwise preparing such copies.

(b) Documents may be furnished without charge where total charges are less than $2.

PART 262—RULES OF PROCEDURE

Sec.

262.1 Basis and scope.
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262.4 Adjudication with formal hearing.
262.5 Appearance and practice.
262.6 Forms.

262.7–262.24 [Reserved]
262.25 Policy statement regarding notice of applications; timeliness of comments; informal meetings.

AUTHORITY: 5 U.S.C. 552, 12 U.S.C. 321, 1467a, 1828(c), and 1842.

SOURCE: 38 FR 6807, Mar. 13, 1973, unless otherwise noted.

§ 262.1 Basis and scope.

This part is issued pursuant to section 552 of title 5 of the United States Code, which requires that every agency shall publish in the FEDERAL REGISTER statements of the general course and method by which its functions are channeled and determined, rules of procedure, and descriptions of forms available or the places at which forms may be obtained.

§ 262.2 Procedure for regulations.

(a) *Notice*. Notices of proposed regulations of the Board of Governors of the Federal Reserve System (the ''Board'') or amendments thereto are published in the FEDERAL REGISTER, except as specified in paragraph (e) of this section or otherwise excepted by law. Such notices include a statement of the terms of the proposed regulations or amendments and a description of the subjects and issues involved; but the giving of such notices does not necessarily indicate the Board's final approval of any feature of any such proposal. The notices also include a reference to the authority for the proposed regulations or amendments and a statement of the time, place, and nature of public participation.

(b) *Public participation*. The usual method of public submission of data, views, or arguments is in writing. It is ordinarily preferable that they be sent to the Secretary of the Board, Washington, DC 20551, with copies to the appropriate Federal Reserve Bank. The locations of the 12 Federal Reserve Banks and the boundaries of the Federal Reserve districts are shown in the appendix to the Board's rules of organization. Such material will be made available for inspection and copying upon request, except as provided in § 261.6(b) of this chapter regarding availability of information.

(c) *Preparation of draft and action by Board*. In the light of consideration of all relevant matter presented or ascertained, the appropriate division of the Board's staff, in collaboration with other divisions, prepares drafts of proposed regulations or amendments, and the staff submits them to the Board. The Board takes such action as it deems appropriate in the public interest. Any other documents that may be necessary to carry out any decision by the Board in the matter are usually prepared by the Legal Division, in collaboration with the other divisions of the staff.

(d) *Effective dates*. Any substantive regulation or amendment thereto issued by the Board is published not less than 30 days prior to the effective date thereof, except as specified in paragraph (e) of this section or as otherwise excepted by law.

(e) *Exceptions as to notice or effective date*. In certain situations, notice and public participation with respect to proposed regulations may be impracticable, unnecessary, contrary to the public interest, or otherwise not required in the public interest, or there may be reason and good cause in the public interest why the effective date should not be deferred for 30 days. The reason or reasons in such cases usually are that such notice, public participation, or deferment of effective date would prevent the action from becoming effective as promptly as necessary in the public interest, would permit speculators or others to reap unfair profits or to interfere with the Board's actions taken with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country, would provoke other consequences contrary to the public interest, would unreasonably interfere with the Board's necessary functions with respect to management or personnel, would not aid the persons affected, or would otherwise serve no useful purpose. The following may be mentioned as some examples of situations in which advance notice or deferred effective date, or both, will ordinarily be omitted in the public interest: The review and determination of discount rates established by Federal Reserve Banks, and changes

in general requirements regarding reserves of member banks, maximum interest rates on time and savings deposits, or credit for purchasing or carrying securities.

[38 FR 6807, Mar. 13, 1973, as amended at 54 FR 33183, Aug. 14, 1989]

§ 262.3 Applications.

(a) *Forms.* Any application, request, or petition (hereafter referred to as ''application'') for the approval, authority, determination, or permission of the Board with respect to any action for which such approval, authority, determination, or permission is required by law or regulation of the Board (including actions authorized to be taken by a Federal Reserve Bank or others on behalf of the Board pursuant to authority delegated under Part 265 of this chapter) shall be submitted in accordance with the pertinent form, if any, prescribed by the Board. Copies of any such form and details regarding information to be included therein may be obtained from any Federal Reserve Bank. Any application for which no form is prescribed should be signed by the person making the application or by his duly authorized agent, should state the facts involved, the action requested, and the applicant's interest in the matter, and should indicate the reasons why the application should be granted. Applications for access to, or copying of, records of the Board should be submitted as provided in § 261.9(a) of this chapter.

(b) *Notice of applications.* (1)(i) In the case of applications,

(A) By a State member bank for the establishment of a domestic branch or other facility that would be authorized to receive deposits,

(B) To become a bank holding company (except as provided in § 225.15 of this chapter),

(C) By a bank holding company to acquire ownership or control of shares or assets of a bank, or to merge or consolidate with any other bank holding company,

(D) To become a savings and loan holding company (except as provided in § 238.14 of this chapter), and

(E) By a savings and loan holding company to acquire ownership or control of shares or assets of a savings association, or to merge or consolidate with any other savings and loan holding company, the applicant shall cause to be published a notice in the form prescribed by the Board.

(ii) The notice shall be placed in the classified advertising legal notices section of the newspaper, and must provide an opportunity for the public to give written comment on the application to the appropriate Federal Reserve Bank for the period specified in Regulation H (12 CFR part 208) in the case of applications specified in § 262.3(b)(1)(i)(A), and for at least thirty days after the date of publication in the case of applications specified in § 262.3(b)(1)(i)(B) and (C). Within 7 days of publication, the applicant shall submit its application to the appropriate Reserve Bank for acceptance along with a copy of the notice. If the Reserve Bank has not accepted the application as complete within ninety days of the date of publication of the notice, the applicant may be required to republish notice of the application. Such notice shall be published in a newspaper of general circulation in—

(A) [Reserved]

(B) The community or communities in which the head office of the bank and the proposed branch or other facility (other than an electronic funds transfer facility) are located in the case of an application for the establishment of a domestic branch or other facility that would be authorized to receive deposits, other than an application incidental to an application by a bank for merger, consolidation, or acquisition of assets or assumption of liabilities,

(C) The community or communities in which the head office of the bank, the office to be closed, and the office to be opened are located in the case of an application for the relocation of a domestic branch office,

(D) The community or communities in which the head office of each of the banks to be party to the merger, consolidation, or acquisition of assets or assumption of liabilities are located in the case of an application by a bank for merger, consolidation, or acquisition of assets or assumption of liabilities,

(E) The community or communities in which the head offices of the largest

subsidiary bank, if any, or an applicant and of each bank, shares of which are to be directly or indirectly acquired, are located in the case of applications under section 3 of the Bank Holding Company Act, or

(F) The community or communities in which the head offices of the largest subsidiary savings association, if any, or an applicant and of each savings association, shares of which are to be directly or indirectly acquired, are located in the case of applications under section 10 of the Home Owners' Loan Act.

(2) In addition to the foregoing notice, an applicant, in the case of an application to relocate a domestic branch office or other facility that would be authorized to receive deposits, shall post in a conspicuous public place in the lobby of the office to be closed a notice containing the information specified in § 262.3(b)(1). Such notice should be posted on the date of the notice required by § 262.3(b)(1).

(3) In the case of an application for a merger, consolidation, or acquisition of assets or assumption of liabilities, if the acquiring, assuming, or resulting bank is to be a State member bank, the applicant shall cause to be published notice in the form prescribed by the Board. The notice shall be published in a newspaper of general circulation in the community or communities in which the head office of each of the banks to be a party to the merger, consolidation, or acquisition of assets or assumption of liabilities is located. The notice shall be published on at least three occasions at appropriate intervals. The last publication of the notice shall appear at least thirty days after the first publication. The notice must provide an opportunity for the public to give written comment on the application to the appropriate Federal Reserve Bank for at least thirty days after the date of the first publication of the notice. Within seven days of publication of notice for the first time, the applicant shall submit its application to the appropriate Reserve Bank for acceptance, along with a copy of the notice. If the Reserve Bank has not accepted the application as complete within ninety days of the date of the first publication of the notice, the applicant may be required to republish notice of the application.

(c) *Filing of applications.* Any application should be sent to the Federal Reserve Bank of the district in which the head office of the parent banking organization is located, except as otherwise specified on application forms, and that Bank will forward it to the Board when appropriate; however, in the case of foreign banking organization, as defined in § 211.23(a)(2) of this chapter, applications shall be sent to the Federal Reserve Bank of the district in which the operations of the organization's subsidiary banks are principally conducted. In the case of a foreign banking organization that is not a bank holding company but that has one or more branches, agencies, or commercial lending companies in any State of the United States or the District of Columbia, applications shall be sent to the Federal Reserve Bank of the district in which the organization's banking assets are the largest. Applications of a member bank subsidiary, however, should be filed with the Reserve Bank of the district in which the member bank is located.

(d) *Analysis by staff.* In every case, the Reserve Bank makes such investigation as may be necessary, and, except when acting pursuant to delegated authority, reports the relevant facts, with its recommendation, to the Board. In the light of consideration of all relevant matter presented or ascertained, the Board's staff prepares and submits to the Board comments on the subject.

(e) *Submission of comments and requests for hearing.* The Board is only required to consider a comment or a request for a hearing with respect to an application or notice if it is in writing and received by the Secretary of the Board or the appropriate Federal Reserve Bank on or before the latest date prescribed in any notice with respect to the application or notice, or where no such date is prescribed, on or before the 30th day after the date notice is first published. Similarly, the Board will consider comments on an application from the Attorney General or a banking supervisory authority to which notification of receipt of an application has been given, only if such comment is received by the Secretary

of the Board within 30 days of the date of the letter giving such notification. Any comment on an application or notice that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing. In every case where a timely comment or request for hearing is received as provided herein, a copy of such comment or request shall be forwarded promptly to the applicant for its response. The Board will consider the applicant's response only if it is in writing and sent to the Secretary of the Board on or before eight business days after the date of the letter by which it is forwarded to the applicant. At the same time it transmits its response to the Board, the applicant should transmit a copy of its response to the person or supervisory authority making such comment or requesting a hearing. Notwithstanding the foregoing, the Board may, in its sole discretion and without notifying the parties, take into consideration the substance of comments with respect to an application, (but not requests for hearing) that are not received within the time periods provided herein.

(f) *Action on applications.* The Board takes such action as it deems appropriate in the public interest. Such documents as may be necessary to carry out any decision by the Board are prepared by the Board's staff. With respect to actions taken by a Federal Reserve Bank on behalf of the Board under delegated authority, statements and necessary documents are prepared by the staff of such Federal Reserve Bank.

(g) *Notice of action.* Prompt notice is given to the applicant of the granting or denial in whole or in part of any application. In the case of a denial, except in affirming a prior denial or where the denial is self-explanatory, such notice is accompanied by a simple statement of the grounds for such action.

(h) *Action at Board's initiative.* When the Board, without receiving an application, takes action with respect to any matter as to which opportunity for hearing is not required by statute or Board regulation, similar procedure is followed, including investigations, reports, and recommendations by the Board's staff and by the Reserve Banks, where appropriate.

(i) *General procedures for bank holding company, savings and loan holding company, and merger applications.* In addition to procedures applicable under other provisions of this part, the following procedures are applicable in connection with the Board's consideration of applications under sections 3 and 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842 and 1843), hereafter referred to as ''section 3 applications'' or ''section 4 applications,'' applications under section 10(c), (e), and (o) of the Home Owners' Loan Act (12 U.S.C. 1467a), hereafter referred to as ''section 10 applications,'' and of applications under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1823), hereafter called ''merger applications.'' Except as otherwise indicated, the following procedures apply to all such applications.

(1) The Board issues each week a list that identifies section 3, section 4, section 10, and merger applications received and acted upon during the preceding week by the Board or the Reserve Banks pursuant to delegated authority. Notice of receipt of all section 3 section 4(c)(8), and section 10 applications acted on by the Board is published in the FEDERAL REGISTER.

(2) If a hearing is required by law or if the Board determines that a formal hearing for the purpose of taking evidence is desirable, the Board issues an order for such a hearing, and a notice thereof is published in the FEDERAL REGISTER. Any such formal hearing is conducted by an administrative law judge in accordance with subparts A and B of the Board's Rules of Practice for Hearings (part 263 of this chapter).

(3) In any case in which a formal hearing is not ordered by the Board, the Board may afford the applicant and other properly interested persons (including Governmental agencies) an opportunity to present views orally before the Board or its designated representative. Unless otherwise ordered

by the Board, any such oral presentation is public and notice of such public proceeding is published in the FEDERAL REGISTER.

(4) Each action taken by the Board on an application is embodied in an order that indicates the votes of members of the Board. The order either contains reasons for the Board's action (i.e., an expanded order) or is accompanied by a statement of the reasons for the Board's action. Both the order and any accompanying statement are released to the press. Each order accompanied by a statement and any order of general interest, together with a list of other orders, are published in the Federal Reserve Bulletin. Action by a Reserve Bank under delegated authority as provided for under part 265 of this chapter is reflected in a letter of notification to the applicant.

(5) Unless the Board shall otherwise direct, each section 3, section 4, section 10, and merger application is made available for inspection by the public except for portions thereof as to which the Board determines that nondisclosure is warranted under section 552(b) of title 5 of the United States Code.

(j) *Special procedures for certain applications.* The following types of applications require procedures exclusive of, or in addition to, those described in paragraphs (i)(1) through (5) of this section.

(1) Special rules pertaining to section 3 and merger applications follow:

(i) Each order of the Board and each letter of notification by a Reserve Bank acting pursuant to delegated authority approving a section 3 application includes, pursuant to the Act approved July 1, 1966 (12 U.S.C. 1849(b)), a requirement that the transaction approved shall not be consummated before the 30th calendar day following the date of such order.

(ii) Each order of the Board approving a merger application includes, pursuant to the Act approved February 21, 1966 (12 U.S.C. 1828(c)(6)), a requirement that the transaction approved shall not be consummated before the 30th calendar day following the date of such order, except as the Board may otherwise determine pursuant to emergency situations as to which the Act permits consummation at earlier dates.

(iii) Each order or each letter of notification approving an application also includes, as a condition of approval, a requirement that the transaction approved shall be consummated within 3 months and, in the case of acquisition by a holding company of stock of a newly organized bank, a requirement that such bank shall be opened for business within 6 months, but such periods may be extended for good cause by the Board (or by the appropriate Federal Reserve Bank where authority to grant such extensions is delegated to the Reserve Bank).

(2) For special rules governing procedures for section 4 applications, refer to § 225.23 of this chapter.

(3) Special rules pertaining to applications filed pursuant to section 10(e) and (o) of HOLA follow:

(i) Each order or each letter of notification approving an application also includes, as a condition of approval, a requirement that the transaction approved shall be consummated within 3 months and, in the case of acquisition by a holding company of stock of a newly organized savings association, a requirement that such savings association shall be opened for business within 6 months, but such periods may be extended for good cause by the Board (or by the appropriate Federal Reserve Bank where authority to grant such extensions is delegated to the Reserve Bank).

(ii) [Reserved]

(4) [Reserved]

(5) For special rules governing procedures for section 4(c)(13) applications, refer to § 225.4(f) of this chapter.

(k) *Reconsideration of certain Board actions.* The Board may reconsider any action taken by it on an application upon receipt by the Secretary of the Board of a written request for reconsideration from any party to such application, on or before the 15th day after the effective date of the Board's action. Such request should specify the reasons why the Board should reconsider its action, and present relevant facts that for good cause shown, were not previously presented to the Board. Within 10 days of receipt of such a request, the General Counsel, acting pursuant to delegated authority (12 CFR 265.2(b)(7)), shall determine whether or

not the request for reconsideration should be granted, and shall notify all parties to the application orally by telephone of this determination within 10 days. Such notification will be confirmed promptly in writing. In the exercise of this authority, the General Counsel shall confer with the Directors of other interested Divisions of the Board or their designees. Notwithstanding the foregoing, the Board may, on its own motion if it deems reconsideration appropriate, elect to reconsider its action with respect to any application, and the parties to such application shall be notified by the Secretary of the Board of its election as provided above. If it is determined that the Board should reconsider its action with respect to an application, such action will be stayed and will not be final until the Board has acted on the application upon reconsideration. If appropriate, notice of reconsideration of an application will be published promptly in the FEDERAL REGISTER.

(l) *Waiver*. The Board, or the officer or Reserve Bank authorized to approve an application, may waive or modify any procedural requirements for that application prescribed or cited in this section and may excuse any failure to comply with them upon a finding that immediate action on the application is necessary to prevent the probable failure of a bank or company or that an emergency exists requiring expeditious action.

(12 U.S.C. 1842(a), 1843, and 1844(b), 12 U.S.C. 1828(c), 321 and 248(i))

[38 FR 6807, Mar. 13, 1973]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 262.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 262.4 Adjudication with formal hearing.

In connection with adjudication with respect to which a formal hearing is required by law or is ordered by the Board, the procedure is set forth in part 263 of this chapter, entitled ''Rules of Practice for Formal Hearings.''

§ 262.5 Appearance and practice.

Appearance and practice before the Board in all matters are governed by § 263.3 of this chapter.

§ 262.6 Forms.

Necessary forms to be used in connection with applications and other matters are available at the Federal Reserve Banks. A list of all such forms, which is reviewed and revised periodically, may be obtained from any Federal Reserve Bank.

(a) This action is taken pursuant to and in accordance with the provisions of section 552 of title 5 of the United States Code.

(b) The provisions of section 553 of title 5, United States Code, relating to notice and public participation and to deferred effective dates, are not followed in connection with the adoption of this action, because the rules involved are procedural in nature and accordingly do not constitute substantive rules subject to the requirements of such section.

§§ 262.7–262.24 [Reserved]

§ 262.25 Policy statement regarding notice of applications; timeliness of comments; informal meetings.

(a) *Notice of applications*. A bank or company applying to the Board for a deposit-taking facility must first publish notice of its application in local newspapers. This requirement, found in § 262.3(b)(1) of the Board's Rules of Procedure covers applications under the Bank Holding Company Act, Bank Merger Act, and Home Owners' Loan Act, as well as applications for membership in the Federal Reserve System and for new branches of State member banks. Notices of these applications are published in newspapers of general circulation in the communities where the applicant intends to do business as well as in the community where the applicant's head office is located. These notices are important in calling the public's attention to an applicant's plans and giving the public a chance to comment on these plans. To improve the effectiveness of the notices, the Board has supplemented its notice procedures as follows.

(1) The Board has adopted standard forms of notice for use by applicants that will specify the exact date on which the comment period on the application ends, which may not be less than thirty calendar days from the date of publication of the notice. The newspaper forms also provide the name and telephone number of the Community Affairs Officer of the appropriate Reserve Bank as the person to call to obtain more information about submitting comments on an application. In general, the Community Affairs Officer will be available to answer questions of a general nature concerning the submission of comments and the processing of applications.

(2) The Board also publishes notice of bank holding company applications for bank acquisitions (but not for bank mergers or branches) and savings and loan holding company applications for savings association acquisitions (but not for savings association mergers or branches) in the FEDERAL REGISTER after the application is received and the Community Affairs Officer can provide the exact date on which this comment period ends. (The FEDERAL REGISTER comment period will generally end after the date specified in the newspaper notice.)

(3) In addition to the formal newspaper and FEDERAL REGISTER notices discussed above, each Reserve Bank publishes a weekly list of applications submitted to the Reserve Bank for which newspaper notices have been published. Any person or organization may arrange to have the list mailed to them regularly, or may request particular lists, by contacting the Reserve Bank's Community Affairs Officer. Each Reserve Bank's list includes only applications submitted to that particular Reserve Bank, and persons or groups should request lists from each Reserve Bank having jurisdiction over applications in which they may be interested. Since the lists are prepared as a courtesy by the Reserve Bank, and are not intended to replace any formal notice required by statute or regulation, the Reserve Banks and the Board do not assume responsibility for errors or omissions. In addition, the weekly lists prepared by Reserve Banks include certain applications by bank holding companies and savings and loan holding companies for nonbank and non-depository institution acquisitions, respectively, filed with the Reserve Bank.

(4) With respect to applications by bank holding companies and savings and loan holding companies to engage *de novo* in nonbank activities or make acquisitions of nonbank firms, the Board publishes notice of most of these applications in the FEDERAL REGISTER when the applications are filed. Notice of certain small acquisitions may be published in a newspaper of general circulation in the area(s) to be served. While applications for nonbanking activities are not covered by the provisions of the Community Reinvestment Act or the notice provisions of § 262.3 of the Board's Rules of Procedure, the provisions of this Statement apply to such applications.

(b) *Timeliness of comments.* (1) All comments must be actually received by the Board or the Reserve Bank on or before the last date of the comment period specified in the notice. Where more than one notice is published with respect to an application, comments must be received on or before the last date of the latest comment period. The Board's Rules allow it to disregard comments received after the comment period expires. In particular, § 262.3(e) of the Board's Rules of Procedure states that the Board will not consider comments on an application that are not received on or before the expiration of the comment period. Thus, a commenter who fails to comment on an application within the specified comment period (or any extension) may be precluded from participating in the consideration of the application.

(2) In cases where a commenter for good cause is unable to send its comment within the specified comment period, § 265.2(a)(10) of the Board's Rules Regarding Delegation of Authority (12 CFR 265.2(a)(10)) allows the Secretary of the Board to grant requests for an extension of the period. Under this provision, upon receipt of a request received on or before the expiration of the comment period, the Secretary may grant a brief extension upon clear demonstration of hardship or other

meritorious reason for seeking additional time.

(c) *Private meetings.* When a timely protest to approval of an application is received, the Reserve Bank may arrange a meeting between the applicant and the protestant to clarify and narrow the issues, and to provide a forum for the resolution of differences between the protestant and the applicant. If the Reserve Bank decides that a private meeting would be appropriate, the Reserve Bank will arrange a private meeting soon after the receipt of a protest and the applicant's response, if any, to the protest. In scheduling the meeting, the Reserve Bank will consider convenience to the parties with respect to the time and place of the meeting. A decision to hold a private meeting will not preclude the Reserve Bank or the Board from holding a public meeting or other proceeding if it is deemed appropriate.

(d) *Public meetings.* The Board's General Counsel (in consultation with the Reserve Bank and the directors of other interested divisions of the Board) may order that a public meeting or other proceeding be held if requested by the applicant or a protestant who files a timely protest, or if such a proceeding appears appropriate. In most instances, the determination to order a public meeting will be made after a private meeting has been held; however, where appropriate a public meeting may be convened immediately after receipt of the protest and the applicant's response, if any. Additional information may be requested prior to making a determination to convene a public meeting. In these cases, a determination will be made within ten days from the date all relevant information is received. The public meeting will be scheduled as soon as possible, but in no event, later than 30 days after the decision to hold the proceeding is made. The purpose of the public meeting will be to elicit information, to clarify factual issues related to the application and to provide an opportunity for interested individuals to provide testimony. The Board has adopted the following guidelines to be used for convening public meetings, although specific provisions may be altered by the General Counsel if circumstances warrant.

(1) *Requesting a public meeting.* A meeting may be requested by a person or an organization objecting to the application during the comment period, and by the applicant during the period within which it must respond to comments. Such a request must be timely and in writing.

(i) A protest does not have to be filed in a legal brief or other format in order for a public meeting to be granted. The Community Affairs Officer at the Reserve Bank will be available to assist any member of the public regarding the types of information generally included in protests; the format generally used by protestants; and any other specific questions about the procedures of the Federal Reserve System regarding protested applications.

(ii) In general, a protest should identify the protestant, state the basis for objection to approval of the application, and provide available written evidence to support the objection. Objections to approval of an application must relate to the factors that the Board is authorized to consider in acting on an application. Generally, these factors relate to the financial and managerial resources of the companies and banks involved, the effects of the proposal on competition, and the convenience and needs of the communities to be served by the companies and banks involved. If a public meeting is requested, the protest should indicate that there are members of the public who wish to speak on the issues in a public forum.

(iii) The protest will be transmitted by the Reserve Bank to the applicant, and the applicant will generally be allowed eight business days to respond in writing to the protest.

(2) *Arranging the public meeting.* Public meetings will be arranged and presided over by a representative of the Federal Reserve System (''Presiding Officer''). In determining the time and place for the public meeting, such factors as convenience to the parties, the number of people expected to attend the meeting, access to public transportation and possible after-hour security problems will be taken into account.

(3) *Conducting the public meeting.* Prior to the meeting, all necessary steps will be taken to ensure that the meeting is conducted appropriately, including scheduling of witnesses, submission of written materials and other arrangements. In conducting the public meeting the Presiding Officer will have the authority and discretion to ensure that the meeting proceeds in a fair and orderly manner. Generally, the public meeting will consist of opening and closing remarks by the Presiding Officer, a presentation by the protestant and a presentation by the applicant. An official transcript will be made of the proceedings and entered into the record. The conclusion of the public meeting normally marks the close of the public portion of the record on the application.

(4) *Notification of Board decision on the application.* After a decision is made on the application, and the applicant is notified of the decision, staff will notify the protestant by telephone. This notification will be confirmed promptly in writing. As set forth in §262.3(k) of the Board's Rules of Procedure (12 CFR 262.3(k)) or §265.3 of the Board's Rules Regarding Delegation of Authority (12 CFR 265.3), a party to the application may request reconsideration of the Board's order, or review of the Reserve Bank's decision.

[49 FR 5603, Feb. 14, 1984, as amended at 57 FR 41642, Sept. 11, 1992; 76 FR 56602, Sept. 13, 2011]

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AUTHORITY: 5 U.S.C. 504, 554–557; 12 U.S.C. 248, 324, 504, 505, 1464, 1467, 1467a, 1468, 1817(j), 1818, 1820(k), 1828(c), 1829(e), 1831o, 1831p–1, 1847(b), 1847(d), 1884(b), 1972(2)(F), 3105, 3107, 3108, 3349, 3907, 3909, 4717; 15 U.S.C. 21, 78(l), 78o–4, 78o–5, 78u–2; and 28 U.S.C. 2461 *note.*; 31 U.S.C. 5321; 42 U.S.C. 4012a.

SOURCE: 56 FR 38052, Aug. 9, 1991, unless otherwise noted.

Subpart A—Uniform Rules of Practice and Procedure

§ 263.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether

the Board of Governors of the Federal Reserve System (''Board'') should issue an order to approve or disapprove a person's proposed acquisition of a state member bank, bank holding company, or savings and loan holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o-5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the Board is the appropriate agency;

(e) Assessment of civil money penalties by the Board against institutions, institution-affiliated parties, and certain other persons for which the Board is the appropriate agency for any violation of:

(1) Any provision of the Bank Holding Company Act of 1956, as amended (''BHC Act''), or any order or regulation issued thereunder, pursuant to 12 U.S.C. 1847(b) and (d);

(2) Sections 19, 22, 23, 23A and 23B of the Federal Reserve Act (''FRA''), or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 9 of the FRA pursuant to 12 U.S.C. 324;

(4) Section 106(b) of the Bank Holding Company Act Amendments of 1970 and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(5) Any provision of the Change in Bank Control Act of 1978, as amended, or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(6) Any provision of the International Lending Supervision Act of 1983 (''ILSA'') or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(7) Any provision of the International Banking Act of 1978 (''IBA'') or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u-2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the Board, the terms of any condition imposed in writing by the Board in connection with the grant of an application or request, and certain unsafe or unsound practices or breaches of fiduciary duty or law or regulation pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act (''HOLA'') or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the special post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20341, May 6, 1996; 70 FR 69638, Nov. 17, 2005; 76 FR 56603, Sept. 13, 2011]

§ 263.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 263.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the Board's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Agency or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the Board in an adjudicatory proceeding.

(e) *Final order* means an order issued by the Board with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(f) *Institution* includes: (1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHC Act (12 U.S.C. 1841 *et seq.*);

(3) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(4) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof;

(5) Any Federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)); and

(6) Any savings and loan holding company or any subsidiary (other than a savings association) of a savings and loan holding company as those terms are defined in the HOLA (12 U.S.C. 1461 *et seq.*).

(g) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(h) *Local Rules* means those rules promulgated by the Board in this part other than subpart A.

(i) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the Board, the Office of Comptroller of the Currency (the *OCC*), the Federal Deposit Insurance Corporation (the *FDIC*), and the National Credit Union Administration (the *NCUA*).

(j) *Party* means the Board and any person named as a party in any notice.

(k) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (f) of this section.

(l) *Respondent* means any party other than the Board.

(m) *Uniform Rules* means those rules in subpart A of this part that are common to the Board, the OCC, the FDIC, and the NCUA.

(n) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56603, Sept. 13, 2011]

§ 263.4 Authority of the Board.

The Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 263.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or prehearing conferences as set forth in § 263.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 263.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the Board or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the Board if such attorney is not currently suspended or debarred from practice before the Board.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the Board.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Board, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20341, May 6, 1996]

§ 263.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statement is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 263.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 263.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20342, May 6, 1996]

§ 263.9 *Ex parte* communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the Board (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, a member of the Board, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Board until the date that the Board issues its final decision pursuant to § 263.40(c):

(1) No interested person outside the Federal Reserve System shall make or knowingly cause to be made an *ex parte* communication to a member of the

Board, the administrative law judge, or a decisional employee; and

(2) A member of the Board, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the Federal Reserve System any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication*. If an *ex parte* communication is received by the administrative law judge, a member of the Board or any other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the *ex parte* communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions*. Any party or his or her counsel who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*. Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Board in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 263.40, except as witness or counsel in public proceedings.

[56 FR 38052, Aug. 9, 1991, as amended at 59 FR 65245, Dec. 19, 1994]

§ 263.10 Filing of papers.

(a) *Filing*. Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 263.25 and 263.26, shall be filed with OFIA, except as otherwise provided.

(b) *Manner of filing*. Unless otherwise specified by the Board or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form*. All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8 1/2 × 11 inch paper, and must be clear and legible.

(2) *Signature*. All papers must be dated and signed as provided in § 263.7.

(3) *Caption*. All papers filed must include at the head thereof, or on a title page, the name of the Board and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies*. Unless otherwise specified by the Board, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 263.11 Service of papers.

(a) *By the parties*. Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 263.10(c).

(c) *By the Board or the administrative law judge.* (1) All papers required to be served by the Board or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 263.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 263.6, the Board or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20342, May 6, 1996]

§ 263.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same-day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20342, May 6, 1996]

§ 263.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board pursuant to § 263.38, the Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or *sua sponte* by the Board or the administrative law judge.

§ 263.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the Board is the party requesting the subpoena. The Board shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the Board.

§ 263.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any Board representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 263.16 The Board's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the Board or any Federal Reserve Bank to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the Board or any Federal Reserve Bank to conduct or continue any form of investigation authorized by law.

[56 FR 38052, Aug. 9, 1991; 56 FR 60056, Nov. 27, 1991]

§ 263.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court

concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 263.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding*. (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Board.

(ii) The notice must be served by the Board upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with OFIA.

(2) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Board.

(b) *Contents of notice*. The notice must set forth:

(1) The legal authority for the proceeding and for the Board's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the Board is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 263.19 Answer.

(a) *When*. Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer*. An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer*. Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings*. If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 263.20 Amended pleadings.

(a) *Amendments*. The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period

is longer, unless the Board or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

[61 FR 20342, May 6, 1996]

§ 263.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board a recommended decision containing the findings and the relief sought in the notice.

§ 263.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule shall be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 263.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Board.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Board, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by

that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 263.29 and 263.30.

§ 263.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by § 263.53 of subpart B of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 263.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20342, May 6, 1996]

§ 263.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by 12 CFR Part 261 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed

may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 263.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 263.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 263.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20343, May 6, 1996]

§ 263.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 263.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 263.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 263.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness's testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon a showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness's unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time

and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 263.28 Interlocutory review.

(a) *General rule.* The Board may review a ruling of the administrative law judge prior to the certification of the record to the Board only in accordance with the procedures set forth in this section and § 263.23.

(b) *Scope of review.* The Board may exercise interlocutory review of a ruling of the administrative law judge if the Board finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure*. Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 263.23. Any party may file a response to a request for interlocutory review in accordance with § 263.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board for final disposition.

(d) *Suspension of proceeding*. Neither a request for interlocutory review nor any disposition of such a request by the Board under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board.

§ 263.29 Summary disposition.

(a) *In general*. The administrative law judge shall recommend that the Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses*. (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion*. At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion*. Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 263.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 263.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 263.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 263.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Board, in the Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Board. The form of, and procedure for, these requests and replies are governed by § 263.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of

the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20343, May 6, 1996]

§ 263.34 Hearing subpoenas.

(a) *Issuance*. (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify*. (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas*. If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 263.26(c).

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20343, May 6, 1996]

§ 263.35 Conduct of hearings.

(a) *General rules*. (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing*. Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses*. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge

may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations*. Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript*. The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20343, May 6, 1996]

§ 263.36 Evidence.

(a) *Admissibility*. (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice*. (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents*. (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institution regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections*. (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations*. The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 263.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

[56 FR 38052, Aug. 9, 1991, as amended at 61 FR 20344, May 6, 1996]

§ 263.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 263.37(b), the administrative law judge shall file with and certify to the Board, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Board for final determination the record of the proceeding, the administrative law judge shall furnish to the Board a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and

admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

[61 FR 20344, May 6, 1996]

§ 263.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 263.38, a party may file with the Board written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 263.40 Review by the Board.

(a) *Notice of submission to the Board.* When the Board determines that the record in the proceeding is complete, the Board shall serve notice upon the parties that the proceeding has been submitted to the Board for final decision.

(b) *Oral argument before the Board.* Upon the initiative of the Board or on the written request of any party filed with the Board within the time for filing exceptions, the Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board's final decision. Oral argument before the Board must be on the record.

(c) *Agency final decision.* (1) Decisional employees may advise and assist the Board in the consideration and disposition of the case. The final decision of the Board will be based upon review of the entire record of the proceeding, except that the Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Board shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board or required by statute, upon any appropriate state or Federal supervisory authority.

§ 263.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Board may not, unless specifically ordered by the Board or a reviewing court, operate as a stay of any order issued by the Board. The Board may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of that order.

Subpart B—Board Local Rules Supplementing the Uniform Rules

§ 263.50 Purpose and scope.

(a) This subpart prescribes the rules of practice and procedure governing formal adjudications set forth in § 263.50(b) of this subpart, and supplements the rules of practice and procedure contained in subpart A of this part.

(b) The rules and procedures of this subpart and subpart A of this part shall apply to the formal adjudications set forth in § 263.1 of subpart A and to the following adjudications:

(1) Suspension of a member bank from use of credit facilities of the Federal Reserve System under section 4 of the FRA (12 U.S.C. 301);

(2) Termination of a bank's membership in the Federal Reserve System under section 9 of the FRA (12 U.S.C. 327);

(3) Issuance of a cease-and-desist order under section 11 of the Clayton Act (15 U.S.C. 21);

(4) Adjudications under sections 2, 3, or 4 of the BHC Act (12 U.S.C. 1841, 1842, or 1843);

(5) Formal adjudications on bank merger applications under section 18(c) of the FDIA (12 U.S.C. 1828(c));

(6) Issuance of a divestiture order under section 5(e) of the BHC Act (12 U.S.C. 1844(e));

(7) Imposition of sanctions upon any municipal securities dealer for which the Board is the appropriate regulatory agency, or upon any person associated or seeking to become associated with such a municipal securities dealer, under section 15B(c)(5) of the Exchange Act (15 U.S.C. 78o-4);

(8) Proceedings where the Board otherwise orders that a formal hearing be held;

(9) Termination of the activities of a state branch, state agency, or commercial lending company subsidiary of a foreign bank in the United States, pursuant to section 7(e) of the IBA (12 U.S.C. 3105(d));

(10) Termination of the activities of a representative office of a foreign bank in the United States, pursuant to section 10(b) of the IBA (12 U.S.C. 3107(b));

(11) Issuance of a prompt corrective action directive to a member bank under section 38 of the FDI Act (12 U.S.C. 1831o);

(12) Reclassification of a member bank on grounds of unsafe or unsound condition under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(13) Reclassification of a member bank on grounds of unsafe and unsound practice under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(14) Issuance of an order requiring a member bank to dismiss a director or senior executive officer under section 38 (e)(5) and 38(f)(2) (F)(ii) of the FDI Act (12 U.S.C. 1831o(e)(5) and 1831o(f)(2) (F)(ii));

(15) Adjudications under section 10 of the HOLA (12 U.S.C. 1467a).

[56 FR 38052, Aug. 9, 1991, as amended at 57 FR 13001, Apr. 15, 1992; 57 FR 44888, Sept. 29, 1992; 76 FR 56603, Sept. 13, 2011]

§ 263.51 Definitions.

As used in subparts B through G of this part:

(a) *Secretary* means the Secretary of the Board of Governors of the Federal Reserve System;

(b) *Member bank* means any bank that is a member of the Federal Reserve System.

(c) *Institution* has the same meaning as that assigned to it in § 263.3(f) of subpart A, and includes any foreign bank with a representative office in the United States.

[56 FR 38052, Aug. 9, 1991, as amended at 57 FR 13001, Apr. 15, 1992; 58 FR 6363, Jan. 28, 1993]

§ 263.52 Address for filing.

All papers to be filed with the Board shall be filed with the Secretary of the Board of Governors of the Federal Reserve System, Washington, DC 20551.

§ 263.53 Discovery depositions.

(a) *In general.* In addition to the discovery permitted in subpart A of this part, limited discovery by means of depositions shall be allowed for individuals with knowledge of facts material to the proceeding that are not protected from discovery by any applicable privilege, and of identified expert witnesses. Except in unusual cases, accordingly, depositions will be permitted only of individuals identified as hearing witnesses, including experts.

All discovery depositions must be completed within the time set forth in § 263.24(d).

(b) *Application.* A party who desires to take a deposition of any other party's proposed witnesses, shall apply to the administrative law judge for the issuance of a deposition subpoena or subpoena duces tecum. The application shall state the name and address of the proposed deponent, the subject matter of the testimony expected from the deponent and its relevancy to the proceeding, and the address of the place and the time, no sooner than ten days after the service of the subpoena, for the taking of the deposition. Any such application shall be treated as a motion subject to the rules governing motions practice set forth in § 263.23.

(c) *Issuance of subpoena.* The administrative law judge shall issue the requested deposition subpoena or subpoena duces tecum upon a finding that the application satisfies the requirements of this section and of § 263.24. If the administrative law judge determines that the taking of the deposition or its proposed location is, in whole or in part, unnecessary, unreasonable, oppressive, excessive in scope or unduly burdensome, he or she may deny the application or may grant it upon such conditions as justice may require. The party obtaining the deposition subpoena or subpoena duces tecum shall be responsible for serving it on the deponent and all parties to the proceeding in accordance with § 263.11.

(d) *Motion to quash or modify.* A person named in a deposition subpoena or subpoena duces tecum may file a motion to quash or modify the subpoena or for the issuance of a protective order. Such motions must be filed within ten days following service of the subpoena, but in all cases at least five days prior to the commencement of the scheduled deposition. The motion must be accompanied by a statement of the reasons for granting the motion and a copy of the motion and the statement must be served on the party which requested the subpoena. Only the party requesting the subpoena may file a response to a motion to quash or modify, and any such response shall be filed within five days following service of the motion.

(e) *Enforcement of a deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures set forth in § 263.27(d).

(f) *Conduct of the deposition.* The deponent shall be duly sworn, and each party shall have the right to examine the deponent with respect to all nonprivileged, relevant and material matters. Objections to questions or evidence shall be in the short form, stating the ground for the objection. Failure to object to questions or evidence shall not be deemed a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The discovery deposition shall be transcribed or otherwise recorded as agreed among the parties.

(g) *Protective orders.* At any time during the taking of a discovery deposition, on the motion of any party or of the deponent, the administrative law judge may terminate or limit the scope and manner of the deposition upon a finding that grounds exist for such relief. Grounds for terminating or limiting the taking of a discovery deposition include a finding that the discovery deposition is being conducted in bad faith or in such a manner as to:

(1) Unreasonably annoy, embarrass, or oppress the deponent;

(2) Unreasonably probe into privilege, irrelevant or immaterial matters; or

(3) Unreasonably attempt to pry into a party's preparation for trial.

§ 263.54 Delegation to the Office of Financial Institution Adjudication.

Unless otherwise ordered by the Board, administrative adjudications subject to subpart A of this part shall be conducted by an administrative law judge of OFIA.

§ 263.55 Board as Presiding Officer.

The Board may, in its discretion, designate itself, one or more of its members, or an authorized officer, to act as presiding officer in a formal hearing. In such a proceeding, proposed findings and conclusions, briefs, and other submissions by the parties permitted in subpart A shall be filed with the Secretary for consideration by the Board. Sections 263.38 and 263.39 of subpart A

will not apply to proceedings conducted under this section.

§ 263.56 Initial licensing proceedings.

Proceedings with respect to applications for initial licenses shall include, but not be limited to, applications for Board approval under section 3 of the BHC Act and section 10 of HOLA and such proceedings as may be ordered by the Board with respect to applications under section 18(c) of the FDIA. In such initial licensing proceedings, the procedures set forth in subpart A of this part shall apply, except that the Board may designate a Board Counsel to represent the Board in a nonadversary capacity for the purpose of developing for the record information relevant to the issues to be determined by the Presiding Officer and the Board. In such proceedings, Board Counsel shall be considered to be a decisional employee for purposes of §§ 263.9 and 263.40 of subpart A.

[76 FR 56603, Sept. 13, 2011]

Subpart C—Rules and Procedures for Assessment and Collection of Civil Money Penalties

§ 263.60 Scope.

The Uniform Rules set forth in subpart A of this part shall govern the procedures for assessment of civil money penalties, except as otherwise provided in this subpart.

§ 263.61 Opportunity for informal proceeding.

In the sole discretion of the Board's General Counsel, the General Counsel may, prior to the issuance by the Board of a notice of assessment of civil penalty, advise the affected person that the issuance of a notice of assessment of civil penalty is being considered and the reasons and authority for the proposed assessment. The General Counsel may provide the person an opportunity to present written materials or request a conference with members of the Board's staff to show that the penalty should not be assessed or, if assessed, should be reduced in amount.

§ 263.62 Relevant considerations for assessment of civil penalty.

In determining the amount of the penalty to be assessed, the Board shall take into account the appropriateness of the penalty with respect to the financial resources and good faith of the person charged, the gravity of the misconduct, the history of previous misconduct, the economic benefit derived by the person from the misconduct, and such other matters as justice may require.

§ 263.63 Assessment order.

(a) In the event of consent to an assessment by the person concerned, or if, upon the record made at an administrative hearing, the Board finds that the grounds for having assessed the penalty have been established, the Board may issue a final order of assessment of civil penalty. In its final order, the Board may modify the amount of the penalty specified in the notice of assessment.

(b) An assessment order is effective immediately upon issuance, or upon such other date as may be specified therein, and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by action of the Board or a reviewing court.

§ 263.64 Payment of civil penalty.

(a) The date designated in the notice of assessment for payment of the civil penalty will normally be 60 days from the issuance of the notice. If, however, the Board finds in a specific case that the purposes of the authorizing statute would be better served if the 60-day period is changed, the Board may shorten or lengthen the period or make the civil penalty payable immediately upon receipt of the notice of assessment. If a timely request for a formal hearing to challenge an assessment of civil penalty is filed, payment of the penalty shall not be required unless and until the Board issues a final order of assessment following the hearing. If an assessment order is issued, it will specify the date by which the civil penalty should be paid or collected.

(b) Checks in payment of civil penalties should be made payable to the ''Board of Governors of the Federal Reserve System.'' Upon collection, the

Board shall forward the amount of the penalty to the Treasury of the United States.

§ 263.65 Civil penalty inflation adjustments.

(a) *Inflation adjustments.* In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 *note*), the Board has set forth in paragraph (b) of this section adjusted maximum penalty amounts for each civil money penalty provided by law within its jurisdiction. The adjusted civil penalty amounts provided in paragraphs (b)(1) through (10) of this section replace only the amounts published in the statutes authorizing the assessment of penalties and the previously-adjusted amounts adopted as of October 12, 2004, October 12, 2000, and October 24, 1996. The adjusted civil penalty amounts provided in paragraphs (b)(11) and (12) of this section replace only the amounts published in the statutes authorizing the assessment of penalties and were adjusted by the Office of Thrift Supervision as of October 27, 2008. The authorizing statutes contain the complete provisions under which the Board may seek a civil money penalty. The increased penalty amounts apply only to violations occurring after September 13, 2011.

(b) *Maximum civil money penalties.* The maximum civil money penalties as set forth in the referenced statutory sections are as follows:

(1) 12 U.S.C. 324:

(i) Inadvertently late or misleading reports, *inter alia*—$2,200.

(ii) Other late or misleading reports, *inter alia*—$32,000.

(iii) Knowingly or recklessly false or misleading reports, *inter alia*—$1,375,000.

(2) 12 U.S.C. 504, 505, 1817(j)(16), 1818(i)(2) and 1972(2)(F):

(i) First tier—$7,500.

(ii) Second tier—$37,500.

(iii) Third tier—$1,375,000.

(3) 12 U.S.C. 1820(k)(6)(A)(ii)—$275,000.

(4) 12 U.S.C. 1832(c)—$1,100.

(5) 12 U.S.C. 1847(b), 3110(a)—$37,500.

(6) 12 U.S.C. 1847(d), 3110(c):

(i) First tier—$2,200.

(ii) Second tier—$32,000.

(iii) Third tier—$1,375,000.

(7) 12 U.S.C. 334, 374a, 1884—$110.

(8) 12 U.S.C. 3909(d)—$1,100.

(9) 15 U.S.C. 78u–2:

(i) 15 U.S.C. 78u–2(b)(1)—$7,500 for a natural person and $70,000 for any other person.

(ii) 15 U.S.C. 78u–2(b)(2)—$70,000 for a natural person and $350,000 for any other person.

(iii) 15 U.S.C. 78u–2(b)(3)—$140,000 for a natural person and $675,000 for any other person.

(10) 42 U.S.C. 4012a(f)(5):

(i) For each violation—$385.

(ii) For the total amount of penalties assessed under 42 U.S.C 4012a(f)(5) against an institution or enterprise during any calendar year—$135,000.

(11) 12 U.S.C. 1467a(i):

(i) 12 U.S.C. 1467a(i)(2)–$32,500.

(ii) 12 U.S.C. 1467a(i)(3)–$32,500.

(12) 12 U.S.C. 1467a(r):

(i) 12 U.S.C. 1467a(r)(1)–$ 2,200.

(ii) 12 U.S.C. 1467a(r)(2)–$32,500.

(iii) 12 U.S.C. 1467a(r)(3)–$1,375,000.

[73 FR 58032, Oct. 6, 2008, as amended at 76 FR 56604, Sept. 13, 2011]

Subpart D—Rules and Procedures Applicable to Suspension or Removal of an Institution-Affiliated Party Where a Felony is Charged or Proven

§ 263.70 Purpose and scope.

The rules and procedures set forth in this subpart apply to informal hearings afforded to any institution-affiliated party for whom the Board is the appropriate regulatory agency, who has been suspended or removed from office or prohibited from further participation in any manner in the conduct of the institution's affairs by a notice or order issued by the Board upon the grounds set forth in section 8(g) of the FDIA (12 U.S.C. 1818(g)).

§ 263.71 Notice or order of suspension, removal, or prohibition.

(a) *Grounds.* The Board may suspend an institution-affiliated party from office or prohibit an institution-affiliated party from further participation in any manner in the conduct of an institution's affairs when the person is charged in any information, indictment, or complaint authorized by a

United States attorney with the commission of, or participation in, a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under State or Federal law. The Board may remove an institution-affiliated party from office or prohibit an institution-affiliated party from further participation in any manner in the conduct of an institution's affairs when the person is convicted of such an offense and the conviction is not subject to further direct appellate review. The Board may suspend or remove an institution-affiliated party or prohibit an institution-affiliated party from participation in an institution's affairs in these circumstances if the Board finds that continued service to the financial institution or participation in its affairs by the institution-affiliated party may pose a threat to the interests of the institution's depositors or may threaten to impair public confidence in the financial institution.

(b) *Contents.* The Board commences a suspension, removal, or prohibition action under this subpart with the issuance, and service upon an institution-affiliated party, of a notice of suspension from office, or order of removal from office, or notice or order of prohibition from participation in the financial institution's affairs. Such a notice or order shall indicate the basis for the suspension, removal, or prohibition and shall inform the institution-affiliated party of the right to request in writing, within 30 days of service of the notice or order, an opportunity to show at an informal hearing that continued service to, or participation in the conduct of the affairs of, the financial institution does not and is not likely to pose a threat to the interests of the financial institution's depositors or threaten to impair public confidence in the financial institution. Failure to file a timely request for an informal hearing shall be deemed to be a waiver of the right to request such a hearing. A notice of suspension or prohibition shall remain in effect until the criminal charge upon which the notice is based is finally disposed of or until the notice is terminated by the Board.

(c) *Service.* The notice or order shall be served upon the affiliated financial institution concerned, whereupon the institution-affiliated party shall immediately cease service to the financial institution or further participation in any manner in the conduct of the affairs of the financial institution. A notice or order of suspension, removal, or prohibition may be served by any of the means authorized for service under § 263.11(c)(2) of subpart A.

§ 263.72 Request for informal hearing.

An institution-affiliated party who is suspended or removed from office or prohibited from participation in the institution's affairs may request an informal hearing within 30 days of service of the notice or order. The request shall be filed in writing with the Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551. The request shall state with particularity the relief desired and the grounds therefor and shall include, when available, supporting evidence in the form of affidavits. If the institution-affiliated party desires to present oral testimony or witnesses at the hearing, the institution-affiliated party must include a request to do so with the request for informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony.

§ 263.73 Order for informal hearing.

(a) *Issuance of hearing order.* Upon receipt of a timely request for an informal hearing, the Secretary shall promptly issue an order directing an informal hearing to commence within 30 days of the receipt of the request. At the request of the institution-affiliated party, the Secretary may order the hearing to commence at a time more than 30 days after the receipt of the request for hearing. The hearing shall be held in Washington, DC, or at such other place as may be designated by the Secretary, before presiding officers designated by the Secretary to conduct the hearing. The presiding officers normally will include representatives from the Board's Legal Division and the Division of Banking Supervision and Regulation and from the appropriate Federal Reserve Bank.

(b) *Waiver of oral hearing.* A institution-affiliated party may waive in writing his or her right to an oral hearing and instead elect to have the matter determined by the Board solely on the basis of written submissions.

(c) *Hearing procedures.* (1) The institution-affiliated party may appear at the hearing personally, through counsel, or personally with counsel. The institution-affiliated party shall have the right to introduce relevant written materials and to present an oral argument. The institution-affiliated party may introduce oral testimony and present witnesses only if expressly authorized by the Board or the Secretary. Except as provided in § 263.11, the adjudicative procedures of the Administrative Procedure Act (5 U.S.C. 554-557) and of subpart A of this part shall not apply to the informal hearing ordered under this subpart unless the Board orders that subpart A of this part applies.

(2) The informal hearing shall be recorded and a transcript shall be furnished to the institution-affiliated party upon request and after the payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officers. The presiding officers may ask questions of any witness.

(3) The presiding officers may order the record to be kept open for a reasonable period following the hearing (normally five business days), during which time additional submissions to the record may be made. Thereafter, the record shall be closed.

(d) *Authority of presiding officers.* In the course of or in connection with any proceeding under this subpart, the Board or the presiding officers are authorized to administer oaths and affirmations, to take or cause to be taken depositions, to issue, quash or modify subpoenas and subpoenas duces tecum, and, for the enforcement thereof, to apply to an appropriate United States district court. All action relating to depositions and subpoenas shall be in accordance with the rules provided in §§ 263.34 and 263.53.

(e) *Recommendation of presiding officers.* The presiding officers shall make a recommendation to the Board concerning the notice or order of suspension, removal, or prohibition within 20 calendar days following the close of the record on the hearing.

§ 263.74 Decision of the Board.

(a) Within 60 days following the close of the record on the hearing, or receipt of written submissions where a hearing has been waived, the Board shall notify the institution-affiliated party whether the notice of suspension or prohibition will be continued, terminated, or otherwise modified, or whether the order of removal or prohibition will be rescinded or otherwise modified. The notification shall contain a statement of the basis for any adverse decision by the Board. In the case of a decision favorable to the institution-affiliated party, the Board shall take prompt action to rescind or otherwise modify the order of suspension, removal or prohibition.

(b) In deciding the question of suspension, removal, or prohibition under this subpart, the Board shall not rule on the question of the guilt or innocence of the individual with respect to the crime with which the individual has been charged.

Subpart E—Procedures for Issuance and Enforcement of Directives To Maintain Adequate Capital

§ 263.80 Purpose and scope.

This subpart establishes procedures under which the Board may issue a directive or take other action to require a state member bank, bank holding company, or a savings and loan holding company to achieve and maintain adequate capital.

[76 FR 56604, Sept. 13, 2011]

§ 263.81 Definitions.

(a) *Bank holding company* means any company that controls a bank as defined in section 2 of the BHC Act, 12 U.S.C. 1841, and in the Board's Regulation Y (12 CFR 225.2(b)) or any direct or indirect subsidiary thereof other than a bank subsidiary as defined in section 2(c) of the BHC Act, 12 U.S.C. 1841(c), and in the Board's Regulation Y (12 CFR 225.2(a)).

(b) *Capital Adequacy Guidelines* means those guidelines for bank holding companies and state member banks contained in appendices A and D to the Board's Regulation Y (12 CFR part 225), and in appendix A to the Board's Regulation H (12 CFR part 208), or any succeeding capital guidelines promulgated by the Board.

(c) *Directive* means a final order issued by the Board:

(1) Pursuant to ILSA (12 U.S.C. 3907(b)(2)) requiring a state member bank or bank holding company to increase capital to or maintain capital at the minimum level set forth in the Board's Capital Adequacy Guidelines or as otherwise established under procedures described in § 263.85; or

(2) Pursuant to HOLA (12 U.S.C. 1467a(g)(1)) requiring a savings and loan holding company to increase capital to or maintain capital at a certain level.

(d) *State member bank* means any state-chartered bank that is a member of the Federal Reserve System.

(e) *Savings and loan holding company* means any company that controls a savings association as defined in section 10 of the HOLA, 12 U.S.C. 1467a, and in the Board's Regulation LL (12 CFR 238.2) or any direct or indirect subsidiary thereof other than a savings association subsidiary as defined in section 10 of the HOLA, 12 U.S.C. 1467a, and in the Board's Regulation LL (12 CFR 238.2).

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56604, Sept. 13, 2011]

§ 263.82 Establishment of minimum capital levels.

The Board has established minimum capital levels for state member banks and bank holding companies in its Capital Adequacy Guidelines. The Board may set higher capital levels as necessary and appropriate for a particular state member bank or bank holding company based upon its financial condition, managerial resources, prospects, or similar factors, pursuant to the procedures set forth in § 263.85 of this subpart.

§ 263.83 Issuance of capital directives.

(a) *Notice of intent to issue directive.* If a state member bank or bank holding company is operating with less than the minimum level of capital established in the Board's Capital Adequacy Guidelines, or as otherwise established under the procedures described in § 263.85, or if the Board has determined that the current capital level of a savings and loan holding company is not adequate, the Board may issue and serve upon such state member bank, bank holding company, or savings and loan holding company written notice of the Board's intent to issue a directive to require the bank, bank holding company, or savings and loan holding company to achieve and maintain adequate capital within a specified time period.

(b) *Contents of notice.* The notice of intent to issue a directive shall include:

(1) The required minimum level of capital to be achieved or maintained by the institution;

(2) Its current level of capital;

(3) The proposed increase in capital needed to meet the minimum requirements;

(4) The proposed date or schedule for meeting these minimum requirements;

(5) When deemed appropriate, specific details of a proposed plan for meeting the minimum capital requirements; and

(6) The date for a written response by the bank or bank holding company to the proposed directive, which shall be at least 14 days from the date of issuance of the notice unless the Board determines a shorter period is necessary because of the financial condition of the bank or bank holding company.

(c) *Response to notice.* The bank or bank holding company may file a written response to the notice within the time period set by the Board. The response may include:

(1) An explanation why a directive should not be issued;

(2) Any proposed modification of the terms of the directive;

(3) Any relevant information, mitigating circumstances, documentation or other evidence in support of the institution's position regarding the proposed directive; and

(4) The institution's plan for attaining the required level of capital.

(d) *Failure to file response.* Failure by the bank or bank holding company to

file a written response to the notice of intent to issue a directive within the specified time period shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of such directive.

(e) *Board consideration of response.* After considering the response of the bank or bank holding company, the Board may:

(1) Issue the directive as originally proposed or in modified form;

(2) Determine not to issue a directive and so notify the bank or bank holding company; or

(3) Seek additional information or clarification of the response by the bank or bank holding company.

(f) *Contents of directive.* Any directive issued by the Board may order the bank or bank holding company to:

(1) Achieve or maintain the minimum capital requirement established pursuant to the Board's Capital Adequacy Guidelines or the procedures in § 263.85 of this subpart by a certain date;

(2) Adhere to a previously submitted plan or submit for approval and adhere to a plan for achieving the minimum capital requirement by a certain date;

(3) Take other specific action as the Board directs to achieve the minimum capital levels, including requiring a reduction of assets or asset growth or restriction on the payment of dividends; or

(4) Take any combination of the above actions.

(g) *Request for reconsideration of directive.* Any state member bank or bank holding company, upon a change in circumstances, may request the Board to reconsider the terms of a directive and may propose changes in the plan under which it is operating to meet the required minimum capital level. The directive and plan continue in effect while such request is pending before the Board.

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56604, Sept. 13, 2011]

§ 263.84 Enforcement of directive.

(a) *Judicial and administrative remedies.* (1) Whenever a bank or bank holding company fails to follow a directive issued under this subpart, or to submit or adhere to a capital adequacy plan as required by such directive, the Board may seek enforcement of the directive, including the capital adequacy plan, in the appropriate United States district court, pursuant to section 908 (b)(2)(B)(ii) of ILSA (12 U.S.C. 3907(b)(2)(B)(ii)) and to section 8(i) of the FDIA (12 U.S.C. 1818(i)), in the same manner and to the same extent as if the directive were a final cease-and-desist order. Whenever a savings and loan holding company fails to follow a directive issued under this subpart, or to submit or adhere to a capital adequacy plan as required by such directive, the Board may seek enforcement of the directive, including the capital adequacy plan, in the proper United States district court, or the United States court of any territory or other place subject to the jurisdiction of the United States, pursuant to section 10(g)(4) of HOLA (12 U.S.C. 1567a(g)(4)).

(2) The Board, pursuant to section 910(d) of ILSA (12 U.S.C. 3909(d)), may also assess civil money penalties for violation of the directive against any bank or bank holding company and any institution-affiliated party of the bank or bank holding company, in the same manner and to the same extent as if the directive were a final cease-and-desist order. The Board, pursuant to section 10(i) (12 U.S.C. 1467a(i)), may also assess civil money penalties for violation of the directive against any savings and loan holding company and any institution-affiliated party of the savings and loan holding company, in the same manner and to the same extent as if the directive were a final cease-and-desist order.

(b) *Other enforcement actions.* A directive may be issued separately, in conjunction with, or in addition to any other enforcement actions available to the Board, including issuance of cease-and-desist orders, the approval or denial of applications or notices, or any other actions authorized by law.

(c) *Consideration in application proceedings.* In acting upon any application or notice submitted to the Board pursuant to any statute administered by the Board, the Board may consider the progress of a state member bank, bank holding company, or savings and

loan holding company or any subsidiary thereof in adhering to any directive or capital adequacy plan required by the Board pursuant to this subpart, or by any other appropriate banking supervisory agency pursuant to ILSA. The Board shall consider whether approval or a notice of intent not to disapprove would divert earnings, diminish capital, or otherwise impede the bank, bank holding company, or savings and loan holding company in achieving its required minimum capital level or complying with its capital adequacy plan.

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56604, Sept. 13, 2011]

§ 263.85 Establishment of increased capital level for specific institutions.

(a) *Establishment of capital levels for specific institutions.* The Board may establish a capital level higher than the minimum specified in the Board's Capital Adequacy Guidelines for a specific bank or bank holding company pursuant to:

(1) A written agreement or memorandum of understanding between the Board or the appropriate Federal Reserve Bank and the bank or bank holding company;

(2) A temporary or final cease-and-desist order issued pursuant to section 8(b) or (c) of the FDIA (12 U.S.C. 1818(b) or (c));

(3) A condition for approval of an application or issuance of a notice of intent not to disapprove a proposal;

(4) Or other similar means; or

(5) The procedures set forth in paragraph (b) of this section.

(b) *Procedure to establish higher capital requirement* —(1) *Notice.* When the Board determines that capital levels above those in the Board's Capital Adequacy Guidelines may be necessary and appropriate for a particular bank or bank holding company under the circumstances, or when the Board determines that the current capital level of a savings and loan holding company is not adequate, the Board shall give the bank or bank holding company notice of the proposed higher capital requirement and shall permit the bank, bank holding company, or savings and loan holding company an opportunity to comment upon the proposed capital level, whether it should be required and, if so, under what time schedule. The notice shall contain the Board's reasons for proposing a higher level of capital.

(2) *Response.* The bank, bank holding company, or savings and loan holding company shall be allowed at least 14 days to respond, unless the Board determines that a shorter period is necessary because of the financial condition of the bank, bank holding company, or savings and loan holding company. Failure by the bank, bank holding company, or savings and loan holding company to file a written response to the notice within the time set by the Board shall constitute a waiver of the opportunity to respond and shall constitute consent to issuance of a directive containing the required minimum capital level.

(3) *Board decision.* After considering the response of the institution, the Board may issue a written directive to the bank, bank holding company, or savings and loan holding company setting an appropriate capital level and the date on which this capital level will become effective. The Board may require the bank, bank holding company, or savings and loan holding company to submit and adhere to a plan for achieving such higher capital level as the Board may set.

(4) *Enforcement of higher capital level.* The Board may enforce the capital level established pursuant to the procedures described in this section and any plan submitted to achieve that capital level through the procedures set forth in § 263.84 of this subpart.

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56604, Sept. 13, 2011]

Subpart F—Practice Before the Board

§ 263.90 Scope.

This subpart prescribes rules relating to general practice before the Board on one's own behalf or in a representational capacity, including the circumstances under which disciplinary sanctions—censure, suspension, or debarment—may be imposed upon persons appearing in a representational

capacity, including attorneys and accountants, but not including employees of the Board. These disciplinary sanctions, which continue in effect beyond the duration of a specific proceeding, supplement the provisions of § 263.6(b) of subpart A, which address control of a specific proceeding.

§ 263.91 Censure, suspension or debarment.

The Board may censure an individual or suspend or debar such individual from practice before the Board if he or she engages, or has engaged, in conduct warranting sanctions as set forth in § 263.94; refuses to comply with the rules and regulations in this part; or with intent to defraud in any manner, willfully and knowingly deceives, misleads, or threatens any client or prospective client. The suspension or debarment of an individual shall be initiated only upon a finding by the Board that the conduct that forms the basis for the disciplinary action is egregious.

§ 263.92 Definitions.

(a) As used in this subpart, the following terms shall have the meaning given in this section unless the context otherwise requires.

(b)(1) *Practice before the Board* includes any matters connected with presentations to the Board or to any of its officers or employees relating to a client's rights, privileges or liabilities under laws or regulations administered by the Board. Such matters include, but are not limited to, the preparation of any statement, opinion or other paper or document by an attorney, accountant, or other licensed professional which is filed with, or submitted to, the Board, on behalf of another person in, or in connection with, any application, notification, report or document; the representation of a person at conferences, hearings and meetings; and the transaction of other business before the Board on behalf of another person.

(2) *Practice before the Board* does not include work prepared for an institution solely at its request for use in the ordinary course of its business.

(c) *Attorney* means any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, or the District of Columbia.

(d) *Accountant* means any individual who is duly qualified to practice as a certified public accountant or a public accountant in any state, possession, territory, commonwealth, or the District of Columbia.

§ 263.93 Eligibility to practice.

(a) *Attorneys.* Any attorney who is qualified to practice as an attorney and is not currently under suspension or debarment pursuant to this subpart may practice before the Board.

(b) *Accountants.* Any accountant who is qualified to practice as a certified public accountant or public accountant and is not currently under suspension or debarment by the Board may practice before the Board.

§ 263.94 Conduct warranting sanctions.

Conduct for which an individual may be censured, debarred or suspended from practice before the Board includes, but is not limited to:

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the Board or to any Board officer or employee, or to any tribunal authorized to pass upon matters administered by the Board in connection with any matter pending or likely to be pending before it. The term ''information'' includes facts or other statements contained in testimony, financial statements, applications, affidavits, declarations, or any other document or written or oral statement;

(c) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Board by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor, or thing of value;

(d) Disbarment or suspension from practice as an attorney, or debarment or suspension from practice as a certified public accountant or public accountant, by any duly constituted authority of any state, possession, commonwealth, or the District of Columbia for the conviction of a felony or misdemeanor involving personal dishonesty or breach of trust in matters relating to the supervisory responsibilities of the Board, where the conviction has not been reversed on appeal;

(e) Knowingly aiding or abetting another individual to practice before the Board during that individual's period of suspension, debarment, or ineligibility;

(f) Contemptuous conduct in connection with practice before the Board, and knowingly making false accusations and statements, or circulating or publishing malicious or libelous matter;

(g) Suspension or debarment from practice before the OCC, the FDIC, the Office of Thrift Supervision, the Securities and Exchange Commission, the NCUA, or any other Federal agency based on matters relating to the supervisory responsibilities of the Board;

(h) Willful or knowing violation of any of the regulations contained in this part.

[56 FR 38052, Aug. 9, 1991, as amended at 68 FR 48267, Aug. 13, 2003; 76 FR 56605, Sept. 13, 2011]

§ 263.95 Initiation of disciplinary proceeding.

(a) *Receipt of information.* An individual, including any employee of the Board, who has reason to believe that an individual practicing before the Board in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension or debarment under § 263.94, may make a report thereof and forward it to the Board.

(b) *Censure without formal proceeding.* Upon receipt of information regarding an individual's qualification to practice before the Board, the Board may, after giving the individual notice and opportunity to respond, censure such individual.

(c) *Institution of formal disciplinary proceeding.* When the Board has reason to believe that any individual who practices before the Board in a representative capacity has engaged in conduct that would serve as a basis for censure, suspension or debarment under § 263.94 the Board may, after giving the individual notice and opportunity to respond, institute a formal disciplinary proceeding against such individual. The proceeding shall be conducted pursuant to § 263.97 and shall be initiated by a complaint issued by the Board that names the individual as a respondent. Except in cases when time, the nature of the proceeding, or the public interest do not permit, a proceeding under this section shall not be instituted until the respondent has been informed, in writing, of the facts or conduct which warrant institution of a proceeding and the respondent has been accorded the opportunity to comply with all lawful requirements or take whatever action may be necessary to remedy the conduct that is the basis for the initiation of the proceeding.

§ 263.96 Conferences.

(a) *General.* The Board's staff may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, debarment or suspension, regardless of whether a proceeding for debarment or suspension has been instituted. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(b) *Resignation or voluntary suspension.* In order to avoid the institution of, or a decision in, a debarment or suspension proceeding, a person who practices before the Board may consent to suspension from practice. At the discretion of the Board, the individual may be suspended or debarred in accordance with the consent offered.

§ 263.97 Proceedings under this subpart.

Except as otherwise provided in this subpart, any hearing held under this subpart shall be held before an administrative law judge of the OFIA pursuant to procedures set forth in subparts A and B of this part. The Board shall

appoint a person to represent the Board in the hearing. Any person having prior involvement in the matter which is the basis for the suspension or debarment proceeding shall be disqualified from representing the Board in the hearing. The hearing shall be closed to the public unless the Board, sua sponte or on the request of a party, otherwise directs. The administrative law judge shall refer a recommended decision to the Board, which shall issue the final decision and order. In its final decision and order, the Board may censure, debar or suspend an individual, or take such other disciplinary action as the Board deems appropriate.

§ 263.98 Effect of suspension, debarment or censure.

(a) *Debarment*. If the final order against the respondent is for debarment, the individual will not thereafter be permitted to practice before the Board unless otherwise permitted to do so by the Board pursuant to § 263.99 of this subpart.

(b) *Suspension*. If the final order against the respondent is for suspension, the individual will not thereafter be permitted to practice before the Board during the period of suspension.

(c) *Censure*. If the final order against the respondent is for censure, the individual may be permitted to practice before the Board, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the Board's files.

(d) *Notice of debarment or suspension*. Upon the issuance of a final order for suspension or debarment, the Board shall give notice of the order to appropriate officers and employees of the Board, to interested departments and agencies of the Federal Government, and to the appropriate authorities of the State in which any debarred or suspended individual is or was licensed to practice.

§ 263.99 Petition for reinstatement.

The Board may entertain a petition for reinstatement from any person debarred from practice before the Board. The Board shall grant reinstatement only if the Board finds that the petitioner is likely to act in accordance with the regulations in this part, and that granting reinstatement would not be contrary to the public interest. Any request for reinstatement shall be limited to written submissions unless the Board, in its discretion, affords the petitioner an informal hearing.

Subpart G—Rules Regarding Claims Under the Equal Access to Justice Act

§ 263.100 Authority and scope.

This subpart implements the provisions of the Equal Access to Justice Act (5 U.S.C. 504) as they apply to formal adversary adjudications before the Board. The types of proceedings covered by this subpart are listed in §§ 263.1 and 263.50.

§ 263.101 Standards for awards.

A respondent in a covered proceeding that prevails on the merits of that proceeding against the Board, and that is eligible under this subpart as defined in § 263.103, may receive an award for fees and expenses incurred in the proceeding unless the position of the Board during the proceeding was substantially justified or special circumstances make an award unjust. The position of the Board includes, in addition to the position taken by the Board in the adversary proceeding, the action or failure to act by the Board upon which the adversary proceeding was based. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings.

§ 263.102 Prevailing party.

Only an eligible applicant that prevailed on the merits of an adversary proceeding may qualify for an award under this subpart.

§ 263.103 Eligibility of applicants.

(a) *General rule*. To be eligible for an award under this subpart, an applicant must have been named as a party to the adjudicatory proceeding and show that it meets all other conditions of eligibility set forth in paragraphs (b) and (c) of this section.

(b) *Types of eligible applicant*. An applicant is eligible for an award only if

it meets at least one of the following descriptions:

(1) An individual with a net worth of not more than $2 million at the time the adversary adjudication was initiated;

(2) Any sole owner of an unincorporated business, or any partnership, corporation, associations, unit of local government or organization, the net worth of which did not exceed $7,000,000 and which did not have more than 500 employees at the time the adversary adjudication was initiated;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees at the time the adversary proceeding was initiated; or

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees at the time the adversary proceeding was initiated.

(c) *Factors to be considered.* In determining the eligibility of an applicant:

(1) An applicant who owns an unincorporated business shall be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which he or she prevailed are related to personal interests rather than to business interests.

(2) An applicant's net worth includes the value of any assets disposed of for the purpose of meeting an eligibility standard and excludes the value of any obligations incurred for this purpose. Transfers of assets or obligations incurred for less than reasonably equivalent value will be presumed to have been made for this purpose.

(3) The net worth of a financial institution shall be established by the net worth information reported in conformity with applicable instructions and guidelines on the financial institution's financial report to its supervisory agency for the last reporting date before the initiation of the adversary proceeding. A bank holding company's and a savings and loan holding company's net worth will be considered on a consolidated basis even if the bank holding company or the savings and loan holding company is not required to file its regulatory reports to the Board on a consolidated basis.

(4) The employees of an applicant include all those persons who were regularly providing services for remuneration for the applicant, under its direction and control, on the date the adversary proceeding was initiated. Part-time employees are counted on a proportional basis.

(5) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. As used in this subpart, *affiliates* are: Individuals, corporations, and entities that directly or indirectly or acting through one or more entities control at least 25% of the voting shares of the applicant, and corporations and entities of which the applicant directly or indirectly owns or controls at least 25% of the voting shares. The Board may determine, in light of the actual relationship among the affiliated entities, that aggregation with regard to one or more of the applicant's affiliates would be unjust and contrary to the purposes of this subpart and decline to aggregate the net worth and employees of such affiliate; alternatively, the Board may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56605, Sept. 13, 2011]

§ 263.104 Application for awards.

(a) *Time to file.* An application and any other pleading or document related to the application may be filed with the Board whenever the applicant has prevailed in the proceeding within 30 days after service of the final order of the Board disposing of the proceeding.

(b) *Contents.* An application for an award of fees and expenses under this subpart shall contain:

(1) The name of the applicant and an identification of the proceeding;

(2) A showing that the applicant has prevailed, and an identification of the way in which the applicant believes that the position of the Board in the proceeding was not substantially justified;

(3) If the applicant is not an individual, a statement of the number of its employees on the date the proceeding was initiated;

(4) A description of any affiliated individuals or entities, as defined in § 263.103(c)(5), or a statement that none exist;

(5) A declaration that the applicant, together with any affiliates, had a net worth not more than the maximum set forth in § 263.103(b) as of the date the proceeding was initiated, supported by a net worth statement conforming to the requirements of § 263.105;

(6) A statement of the amount of fees and expenses for which an award is sought conforming to § 263.107; and

(7) Any other matters that the applicant wishes the Board to consider in determining whether and in what amount an award should be made.

(c) *Verification*. The application shall be signed by the applicant or an authorized officer of or attorney for the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application and supporting documents is true and correct.

(d) *Service*. The application and related documents shall be served on all parties to the adversary proceeding in accordance with § 263.11, except that statements of net worth shall be served only on counsel for the Board.

(e) *Presiding officer*. Upon receipt of an application, the Board shall, if feasible, refer the matter to the administrative law judge who heard the underlying adversary proceeding.

§ 263.105 Statement of net worth.

(a) *General rule*. A statement of net worth shall be filed with the application for an award of fees. The statement shall reflect the net worth of the applicant and all affiliates of the applicant, as specified in § 263.103(c)(5). In all cases, the administrative law judge or the Board may call for additional information needed to establish the applicant's net worth as of the initiation of the proceeding.

(b) *Contents*. (1) Except as otherwise provided herein, the statement of net worth may be in any form convenient to the applicant which fully discloses all the assets and liabilities of the applicant and all the assets and liabilities of its affiliates, as of the time of the initiation of the adversary adjudication. Unaudited financial statements are acceptable for individual applicants as long as the statement provides a reliable basis for evaluation, unless the administrative law judge or the Board otherwise requires. Financial statements or reports filed with or reported to a Federal or State agency, prepared before the initiation of the adversary proceeding for other purposes, and accurate as of a date not more than three months prior to the initiation of the proceeding, shall be acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the administrative law judge or the Board otherwise requires.

(2) In the case of applicants or affiliates that are not banks, net worth shall be considered for the purposes of this subpart to be the excess of total assets over total liabilities, as of the date the underlying proceeding was initiated, except as adjusted under § 263.103(c)(5). The net worth of a bank holding company or a savings and loan holding company shall be considered on a consolidated basis. Assets and liabilities of individuals shall include those beneficially owned.

(3) If the applicant or any of its affiliates is a bank or a savings association, the portion of the statement of net worth which relates to the bank or the savings association shall consist of a copy of the bank's or a savings association's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. Net worth shall be considered for the purposes of this subpart to be the total equity capital (or, in the case of mutual savings banks or mutual savings associations, the total surplus accounts) as reported, in conformity with applicable instructions and guidelines, on the bank's or the savings association's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(c) *Statement confidential*. Unless otherwise ordered by the Board or required by law, the statement of net worth shall be for the confidential use of the

Board, counsel for the Board, and the administrative law judge.

[56 FR 38052, Aug. 9, 1991, as amended at 76 FR 56605, Sept. 13, 2011]

§ 263.106 Measure of awards.

(a) *General rule.* Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, provided that no award under this subpart for the fee of an attorney or agent shall exceed $75 per hour. No award to compensate an expert witness shall exceed the highest rate at which the Board pays expert witnesses. An award may include the reasonable expenses of the attorney, agent, or expert witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(b) *Determination of reasonableness of fees.* In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, subject to the limits set forth above, the administrative law judge shall consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fee for like services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(c) *Awards for studies.* The reasonable cost of any study, analysis, test, project, or similar matter prepared on behalf of an applicant may be awarded to the extent that the charge for the service does not exceed the prevailing rate payable for similar services, and the study or other matter was necessary solely for preparation of the applicant's case and not otherwise required by law or sound business or financial practice.

§ 263.107 Statement of fees and expenses.

The application shall be accompanied by a statement fully documenting the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in work in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services performed. The administrative law judge or the Board may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 263.108 Responses to application.

(a) *By counsel for the Board.* (1) Within 20 days after service of an application, counsel for the Board may file an answer to the application.

(2) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Board's position. If the answer is based on any alleged facts not already in the record of the proceeding, the answer shall include either supporting affidavits or a request for further proceedings under § 263.109, or both.

(b) *Reply to answer.* The applicant may file a reply only if the Board has addressed in its answer any of the following issues: that the position of the agency was substantially justified, that the applicant unduly protracted the proceedings, or that special circumstances make an award unjust. Any reply authorized by this section shall be filed within 15 days of service of the answer. If the reply is based on any alleged facts not already in the record of the proceeding, the reply shall include either supporting affidavits or a request for further proceedings under § 263.109, or both.

(c) *Additional response.* Additional filings in the nature of pleadings may be submitted only by leave of the administrative law judge.

§ 263.109 Further proceedings.

(a) *General rule.* The determination of a recommended award shall be made by the administrative law judge on the basis of the written record of the adversary adjudication, including any supporting affidavits submitted in connection with the application, unless, on the motion of either the applicant or Board counsel, or sua sponte, the administrative law judge or the Board orders further proceedings to amplify the record such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted promptly and expeditiously.

(b) *Request for further proceedings.* A request for further proceedings under this section shall specifically identify the information sought or the issues in dispute and shall explain why additional proceedings are necessary.

(c) *Hearing.* The administrative law judge shall hold an oral evidentiary hearing only on disputed issues of material fact which cannot be adequately resolved through written submissions.

§ 263.110 Recommended decision.

The administrative law judge shall file with the Board a recommended decision on the fee application not later than 30 days after the submission of all pleadings and evidentiary material concerning the application. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and, if applicable, an explanation of the reasons for any difference between the amount requested and the amount of the recommended award. The recommended decision shall also include, if at issue, proposed findings as to whether the Board's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. The administrative law judge shall file the record of the proceeding on the fee application upon the filing of the recommended decision and, at the same time, serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

§ 263.111 Action by the Board.

(a) *Exceptions to recommended decision.* Within 20 days after service of the recommended decision, findings, conclusions, and proposed order, the applicant or counsel for the Board may file written exceptions thereto. A supporting brief may also be filed.

(b) *Decision by the Board.* The Board shall render its decision within 90 days after it has notified the parties that the matter has been received for decision. The Board shall serve copies of the decision and order of the Board upon the parties. Judicial review of the decision and order may be obtained as provided in 5 U.S.C. 504(c)(2).

Subpart H—Issuance and Review of Orders Pursuant to Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

SOURCE: 57 FR 44888, Sept. 29, 1992, unless otherwise noted.

§ 263.201 Scope.

(a) The rules and procedures set forth in this subpart apply to state member banks, companies that control state member banks or are affiliated with such banks, and senior executive officers and directors of state member banks that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) and subpart D of part 208 of this chapter.

(b) [Reserved]

[57 FR 44888, Sept. 29, 1992, as amended at 63 FR 58621, Nov. 2, 1998]

§ 263.202 Directives to take prompt regulatory action.

(a) *Notice of intent to issue directive*—(1) *In general.* The Board shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized state member bank or, where appropriate, any company that controls the bank, prior written notice of the Board's intention to issue a directive requiring such bank or company to take actions or to follow proscriptions described in section 38 that

are within the Board's discretion to require or impose under section 38 of the FDI Act, including sections 38(e)(5), (f)(2), (f)(3), or (f)(5). The bank shall have such time to respond to a proposed directive as provided by the Board under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the Board finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the Board may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a state member bank or any company that controls a state member bank immediately to take actions or to follow proscriptions described in section 38 that are within the Board's discretion to require or impose under section 38 of the FDI Act, including section 38(e)(5), (f)(2), (f)(3), or (f)(5). A bank or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the Board. Such an appeal must be received by the Board within 14 calendar days of the issuance of the directive, unless the Board permits a longer period. The Board shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the Board, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the bank's capital measures and capital levels;

(2) A description of the restrictions, prohibitions, or affirmative actions that the Board proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the bank or company subject to the directive may file with the Board a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A bank or company may file a written response to a notice of intent to issue a directive within the time period set by the Board. The date shall be at least 14 calendar days from the date of the notice unless the Board determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the Board is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the proposed directive.

(d) *Board consideration of response.* After considering the response, the Board may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the bank or company; or

(3) Seek additional information or clarification of the response from the bank or company, or any other relevant source.

(e) *Failure to file response.* Failure by a bank or company to file with the Board, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any bank or company that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the Board reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the Board, the directive shall continue in place while such request is pending before the Board.

§ 263.203 Procedures for reclassifying a state member bank based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification*—(i) *Grounds for reclassification.*

(A) Pursuant to § 208.43(c) of Regulation H (12 CFR 208.43(c)), the Board may reclassify a well capitalized bank as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The Board determines that the bank is in unsafe or unsound condition; or

(*2*) The Board deems the bank to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as ''reclassification.''

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 208.33(c) of this chapter, the Board shall issue and serve on the bank a written notice of the Board's intention to reclassify the bank.

(2) *Contents of notice.* A notice of intention to reclassify a bank based on unsafe or unsound condition shall include:

(i) A statement of the bank's capital measures and capital levels and the category to which the bank would be reclassified;

(ii) The reasons for reclassification of the bank;

(iii) The date by which the bank subject to the notice of reclassification may file with the Board a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the Board determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A bank may file a written response to a notice of proposed reclassification within the time period set by the Board. The response should include:

(i) An explanation of why the bank is not in unsafe or unsound condition or otherwise should not be reclassified;

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the reclassification.

(4) *Failure to file response.* Failure by a bank to file, within the specified time period, a written response with the Board to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the Board or its designee under this section. If the bank desires to present oral testimony or witnesses at the hearing, the bank shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the Board shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the bank requests a later date. The hearing shall be held in Washington, DC or at such other place as may be designated by the Board, before a presiding officer(s) designated by the Board to conduct the hearing.

(7) *Hearing procedures.* (i) The bank shall have the right to introduce relevant written materials and to present oral argument at the hearing. The bank may introduce oral testimony and present witnesses only if expressly authorized by the Board or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the Board orders that such procedures shall apply.

(ii) The informal hearing shall be recorded, and a transcript shall be furnished to the bank upon request and payment of the cost thereof. Witnesses

need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the Board on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the Board will decide whether to reclassify the bank and notify the bank of the Board's decision.

(b) *Request for rescission of reclassification.* Any bank that has been reclassified under this section, may, upon a change in circumstances, request in writing that the Board reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the Board, the bank shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the Board.

[57 FR 44888, Sept. 29, 1992, as amended at 63 FR 58621, Nov. 2, 1998]

§ 263.204 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the Board issues and serves a directive on a state member bank pursuant to § 263.202 requiring the bank to dismiss from office any director or senior executive officer under section 38(f) (2) (F) (ii) of the FDI Act, the Board shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the Board at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the Board or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the Board, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a bank to dismiss from office any director or senior executive officer, the Board shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the Board, before a presiding officer(s) designated by the Board to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized

by the Board or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the Board orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript shall be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review*. A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the bank would materially strengthen the bank's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the bank's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the bank based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers*. Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the Board concerning the Respondent's request for reinstatement with the bank.

(g) *Time for decision*. Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the Board shall grant or deny the request for reinstatement and notify the Respondent of the Board's decision. If the Board denies the request for reinstatement, the Board shall set forth in the notification the reasons for the Board's action.

§ 263.205 Enforcement of directives.

(a) *Judicial remedies*. Whenever a state member bank or company that controls a state member bank fails to comply with a directive issued under section 38, the Board may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i) (1) of the FDI Act.

(b) *Administrative remedies*—(1) *Failure to comply with directive*. Pursuant to section 8(i) (2) (A) of the FDI Act, the Board may assess a civil money penalty against any state member bank or company that controls a state member bank that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan*. The failure of a bank to implement a capital restoration plan required under section 38, subpart D of Regulation H (12 CFR part 208, subpart D), or this subpart, or the failure of a company having control of a bank to fulfill a guarantee of a capital restoration plan made pursuant to section 38 (e) (2) of the FDI Act shall subject the bank or company to the assessment of civil money penalties pursuant to section 8(i) (2) (A) of the FDI Act.

(c) *Other enforcement action*. In addition to the actions described in paragraphs (a) and (b) of this section, the Board may seek enforcement of the provisions of section 38 or subpart B of Regulation H (12 CFR part 208, subpart B) through any other judicial or administrative proceeding authorized by law.

[57 FR 44888, Sept. 29, 1992, as amended at 63 FR 58621, Nov. 2, 1998]

Subpart I—Submission and Review of Safety and Soundness Compliance Plans and Issuance of Orders To Correct Safety and Soundness Deficiencies

SOURCE: 60 FR 35682, July 10, 1995, unless otherwise noted.

§ 263.300 Scope.

The rules and procedures set forth in this subpart apply to State member banks that are subject to the provisions of section 39 of the Federal Deposit Insurance Act (section 39) (12 U.S.C. 1831p–1).

§ 263.301 Purpose.

Section 39 of the FDI Act requires the Board to establish safety and soundness standards. Pursuant to section 39, a bank may be required to submit a compliance plan if it is not in compliance with a safety and soundness standard established by guideline under section 39(a) or (b). An enforceable order under section 8 may be issued if, after being notified that it is in violation of a safety and soundness standard established under section 39, the bank fails to submit an acceptable compliance plan or fails in any material respect to implement an accepted plan. This subpart establishes procedures for requiring submission of a compliance plan and issuing an enforceable order pursuant to section 39.

§ 263.302 Determination and notification of failure to meet safety and soundness standard and request for compliance plan.

(a) *Determination*. The Board may, based upon an examination, inspection, or any other information that becomes available to the Board, determine that a bank has failed to satisfy the safety and soundness standards contained in the Interagency Guidelines Establishing Standards for Safety and Soundness or the Interagency Guidelines Establishing Standards for Safeguarding Customer Information, set forth in appendices D–1 and D–2 to part 208 of this chapter, respectively.

(b) *Request for compliance plan*. If the Board determines that a State member bank has failed a safety and soundness standard pursuant to paragraph (a) of this section, the Board may request, by letter or through a report of examination, the submission of a compliance plan, and the bank shall be deemed to have notice of the request three days after mailing of the letter by the Board or delivery of the report of examination.

[60 FR 35682, July 10, 1995, as amended at 63 FR 55488, Oct. 15, 1998; 66 FR 8637, Feb. 1, 2001]

§ 263.303 Filing of safety and soundness compliance plan.

(a) *Schedule for filing compliance plan*—(1) *In general*. A State member bank shall file a written safety and soundness compliance plan with the Board within 30 days of receiving a request for a compliance plan pursuant to § 263.302(b), unless the Board notifies the bank in writing that the plan is to be filed within a different period.

(2) *Other plans*. If a State member bank is obligated to file, or is currently operating under, a capital restoration plan submitted pursuant to section 38 of the FDI Act (12 U.S.C. 1831o), a cease-and-desist order entered into pursuant to section 8 of the FDI Act, a formal or informal agreement, or a response to a report of examination or report of inspection, it may, with the permission of the Board, submit a compliance plan under this section as part of that plan, order, agreement, or response, subject to the deadline provided in paragraph (a)(1) of this section.

(b) *Contents of plan*. The compliance plan shall include a description of the steps the State member bank will take to correct the deficiency and the time within which those steps will be taken.

(c) *Review of safety and soundness compliance plans*. Within 30 days after receiving a safety and soundness compliance plan under this subpart, the Board shall provide written notice to the bank of whether the plan has been approved or seek additional information from the bank regarding the plan. The Board may extend the time within which notice regarding approval of a plan will be provided.

(d) *Failure to submit or implement a compliance plan*—(1) *Supervisory actions*.

If a State member bank fails to submit an acceptable plan within the time specified by the Board or fails in any material respect to implement a compliance plan, then the Board shall, by order, require the bank to correct the deficiency and may take further actions provided in section 39(e)(2)(B). Pursuant to section 39(e)(3), the Board may be required to take certain actions if the bank commenced operations or experienced a change in control within the previous 24-month period, or the bank experienced extraordinary growth during the previous 18-month period.

(2) *Extraordinary growth*. For purposes of paragraph (d)(1) of this section, *extraordinary growth* means an increase in assets of more than 7.5 percent during any quarter within the 18-month period preceding the issuance of a request for submission of a compliance plan, by a bank that is not well capitalized for purposes of section 38 of the FDI Act. For purposes of calculating an increase in assets, assets acquired through merger or acquisition approved pursuant to the Bank Merger Act (12 U.S.C. 1828(c)) will be excluded.

(e) *Amendment of compliance plan*. A State member bank that has filed an approved compliance plan may, after prior written notice to and approval by the Board, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank shall implement the compliance plan as previously approved.

§ 263.304 Issuance of orders to correct deficiencies and to take or refrain from taking other actions.

(a) *Notice of intent to issue order*—(1) *In general*. The Board shall provide a bank prior written notice of the Board's intention to issue an order requiring the bank to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39 of the FDI Act. The bank shall have such time to respond to a proposed order as provided by the Board under paragraph (c) of this section.

(2) *Immediate issuance of final order*. If the Board finds it necessary in order to carry out the purposes of section 39 of the FDI Act, the Board may, without providing the notice prescribed in paragraph (a)(1) of this section, issue an order requiring a bank immediately to take actions to correct a safety and soundness deficiency or take or refrain from taking other actions pursuant to section 39. A State member bank that is subject to such an immediately effective order may submit a written appeal of the order to the Board. Such an appeal must be received by the Board within 14 calendar days of the issuance of the order, unless the Board permits a longer period. The Board shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the order shall remain in effect unless the Board, in its sole discretion, stays the effectiveness of the order.

(b) *Contents of notice*. A notice of intent to issue an order shall include:

(1) A statement of the safety and soundness deficiency or deficiencies that have been identified at the bank;

(2) A description of any restrictions, prohibitions, or affirmative actions that the Board proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of any required action; and

(4) The date by which the bank subject to the order may file with the Board a written response to the notice.

(c) *Response to notice*—(1) *Time for response*. A bank may file a written response to a notice of intent to issue an order within the time period set by the Board. Such a response must be received by the Board within 14 calendar days from the date of the notice unless the Board determines that a different period is appropriate in light of the safety and soundness of the bank or other relevant circumstances.

(2) *Contents of response*. The response should include:

(i) An explanation why the action proposed by the Board is not an appropriate exercise of discretion under section 39;

(ii) Any recommended modification of the proposed order; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of

the position of the bank regarding the proposed order.

(d) *Agency consideration of response.* After considering the response, the Board may:

(1) Issue the order as proposed or in modified form;

(2) Determine not to issue the order and so notify the bank; or

(3) Seek additional information or clarification of the response from the bank, or any other relevant source.

(e) *Failure to file response.* Failure by a bank to file with the Board, within the specified time period, a written response to a proposed order shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the order.

(f) *Request for modification or rescission of order.* Any bank that is subject to an order under this subpart may, upon a change in circumstances, request in writing that the Board reconsider the terms of the order, and may propose that the order be rescinded or modified. Unless otherwise ordered by the Board, the order shall continue in place while such request is pending before the Board.

§ 263.305 Enforcement of orders.

(a) *Judicial remedies.* Whenever a State member bank fails to comply with an order issued under section 39, the Board may seek enforcement of the order in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Failure to comply with order.* Pursuant to section 8(i)(2)(A) of the FDI Act, the Board may assess a civil money penalty against any State member bank that violates or otherwise fails to comply with any final order issued under section 39 and against any institution-affiliated party who participates in such violation or noncompliance.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the Board may seek enforcement of the provisions of section 39 or this part through any other judicial or administrative proceeding authorized by law.

Subpart J—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

SOURCE: 68 FR 48267, Aug. 13, 2003, unless otherwise noted.

§ 263.400 Scope.

This subpart, which implements section 36(g)(4) of the Federal Deposit Insurance Act (FDIA)(12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services for insured state member banks, bank holding companies, and savings and loan holding companies required by section 36 of the FDIA (12 U.S.C. 1831m).

[76 FR 56605, Sept. 13, 2011]

§ 263.401 Definitions.

As used in this subpart, the following terms shall have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA and 12 CFR part 363, including attestation services. Audit services include any service performed with respect to the holding company of an insured bank that is used to satisfy requirements imposed by section 36 or part 363 on that bank.

(c) *Banking organization* means an insured state member bank, bank holding company, or savings and loan holding company that obtains audit services that are used to satisfy requirements imposed by section 36 or part 363 on an insured subsidiary bank or insured savings association of that holding company.

(d) *Independent public accountant* (accountant) means any individual who performs or participates in providing audit services.

[68 FR 48267, Aug. 13, 2003, as amended at 76 FR 56605, Sept. 13, 2011]

§ 263.402 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment*—(1) *Individuals.* The Board may remove, suspend, or debar an independent public accountant from performing audit services for banking organizations that are subject to section 36 of the FDIA, if, after notice of and opportunity for hearing in the matter, the Board finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflict of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the Board or any officer or employee of the Board;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or state agency regulating the banking, insurance, or securities industries, other than by an action listed in § 263.403, on grounds relevant to the provision of audit services; or

(vii) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(2) *Accounting firms.* If the Board determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Board also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Board may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Board, be made applicable to a particular banking organization or class of banking organizations.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the Board may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar*—(1) *Initiation of formal removal, suspension, or debarment proceedings.* The Board may initiate a proceeding to

remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearing under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 263, subpart A).

(c) *Immediate suspension from performing audit services*—(1) *In general.* If the Board serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Board may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for banking organizations, if the Board:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Board dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Board to the respondent.

(3) *Petition to stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the immediate suspension shall remain in effect.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Secretary will designate a presiding officer who shall fix a place and time (not more than 10 calendar days after receipt of the petition, unless extended at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any Board employee engaged in investigative or prosecuting functions for the Board in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the Board, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph there shall be no discovery and the provisions of §§ 263.6 through 263.12, 263.16, and 263.21 of this part shall apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer shall issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after

service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer shall promptly certify the entire record to the Board. Within 60 calendar days of the presiding officer's certification, the Board shall issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order shall state the basis of the Board's decision.

§ 263.403 Automatic removal, suspension, and debarment.

(a) An independent public accountant or accounting firm may not perform audit services for banking organizations if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision under section 36 of the FDIA;

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(4)(A) or (B)); or

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(b) Upon written request, the Board, for good cause shown, may grant written permission to such accountant or firm to perform audit services for banking organizations. The request shall contain a concise statement of the action requested. The Board may require the applicant to submit additional information.

§ 263.404 Notice of removal, suspension, or debarment.

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Board shall make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the Board by accountants and firms.* An accountant or accounting firm that provides audit services to a banking organization must provide the Board with written notice of:

(1) Any currently effective order or other action described in §§ 263.402(a)(1)(vi) through (a)(1)(vii) or §§ 263.403(a)(2) through (a)(3); and

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

§ 263.405 Petition for reinstatement.

(a) *Form of petition.* Unless otherwise ordered by the Board, a petition for reinstatement by an independent public accountant, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 263.402 may be made in writing at any time. The request shall contain a concise statement of the action requested. The Board may require the petitioner to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Board, be afforded a hearing. The accountant or firm shall bear the burden of going forward with a petition and proving the grounds asserted in support of the petition. The Board may, in its sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment shall continue until the Board, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement shall not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

PART 264—EMPLOYEE RESPONSIBILITIES AND CONDUCT

AUTHORITY: 5 U.S.C. 7301; 12 U.S.C. 244.

§ 264.101 Cross-reference to employees' ethical conduct standards and financial disclosure regulations.

Employees of the Board of Governors of the Federal Reserve System (Board) are subject to the executive branch-wide standards of ethical conduct at 5 CFR part 2635 and the Board's regulation at 5 CFR part 6801, which supplements the executive branch-wide standards, and the executive branch-wide financial disclosure regulation at 5 CFR part 2634.

[61 FR 53830, Oct. 16, 1996]

PART 264a—POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

Sec.

264a.1 What is the purpose and scope of this part?
264a.2 Who is considered a senior examiner of the Federal Reserve?
264a.3 What special post-employment restrictions apply to senior examiners?
264a.4 When do these special restrictions become effective and may they be waived?
264a.5 What are the penalties for violating these special post-employment restrictions?
264a.6 What other definitions and rules of construction apply for purposes of this part?

AUTHORITY: 12 U.S.C. 1820(k).

SOURCE: 70 FR 69638, Nov. 17, 2005, unless otherwise noted.

§ 264a.1 What is the purpose and scope of this part?

This part identifies those officers and employees of the Federal Reserve that are subject to the special post-employment restrictions set forth in section 10(k) of the Federal Deposit Insurance Act (FDI Act) and implements those restrictions as they apply to officers and employees of the Federal Reserve.

§ 264a.2 Who is considered a senior examiner of the Federal Reserve?

For purposes of this part, an officer or employee of the Federal Reserve is considered to be the ''senior examiner'' for a particular state member bank, bank holding company, savings and loan holding company, or foreign bank if—

(a) The officer or employee has been authorized by the Board to conduct examinations or inspections on behalf of the Board;

(b) The officer or employee has been assigned continuing, broad and lead responsibility for examining or inspecting the state member bank, bank holding company, savings and loan holding company, or foreign bank; and

(c) The officer's or employee's responsibilities for examining, inspecting and supervising the state member bank, bank holding company, savings and loan holding company, or foreign bank—

(1) Represent a substantial portion of the officer's or employee's assigned responsibilities; and

(2) Require the officer or employee to interact routinely with officers or employees of the state member bank, bank holding company, savings and loan holding company, or foreign bank or its affiliates.

[76 FR 56605, Sept. 13, 2011]

§ 264a.3 What special post-employment restrictions apply to senior examiners?

(a) *Senior Examiners of State Member Banks*. An officer or employee of the Federal Reserve who serves as the senior examiner of a state member bank for two or more months during the last twelve months of such individual's employment with the Federal Reserve may not, within one year after leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The state member bank; or

(2) Any company (including a bank holding company) that controls the state member bank.

(b) *Senior Examiners of Bank Holding Companies*. An officer or employee of the Federal Reserve who serves as the senior examiner of a bank holding company for two or more months during

the last twelve months of such individual's employment with the Federal Reserve may not, within one year of leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The bank holding company; or

(2) Any depository institution that is controlled by the bank holding company.

(c) *Senior Examiners of Foreign Banks.* An officer or employee of the Federal Reserve who serves as the senior examiner of a foreign bank for two or more months during the last twelve months of such individual's employment with the Federal Reserve may not, within one year of leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The foreign bank; or

(2) Any branch or agency of the foreign bank located in the United States; or

(3) Any other depository institution controlled by the foreign bank.

(d) *Senior Examiners of Savings and Loan Holding Companies.* An officer or employee of the Federal Reserve who serves as the senior examiner of a savings and loan holding company for two or more months during the last twelve months of such individual's employment with the Federal Reserve may not, within one year of leaving the employment of the Federal Reserve, knowingly accept compensation as an employee, officer, director or consultant from—

(1) The savings and loan holding company; or

(2) Any depository institution that is controlled by the savings and loan holding company.

[70 FR 69638, Nov. 17, 2005, as amended at 76 FR 56606, Sept. 13, 2011]

§ 264a.4 When do these special restrictions become effective and may they be waived?

The post-employment restrictions set forth in section 10(k) of the FDI Act and § 264a.3 do not apply to any officer or employee of the Federal Reserve, or any former officer or employee of the Federal Reserve, if—

(a) The individual ceased to be an officer or employee of the Federal Reserve before December 17, 2005; or

(b) The Chairman of the Board of Governors certifies, in writing and on a case-by-case basis, that granting the individual a waiver of the restrictions would not affect the integrity of the Federal Reserve's supervisory program.

§ 264a.5 What are the penalties for violating these special post-employment restrictions?

(a) *Penalties under section 10(k) of FDI Act.* A senior examiner of the Federal Reserve who, after leaving the employment of the Federal Reserve, violates the restrictions set forth in § 264a.3 shall, in accordance with section 10(k)(6) of the FDI Act, be subject to one or both of the following penalties—

(1) An order—

(i) Removing the individual from office or prohibiting the individual from further participation in the affairs of the relevant state member bank, bank holding company, savings and loan holding company, foreign bank or other depository institution or company for a period of up to five years; and

(ii) Prohibiting the individual from participating in the affairs of any insured depository institution for a period of up to five years; and/or

(2) A civil monetary penalty of not more than $250,000.

(b) *Imposition of penalties.* The penalties described in paragraph (a) of this section shall be imposed by the appropriate Federal banking agency as determined under section 10(k)(6) of the FDI Act, which may be an agency other than the Federal Reserve.

(c) *Scope of prohibition orders.* Any senior examiner who is subject to an order issued under paragraph (a) of this section shall, as required by section 10(k)(6)(B) of the FDI Act, be subject to paragraphs (6) and (7) of section 8(e) of the FDI Act in the same manner and to the same extent as a person subject to an order issued under section 8(e).

(d) *Procedures.* The procedures applicable to actions under paragraph (a) of this section are provided in section 10(k)(6) of the FDI Act.

(e) *Other penalties.* The penalties set forth in paragraph (a) of this section

are not exclusive, and a senior examiner who violates the restrictions in § 264a.3 also may be subject to other administrative, civil or criminal remedies or penalties as provided in law.

[70 FR 69638, Nov. 17, 2005, as amended at 76 FR 56606, Sept. 13, 2011]

§ 264a.6 What other definitions and rules of construction apply for purposes of this part?

For purposes of this part—

(a) *Bank holding company* means any company that controls a bank (as provided in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*)).

(b) A person shall be deemed to act as a *consultant* for a bank or other company only if such person works directly on matters for, or on behalf of, such bank or other company.

(c) *Control* has the meaning given in section 2 of the Bank Holding Company Act, with respect to banking holding companies, and has the meaning given in section 10 of the Home Owners' Loan Act, with respect to savings and loan holding companies.

(d) *Depository institution* has the meaning given in section 3 of the FDI Act and includes an uninsured branch or agency of a foreign bank, if such branch or agency is located in any State.

(e) *Federal Reserve* means the Board of Governors of the Federal Reserve System and the Federal Reserve Banks.

(f) *Foreign bank* means any foreign bank or company described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)).

(g) *Insured depository institution* has the meaning given in section 3 of the FDI Act.

(h) *Savings and loan holding company* means any company that controls a savings association (as provided in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*))

[70 FR 69638, Nov. 17, 2005, as amended at 76 FR 56606, Sept. 13, 2011]

PART 264b—RULES REGARDING FOREIGN GIFTS AND DECORATIONS

Sec.

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AUTHORITY: 5 U.S.C. 552, 7342; 12 U.S.C. 248(i).

SOURCE: 68 FR 68721, Dec. 10, 2003, unless otherwise noted.

§ 264b.1 Purpose and scope.

These rules govern when Board employees, their spouses, and their dependents may accept and retain gifts and decorations from foreign governments under the Foreign Gifts and Decorations Act of 1966, as amended (5 U.S.C. 7342) (''Act'').

§ 264b.2 Definitions.

When used in this part, the following terms have the meanings indicated:

(a) *Board employees* means:

(1) Members of the Board of Governors of the Federal Reserve System (''Board''), officers, and other employees of the Board, including experts or consultants while employed by, and acting on behalf of, the Board; and

(2) Spouses (unless separated) or dependents (within the meaning of section 152 of the Internal Revenue Code of 1986 (26 U.S.C. 152)) of such persons.

(b) *Foreign government* means:

(1) Any unit of foreign governmental authority, including any foreign national, State, local, or municipal government;

(2) Any international or multinational organization whose membership is composed of any unit of foreign government as described in paragraph (b)(1) of this section; and

(3) Any agent or representative of any such unit or organization, while acting as such.

(c) *Gift* means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government.

(d) *Decoration* means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government.

(e) *Minimal value* means retail value in the United States at the time of acceptance of $285 or less as of January 1, 2002, and at 3-year intervals thereafter, as redefined in regulations prescribed by the Administrator of General Services, in consultation with the Secretary of State, to reflect changes in the consumer price index for the immediately preceding 3-year period.

(f) *Administrative Governor* means the Board member serving as the Administrative Governor and includes persons designated by the Administrative Governor to exercise the authority granted under this part in the governor's absence.

§ 264b.3 Restrictions on acceptance of gifts and decorations.

(a) Board employees are prohibited from requesting or otherwise encouraging the tender of a gift or decoration from a foreign government.

(b) Board employees are prohibited from accepting a gift or decoration from a foreign government, except in accordance with this part.

§ 264b.4 Gifts of minimal value.

(a) Board employees may accept and retain a gift of minimal value tendered and received as a souvenir or mark of courtesy. If more than one tangible gift is presented at or marks an event, the value of all such gifts must not exceed ''minimal value.'' If tangible gifts are presented at or mark separate events, their value must not exceed ''minimal value'' for each event, but may exceed ''minimal value'' for all events, even if the events occur on the same day.

(b) Board employees may determine at the time a gift is offered whether it is of minimal value, or they may submit an accepted gift as soon as practicable to the Office of the Secretary for valuation.

(c) Disagreements over whether a gift is of minimal value will be resolved by an independent appraisal under procedures established by the Office of the Secretary.

§ 264b.5 Gifts of more than minimal value.

(a) *Educational scholarships or medical treatment*. Board employees may accept and retain gifts of more than minimal value when such gifts are in the nature of an educational scholarship or medical treatment.

(b) *Travel or travel expenses*. Board employees may accept gifts of travel or expenses for travel taking place entirely outside the United States (such as transportation, food, and lodging) of more than minimal value if appropriate, consistent with the interests of the United States, and permitted by the Board under paragraph (b)(1) or (b)(2) of this section.

(1) Board employees may accept gifts of travel or expenses for travel under paragraph (b) of this section in accordance with specific instructions of the Board, as evidenced by the prior approval of the Administrative Governor. Board employees must request prior approval under procedures established by the Office of the Secretary.

(2) Board employees may accept gifts of travel or expenses for travel under paragraph (b) of this section without the prior approval of the Administrative Governor if such expenses are reported under § 264b.6(b) and the Administrative Governor approves their acceptance after the fact. Board employees must personally repay gifts of travel or expenses for travel of more than minimal value that are not approved by the Administrative Governor.

(c) *Other gifts*. (1) Board employees may typically regard the refusal of gifts of more than minimal value at the inception (when offered or received without a prior offer) as consistent with the interests and general policy of the United States.

(2) Board employees may accept gifts of more than minimal value when it appears that refusal would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. Tangible gifts are considered to have been accepted on behalf of the United States and become the property of the United States on acceptance. Accordingly, they must be

deposited and documented in accordance with § 264b.6(a) and can only be returned or otherwise processed by the Office of the Secretary under § 264b.8.

§ 264b.6 Requirements for gifts of more than minimal value.

(a) *Tangible gifts.* Board employees must deposit tangible gifts of more than minimal value with the Office of the Secretary within 60 days of acceptance and assist in preparing a statement that contains the following information for each gift:

(1) The name and position of the Board employee;

(2) A brief description of the gift and the circumstances justifying acceptance;

(3) The identity, if known, of the foreign government and the name and position of the individual who presented the gift;

(4) The date of acceptance of the gift;

(5) The estimated value in the United States of the gift at the time of acceptance; and

(6) The disposition or current location of the gift.

(b) *Travel or travel expenses without prior approval.* Board employees who accept a gift of travel or expenses for travel under § 264b.5(b)(2) without the prior approval of the Administrative Governor must submit a report to the Office of the Secretary within 30 days of acceptance that contains the following information:

(1) The name and position of the Board employee;

(2) A brief description of the gift, including its estimated value, and the circumstances justifying acceptance; and

(3) The identity, if known, of the foreign government and the name and position of the individual who presented the gift.

(c) *Reports to the Secretary of State.* The Office of the Secretary must report the information contained in the statements described in paragraphs (a) and (b) of this section to the Secretary of State, who must publish in the FEDERAL REGISTER not later than January 31 of each year a comprehensive listing of all such statements for gifts of more than minimal value that were received by federal employees during the preceding year.

§ 264b.7 Decorations.

(a) Board employees may accept, retain, and wear a decoration tendered or awarded by a foreign government in recognition of active field service in time of combat operations or for other outstanding or unusually meritorious performance, subject to the approval of the Administrative Governor. Requests for approval must be submitted to the Office of the Secretary and contain a statement of the circumstances surrounding the award and include any accompanying documentation. The recipient may retain the decoration pending action on the request.

(b) Decorations accepted by Board employees without the approval of the Administrative Governor are considered to have been accepted on behalf of the United States and must be deposited within 60 days of the decoration's acceptance with the Office of the Secretary for disposition or retention under § 264b.8.

§ 264b.8 Disposition or retention of gifts and decorations deposited with the Office of the Secretary.

(a) The Office of the Secretary may dispose of gifts and decorations deposited under §§ 264b.6(a) and 264b.7(b) by returning them to the donors or by handling them in accordance with instructions from the General Services Administration under applicable law.

(b) The Office of the Secretary may approve and retain gifts and decorations deposited under §§ 264b.6(a) and 264b.7(b) for official use. The Office of the Secretary must dispose of a gift within 30 days of the termination of its official use in accordance with instructions from the General Services Administration under applicable law.

§ 264b.9 Enforcement.

(a) The Administrative Governor, after consultation with the General Counsel, must report to the Attorney General cases in which there is reason to believe that a Board employee has violated the Act.

(b) The Attorney General may bring a civil action in any district court of

the United States against a Board employee who knowingly solicits or accepts a gift from a foreign government in violation of the Act, or who fails to deposit or report such a gift as required by the Act. The court may assess a maximum penalty of the retail value of a gift improperly solicited or received plus $5,000.

§ 264b.10 Certain grants excluded.

This part does not apply to grants and other forms of assistance to which § 108A of the Mutual Educational and Cultural Exchange Act of 1961 applies. *See* 22 U.S.C. 2458a.

PART 265—RULES REGARDING DELEGATION OF AUTHORITY

Sec.
265.1 Authority, purpose, and scope.
265.2 Delegation of functions generally.
265.3 Board review of delegated actions.
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265.9 Functions delegated to the Director of Division of Consumer and Community Affairs.
265.10 Functions delegated to Secretary of Federal Open Market Committee.
265.11 Functions delegated to Federal Reserve Banks.

AUTHORITY: 12 U.S.C. 248(i) and (k).

SOURCE: 56 FR 25619, June 5, 1991, unless otherwise noted.

§ 265.1 Authority, purpose, and scope.

(a) Pursuant to section 11(k) of the Federal Reserve Act (12 U.S.C. 248(k)), the Board of Governors of the Federal Reserve System (the ''Board'') may delegate, by published order or rule, any of its functions other than those relating to rulemaking or pertaining principally to monetary and credit policies to Board members and employees, Reserve Banks, or administrative law judges. Pursuant to section 11(i) of the Federal Reserve Act (12 U.S.C. 248(i)), the Board may make all rules and regulations necessary to enable it to effectively perform the duties, functions, or services specified in that Act. Pursuant to section 5(b) of the Bank Holding Company Act (12 U.S.C. 1844(b)), the Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this Act and prevent evasions thereof. Other provisions of Federal law also may authorize specific delegations by the Board.

(b) The Board's Rules Regarding Delegation of Authority (12 CFR part 265) detail the responsibilities that the Board has delegated. The table of contents, titles, and headings that appear in these rules are used solely for their descriptive convenience. Section 265.4 addresses the specific functions delegated to Board members. The functions that have been delegated to Board employees are set forth in §§ 265.5, 265.6, 265.7, 265.8, and 265.9. The functions that have been delegated to the Secretary of the Federal Open Market Committee are set forth in § 265.10. The functions that have been delegated to the Reserve Banks are set forth in § 265.11. Provisions for review of any action taken pursuant to delegated authority are found in § 265.3. Except as otherwise indicated in these rules, the Board will review a delegated action only if a Board member, at his or her own initiative, requests a review.

§ 265.2 Delegation of functions generally.

(a) The Board has determined to delegate authority to exercise the functions described in this part.

(b) The Chairman of the Board shall assign responsibility for performing such delegated functions.

§ 265.3 Board review of delegated actions.

(a) *Request by Board member*. The Board shall review any action taken at a delegated level upon the vote of one member of the Board, either on the member's own initiative or on the basis of a petition for review by any person claiming to be adversely affected by the delegated action.

(b) *Petition for review*. A petition for review of a delegated action must be received by the Secretary of the Board

not later than the fifth day following the date of the delegated action.

(c) *Notice of review.* The Secretary shall give notice of review by the Board of a delegated action to any person with respect to whom the action was taken not later than the tenth day following the date of the delegated action. Upon receiving notice, such person may not proceed further in reliance upon the delegated action until notified of the outcome of the review by the Board.

(d) *By action of a delegee.* A delegee may submit any matter to the Board for determination if the delegee considers it appropriate because of the importance or complexity of the matter.

§ 265.4 Functions delegated to Board members.

(a) *Individual members.* Any Board member designated by the Chairman is authorized:

(1) *Review of denial of access to Board records; FOIA.* To review and determine an appeal of denial of access to Board records under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and the Board's rules regarding such access (12 CFR parts 261 and 261a, respectively).

(2) *Approval of amendments to notice of charges or cease and desist orders.* To approve (after receiving recommendations of the Director of the Division of Banking Supervision and Regulation and the General Counsel) amendments to any notice, temporary order, or proposed order previously approved by the Board in a specific formal enforcement matter (including a notice of charges or removal notice) or any proposed or temporary cease and desist order previously approved by the Board under 12 U.S.C. 1818 (b) and (c).

(3) *Requests for permission to appeal rulings.* (i) To act, when requested by the Secretary, upon any request under § 263.10(e) of the Board's Rules of Practice for Hearings (12 CFR part 263) for special permission to appeal from a ruling of the presiding officer on any motion made at a hearing conducted under the rules, and if special permission is granted, the merits of the appeal shall be presented to the Board for decision.

(ii) Notwithstanding § 265.3 of this part, the denial of special permission to appeal a ruling may be reviewed by the Board only if a Board member requests a review within two days of the denial. No person claiming to be adversely affected by the denial shall have any right to petition the Board or any Board member for review or reconsideration of the denial.

(4) *Extension of time period for final Board action.* To extend for an additional 180 days the 180-day period within which final Board action is required on an application pursuant to section 7(d) of the International Banking Act.

(b) *Three member Action Committee.* Any three Board members designated from time to time by the Chairman (the ''Action Committee'') are authorized:

(1) *Absence of quorum.* To act, upon certification by the Secretary of the Board of an absence of a quorum of the Board present in person, by unanimous vote on any matter that the Chairman has certified must be acted upon promptly in order to avoid delay that would be inconsistent with the public interest except for matters:

(i) Relating to rulemaking;

(ii) Pertaining principally to monetary and credit policies; and

(iii) For which a statute expressly requires the affirmative vote of more than three Board members.

(2) [Reserved]

[56 FR 25619, June 5, 1991, as amended at 56 FR 67154, Dec. 30, 1991; 62 FR 14793, Mar. 28, 1997]

§ 265.5 Functions delegated to Secretary of the Board.

The Secretary of the Board (or the Acting Secretary) is authorized:

(a) *Procedure*—(1) *Extension of time period for public participation in proposed regulations.* To extend, when appropriate under the Board's Rules of Procedure (12 CFR 262.2 (a) and (b)), the time period for public participation with respect to proposed regulations of the Board.

(2) *Extension of time period in notices, orders, rules, or regulations.* (i) To grant or deny requests to extend any time period in any notice, order, rule, or regulation of the Board relating to filing information, comments, opposition,

briefs, exceptions, or other matters, in connection with any application, request or petition for the Board's approval, authority, determination, or permission, or any other action by the Board.

(ii) Notwithstanding § 265.3 of this part, no person claiming to be adversely affected by any such extension of time by the Secretary shall have the right to petition the Board or any Board member for review or reconsideration of the extension.

(3) *Conforming citations and references in Board rules and regulations.* (i) To conform references to administrative positions or units in Board rules and regulations with changes in the administrative structure of the Board and in the government and agencies of the United States.

(ii) To conform citations and references in Board rules and regulations with other regulatory or statutory changes adopted or promulgated by the Board or by the government or agencies of the United States.

(4) *Technical corrections in Board rules and regulations.* To make technical corrections, such as spelling, grammar, construction, and organization (including removal of obsolete provisions and consolidation of related provisions), to the Board's rules, regulations, and orders and other records of Board action but only with the concurrence of the Board's General Counsel.

(b) *Availability of information*—(1) *FOIA requests.* To make available, upon request, information in Board records and consider requests for confidential treatment of information in Board records under the Freedom of Information Act (5 U.S.C. 552) and under the Board's Rules Regarding Availability of Information (12 CFR part 261).

(2) *Annual reports on Privacy Act.* To approve annual reports required by the Privacy Act (5 U.S.C. 552a(p)) from the Board to the Office of Management and Budget for inclusion in the President's annual consolidated report to Congress.

(3) *Report on prime rate of commercial banks.* To determine and report, under 26 U.S.C. (IRC) 6621, to the Secretary of the Treasury the average predominant prime rate quoted by commercial banks to large businesses.

(c) *Bank holding companies; Change in bank control; Mergers*—(1) *Reports on competitive factors in bank mergers.* To furnish reports on competitive factors involved in a bank merger to the Comptroller of the Currency and the Federal Deposit Insurance Corporation under the provisions of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)); The Bank Holding Company Act (12 U.S.C. 1842(a), 1843(c)(14)); the Bank Service Corporation Act (12 U.S.C. 1865(a), (b), 1867(d)); the Change in Bank Control Act (12 U.S.C. 1817(j)); and the Federal Reserve Act (12 U.S.C. 321 *et seq.*, 601–604a, 611 *et seq.*).

(2) *Reserve Bank director interlocks.* To take actions the Reserve Bank could take except for the fact that the Reserve Bank may not act because a director, senior officer, or principal shareholder of any holding company, bank, or company involved in the transaction is a director of that Reserve Bank or branch of the Reserve Bank.

(3) *Application approval under section 5(d)(3) of the FDI Act.* To approve applications pursuant to section 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)), in those cases in which the appropriate Federal Reserve Bank concludes that, because of unusual considerations, or for other good cause, it should not take action.

(d) *International banking*—(1) *Establishment of foreign branch or foreign agency or of Edge or Agreement Corporations.* To approve, under sections 25 and 25A of the Federal Reserve Act (12 U.S.C. 601 and 604) and Regulation K (12 CFR part 211), the establishment, directly or indirectly, of a foreign branch or agency by a member bank or an Edge or Agreement Corporation if all of the following conditions are met:

(i) The appropriate Reserve Bank and relevant divisions of the Board's staff recommend approval;

(ii) No significant policy issue is raised on which the Board has not expressed its view; and

(iii) The application is not for the applicant's first full-service branch in a foreign country.

(2) *Acquisition of foreign company or U.S. company financing exports.* To grant, under sections 25 and 25A of the Federal Reserve Act (12 U.S.C. 601 and

604) and section 4(c)(13) of the Bank Holding Company Act (12 U.S.C. 1843(c)(13)) and the Board's Regulations K and Y (12 CFR parts 211 and 225), specific consent to the acquisition, either directly or indirectly, by a member bank, an Edge or Agreement corporation, or a bank holding company of stock of a company chartered under the laws of a foreign country or a company chartered under the laws of a state of the United States that is organized and operated for the purpose of financing exports from the United States, and to approve any such acquisition that may exceed the limitations of section 25A of the Federal Reserve Act based on the company's capital and surplus, if all of the following conditions are met:

(i) The appropriate Reserve Bank and all relevant divisions of the Board's staff recommend approval;

(ii) No significant policy issue is raised on which the Board has not expressed its view;

(iii) The acquisition does not result, either directly or indirectly, in the bank, corporation, or bank holding company acquiring effective control of the company, except that this condition need not be met if:

(A) The company is to perform nominee, fiduciary, or other services incidental to the activities of a foreign branch or affiliate of the bank holding company, or corporation; or

(B) The stock is being acquired from the parent bank or bank holding company, or subsidiary Edge or Agreement corporation, as the case may be, and the selling parent or subsidiary holds the stock with the consent of the Board pursuant to Regulations K and Y (12 CFR parts 211 and 225).

(3) *Investments in Edge and Agreement Corporations.* To approve an application by a member bank to invest more than 10 percent of capital and surplus in Edge and agreement corporation subsidiaries, provided that:

(i) The member bank's total investment, including the retained earnings of the Edge and agreement corporation subsidiaries, does not exceed 20 percent of the bank's capital and surplus or would not exceed that level as a result of the proposal; and

(ii) The proposal raises no significant policy or supervisory issues.

(e) *Member banks*—(1) *Waiver of penalty for early withdrawals of time deposits.* To permit depository institutions to waive the penalty for early withdrawal of time deposits under section 19(j) of the Federal Reserve Act (12 U.S.C. 371b) and § 204.2 of Regulation D (12 CFR part 204) if the following conditions are met:

(i) The President declares an area of major disaster or emergency area pursuant to section 301 of the Disaster Relief Act of 1974 (42 U.S.C. 5141);

(ii) The waiver is limited to depositors suffering disaster or emergency related losses in the officially designated area; and

(iii) The appropriate Reserve Bank and all relevant divisions of the Board's staff recommend approval.

(2) [Reserved]

(f) *Location of institution.* To determine the Federal Reserve District in which an institution is located pursuant to § 204.3(b)(2)(ii) of Regulation D (12 CFR part 204) or § 209.15(b) of Regulation I (12 CFR part 209) if:

(1) The relevant Federal Reserve Banks and the institution agree on the specific Reserve Bank in which the institution should hold stock or with which the institution should maintain reserve balances; and

(2) The agreed-upon location does not raise any significant policy issues.

[56 FR 25619, June 5, 1991, as amended at 56 FR 67153, 67154, Dec. 30, 1991; 58 FR 26509, May 4, 1993; 62 FR 34617, June 27, 1997; 66 FR 58655, Nov. 23, 2001]

§ 265.6 Functions delegated to General Counsel.

The Board's general counsel (or the general counsel's delegee) is authorized:

(a) *Procedure*—(1) *Reconsideration of Board action.* Pursuant to § 262.3(i) of this chapter (Rules of Procedure) to determine whether or not to grant a request for reconsideration or whether to deny a request for stay of the effective date of any action taken by the Board with respect to an action as provided in that part.

(2) *Public meetings.* To order, after consulting with the directors of other interested divisions of the Board and

the appropriate Reserve Bank, that a public meeting or other proceeding be held, under § 262.25 of the Board's Rules of Procedure (12 CFR part 262), in connection with any application or notice filed with the Board, and to designate the presiding officer in the proceeding under terms and conditions the General Counsel deems appropriate.

(3) *Designation of Board counsel for hearings.* To designate Board staff attorneys as Board counsel in any proceeding ordered by the Board in accordance with § 263.6 of the Board's Rules of Practice for Hearings (12 CFR part 263).

(4) *Oaths, depositions, subpoenas.* To take, or authorize designated persons to take, with the concurrence of the Director of the Division of Banking Supervision and Regulation, actions permitted under 12 U.S.C. 1818(n), 1820(c), and 12 U.S.C. 1844(f), including administering oaths and affirmations, taking depositions, and issuing, revoking, quashing, or modifying subpoenas duces tecum.

(b) *Availability of Information*—(1) *FOIA requests.* To make available information of the Board of the nature and in the circumstances described in the Board's Rules Regarding Availability of Information (12 CFR part 261).

(2) *Disclosure to foreign authorities.* To make the determinations required for disclosure of information to a foreign bank regulatory or supervisory authority, and to obtain, to the extent necessary, the agreement of such authority to maintain the confidentiality of such information to the extent possible under applicable law.

(3) *Assistance to foreign authorities.* To approve requests for assistance from any foreign bank regulatory or supervisory authority that is conducting an investigation regarding violations of any law or regulation relating to banking matters or currency transactions administered or enforced by such authority, and to make the determinations required for any investigation or collection of information and evidence pertinent to such request. In deciding whether to approve requests for assistance under this paragraph, the General Counsel shall consider:

(i) Whether the requesting authority has agreed to provide reciprocal assistance with respect to banking matters within the jurisdiction of any appropriate Federal banking agency;

(ii) Whether compliance with the request would prejudice the public interest of the United States; and

(iii) Whether the request is consistent with the requirement that the Board conduct any such investigation in compliance with the laws of the United States and the policies and procedures of the Board.

(c) *Bank holding companies; Change in bank control; Mergers*—(1) *Control determinations under section 2(g) of BHC Act.* To determine whether a company that transfers shares under section 2(g) of the Bank Holding Company Act (12 U.S.C. 1841(g)) is incapable of controlling the transferee.

(2) *Control determinations under section 4(c)(8) of BHC Act.* To determine, or issue an order for a hearing to determine, whether a company engaged in financial, fiduciary, or insurance activities falls within the exemption in section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)), permitting retention or acquisition of control thereof by a bank holding company.

(3) *Notices under CBC Act.* To revoke acceptance of and return as incomplete a notice filed under the Change in Bank Control Act (12 U.S.C. 1817(j)) or to extend the time during which action must be taken on a notice where the General Counsel determines, with the concurrence of the Director of the Division of Banking Supervision and Regulation, that the notice is materially incomplete under that Act or Regulation Y (12 CFR part 225) or contains material information that is substantially inaccurate.

(4) *Tax certifications.* To make prior and final certification for federal tax purposes (26 U.S.C. (IRC) 1101–1103, 6158) with respect to distributions pursuant to the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*).

(d) *Management interlocks*—(1) *General exceptions.* To grant exceptions from the prohibitions of Regulation L (12 CFR part 212) when the primary federal supervisor of the depository institution in need of management assistance approves.

(2) *Temporary exceptions.* To grant requests, after consultation with the Director for the Division of Banking Supervision and Regulation, for temporary director interlocks under Regulation L (12 CFR part 212) for newly chartered banks, banks in low income areas, minority banks, women's banks, organizations experiencing conditions endangering their safety or soundness, organizations sponsoring a credit union, and organizations that lose thirty percent or more of their directors or management officials due to changes in circumstances.

(e) *Consent enforcement orders.* With the concurrence of the director of the Board's Division of Banking Supervision and Regulation (or the Director's delegee):

(1) To enter into a cease-and-desist order, removal and prohibition order, or civil money penalty assessment order with a bank holding company or any nonbanking subsidiary thereof, with a state member bank, or with any other person or entity subject to the Board's jurisdiction, when the order has been consented to by the institution or individual subject to the order;

(2) To stay, modify, terminate, or suspend an order issued pursuant to paragraph (e)(1) of this section.

(f) *International banking*—(1) *After-the-fact applications.* With the concurrence of the Board's Director of the Division of Banking Supervision and Regulation, to grant a request by a foreign bank to establish a branch, agency, commercial lending company, or representative office through certain acquisitions, mergers, consolidations, or similar transactions, in conjunction with which:

(i) The foreign bank would be required to file an after-the-fact application for the Board's approval under § 211.24(a)(6) of Regulation K (12 CFR 211.24(a)(6)); or

(ii) The General Counsel may waive the requirement for an after-the-fact application if:

(A) The surviving foreign bank commits to wind down the U.S. operations of the acquired foreign bank; and

(B) The merger or consolidation raises no significant policy or supervisory issues.

(2) To modify the requirement that a foreign bank that has submitted an application or notice to establish a branch, agency, commercial lending company, or representative office pursuant to § 211.24(a)(6) of Regulation K (12 CFR 211.24(a)(6)) shall publish notice of the application or notice in a newspaper of general circulation in the community in which the applicant or notificant proposes to engage in business, as provided in § 211.24(b)(2) of Regulation K (12 CFR 211.24(b)(2)).

(3) With the concurrence of the Board's Director of the Division of Banking Supervision and Regulation, to grant a request for an exemption under section 4(c)(9) of the Bank Holding Company Act (12 U.S.C. 1843(c)(9)), provided that the request raises no significant policy or supervisory issues that the Board has not already considered.

(4) To return applications and notices filed under the International Banking Act for informational deficits.

(5) To determine that an entity qualifies as a ''special-purpose foreign government-owned bank'' for purposes of § 211.24(d)(3) (12 CFR 211.24(d)(3)).

(g) *Conflicts of interest waivers.* To issue individual conflicts of interest waivers under 18 U.S.C. 208(b)(1) to employees and officials other than Board members.

[56 FR 25619, June 5, 1991, as amended at 56 FR 67154, Dec. 30, 1991; 57 FR 6789, Feb. 28, 1992; 57 FR 13002, Apr. 15, 1992; 58 FR 6363, Jan. 28, 1993; 58 FR 26509, May 4, 1993; 58 FR 53394, Oct. 15, 1993; 60 FR 10307, Feb. 24, 1995; 61 FR 13395, Mar. 27, 1996; 62 FR 45150, Aug. 26, 1997; 66 FR 54397, Oct. 26, 2001]

§ 265.7 Functions delegated to Director of Division of Banking Supervision and Regulation.

The Board's Director of the Division of Banking Supervision and Regulation (or the Director's delegee) is authorized:

(a) *Procedure*—(1) *Cease and desist orders.* To refuse, with the prior concurrence of the appropriate Reserve Bank and the Board's General Counsel, an application to the Board to stay, modify, terminate, or set aside any effective cease and desist order previously issued by the Board under section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)), or any written

agreement between the Board or the Reserve Bank and a bank holding company or any nonbanking subsidiary thereof or a state member bank.

(2) *Modification of commitments or conditions.* To grant or deny requests for modifying, including extending the time for, performing a commitment or condition relied on by the Board or its delegee in taking any action under the Bank Holding Company Act, the Bank Merger Act, the Change in Bank Control Act of 1978, the Federal Reserve Act, or the International Banking Act. In acting on such requests, the Board's Director may take into account changed circumstances and good faith efforts to fulfill the commitments or conditions, and shall consult with the directors of other interested divisions where appropriate. The Board's Director may not take any action that would be inconsistent with or result in an evasion of the provisions of the Board's original action.

(3) *Notice of insufficient capital.* To issue, with the concurrence of the Board's General Counsel, a notice that a state member bank or bank holding company has insufficient capital and which directs the bank or company to file with its regional Reserve Bank a capital improvement plan under subpart D of the Board's Rules of Practice for Hearings (12 CFR part 263).

(4) *Obtaining possession or control of securities; extending time period.* To approve, under § 403.5(g) of the Treasury Department regulations (17 CFR part 403) implementing the Government Securities Act of 1986, as amended (Pub. L. 95–571), the application of a member bank, a state branch or agency of a foreign bank, a foreign bank, or a commercial lending company owned or controlled by a foreign bank, to extend for one or more limited periods commensurate with the circumstances the 30-day time period specified in 17 CFR 403.5(c)(1)(iii), provided the Director is satisfied that the applicant is acting in good faith and that exceptional circumstances warrant such action.

(b) *Availability of Information*—(1) *FOIA requests.* To make available information of the Board of the nature and in the circumstances described in § 261.11 of the Board's Rules Regarding Availability of Information (12 CFR part 261).

(2) *FOIA; Availability of information.* To make available, under the Board's Rules Regarding Availability of Information (12 CFR part 261), reports and other information of the Board acquired pursuant to the Board's Regulations G, T, U, and X (12 CFR parts 207, 220, 221, 224) of the nature and in circumstances described in §§ 261.8(a) (2) and (3) of these rules.

(c) *Bank holding companies; Change in bank control; Mergers*—(1) *Bank holding company registration forms and annual reports.* To promulgate registration forms and annual reports and other forms for use in connection with the Bank Holding Company Act, after receiving clearance from the Office of Management and Budget (where necessary), under section 5 of the Bank Holding Company Act (12 U.S.C. 1844) and in accordance with 5 U.S.C. 553.

(2) *Emergency action.* To take actions the Reserve Bank could take under this part at §§ 265.11(c)(2)(ii) and 265.11(c)(3)(iii) if immediate or expeditious action is required to avert failure of a bank or savings association or because of an emergency pursuant to sections 3(a) and 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1842(a), 1843(c)(8)) on the Change in Bank Control Act (12 U.S.C. 1817(j)).

(3) *Waiver of notice.* To waive, dispense with, modify or excuse the failure to comply with the requirement for publication and solicitation of public comment regarding a notice filed under the Change in Bank Control Act (12 U.S.C. 1817(j)), with the concurrence of the Board's General Counsel, provided a written finding is made that such disclosure would seriously threaten the safety or soundness of a bank holding company or a bank.

(4) *Notices for addition or change of directors or officers.* Under section 914(a) of the Financial Institutions Reform, Recovery and Enforcement Act (12 U.S.C. 1831i) and subpart H of Regulation Y (12 CFR part 225), provided that no senior officer or director or proposed senior officer or director of the notificant is also a director of the Reserve Bank or a branch of the Reserve Bank:

(i) To determine the informational sufficiency of notices filed pursuant to § 225.72 of Regulation Y (12 CFR part 225); and

(ii) To waive the prior notice requirements of that section.

(5) *ERISA violations.* To provide the Department of Labor written notification of possible significant violations of the Employee Retirement Income Security Act (ERISA) by bank holding companies, in accordance with section 3004(b) of ERISA and the Interagency Agreement adopted to implement its provisions.

(6) *Appraisal not required.* To determine pursuant to 12 CFR 225.63(b)(12) that the services of an appraiser are not necessary in order to protect Federal financial and public policy interests in real estate-related financial transactions or to protect the safety and soundness of an institution.

(d) *International banking*—(1) *Foreign bank reports.* To require submission of a report of condition respecting any foreign bank in which a member bank holds stock acquired under § 211.5(b) of Regulation K (12 CFR part 211) and section 25 of the Federal Reserve Act (12 U.S.C. 602).

(2) *Edge corporation reports.* To require submission and publication of reports by an Edge corporation under section 25A of the Federal Reserve Act (12 U.S.C. 625).

(3) *Capital stock of Edge corporation; articles of association; additional investments in Agreement corporation.* To approve under sections 25 and 25A as of the Federal Reserve Act (12 U.S.C. 601 and 604), increases and decreases in the capital stock of and amendments to the articles of association of an Edge corporation and additional investments by a member bank in the stock of an Agreement corporation.

(4) *Authority under general-consent and prior-notice procedures.* (i) With regard to a prior notice to establish a branch in a foreign country under § 211.3 of Regulation K (12 CFR 211.3):

(A) To waive the notice period;

(B) To suspend the notice period;

(C) To determine not to object to the notice; or

(D) To require the notificant to file an application for the Board's specific consent.

(ii) With regard to a prior notice to make an investment under § 211.9(f) of Regulation K (12 CFR 211.9(f)):

(A) To waive the notice period;

(B) To suspend the notice period; or

(C) To require the notificant to file an application for the Board's specific consent.

(iii) With regard to a prior notice of a foreign bank to establish certain U.S. offices under § 211.24(a)(2)(i) of Regulation K (12 CFR 211.24(a)(2)(i)):

(A) To waive the notice period;

(B) To suspend the notice period; or

(C) To require the notificant to file an application for the Board's specific consent.

(iv) To suspend the ability:

(A) Of a foreign banking organization to establish an office under the prior-notice procedures in § 211.24(a)(2)(i) of Regulation K (12 CFR 211.24(a)(2)(i)) or the general-consent procedures in § 211.24(a)(3) of Regulation K (12 CFR 211.24(a)(3));

(B) Of a U.S. banking organization to establish a foreign branch under the prior-notice or general-consent procedures in § 211.3(b) of Regulation K (12 CFR 211.3(b));

(C) Of an investor to make investments under the general-consent or prior-notice procedures in § 211.9 of Regulation K (12 CFR 211.9); and

(D) Of an eligible investor to make an investment in an export trading company under the general-consent procedures in § 211.34(b) of Regulation K (12 CFR 211.34(b)).

(5) *Investment by foreign subsidiaries in U.S. affiliates.* To permit, after consultation with the Board's General Counsel, a foreign subsidiary of a bank holding company to invest in shares of a U.S. affiliate of the bank holding company where the investment is made as part of an internal corporate reorganization or an internal transfer of funds, subject to any conditions and terms the Director and General Counsel deem appropriate and consistent with the purposes of Regulation K (12 CFR part 211).

(6) *Allocated transfer risk reserves.* To determine the need for establishing and the amount of any allocated transfer risk reserve against specific international assets, and notify the banking institutions of the determination and

the amount of the reserve and whether the reserve may be reduced under subpart D of Regulation K (12 CFR part 211).

(7) *Underwriting and dealing authority outside the United States; hedging techniques.* To approve, under § 211.5(d)(14) of Regulation K (12 CFR part 211):

(i) Requests for authority to engage in the activities of underwriting, distributing, and dealing in shares outside the United States, provided that the Director has determined that the internal procedures and operations of the organization and the effect of the proposed activities on capital adequacy are consistent with approval.

(ii) Hedging methods authorized under § 211.5(d)(14)(iii)(A) of Regulation K (12 CFR part 211).

(8) *Conduct and coordination of examinations.* To authorize the conduct of examinations of the U.S. offices and affiliates of foreign banks as provided in sections 7(c) and 10(c) of the IBA (12 U.S.C. 3105(c), 3107(c)), and, where appropriate, to coordinate those examinations with examinations of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the state entity that is authorized to supervise or regulate a state branch, state agency, commercial lending company, or representative office.

(9) *Allowing use of general-consent procedures.* To allow an investor that is not well-capitalized and well-managed to make investments under the general-consent procedures in § 211.9 or 211.34(b) of Regulation K (12 CFR 211.9 or 211.34(b)), provided that:

(i) The investor has implemented measures to become well-capitalized and well-managed;

(ii) Granting such authority raises no significant policy or supervisory concerns; and

(iii) Authority granted by the Director under this paragraph (d)(9) expires after one year, but may be renewed.

(10) *Exceeding general-consent investment limits.* To allow an investor to exceed the general-consent investment limits under § 211.9 of Regulation K (12 CFR 211.9), provided that:

(i) The investor demonstrates adequate financial and managerial strength;

(ii) The investor's investment strategy is not unsafe or unsound;

(iii) Granting such authority raises no significant policy or supervisory concerns; and

(iv) Authority granted by the Director under this paragraph (d)(10) expires after one year, but may be renewed.

(11) *Approval of temporary U.S. offices.* To allow a foreign bank to operate a temporary office in the United States, pursuant to § 211.24 of Regulation K (12 CFR 211.24), provided that:

(i) There is no direct public access to such office, with respect to any branch or agency function; and

(ii) The proposal raises no significant policy or supervisory issues.

(12) With the concurrence of the General Counsel, to approve applications, notices, exemption requests, waivers and suspensions, and other related matters under Regulation K (12 CFR part 211), where such matters do not raise any significant policy or supervisory issues.

(13) With the concurrence of the General Counsel, to approve:

(i) The establishment by a bank holding company or member bank of an agreement corporation under section 25 of the Federal Reserve Act; and

(ii) Any initial investment associated with the establishment of such agreement corporation.

(14) With the concurrence of the General Counsel, to determine that an election by a foreign bank to become or to be treated as a financial holding company is effective, provided that:

(i) The foreign bank meets the criteria for becoming or being treated as a financial holding company; and

(ii) The election raised no significant policy or supervisory issues.

(e) *Member banks*—(1) *Membership certification to FDIC.* Tocertify, under section 4(b) of the Federal Deposit Insurance Act (12 U.S.C. 1814(b)), to the Federal Deposit Insurance Corporation that the factors specified in section 6 of the Act (12 U.S.C. 1816) were considered with respect to the admission of a state-chartered bank to Federal Reserve membership.

(2) *Dollar exchange.* To permit any member bank to accept drafts or bill of exchange drawn upon it for the purpose of furnishing dollar exchange under

section 13(12) of the Federal Reserve Act (12 U.S.C. 373).

(3) *ERISA violations*. To provide to the Department of Labor written notification of possible significant violations of the Employee Retirement Income Security Act (ERISA) by member banks, in accordance with section 3004(b) of ERISA and the Interagency Agreement adopted to implement its provisions.

(4) *Examiners*. To select or approve the appointment of Federal Reserve examiners, assistant examiners, and special examiners for the purpose of making examinations for or by the direction of the Board under 12 U.S.C. 325, 338, 625, 1844(c), and 3105(b)(1).

(5) *Capital stock reduction; branch applications; declaration of dividends; investment in bank premises*. To exercise the functions described in § 265.11(e)(5), (11), and (12) of this part (reductions in capital, issuance of subordinated debt, and early retirement of subordinated debt) when the conditions specified in those sections preclude a Reserve Bank from acting on a member bank's request for action or when the Reserve Bank concludes that it should not take action, and to exercise the functions in § 265.11(e)(3), (4), and (7) of this part (approving branch applications, declaration of dividends, and investment in bank premises) in cases in which the Reserve Bank concludes that it should not take action.

(6) *Security devices; Regulation P*. To exercise the functions described in § 265.11(e)(8) of this part in those cases in which the appropriate Reserve Bank concludes that it should not take action for good cause.

(f) *Securities*—(1) *Registration statements by member banks*. Under section 12(g) of the Securities Exchange Act (15 U.S.C. 78*l*(g)):

(i) To accelerate the effective date of a registration statement filed by a member bank with respect to its securities;

(ii) To accelerate termination of the registration of a security that is no longer held of record by 300 persons; and

(iii) To extent the time for filing a registration statement by a member bank.

(2) *Exemption from registration*. To issue notices with respect to application by a statement member bank for exemption from registration under section 12(h) of the Securities Exchange Act (15 U.S.C. 78*l*(h)).

(3) *Accelerating registration of security on national securities exchange*. To accelerate the effective date of an application by a state member bank for registration of a security on a national securities exchange under section 12(d) of the Securities Exchange Act (15 U.S.C. 78*l*(d)).

(4) *Unlisted trading in security of state member bank*. To issue notices with respect to an application by a national securities exchange for unlisted trading privileges in a security of a state member bank under section 12(f) of the Securities Exchange Act (15 U.S.C. 78*l*(f)).

(5) *Transfer agent registration; acceleration; withdrawal or cancellation*. (i) To accelerate, under section 17A(c)(2) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78q–1), the effective date of a registration statement for transfer agent activities filed by a member bank or a subsidiary thereof, a bank holding company or a subsidiary thereof that is a bank as defined in section 3(a)(6) of the Act other than a bank specified in clause (i) or (iii) of section 3(a)(34)(B) of the Act (15 U.S.C. 78c).

(ii) To withdraw or cancel, under section 17A(c)(3)(C) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78q–1(c)(3)(C)), the transfer agent registration of a member bank or a subsidiary thereof, a bank holding company, or a subsidiary thereof that is a bank as defined in section 3(a)(6) of that Act other than a bank specified in clause (i) or (iii) of section 3(a)(34)(B) of the Act (15 U.S.C. 78c), that has filed a written notice of withdrawal with the Board or upon a finding that such transfer agent is no longer in existence or has ceased to do business as a transfer agent.

(6) *Proxy solicitation; financial statements*. (i) To permit the mailing of proxy and other soliciting materials by a state member bank before the expiration of the time prescribed therein under § 208.36 of Regulation H (12 CFR part 208).

(ii) To permit the omission of financial statements from reports by a state member bank, or to require other financial statements in addition to, or in substitution for, the statements required therein under § 208.36 of Regulation H (12 CFR part 208).

(7) *Municipal securities dealers.* Under section 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78w).

(i) To grant or deny requests for waiver of examination and waiting period requirements for municipal securities principals and representatives under Municipal Securities Rulemaking Board Rule G–3;

(ii) To grant or deny requests for a determination that a natural person or municipal securities dealer subject to a statutory disqualification is qualified to act as a municipal securities representative or dealer under Municipal Securities Rulemaking Board Rule G–4;

(iii) To approve or disapprove clearing arrangements under Municipal Securities Rulemaking Board Rule G-8, in connection with the administration of these rules for municipal securities dealers for which the Board is the appropriate regulatory agency under section 3(a)(34) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)).

(8) *Making reports available to SEC.* To make available, upon request, to the Securities and Exchange Commission reports of examination of transfer agents, clearing agencies, and municipal securities dealers for which the Board is the appropriate regulatory agency for use by the Commission in exercising its supervisory responsibilities under the Act under section 17(c)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(c)(3)).

(9) *Issuing examination manuals, forms, and other materials.* To issue examination or inspection manuals, registration, report, agreement, and examination forms, guidelines, instructions, and other similar materials for use in administering sections 7, 8, 15B, and 17A(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78g, 78h, 78o–4, and 78q–1).

(10) *Lists of OTC and foreign margin stocks.* To approve issuance of the lists of OTC margin stocks and foreign margin stocks and add, omit, or remove any stock in circumstances indicating that such change is necessary or appropriate in the public interest under § 207.6(d) of Regulation G (12 CFR part 207), § 220.17(f) of Regulation T (12 CFR part 220), or § 221.7(d) of Regulation U (12 CFR part 221).

[56 FR 25619, June 5, 1991, as amended at 56 FR 67153, 67154, Dec. 30, 1991; 57 FR 13002, Apr. 15, 1992; 58 FR 6363, Jan. 28, 1993; 58 FR 26509, May 4, 1993; 62 FR 64996, Dec. 9, 1997; 63 FR 58621, Nov. 2, 1998; 66 FR 54397, Oct. 26, 2001]

§ 265.8 Functions delegated to the Staff Director of the Division of International Finance.

The Board's Staff Director of the Division of International Finance (or the Director's delegee) is authorized:

(a) *Establishment of foreign accounts.* To approve the establishment of foreign accounts and the terms of any account-related agreements with the Federal Reserve Bank of New York under section 14(e) of the Federal Reserve Act (12 U.S.C. 358).

(b) [Reserved]

§ 265.9 Functions delegated to the Director of Division of Consumer and Community Affairs.

The Director of the Board's Division of Consumer and Community Affairs (or the Director's delegee) is authorized:

(a) *Issuing examination manuals, forms, and other materials.* To issue examination or inspection manuals; report, agreement, and examination forms; examination procedures, guidelines, instructions, and other similar materials pursuant to: section 11(a) of the Federal Reserve Act (12 U.S.C. 248(a)); sections 108(b), 621(c), 704(b), 814(c), and 917(b) of the Consumer Credit Protection Act (15 U.S.C. 1607(b), 1681s(b), 1691c(b), 1692*l*(c) and 1693o(b)); section 305(c) of the Home Mortgage Disclosure Act (12 U.S.C. 2804(c)); section 18(f)(3) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(3)); section 808(c) of the Civil Rights Act of 1968 (42 U.S.C. 3608(c)); section 270(b) of the Truth in Savings Act (12 U.S.C. 4309); and section 5 of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)). The foregoing manuals, forms, and other materials are for use within the Federal Reserve System in the administration of

enforcement responsibilities in connection with:

(1) Sections 1–200 and 501–921 of the Consumer Credit Protection Act (15 U.S.C. 1601–1693r), in regard to the Truth in Lending Act, the Consumer Leasing Act, the Equal Credit Opportunity Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act and the Fair Debt Collection Practices Act;

(2) Sections 301–312 of the Home Mortgage Disclosure Act (12 U.S.C. 2801–2811);

(3) Section 18(f)(1)–(3) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(1)–(3));

(4) Section 805 of the Civil Rights Act of 1968 (42 U.S.C. 3605) and rules and regulations issued thereunder;

(5) Section 1364 of the National Flood Insurance Act of 1968 (42 U.S.C. 4101(a)), and sections 105(b) and 202(b) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(b), 4106(b));

(6) Section 19(j) of the Federal Reserve Act (12 U.S.C. 371b); and

(7) Sections 801–806 of the Community Reinvestment Act (12 U.S.C. 2901–2905).

(8) Sections 261–274 of the Truth in Savings Act (12 U.S.C. 4301–4313).

(b) *Consumer Advisory Council.* Pursuant to section 703(b) of the Consumer Credit Protection Act (15 U.S.C. 1691b(b)), to call meetings of and consult with the Consumer Advisory Council established under that section, approve the agenda for such meetings, and accept any resignations from Consumer Advisory Council members.

(c) *Determining inconsistencies between state and federal laws.* To determine whether a state law is inconsistent with the following federal acts and regulations:

(1) Sections 111, 171(a) and 186(a) of the Truth in Lending Act (15 U.S.C. 1610(a), 1666j(a), 1667e(a)) and § 226.28 of Regulation Z (12 CFR part 226) and § 213.7 of Regulation M (12 CFR part 213);

(2) Section 919 of the Electronic Fund Transfer Act (15 U.S.C. 1693q), § 205.12 of Regulation E (12 CFR part 205);

(3) Section 705(f) of the Equal Credit Opportunity Act (15 U.S.C. 1691d(f) and § 202.11 of Regulation B (12 CFR part 202);

(4) Section 306(a) of the Home Mortgage Disclosure Act (12 U.S.C. 2805(a)) and § 203.3 of Regulation C (12 CFR part 203); and

(5) Section 273 of the Truth in Savings Act (12 U.S.C. 4312) and § 230.1 of Regulation DD (12 CFR part 230).

(d) *Interpreting the Fair Credit Reporting Act.* To issue interpretations pursuant to section 621(e) of the Fair Credit Reporting Act (15 U.S.C. 1681s(e));

(e) *Annual adjustments.* To adjust as required by law:

(1) The amount specified in section 103(aa)(1)(B)(ii) of the Truth in Lending Act and § 226.32(a)(1)(ii) of Regulation Z (12 CFR part 226), relating to mortgages bearing fees above a certain amount in accord with section 103(aa)(3) of that act (15 U.S.C. 1602(aa)); and

(2) The amount specified in section 309(b)(1) of the Home Mortgage Disclosure Act (12 U.S.C. 2808(b)(1)) and § 203.3(a)(1)(ii) of Regulation C (12 CFR part 203) relating to the asset threshold above which a depository institution must collect and report data.

(f) *Community Reinvestment Act determinations.* To make determinations, pursuant to section 804 of the Community Reinvestment Act (12 U.S.C. 2903), approving or disapproving:

(1) Strategic plans and any amendments thereto pursuant to § 228.27(g) and (h) of Regulation BB (12 CFR part 228); and

(2) Requests for designation as a wholesale or limited purpose bank or the revocation of such designation, pursuant to § 228.25(b) of Regulation BB (12 CFR part 228).

(g) *Public hearings.* To conduct hearings or other proceedings required by law, concerning consumer law or other matters within the responsibilities of the Division of Consumer and Community Affairs, in consultation with other interested divisions of the Board where appropriate.

[56 FR 25619, June 5, 1991, as amended at 56 FR 67154, Dec. 30, 1991; 58 FR 65540, Dec. 15, 1993; 63 FR 65044, Nov. 25, 1998]

§ 265.10 Functions delegated to Secretary of Federal Open Market Committee.

The Secretary of the Federal Open Market Committee (or the Deputy Secretary in the Secretary's absence) is authorized:

(a) Records of policy actions. To approve for inclusion in the Board's Annual Report to Congress, records of policy actions of the Federal Open Market Committee.

(b) [Reserved]

§ 265.11 Functions delegated to Federal Reserve Banks.

Each Federal Reserve Bank is authorized as to a member bank or other indicated organization for which the Reserve Bank is reponsible for receiving applications or registration statements or to take other actions as indicated:

(a) *Procedure*—(1) *Member bank affiliate's reports.* To extend the time for good cause shown, within which an affiliate of a state member bank must file reports under section 9(17) of the Federal Reserve Act (12 U.S.C. 334).

(2) *Edge corporation's divestiture of stock.* To extend the time in which an Edge Act corporation must divest itself of stock acquired in satisfaction of a debt previously contracted under section 25A(9) of the Federal Reserve Act (12 U.S.C. 615).

(3) *Edge corporation's corporate existence.* To extend the period of corporate existence of an Edge corporation under section 25A(22) of the Federal Reserve Act (12 U.S.C. 628).

(4) *Bank holding company registration statement.* To extend the time within which a bank holding company must file a registration statement under section 5(a) of the Bank Holding Company Act (12 U.S.C. 1844(a)).

(5) *Bank holding company divestiture of nonbanking interests.* To extend the time within which a bank holding company must divest itself of interests in nonbanking organizations under section 4(a) of the Bank Holding Company Act (12 U.S.C. 1843(a)).

(6) *Bank holding company divestiture of dpc interests.* To extend the time within which a bank holding company or any of its subsidiaries must divest itself of interests acquired in satisfaction of a debt previously contracted:

(i) Under section 4(c)(2) of the Bank Holding Company Act (12 U.S.C. 1843(c)(2)) or § 225.22(c)(1) of Regulation Y (12 CFR part 225); or

(ii) Under sections 2(a)(5)(D) and 3(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)(5)(D) and 1842(a)).

(7) *Member bank's surrender of Reserve Bank stock upon withdrawal from membership.* To extend the time within which a member bank that has given notice of intention to withdraw from membership must surrender its Federal Reserve Bank stock and its certificate of membership under Regulation H (12 CFR 209.3(e)).

(8) *Members bank's reports of condition.* To extend the time for publication of reports of condition under Regulation H (12 CFR part 208) for good cause shown.

(9) *Bank holding company's annual reports.* To grant to a bank holding company a 90-day extension of time in which to file an annual report, and for good cause shown grant an additional extension of time not to exceed 90 days under section 5(c) of the Bank Holding Company Act (12 U.S.C. 1844(c)).

(10) *Regulation K—Divestiture of foreign portfolio investment, joint venture, or subsidiary acquired through debt previously contracted.* To extend the time within which an investor must divest itself of interests in a foreign portfolio investment, joint venture, or subsidiary acquired in satisfaction of a debt previously contracted under Regulation K (12 CFR 211.5(e)).

(11) *Bank holding company's acquisition of shares, opening new bank, consummating merger.* To extend the time within which a bank holding company may acquire shares, open a new bank to be acquired, or consummante a merger in connection with an application approved by the Board, if no material change relevant to the proposal has occurred since its approval.

(12) *Member bank's establishing domestic or foreign branch; Edge or agreement corporation's establishing branch or agency.* To extend the times within which:

(i) A member bank may establish a domestic branch;

(ii) A member bank may establish a foreign branch; or

(iii) An Edge or agreement corporation may establish a branch or agency, if no material change has occurred in the bank's (or corporation's) general condition since the application was approved.

(13) *Purchase of stock by Edge or Agreement Corporation, member bank, or bank holding company.* To extend the time within which an Edge or Agreement corporation, member bank, or a bank holding company may accomplish a purchase of stock if no material change has occurred in the general condition of the corporation, the member bank, or bank holding company since such authorization under sections 25 or 25A of the Federal Reserve Act or section 4(c)(13) of the Bank Holding Company Act (12 U.S.C. 615, 628, 1843).)

(14) *Federal Reserve Membership.* To extend the time within which Federal Reserve membership must be accomplished, if no material change has occurred in the bank's general condition since the application was approved.

(15) *Enforcement actions; written agreements; cease and desist orders.* With the prior approval of both the Board's Director of the Division of Banking Supervision and Regulation and the Board's General Counsel;

(i) To enter into a written agreement with a bank holding company or any nonbanking subsidiary thereof, with a state member bank, or with any other person or entity subject to the Board's supervisory jurisdiction under 12 U.S.C. 1818(b) concerning the prevention or correction of an unsafe or unsound practice in conducting the business of the bank holding company, nonbanking subsidiary, or state member bank or other entity, or concerning the correction or prevention of any violation of law, rule, or regulation, or any condition imposed in writing by the Board in connection with the granting of any application or other request by the bank or company or any other appropriate matter;

(ii) To stay, modify, terminate, or suspend an agreement entered into pursuant to this paragraph;

(iii) To stay, modify, terminate, or suspend an outstanding cease and desist order that has become final pursuant to 12 U.S.C. 1818 (b) and (k). Any agreement authorized under this paragraph may, by its terms, be enforceable to the same extent and in the same manner as an effective and outstanding cease and desist order that has become final pursuant to 12 U.S.C. 1818 (b) and (k).

(16) *Appointment of assistant Federal Reserve agents.* To approve the appointment of assistant Federal Reserve agents (including representatives or alternate representatives of such agents) under section 4, paragraph 21 of the Federal Reserve Act (12 U.S.C. 306).

(b) *Availability of Information*—(1) *Availability of Information; Board records.* To make available information of the Board of the nature and in the circumstances described in the Board's Rules Regarding Availability of Information (12 CFR 261.11).

(2) [Reserved]

(c) *Bank holding companies; Change in bank control; Mergers*—(1) *Require reports under oath.* To require reports under oath to determine whether a company is complying with section 5(c) of the Bank Holding Company Act (12 U.S.C. 1844(c)).

(2) *Acquisition of going concern—authorization of consummation; early consummation.* (i) To notify a bank holding company that, because the circumstances surrounding the application to acquire a going concern indicate that additional information is required or that the acquisition should be considered by the Board, the acquisition should not be consummated until specifically authorized by the Reserve Bank or by the Board.

(ii) To permit a bank holding company to make a proposed acquisition of a going concern before the expiration of the 30-day period referred to in Regulation Y (12 CFR 225.23(a)(2)) because exigent circumstances justify consummation of the acquisition at an earlier time.

(3) *Petition for review of decision that adverse comments are not substantive; permit proposed de novo activities; authorization of consummation; early consummation.* Under § 225.4(b)(1) of Regulation Y (12 CFR part 225) and subject to § 265.3 of this part, if a person submitting adverse comments that the Reserve Bank had decided are not substantive files a petition for review by the Board of that decision:

(i) To permit a bank holding company to engage *de novo* in activities specified in § 225.25 of Regulation Y (12 CFR part 225), or retain shares in a company established *de novo* and engaging in such activities, if the Reserve Bank's evaluation of the considerations specified in section 4(c)(8) of the Bank Holding Company Act leads it to conclude that the proposal can reasonably be expected to produce benefits to the public.

(ii) To notify a bank holding company that the proposal should not be consummated until specifically authorized by the Reserve Bank or by the Board or that the proposal should be processed in accordance with the procedures in § 225.23(a)(2) of Regulation Y (12 CFR part 225).

(iii) To permit a bank holding company to consummate the proposal before the expiration of the 45-day period referred to in § 225.23(a)(1) of Regulation Y because exigent circumstances justify consummation at an earlier time under § 225.4(b)(1) of Regulation Y (12 CFR part 225).

(4) *Permit or stay of modification or location of activities.* To permit or stay a proposed *de novo* modification or relocation of activities engaged in by a bank holding company on the same basis as *de novo* proposals under § 265.11(d)(3) of this part.

(5) *Notices under change in Bank Control Act.* With respect to the bank holding company or a state member bank:

(i) To determine the informational sufficiency of notices and reports filed under the Change in Bank Control Act;

(ii) To extend periods for consideration of notices;

(iii) To determine whether a person who is or will be subject to a presumption described in § 225.41(b) of Regulation Y (12 CFR part 225) should file a notice regarding a proposed transaction; and

(iv) To issue a notice of intention not to disapprove a proposed change in control if all the following conditions are met:

(A) No member of the Board has indicated an objection prior to the Reserve Bank's action;

(B) No senior officer or director of an involved party is also a director of a Federal Reserve Bank or branch;

(C) All relevant departments of the Reserve Bank concur;

(D) If the proposal involves shares of a state member bank or a bank holding company controlling a state member bank, the appropriate bank supervisory authorities have indicated that they have no objection to the proposal, or no objection has been received from them within the time allowed by the act; and

(E) No significant policy issue under the change in Bank Control Act, 12 U.S.C. 1817(j) or § 225.41 of Regulation Y (12 CFR part 225) is raised by the proposal as to which the Board has not expressed its view.

(6) *Failure to comply with publication requirement under change in Bank Control Act.* To waive, dispense with, modify, or excuse the failure to comply with the requirement for publication and solicitation of public comment regarding a notice filed under the Change in Bank Control Act, with the concurrence of the Board's Director of the Division of Banking Supervision and Regulation and the Board's General Counsel, provided that a written finding is made that such disclosure or solicitation would seriously threaten the safety or soundness of a bank holding company or bank under the Change in Bank Control Act (12 U.S.C. 1817(j)(2)).

(7) *Grandfathered nonbanking activities.* To determine under section 4(a)(2) of the Bank Holding Company Act (12 U.S.C. 1843(a)(2)) that termination of grandfathered nonbanking activities of a particular bank holding company is not warranted, provided the Reserve Bank is satisfied all of the following conditions are met:

(i) The company or its successor is ''a company covered in 1970'';

(ii) The nonbanking activities for which indefinite grandfather privileges are being sought do not present any significant unsettled policy issues; and

(iii) The bank holding company was lawfully engaged in such activities as of June 30, 1968 and has been engaged in such activities continuously thereafter.

(8) *Opening of additional nonbanking offices.* To approve applications by a bank holding company under sections 4(c)(8) and 5(b) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8),

1844(b)) and § 225.23(b) of Regulation Y (12 CFR part 225) to open additional offices to engage in nonbanking activities for which the bank holding company previously received approval pursuant to Board order, unless one of the conditions specified in § 265.11(f) (1), (2), (3), or (4), of this part is present.

(9) *Notices for addition or change of directors or officers.* Under section 914(a) of the Financial Institutions Reform, Recovery and Enforcement Act (12 U.S.C. 1831i) and subpart H of Regulation Y (12 CFR part 225), provided that no senior officer or director or proposed senior officer or director of the notificant is also a director of the Reserve Bank or a branch of the Reserve Bank:

(i) To determine the informational sufficiency of notices filed pursuant to § 225.72 of Regulation Y; and

(ii) To waive the prior notice requirements of that section.

(10) *Acquisition approvals under section 5(d)(3) of the FDI Act.* To approve, under section 5(d)(3)(E) of the Federal Deposit Insurance Act, requests by a bank holding company to engage in any transaction described in section 5(d)(3)(A) of that Act.

(11) *Applications requiring Board approval; competitive factors reports for bank mergers.* To approve applications requiring prior approval of the Board and furnish to the Comptroller of the Currency and the Federal Deposit Insurance Corporation reports on competitive factors involved in a bank merger required to be approved by one of those agencies, unless one or more of the following conditions is present.

(i) A member of the Board has indicated an objection prior to the Reserve Bank's action; or

(ii) The Board has indicated that such delegated authority shall not be exercised by the Reserve Bank in whole or in part; or

(iii) A written substantive objection to the application has been properly made; or

(iv) The application raises a significant policy issue or legal question on which the Board has not established its position; or

(v) With respect to bank holding company formations, bank acquisitions or mergers, the proposed transaction involves two or more banking organizations that, upon consummation of the proposal, would control over 35 percent of total deposits (including 50 percent of thrift deposits) in banking offices in the relevant geographic market, or would result in an increase of at least 200 points in the Herfindahl-Hirschman Index (HHI) in a highly concentrated market (a market with a post-merger HHI of at least 1800); or

(vi) With respect to nonbank acquisitions, the nonbanking activities involved do not clearly fall within activities that the Board has designated as permissible for bank holding companies under § 225.25(b) of Regulation Y.

(d) *International banking*—(1) *Application to establish Edge Corporation.* To approve the application by a U.S. banking organization to establish an Edge corporation under section 25 of the Federal Reserve Act (12 U.S.C. 611) and the Board's Regulation K (12 CFR part 211) if all of the following criteria are met:

(i) The U.S. banking organization meets the capital adequacy guidelines and is otherwise in satisfactory condition;

(ii) The proposed Edge corporation will be a wholly-owned subsidiary of a single banking organization; and

(iii) No other significant policy issue is raised on which the Board has not previously expressed its view.

(2) *Issuance of permit to Edge corporation to commence business.* To issue to an Edge corporation under section 25A of the Federal Reserve Act (12 U.S.C. 612) and Regulation K, § 211.4(a) (12 CFR part 211) a final permit to commence business and to approve amendments to the articles of association of any Edge corporation to reflect the following:

(i) Any increase in capital stock where all additional shares are to be acquired by existing shareholders;

(ii) Any change in the location of the home office in the city where the Edge corporation is presently located;

(iii) Any change in the number of members of the board of directors;

(iv) Any change in the name; and

(v) Deletion of the requirements that all directors and shareholders must be U.S. citizens.

(3) *Edge corporation establishing branch abroad.* To approve, under § 211.3(a) Regulation K (12 CFR part 211), an Edge corporation application to establish a branch abroad, provided that no senior officer or director of the involved parties is also a director of a Reserve Bank or branch and that no significant policy issue is raised by the proposal as to which the Board has not expressed its view.

(4) *Member bank establishing foreign branch.* To approve under § 211.3(a) of Regulation K (12 CFR part 211) a member bank's establishing, directly or indirectly, a foreign branch where the application is not one for a full-service branch in a foreign country, provided that no senior officer or director of the involved parties is also a director of a Reserve Bank or branch and that no significant policy issue is raised by the proposal as to which the Board has not expressed its view.

(5) *Agreement with foreign bank concerning deposits of out-of-home-state branch.* To enter into an agreement or undertaking with a foreign bank that it shall receive only such deposits at its out-of-home-state branch as would be permissible for an Edge corporation under section 5 of the International Banking Act (12 U.S.C. 3103).

(6) *Waiver of 30-day prior notification period.* To waive the 30-day prior notification period with respect to a foreign bank's change of home state under § 211.22(c)(1) of Regulation K (12 CFR part 211).

(7) *Granting specific consent.* To grant prior specific consent to an investor for an investment in its first subsidiary or its first joint venture, where such investment does not exceed the general consent limitations under 211.5(c) of Regulation K (12 CFR part 211).

(8) *Authority under prior-notice procedures.* (i) With regard to a prior notice to make an investment under § 211.9(f) of Regulation K (12 CFR 211.9(f)):

(A) To suspend the notice period; or

(B) To require the notificant to file an application for the Board's specific consent.

(ii) With regard to a prior notice of a foreign bank to establish certain U.S. offices under § 211.24(a)(2)(i) of Regulation K (12 CFR 211.24(a)(2)(i)):

(A) To suspend the notice period; or

(B) To require that the foreign bank file an application for the Board's specific consent.

(9) *Investment in export trading company.* To issue a notice of intention not to disapprove a proposed investment in an export trading company if all the following criteria are met:

(i) The proposed export trading company will be a wholly-owned subsidiary of a single investor, or ownership will be shared with an individual or individuals involved in the operation of the export trading company;

(ii) A bank holding company investor and its lead bank meet the minimum capital adequacy guidelines of the Board, the Comptroller of the Currency, or the Federal Deposit Insurance Corporation or have enacted capital enhancement plans that have been determined by the appropriate supervisory authority to be acceptable.

(iii) The proposed activities of the export trading company do not include product research or design, product modification, or activities not specifically covered by the list of services contained in 4(c)(14)(F)(ii) of the Bank Holding Company Act (12 U.S.C. 1843(c)(14)(F)(ii));

(iv) No other significant policy issue is raised on which the Board has not previously expressed its view under section 4(c)(14) of the Bank Holding Company Act (12 U.S.C. 1843(c)(14) and Regulation K (12 CFR 211.31–211.34).

(10) *Futures commission merchant activities.* To approve, under § 211.5(d)(17) of Regulation K (12 CFR part 211), applications to engage in futures commission merchant activities on an exchange that requires members to guarantee or otherwise contract to cover losses suffered by the other members, provided that the Board has previously approved the exchange and the application is on the same terms and conditions on which the Board based its approval of the exchange.

(11) *Investments in Edge and agreement Corporation subsidiaries.* To approve an application by a member bank to invest more than 10 percent of capital and surplus in Edge and agreement corporation subsidiaries, provided that:

(i) The member bank's total investment, including the retained earnings of the Edge and agreement corporation

subsidiaries, does not exceed 20 percent of the bank's capital and surplus or would not exceed that level as a result of the proposal; and

(ii) The proposal raises no significant policy or supervisory issues.

(12) *Amendments to Edge corporation charters.* To approve amendments to Edge corporation charters.

(e) *Member banks*—(1) *Approval of membership applications.* To approve applications for membership in the Federal Reserve System under section 9 of the Federal Reserve Act (12 USC 321 *et seq.*) and Regulation H (12 CFR part 208) if the Reserve Bank is satisfied that approval is warranted after considering the factors set forth in 12 CFR 208.3(b).

(2) *Waiver of notice of intention to withdraw from membership.* To approve or deny applications by state banks for waiver of the required six months' notice of intention to withdraw from Federal Reserve membership under section 9(10) of the Federal Reserve Act (12 U.S.C. 328).

(3) *Approval of branch applications.* To approve a state member bank's establishment of a domestic branch under section 9 of the Federal Reserve Act (12 USC 321 *et seq.*) and Regulation H (12 CFR part 208) if the Reserve Bank is satisfied that approval is warranted after considering the factors set forth in 12 CFR 208.6(b).

(4) *Declaration of dividends in excess of net profits.* To permit a state member bank under section 9(6) of the Federal Reserve Act (12 USC 324 and 60) to declare dividends in excess of the amounts allowed in 12 CFR 208.5(c) if the Reserve Bank is satisfied that approval is warranted after giving consideration to:

(i) The banks capitalization in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, including the volume of its risk assets and of its marginal and inferior quality assets, all considered in relation to the strength of its management; and

(ii) The bank's capitalization after payment of the proposed dividends.

(5) *Reduction of capital stock.* To permit a state member bank under section 9(11) of the Federal Reserve Act (12 USC 239) to reduce its capital stock below the amounts set forth in 12 CFR 208.5(d) if the state member bank's capitalization thereafter will be:

(i) In conformity with the requirements of federal law; and

(ii) Adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, including the volume of its risk assets and of its marginal and inferior quality assets, all considered in relation to the strength of its management.

(6) *Acceptance of drafts and bills of exchange.* To permit a member bank or a federal or state branch or agency of a foreign bank that is subject to reserve requirements under section 7 of the International Banking Act of 1978 (12 U.S.C. 3105) to accept drafts or bills of exchange under section 13(7) of the Federal Reserve Act (12 U.S.C. 372) in an aggregate amount at any one time up to 200 percent of its paid-up and unimpaired capital stock and surplus, if the Reserve Bank is satisfied that such permission is warranted after giving consideration to the institution's capitalization in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, including the volume of its risk assets and of its marginal and inferior-quality assets, all considered in relation to the strength of its management.

(7) *Investment in bank premises in excess of capital stock.* To permit a state member bank to invest in bank premises under section 24A of the Federal Reserve Act (12 USC 371a) in an amount in excess of that set forth in 12 CFR 208.21(a), if the Reserve Bank is satisfied that approval is warranted after giving consideration to the bank's capitalization in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities, including the volume of its risk assets and of its marginal and inferior quality assets, all considered in relation to the strength of its management.

(8) *Security devices.* To determine whether security devices and procedures of state member banks are deficient in meeting the requirements of Regulation H (12 CFR part 208) and whether such requirements should be

varied in the circumstances of a particular banking office, and whether to require corrective action.

(9) *Classifying member banks for election of directors.* To classify member banks for the purposes of electing Federal Reserve Bank class A and class B directors under section 4(16) of the Federal Reserve Act (12 U.S.C. 304), giving consideration to:

(i) The statutory requirement that each of the three groups shall consist as nearly as may be of banks of similar capitalization; and

(ii) The desirability that every member bank have the opportunity to vote for a class A or a class B director at least once every three years.

(10) *Waiver of penalty for deficient reserves.* To waive the penalty for deficient reserves by a member bank if, after a review of all the circumstances relating to the deficiency, the Reserve Bank concludes that waiver is warranted, except that in no case may a penalty be waived if the deficiency in reserves arises out of the bank's gross negligence or conduct inconsistent with the principles and purposes of reserve requirements.

(11) *Retirement of subordinated debt.* To approve the retirement prior to maturity of capital notes described in § 204.2(a)(1)(vii)(C) of Regulation D (12 CFR part 204) and issued by a state member bank, provided the Reserve Bank is satisfied that the capital position of the bank will be adequate after the proposed redemption.

(12) *Public welfare investments.* To permit a state member bank to make a public welfare investment that meets the conditions of 12 CFR 208.22(b)(1)–(3), (b)(5) and (b)(7), if the Reserve Bank is satisfied that:

(i) The state member bank received at least an overall rating of ''3'' as of its most recent consumer compliance examination; and

(ii) The aggregate of all such investments of the state member bank does not exceed 10 percent of its capital stock and surplus as defined under 12 CFR 208.2(d).

(f) *Securities.* To approve applications by a registered lender for termination of the registration under § 221.3(b)(2) of Regulation U (12 CFR 221.3(b)(2)).

(g) *Management interlocks*—(1) *Change in circumstances requiring termination of management interlocks; Regulation L.* To grant time for compliance with § 121.6 of Regulation L (12 CFR part 212) of up to an aggregate of 15 months from the date on which the change in circumstances as specified in that section occurs when the additional time appears to be appropriate to avoid undue disruption to the depository organizations involved in the management interlocks.

(2) *Depository Institutions Management Interlocks Act.* After consultation with the General Counsel of the Board, to decide not to disapprove notices to establish director interlocks with diversified savings and loan holding companies. (12 U.S.C. 3204(8)).

[56 FR 25619, June 5, 1991, as amended at 56 FR 67154, Dec. 30, 1991; 57 FR 11907, Apr. 8, 1992; 57 FR 40600, Sept. 4, 1992; 58 FR 6363, Jan. 28, 1993; 59 FR 22968, May 4, 1994; 60 FR 22257, May 5, 1995; 63 FR 2839, Jan. 16, 1998; 63 FR 58622, Nov. 2, 1998; 66 FR 54398, Oct. 26, 2001; 66 FR 58656, Nov. 23, 2001]

PART 266—LIMITATIONS ON ACTIVITIES OF FORMER MEMBERS AND EMPLOYEES OF THE BOARD

Sec.

266.1 Basis and scope.
266.2 Definitions.
266.3 Limitations.
266.4 Suspension of appearance privilege.
266.5 Criminal penalties.

AUTHORITY: Sec. 11(i), Federal Reserve Act (12 U.S.C. 248(i)); 5 U.S.C. 552.

SOURCE: 38 FR 31672, Nov. 16, 1973, unless otherwise noted.

§ 266.1 Basis and scope.

This part, issued under authority of section 11(i) of the Federal Reserve Act (12 U.S.C. 248(i)), and pursuant to section 552 of title 5 of the United States Code, which requires that every agency shall publish in the FEDERAL REGISTER its rules of procedure, relates to limitations on former members and employees of the Board with respect to participation in matters connected with

their former duties and official responsibilities while serving with the Board.[1]

§ 266.2 Definitions.

(a) *Employee* means a regular officer or employee of the Board; it does not include a consultant to the Board.[2]

(b) *Official responsibility*, with respect to a matter, means administrative, supervisory, or decisional authority, whether intermediate or final, exercisable alone or with others, personally or through subordinates, to approve, disapprove, decide, or recommend Board action or to express staff opinions in dealings with the public.

(c) *Appear personally* includes personal appearance or attendance before, or personal communication, either written or oral, with the Board or a Federal Reserve Bank of any member or employee thereof, or personal participation in the formulation or preparation of any material presented or communicated to, or filed with, the Board, in connection with any application or interpretation arising under the statutes or regulations administered by the Board or the Federal Reserve Banks, except that requests for general information or explanations of Board policy or interpretation shall not be construed to be a personal appearance.

§ 266.3 Limitations.

(a) *Matters on which Board member or employee worked*. No former member or employee of the Board shall appear personally before the Board or a Federal Reserve Bank on behalf of anyone other than the United States, an agency thereof, or a Federal Reserve Bank, in connection with any judicial or other proceedings, application, request for ruling or determination, or other particular matter involving a specific party or parties in which the United States, an agency thereof, or a Federal Reserve Bank is also a party or has a direct and substantial interest and in which he participated personally and substantially as a member or employee of the Board through approval, disapproval, decision, recommendation, advice, investigation or otherwise.

(b) *Matters within Board member or employee's official responsibility*. No former member or employee of the Board shall appear personally before the Board or a Federal Reserve Bank on behalf of anyone other than the United States, an agency thereof, or a Federal Reserve Bank, in connection with any judicial or other proceeding, application, request for ruling or determination, or other particular matter involving a specific party or parties in which the United States, an agency thereof, or a Federal Reserve Bank is also a party or has a direct and substantial interest, and which matter was in process during his tenure of office or period of employment and under his official Board responsibility, at any time within a period of one year after the termination of such responsibility.

(c) *Consultation as to propriety of appearance before the Board*. Any former member or employee of the Board who wishes to personally appear before the Board or a Federal Reserve Bank on behalf of any party other than the United States or an agency thereof or a Federal Reserve Bank at any time within two years from termination of employment with the Board is advised to consult the General Counsel or the Secretary of the Board as to the propriety of such appearance.

(d) *Rulemaking proceedings*. Nothing in this section shall preclude a former member or employee of the Board from representing another person in any Board or Federal Reserve Bank proceeding governed by a rule, regulation, standard, or policy of the Board solely by reason of the fact that such former member or employee participated in or had official responsibility in the formation or adoption of such rule, regulation, standard, or policy.

[1] While the Board has not adopted rules with regard to the disclosure of unpublished information by former Board members and employees, it advises such persons not to disclose unpublished information of the Board obtained in the course of their work. Questions in this regard may be addressed to the General Counsel or the Secretary of the Board.

[2] While former consultants to the Board are not covered by these Rules, they appear to fall within the coverage of section 207 of the United States Criminal Code (18 U.S.C. 207) that provides criminal penalties for engaging in activities similar, although not identical, to those described in paragraphs (a) and (b) of § 266.3.

(e) *Effective date*. This part shall become effective November 6, 1973. Notwithstanding the foregoing, the limitations of this part shall not apply to any activities with respect to a specific matter before the Board in which any former Board member or employee may be engaged on September 21, 1973, the date of publication of this part, until the expiration of 60 days following the effective date of this part or of such additional period as the Secretary of the Board may determine to be appropriate in order to avoid inequity.

§ 266.4 Suspension of appearance privilege.

If any person knowingly and willfully fails to comply with the provisions of this part, the Board may decline to permit such person to appear personally before it or a Federal Reserve Bank for such periods of time as it may determine and may impose such other sanctions as the Board may deem just and proper.

§ 266.5 Criminal penalties.

Any former member or employee of the Board who engages in actions in contravention of paragraph (a) or (b) of § 266.3 may be subject to criminal penalties for violation of section 207 of the United States Criminal Code (18 U.S.C. 207).

PART 267—RULES OF ORGANIZATION AND PROCEDURE OF THE CONSUMER ADVISORY COUNCIL

Sec.
267.1 Statutory authority.
267.2 Purposes and objectives of the Council.
267.3 Members.
267.4 Officers.
267.5 Meetings.
267.6 Amendments.

AUTHORITY: Sec. 703, Equal Credit Opportunity Act, as amended in Pub. L. 94–239.

SOURCE: 41 FR 49802, Nov. 11, 1976, unless otherwise noted.

§ 267.1 Statutory authority.

Section 703 of the Equal Credit Opportunity Act, as amended, provides:

The Board [of Governors of the Federal Reserve System] shall establish a Consumer Advisory Council to advise and consult with it in the exercise of its functions under the Consumer Credit Protection Act and to advise and consult with it concerning other consumer related matters it may place before the Council. In appointing the members of the Council, the Board shall seek to achieve a fair representation of the interests of creditors and consumers. The Council shall meet from time to time at the call of the Board. Members of the Council who are not regular full-time employees of the United States shall, while attending meetings of such Council, be entitled to receive compensation at a rate fixed by the Board, but not exceeding $100 per day, including travel time. Such members may be allowed travel expenses, including transportation and subsistence, while away from their homes or regular place of business.

§ 267.2 Purposes and objectives of the Council.

The Council shall advise and consult with the Board in the exercise of the Board's functions under the Consumer Credit Protection Act and with regard to other matters the Board may place before the Council.

§ 267.3 Members.

(a) The Council shall consist of not more than 30 members appointed by the Board. The term of office of each member of the Council shall be three years. However, the initial terms of the members first taking office shall expire as follows: approximately one-third on December 31, 1977, and approximately one-third at the end of each of the two succeeding calendar years. After the expiration of any member's term of office, such member may continue to serve until a successor has been appointed by the Board. The Board shall have the authority to appoint persons to fill vacancies on the Council.

(b) *Resignation*. Any member may resign at any time by giving notice to the Board. Any such resignation shall take effect upon its acceptance by the Board.

(c) *Compensation*. Members who are not regular full-time employees of the United States shall be paid travel expenses, including transportation and subsistence, and compensation of $100 for each day devoted to attending and traveling to and from meetings.

§ 267.4 Officers.

(a) *Chairman*. The Board shall appoint a Chairman and a Vice Chairman from among the members of the Council, who shall serve at the pleasure of the Board. The Chairman, or in the Chairman's absence the Vice Chairman, shall preside at all meetings of the Council. The Board may appoint a Chairman pro tem who shall preside at a meeting of the Council in the absence of the Chairman and Vice Chairman.

(b) *Secretary*. The Board shall designate a member of its staff, who may but need not be the representative described in § 267.5(c), to act as Secretary of the Council. The Secretary shall record and maintain minutes of the meetings of the Council. Minutes of each meeting shall contain, among other things, a record of the persons present, a description of the matters discussed, and recommendations made. The person acting as Secretary at a meeting shall certify to the accuracy of the minutes of that meeting.

§ 267.5 Meetings.

(a) *Time*. Meetings of the Council shall be held at least once each year and may be held more frequently at the call of the Board.

(b) *Agenda*. Each meeting of the Council shall be conducted in accordance with an agenda formulated or approved by the Board.

(c) *Board representation*. Each meeting of the Council shall be attended by a representative of the Board who is either a member of the Board or of the Board's staff. The Board representative shall have authority to and shall adjourn any meeting of the Council when such representative considers adjournment to be in the public interest.

(d) *Public nature*. (1) Each meeting of the Council shall, to the extent of reasonably available facilities, be open to public observation unless the Board, in accordance with paragraph (d)(6), of this section, determines that the meeting shall be closed.

(2) Notice of the time, place and purpose of each meeting, as well as a summary of the proposed agenda, shall be published in the FEDERAL REGISTER not more than 45 or less than 15 days prior to the scheduled meeting date. Insofar as is practicable, a list of persons and organizations interested in the Council shall be maintained, and a notice of each meeting shall be mailed to such persons and organizations at least 15 days in advance of the scheduled meeting date. Shorter notice may be given when the Board determines that its business so requires; in such event, the public, including persons and organizations described in the preceding sentence, will be given notice at the earliest practicable time.

(3) Members of the public may file written statements with the Council prior to the meeting concerning matters on the Council's agenda. The person presiding at the Council meeting may permit members of the public to submit written statements on such matters within a specified time after the Council meeting. All such submissions shall be circulated to the Council members as soon as is practicable.

(4) Oral presentations at the Council meetings by members of the public shall not be permitted except upon invitation of the Council. However, if the Council and the Board determine that public hearings regarding a matter or matters of concern to the Council are warranted, members of the public may make presentations at such hearings in accordance with procedures established therefor.

(5) Minutes of meetings, records, reports, studies, and agenda of the Council shall be available to the public for copying at the Board's offices in Washington, DC, in accordance with the provisions of 12 CFR part 261 Rules Regarding Availability of Information. Requests for copies of such documents should be addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, DC 20551.

(6) The Board may close to the public any meeting, or any portion of any meeting, of the Council if it determines that such meeting or portion thereof is likely to:

(i) Disclose matters that relate solely to internal personnel rules and practices of the Council;

(ii) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(iii) Involve accusing any person of a crime, or formally censuring any person;

(iv) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(v) Disclose information contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(vi) Disclose information the premature disclosure of which would be likely to lead to significant financial speculation in currencies, securities, or commodities or significantly endanger the stability of any financial institution;

(vii) Disclose information the premature disclosure of which would be likely to frustrate significantly implementation of a proposed Board action, unless the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on the proposal; or

(viii) Which relate to any legal proceedings, agency adjudicatory proceeding or arbitration involving the Board or the Council.

(e) If the Board closes a meeting or any portion of a meeting, the Council will issue, at least annually, a report containing a summary, consistent with 5 U.S.C. 552(b) (1970), of the Council's activities during such closed meetings or portions of meetings.

§ 267.6 Amendments.

These rules of organization and procedure may be amended or repealed at any time by action of the Board, provided, however, that members of the Council shall be promptly notified by the Board of any such action.

PART 268—RULES REGARDING EQUAL OPPORTUNITY

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268.2 Definitions.

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268.201 Age Discrimination in Employment Act.
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AUTHORITY: 12 U.S.C. 244 and 248(i), (k) and (1).

SOURCE: 68 FR 18085, Apr. 15, 2003, unless otherwise noted.

Subpart A—General Provisions and Administration

§ 268.1 Authority, purpose and scope.

(a) *Authority*. The regulations in this part (12 CFR part 268) are issued by the Board of Governors of the Federal Reserve System (Board) under the authority of sections 10(4) and 11(i), (k), and (l) of the Federal Reserve Act (partially codified in 12 U.S.C. 244 and 248(i), (k) and (1)).

(b) *Purpose and scope*. This part sets forth the Board's policy, program and procedures for providing equal opportunity to Board employees and applicants for employment without regard to race, color, religion, sex, national origin, age, or physical or mental disability. It also sets forth the Board's policy, program and procedures for prohibiting discrimination on the basis of physical or mental disability in programs and activities conducted by the Board. It also specifies the circumstances under which the Board will hire or decline to hire persons who are not citizens of the United States, consistent with the Board's operational needs and applicable law.

§ 268.2 Definitions.

The definitions contained in this section shall have the following meanings throughout this part unless otherwise stated.

(a) *Commission or EEOC* means the Equal Employment Opportunity Commission.

(b) *Title VII* means Title VII of the Civil Rights Act (42 U.S.C. 2000e *et seq.*).

Subpart B—Board Program To Promote Equal Opportunity

§ 268.101 General policy for equal opportunity.

(a) It is the policy of the Board to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or disability, and to promote the full realization of equal opportunity in employment through a continuing affirmative program.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)), or the Rehabilitation Act (29 U.S.C. 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

§ 268.102 Board program for equal employment opportunity.

(a) The Board shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the Board shall:

(1) Provide sufficient resources to its equal opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the Board's personnel policies, practices and working conditions;

(4) Communicate the Board's equal employment opportunity policy and program and its employment needs to all sources of job candidates without

regard to race, color, religion, sex, national origin, age or disability, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of employees and applicants for employment when those accommodations can be made without undue hardship on the business of the Board;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with a disability unless the accommodation would impose an undue hardship on the operations of the Board's program;

(9) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(10) Establish a system for periodically evaluating the effectiveness of the Board's overall equal employment opportunity effort;

(11) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(12) Inform its employees and recognized labor organizations of the Board's affirmative equal opportunity policy and program and enlist their cooperation; and

(13) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, the Board shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Establish or make available an alternative dispute resolution program. Such program must be available for both the precomplaint process and the formal complaint process.

(3) Appraise its personnel operations at regular intervals to assure their conformity with the Board's program, this part 268 and the instructions contained in the Commission's management directives;

(4) Designate a Director for Equal Employment Opportunity (EEO Programs Director), EEO Officer(s), and such Special Emphasis Program Managers/Coordinators (*e.g.*, People with Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the Board and at all Board installations. The EEO Programs Director shall be under the immediate supervision of the Chairman.

(5) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(6) Ensure that full cooperation is provided by all Board employees to EEO Counselors and Board EEO personnel in the processing and resolution of pre-complaint matters and complaints within the Board and that full cooperation is provided to the Commission in the course of appeals, including, granting the Commission routine access to personnel records of the Board when required in connection with an investigation;

(7) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and

posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Programs Director, EEO Officer(s) and the Special Emphasis Program Managers/Coordinators.

(c) The EEO Programs Director shall be responsible for:

(1) Advising the Board of Governors with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 268.101 and the Board's program;

(2) Evaluating from time to time the sufficiency of the total Board program for equal employment opportunity and reporting to the Board of Governors with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the Board of Governors, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the Board's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final action is taken in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be obtained in accordance with the provisions of 29 CFR 1610.7.

§ 268.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved person is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of disability), or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to all Board employees and applicants for employment at the Board, and to all employment policies or practices affecting Board employees or applicants for employment.

(c) This part does not apply to Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

§ 268.104 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or disability must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

(2) The Board or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the Board or the Commission.

(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the Board in accordance with § 268.107(f), election rights pursuant to § 268.302, the right to file a notice of intent to sue pursuant to § 268.201(a) and a lawsuit

under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in precomplaint counseling) may be alleged in a subsequent complaint filed with the Board. Counselors must advise individuals of their duty to keep the Board and the Commission informed of their current address and to serve copies of appeal papers on the Board. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(2) Counselors shall advise aggrieved persons that, where the Board agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the EEO Programs Director and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the Board's EEO Programs Office to request counseling. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint with the Board. This notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the EEO Programs Director is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the Board to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the claim has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the Board has received a discrimination complaint under this part from that person involving the same matter.

§ 268.105 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 268.104 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the Board and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also

contain a telephone number and address where the complainant or the representative can be contacted.

(d) A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

(e) The Board shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint or amendment was filed. The Board shall advise the complainant in the acknowledgment of the EEOC office and its address where a request for a hearing shall be sent. Such acknowledgment shall also advise the complainant that:

(1) The complainant has the right to appeal the final action on or dismissal of a complaint; and

(2) The Board is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the Board shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

§ 268.106 Dismissals of complaints.

(a) Prior to a request for a hearing in a case, the Board shall dismiss an entire complaint:

(1) That fails to state a claim under § 268.103 or § 268.105(a), or states the same claim that is pending before or has been decided by the Board or the Commission;

(2) That fails to comply with the applicable time limits contained in §§ 268.104, 268.105 and 268.204(c), unless the Board extends the time limits in accordance with § 268.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(4) Where a complainant has raised the matter in an appeal to the Merit Systems Protection Board and § 268.302 indicates that the complainant has elected to pursue the non-EEO process;

(5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(7) Where the Board has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the Board's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;

(8) That alleges dissatisfaction with the processing of a previously filed complaint; or

(9) Where the Board, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:

(i) Evidence of multiple complaint filings; and

(ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or

(iii) Evidence of circumventing other administrative processes, retaliating against the Board's in-house administrative processes or overburdening the EEO complaint system.

(b) Where the Board believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the Board shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

§ 268.107 Investigation of complaints.

(a) The investigation of complaints filed against the Board shall be conducted by the Board.

(b) In accordance with instructions contained in Commission Management Directives, the Board shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. The Board may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. The Board may incorporate alternative dispute resolution techniques into its investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c)(1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the Board, and any employee of the Board shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the Board or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances.

(e)(1) The Board shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 268.106. By written agreement within those time periods, the complainant and the Board may voluntarily extend the time period for not more than an additional 90 days. The Board may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Executive Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the Board notifies the complainant of the extension.

(2) Confidential supervisory information, as defined in 12 CFR 261.2(c), and

other confidential information of the Board may be included in the investigative file by the investigator, the EEO Programs Director, or another appropriate officer of the Board, where such information is relevant to the complaint. Neither the complainant nor the complainant's personal representative may make further disclosure of such information, however, except in compliance with the Board's Rules Regarding Availability of Information, 12 CFR part 261, and where applicable, the Board's Rules Regarding Access to Personal Information under the Privacy Act of 1974, 12 CFR part 261a.

(f) Within 180 days from the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the Board shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and decision from an administrative judge or may request an immediate final decision pursuant to § 268.109(b) from the Board.

(g) Where the complainant has received the notice required in paragraph (f) of this section or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a written request for a hearing directly to the EEOC office indicated in the Board's acknowledgment letter. The complainant shall send a copy of the request for a hearing to the Board's EEO Programs Office. Within 15 days of receipt of the request for a hearing, the Board's EEO Programs Office shall provide a copy of the complaint file to EEOC and, if not previously provided, to the complainant.

§ 268.108 Hearings.

(a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Upon appointment, the administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances.

(b) *Dismissals*. Administrative judges may dismiss complaints pursuant to § 268.106, on their own initiative, after notice to the parties, or upon the Board's motion to dismiss a complaint.

(c) *Offer of resolution*. (1) Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the Board may make an offer of resolution to a complainant who is represented by an attorney.

(2) Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the Board may make an offer of resolution to the complainant, whether represented by an attorney or not.

(3) The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The Board's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief. With regard to monetary relief, the Board may make a lump sum offer covering all forms of monetary liability, or it may itemize the amounts and types of monetary relief being offered. The complainant shall have 30 days from receipt of the offer of resolution to accept it. If the complainant fails to accept an offer of resolution and the relief awarded in the administrative judge's decision, the Board's final decision, or the Commission's decision on appeal is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the Board of attorney's fees or costs incurred after the expiration of the 30-day acceptance period. An acceptance of an offer must be in writing and will be timely if postmarked or received within the 30-day period. Where

a complainant fails to accept an offer of resolution, the Board may make other offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

(d) *Discovery*. The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(e) *Conduct of hearing*. The Board shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(f) *Procedures*. (1) The complainant, the Board and any employee of the Board shall produce such documentary and testimonial evidence as the administrative judge deems necessary. The administrative judge shall serve all orders to produce evidence on both parties.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the Board, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(g) *Decisions without hearing*. (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue

as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (g)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(h) *Record of hearing*. The hearing shall be recorded and the Board shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the Board submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the Board's representative for reproduction.

(i) *Decisions by administrative judges*. Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the Board. The administrative judge shall send copies of the hearing record, including the transcript, and the decision to the parties. If the Board does not issue a final order within 40 days of receipt of the administrative judge's decision in accordance with § 268.109(a), then the decision of the administrative judge shall become the final action of the Board.

§ 268.109 Final action by the Board.

(a) *Final action by the Board following a decision by an administrative judge*. When an EEOC administrative judge has issued a decision under §§ 268.108(b), (g), or (i), the Board shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the Board will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the Board shall simultaneously file an appeal in accordance with § 268.403 and append a copy of its appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

(b) *Final action by the Board in all other circumstances*. When the Board dismisses an entire complaint under § 268.106, receives a request for an immediate final decision or does not receive a reply to the notice issued under § 268.107(f), the Board shall take final action by issuing a final decision. The final decision shall consist of findings by the Board on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart F of this part. The Board shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the Board, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. The final

action shall contain notice of the right to appeal the final action to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the final action. The Board may issue a final decision within 30 days after receiving a decision of the Commission pursuant to § 268.405(c) of this part.

Subpart C—Provisions Applicable to Particular Complaints

§ 268.201 Age Discrimination in Employment Act.

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the Chairman of the Board of Governors after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, at PO Box 19848, Washington, DC 20036, or by personal delivery or facsimile within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the Board has not taken final action and the individual has not filed an appeal or 180 days after the filing of a class complaint if the Board has not issued a final decision;

(2) After final action on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal, if the Commission has not issued a final decision.

§ 268.202 Equal Pay Act.

Complaints alleging violations of the Equal Pay Act shall be processed under this part.

§ 268.203 Rehabilitation Act.

(a) *Model employer*. The Board shall be a model employer of individuals with disabilities. The Board shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

(b) *ADA standards*. The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and V (sections 501 through 504 and 510) of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101, 12111, 12201), as such sections relate to employment. These standards are set forth in the Commission's ADA regulation at 29 CFR part 1630.

§ 268.204 Class complaints.

(a) *Definitions*—(1) *Class* is a group of Board employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by a Board personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or disability.

(2) *Class complaint* is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An *agent of the class* is a class member who acts for the class during the processing of the class complaint.

(b) *Pre-complaint processing.* An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 268.104. A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a complainant moves for class certification after completing the counseling process contained in § 268.104, no additional counseling is required. The administrative judge shall deny class certification when the complainant has unduly delayed in moving for certification.

(c) *Filing and presentation of a class complaint.* (1) A class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the Board not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance or dismissal.* (1) Within 30 days of the Board's receipt of a complaint, the Board shall: Designate an agency representative who shall not be one of the individuals referenced in § 268.102(b)(4), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or the Board to submit additional information relevant to the complaint.

(2) The administrative judge may dismiss the complaint, or any portion, for any of the reasons listed in § 268.106 or because it does not meet the prerequisites of a class complaint under § 268.204(a)(2).

(3) If an allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the Board for further counseling of the agent. After counseling, the allegation shall be consolidated with the class complaint.

(4) If an allegation lacks specificity and detail, the administrative judge shall afford the agent 15 days to provide specific and detailed information. The administrative judge shall dismiss the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The administrative judge shall extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit extension provisions contained in §§ 268.104(a)(2) and 268.604.

(6) When appropriate, the administrative judge may decide that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The administrative judge shall transmit his or her decision to accept or dismiss a complaint to the Board and the agent. The Board shall take final action by issuing a final order within 40 days of receipt of the hearing record and administrative judge's decision. The final order shall notify the agent whether or not the Board will implement the decision of the administrative judge. If the final order does not implement the decision of the administrative judge, the Board shall simultaneously appeal the administrative judge's decision in accordance with § 268.403 and append a copy of the

appeal to the final order. A dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart B or that the complaint is also dismissed as an individual complaint in accordance with § 268.106. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Equal Employment Opportunity Commission or to file a civil action and shall include EEOC Form 573, Notice of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of receiving notice that the administrative judge has accepted a class complaint or a reasonable time frame specified by the administrative judge, the Board shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

(i) An identification of the Board as the named agency, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint;

(iii) An explanation of the binding nature of the final decision or resolution of the class complaint on class members; and

(iv) The name, address and telephone number of the class representative.

(f) Obtaining evidence concerning the complaint. (1) The administrative judge shall notify the agent and the Board's representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the administrative judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the administrative judge:

(i) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To recommend that a decision be entered in favor of the opposing party; or

(v) To take such other actions as the administrative judge deems appropriate.

(3) During the period for development of evidence, the administrative judge may, in his or her discretion, direct that an investigation of facts relevant to the class complaint or any portion be conducted by an agency certified by the Commission.

(4) Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) *Opportunity for resolution of the complaint.* (1) The administrative judge shall furnish the agent and the Board's representative a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss the materials with the Board's representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the Board and the agent at any time pursuant to the notice and approval procedure contained in paragraph (g)(4) of this section.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the Board.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and to the administrative judge. It shall state the relief, if any, to be granted by the Board and the name and address of the EEOC administrative judge assigned to the case. It shall state that within 30 days of the date of the notice of resolution, any member of the class may petition the administrative judge to vacate the resolution because it benefits only the class agent, or is otherwise not fair, adequate and reasonable to the class as a whole. The administrative judge shall review the notice of resolution and consider any petitions to vacate filed. If the administrative judge finds that the proposed resolution is not fair, adequate and reasonable to the class as a whole, the administrative judge shall issue a decision vacating the agreement and may replace the original class agent with a petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. The decision shall inform the former class agent or the petitioner of the right to appeal the decision to the Equal Employment Opportunity Commission and include EEOC Form 573, Notice of Appeal/Petition. If the administrative judge finds that the resolution is fair, adequate and reasonable to the class as a whole, the resolution shall bind all members of the class.

(h) *Hearing*. On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with 12 CFR 268.108(a) through (f).

(i) *Report of findings and recommendations*. (1) The administrative judge shall transmit to the Board a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.

(2) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The administrative judge shall notify the agent of the date on which the report of findings and recommendations was forwarded to the Board.

(j) *Board decision*. (1) Within 60 days of receipt of the report of findings and recommendations issued under § 268.204(i), the Board shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.

(2) The final decision of the Board shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.

(3) When the Board's final decision is to reject or modify the findings and recommendations of the administrative judge, the decision shall contain specific reasons for the Board's action.

(4) If the Board has not issued a final decision within 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The Board shall transmit the final decision to the agent within five days of the expiration of the 60-day period.

(5) The final decision of the Board shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.

(6) The final decision on a class complaint shall, subject to subpart E of this part, be binding on all members of the class and the Board.

(7) The final decision shall inform the agent of the right to appeal or to file a civil action in accordance with subpart E of this part and of the applicable time limits.

(k) *Notification of decision*. The Board shall notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class

complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the Board within 10 days of the transmittal of its final decision to the agent.

(l) *Relief for individual class members.* (1) When discrimination is found, the Board must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the agent in accordance with § 268.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination, § 268.501 shall apply. The Board shall also, within 60 days of the issuance of the final decision finding no class-wide discrimination, issue the acknowledgment of receipt of an individual complaint as required by § 268.105(d) and process in accordance with the provisions of subpart B of this part, each individual complaint that was subsumed into the class complaint.

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the Board or the Board's EEO Programs Director within 30 days of receipt of notification by the Board of its final decision. Administrative judges shall retain jurisdiction over the complaint in order to resolve any disputed claims by class members. The claim must include a specific, detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the Board found class-wide discrimination in its final decision. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The Board must show by clear and convincing evidence that any class member is not entitled to relief. The administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member. The Board or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within 45 days of the agent's initial contact with the Counselor. Relief otherwise consistent with this Part may be ordered for the time the policy or practice was in effect. The Board shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart E of this part and the applicable time limits.

§ 268.205 Employment of aliens; Access to sensitive information.

(a) *Definitions.* The definitions contained in this paragraph (a) apply only to this section:

(1) *Classified Information* means information that is classified for national security purposes under Executive Order No. 12958, entitled ''Classified National Security Information,'' including any amendments or superseding orders that the President of the United States may issue from time to time.

(2) *Confidential Supervisory Information* means confidential supervisory information of the Board, as defined in 12 CFR 261.2(c). Three internal security designations, which are subject to change by the Board, apply to Confidential Supervisory Information. Those designations are:

(i) *Restricted-Controlled FR* generally applies to information that, if disclosed to or modified by unauthorized individuals, might result in the risk of serious monetary loss, serious productivity loss or serious embarrassment to the Federal Reserve System. Examples of Confidential Supervisory Information designated as Restricted-Controlled FR include, but are not limited to, certain significant lists of financial institution supervisory ratings and nonpublic advance information regarding bank mergers or failures.

(ii) *Restricted FR* covers information that is less sensitive than Restricted-Controlled FR information and, in general, is the largest category of Confidential Supervisory Information. This information, if disclosed to or modified by unauthorized individuals, might result in the risk of significant monetary

loss, significant productivity loss, or significant embarrassment to the Federal Reserve System. Examples of Confidential Supervisory Information designated as Restricted FR include, but are not limited to, single supervisory ratings (e.g., CAMELS, BOPEC, etc.), Federal Reserve examination and inspection reports and workpapers, Interagency Country Exposure Review Committee (ICERC) country exposure determinations, and shared national credit data or listings.

(iii) *Internal FR* covers information that is less sensitive than Restricted FR or Restricted-Controlled FR and generally applies to information that, if disclosed to or modified by unauthorized individuals, might result in the risk of some monetary loss, some productivity loss, or some embarrassment to the Federal Reserve System. Examples of Confidential Supervisory Information designated as Internal FR include, but are not limited to, foreign banking organization country studies and Federal Reserve risk assessments.

(3) *Country List* refers to the list contained in the annual federal appropriations laws of specific countries, including a general category of ''countries allied with the United States in a current defense effort,'' from which particular categories of persons who are exempt from a ban on the use of appropriated funds are eligible to be hired as Federal employees in the excepted service or in the senior executive service. The appropriations ban is codified at 5 U.S.C. 3101 note. The list of eligible countries and persons is subject to legislative and other change.

(4) *Eligible Position* refers to a position or job family requiring access to Sensitive Information for which the Board determines that hiring a Non-Citizen is appropriate.

(5) *Employee* means an individual who works full-time or part-time and is appointed into Board service for a period of more than 90 days. The term ''Employee'' does not include members of the Board.

(6) *FOMC Information* means confidential information of the Federal Open Market Committee (FOMC) regardless of the form or format in which it is created, conveyed, or maintained. FOMC Information includes information derived from confidential FOMC materials. Three internal security designations, which are subject to change by the FOMC, apply to FOMC Information as follows:

(i) *Class I FOMC* generally applies to materials containing policymaker input, such as that related to monetary policy decisions at meetings, views expressed by policy makers on future policy, and identification of meeting participants who express particular views. Examples of Class I FOMC Information include, but are not limited to, the ''Bluebook,'' drafts of meeting minutes, unreleased meeting transcripts, documents reflecting the preparation of semi-annual forecasts and related testimony, and certain sensitive internal memorandums and reports.

(ii) *Class II FOMC* covers information that is less sensitive than Class I FOMC. This designation generally applies to staff forecasts prepared for the FOMC and to information about open market operations. Examples of Class II FOMC Information include, but are not limited to, Part I of the ''Greenbook,'' reports of the Manager on domestic and foreign open market operations, and other materials on economic and financial developments.

(iii) *Class III FOMC* covers information that is less sensitive than either Class II or Class I. This designation generally applies to background information supporting policy discussions and includes, but is not limited to, Part II of the Greenbook.

(7) *National* refers to any individual who meets the requirements described in 8 U.S.C. 1408.

(8) *Non-Citizen* refers to any individual who is not a Protected Individual.

(9) *Protected Individual* means—

(i) A citizen or National of the United States,

(ii) An alien who:

(A) Meets the conditions set forth in 8 U.S.C. 1324b(a)(3)(B), as amended, and

(B) Has filed with the Board or the appropriate Federal Reserve Bank a declaration of intention to become a citizen of the United States, or

(iii) An alien who:

(A) Is lawfully admitted for permanent residence, is admitted for temporary residence under 8 U.S.C. 1160(a)

or section 1255a(a)(1), is admitted as a refugee under 8 U.S.C. 1157, or is granted asylum under 8 U.S.C. 1158;

(B) Was an Employee of the Board or a Federal Reserve Bank on January 1, 2006;

(C) Before requesting access to Sensitive Information filed an application for U.S. citizenship;

(D) Has had his or her application for citizenship pending for two years or less, unless in the case of an application pending for a longer period, the alien can establish that the alien is actively pursuing naturalization. Time consumed by the Department of Homeland Security, Citizenship and Immigration Services (or its predecessor or successor agency) in processing the application shall not be counted toward the 2-year period; and

(E) Has completed a background investigation acceptable to the Board.

(10) *Sensitive Information* means FOMC Information, Classified Information, and Confidential Supervisory Information.

(b) *Hiring and access*—(1) *Prohibition against hiring unauthorized aliens*. An individual is eligible for employment with the Board only if he or she satisfies the requirements of Section 101 of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1324a.

(2) *Preference*. Consistent with applicable law, where two applicants for employment at the Board are equally qualified for a position, the Board shall prefer the citizen or National of the United States over the equally qualified person who is not a citizen or National of the United States.

(3) *Protected Individuals' access to Sensitive Information*. The Board may hire a person as an Employee into a position that requires access to Sensitive Information if the person is a Protected Individual.

(4) *Non-Citizens' access to Sensitive Information*. The Board shall not hire a Non-Citizen into a position that requires access to Sensitive Information unless the Non-Citizen:

(i) Is in an Eligible Position; and

(ii) Meets the requirements of paragraph (c) of this section allowing access to Sensitive Information.

(c) *Access to Sensitive Information*—(1) *Generally*. The Board will grant access to Sensitive Information only in accordance with the Board's rules and policies regarding access to Sensitive Information and, if applicable, the rules and policies of the FOMC. Access to any level of Sensitive Information includes access to all lower levels of that type of Sensitive Information. An Employee who is not a Protected Individual may not have access to FOMC Information or Confidential Supervisory Information unless otherwise permitted by this paragraph (c).

(2) *FOMC Information*—(i) *Access by a Non-Citizen from a country on the Country List*. An Employee in an Eligible Position who is a Non-Citizen from a country that, on the date the Employee begins employment with the Federal Reserve System or on the date access is granted, is on the Country List shall be granted access to Class I FOMC Information only if the Employee:

(A) Has been recommended for such access by the Employee's Division Director;

(B) Has been resident in the United States for at least six years, at least two of which include satisfactory employment with the Board and/or one or more of the Federal Reserve Banks; and

(C) Has completed a background investigation acceptable to the Board.

(ii) *Access by a Non-Citizen from a country not on the Country List*. An Employee in an Eligible Position who is a Non-Citizen from a country that, on the date the Employee begins employment with the Federal Reserve System and on the date access is granted, is not on the Country List:

(A) Shall not be granted access to Class I FOMC Information, and

(B) Shall be granted access to Class II FOMC Information only upon:

(*1*) The recommendation of the Employee's Division Director;

(*2*) Six years of residence in the United States, at least two of which include satisfactory employment by the Board and/or one or more of the Federal Reserve Banks; and

(*3*) Completion of a background investigation acceptable to the Board.

(iii) *Changes to the Country List*. If the Employee's country is deleted from the

Country List after the date the Employee begins employment with the Federal Reserve System, the Employee's existing access to Class I or Class II FOMC information will not be affected by the change in the Country List. Similarly, the Employee would continue to be eligible for access to Class I information and may be granted such access if he or she meets the remaining conditions outlined in paragraph (c)(2)(i) for employees from a country on the Country List.

(3) *Confidential Supervisory Information*—(i) *Access by a Non-Citizen from a country on the Country List*. An Employee in an Eligible Position who is a Non-Citizen from a country that, on the date the Employee begins employment with the Federal Reserve System or on the date access is granted, is on the Country List shall be granted access to Confidential Supervisory Information designated as Restricted-Controlled FR only if the Employee:

(A) Has been recommended for such access by the Employee's Division Director;

(B) Has been resident in the United States for at least six years, at least two of which include satisfactory employment with the Board and/or one or more of the Federal Reserve Banks; and

(C) Has completed a background investigation acceptable to the Board.

(ii) *Access by a Non-Citizen from a country not on the Country List*. An Employee in an Eligible Position who is a Non-Citizen from a country that, on the date the Employee begins employment with the Federal Reserve System and on the date access is granted, is not on the Country List:

(A) Shall not be granted access to Confidential Supervisory Information designated as Restricted-Controlled FR; and

(B) Shall be granted access to Confidential Supervisory Information designated as Restricted FR only upon:

(*1*) The recommendation of the Employee's Division Director;

(*2*) Six years of residence in the United States, at least two of which include satisfactory employment by the Board and/or one or more of the Federal Reserve Banks; and

(*3*) Completion of a background investigation acceptable to the Board.

(iii) *Changes to the Country List*. If the Employee's country is deleted from the Country List after the date the Employee begins employment with the Federal Reserve System, the Employee's existing access to Confidential Supervisory Information designated as Restricted FR or Restricted-Controlled FR will not be affected by the change in the Country List. Similarly, the Employee would continue to be eligible for access to Confidential Supervisory Information designated as Restricted-Controlled FR information and may be granted such access if he or she meets the remaining conditions outlined in paragraph (c)(3)(i) for employees from a country on the Country List.

(4) *Access to Sensitive Information by Reserve Bank employees*—(i) *FOMC Information*. By action of the FOMC, a Reserve Bank employee may access FOMC Information in accordance with these rules.

(ii) *Confidential Supervisory Information*. A Reserve Bank employee will be granted access to Confidential Supervisory Information only to the extent the employee meets all of the requirements for access to Confidential Supervisory Information provided in this paragraph (c) and the employee has received approval for such access from the Board's Director for Banking Supervision and Regulation. Notwithstanding the foregoing, this rule does not affect access that has been granted to employees hired before the effective date of this rule.

(5) *Exceptions for access to Confidential Supervisory Information*. A Board or Reserve Bank employer may request an exception for access to Confidential Supervisory Information. The requester must demonstrate that unusual circumstances exist and that the Board or Reserve Bank employee for whom access is being requested has a strong and particularized need for access to the information. All exceptions for access to Confidential Supervisory Information must be approved by the Chairman of the Board's Committee on Supervisory and Regulatory Affairs.

(6) *Classified Information*. Access to Classified Information is limited to those persons who are permitted access

to Classified Information pursuant to the applicable executive orders and any subsequent amendments or superseding orders that the President of the United States may issue from time to time.

[71 FR 44558, Aug. 7, 2006, as amended at 73 FR 17887, Apr. 2, 2008]

Subpart D—Related Processes

§ 268.301 Negotiated grievance procedure.

When an employee of the Board, which is not an agency subject to 5 U.S.C. 7121(d), is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 268.105 and for appeal to the Commission contained in § 268.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the Board notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

§ 268.302 Mixed case complaints.

A *mixed case complaint* is a complaint of employment discrimination filed with the Board based on race, color, religion, sex, national origin, age or disability related to or stemming from an action that can be appealed to the Merit System Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. A *mixed case appeal* is an appeal filed with the MSPB that alleges that an appealable Board action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability or age. Only a Board employee who is a preference eligible employee as defined by the Veterans Preference Act can file a mixed case complaint with the Board or a mixed case appeal with the MSPB. A mixed case complaint or mixed case appeal may only be filed for action(s) over which the MSPB has jurisdiction. The Board will apply sections 1614.302 to 1614.310 of 29 CFR to the processing of a mixed case complaint or mixed case appeal.

Subpart E—Appeals to the Equal Employment Opportunity Commission

§ 268.401 Appeals to the Equal Employment Opportunity Commission.

(a) A complainant may appeal the Board's final action or dismissal of a complaint.

(b) The Board may appeal as provided in § 268.109(a).

(c) A class agent or the Board may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or the Board may appeal a final decision on a petition pursuant to § 268.204(g)(4).

(d) A complainant, agent of the class or individual class claimant may appeal to the Commission the Board's alleged noncompliance with a settlement agreement or final decision in accordance with § 268.504.

§ 268.402 Time for appeals to the Equal Employment Opportunity Commission.

(a) Appeals described in § 268.401(a) and (c) must be filed within 30 days of receipt of the dismissal, final action or decision. Appeals described in § 268.401(b) must be filed within 40 days of receipt of the hearing file and decision. Where a complainant has notified the Board's EEO Programs Director of alleged noncompliance with a settlement agreement in accordance with § 268.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but no later than 30 days after receipt of the Board's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

§ 268.403 How to appeal.

(a) The complainant, the Board, agent or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at PO Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

(b) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.

(c) If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely.

(d) Any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the Board in support of its appeal must be submitted to the Office of Federal Operations within 20 days filing the notice of appeal. The Office of Federal Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

(e) The Board must submit the complaint file to the Office of Federal Operations within 30 days of initial notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the Board.

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. The Office of Federal Operations will accept statements or briefs in opposition to an appeal by facsimile provided they are no more than 10 pages long.

§ 268.404 Appellate Procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the Board or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

(c) When either party to an appeal fails without good cause shown to comply with the requirements of this section or to respond fully and in timely fashion to requests for information, the Office of Federal Operations shall, in appropriate circumstances:

(1) Draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(2) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(3) Issue a decision fully or partially in favor of the opposing party; or

(4) Take such other actions as appropriate.

§ 268.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 268.106, 268.403(c) and 268.408. The decision on an appeal from the Board's final action shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to § 268.108(i) shall be based on a substantial evidence standard of review. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her civil action

rights, and be transmitted to the complainant and the Board by first class mail.

(b) A decision issued under paragraph (a) of this section is final, subject to paragraph (c) of this section, within the meaning of § 268.406 unless the Commission reconsiders the case. A party may request reconsideration within 30 days of receipt of a decision of the Commission, which the Commission in its discretion may grant, if the party demonstrates that:

(1) The appellate decision involved a clearly erroneous interpretation of material fact or law; or

(2) The decision will have a substantial impact on the policies, practices or operations of the Board.

(c) The Board, within 30 days of receiving the decision of the Commission, shall issue a final decision based upon that decision.

§ 268.406 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

§ 268.407 Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

§ 268.408 Effect of filing a civil action.

Filing a civil action under §§ 268.406 or 268.407 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

Subpart F—Remedies and Enforcement

§ 268.501 Remedies and relief.

(a) When the Board, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the Board shall provide full relief which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the Board in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found unlawful will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the Board shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1)(i) When the Board, or the Commission, finds

that an applicant for employment has been discriminated against, the Board shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed in 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the Board during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the Board shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed in 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The Board shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When the Board, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the Board shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When the Board, or the Commission, finds that an employee of the Board was discriminated against, the Board shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed in 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the Board shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the Board's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (*e.g.*, training, preferential work assignments, overtime scheduling).

(d) The Board has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs.* The provisions

of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a decision or final action, the Board, administrative judge, or Commission may award the applicant or employee or reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the Board.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the Board, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. The Board is not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the Commission affirms on appeal an administrative judge's decision finding discrimination after the Board takes final action by not implementing an administrative judge's decision. Written submissions to the Board that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the Board, administrative judge or the Commission determines an entitlement to attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the Board or administrative judge within 30 days of receipt of the decision and shall submit a copy of the statement to the Board. A statement of attorney's fees and costs shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The Board may respond to a statement of attorney's fees and costs within 30 days of its receipt. The verified statement, accompanying affidavit and any Board response shall be made a part of the complaint file.

(ii)(A) The Board or administrative judge shall issue a decision determining the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. There is a strong presumption that this amount represents the reasonable fee. In limited circumstances, this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the Board.

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a Federal employee who is in a duty status when made available as a witness.

§ 268.502 Compliance with final Commission decisions.

(a) Relief ordered in a final Commission decision, if accepted pursuant to § 268.405(c) as a final decision, or not acted upon the Board within the time periods of § 268.405(c), is mandatory and

binding on the Board except as provided in this section. Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 268.503(f).

(b) Notwithstanding paragraph (a) of this section, when the Board requests reconsideration and the case involves removal, separation, or a suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the Board shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified by the Commission, pending the outcome of the Board's request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) When the Board requests reconsideration, it may delay the payment of any amounts ordered to be paid to the complainant until after the request for reconsideration is resolved. If the Board delays payment of any amount pending the outcome of the request to reconsider and the resolution of the request requires the Board to make the payment, then the Board shall pay interest from the date of the original appellate decision until payment is made.

(3) The Board shall notify the Commission and the employee in writing at the same time it requests reconsideration that the relief it provides is temporary or conditional and, if applicable, that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this section. Failure of the Board to provide notification will result in the dismissal of the Board's request.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the Board shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

§ 268.503 Enforcement of final EEOC decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the Board is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the Board is implementing the decision of the Commission. If the Board is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the Chairman of the Board to show cause why there is noncompliance. Such notice may request the Chairman of the Board or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for noncompliance.

(f) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that the Board is not complying with a

prior decision, or where the Board has failed or refused to submit any required report of compliance, the Commission shall notify the complainant the right to file a civil action for enforcement of the decision pursuant to title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the Board's refusal to implement the ordered relief pursuant to the Administrative Procedures Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

§ 268.504 Compliance with settlement agreements and final actions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. Final action that has not been the subject of an appeal or a civil action shall be binding on the Board. If the complainant believes that the Board has failed to comply with the terms of a settlement agreement or decision, the complainant shall notify the Board's EEO Programs Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The Board shall resolve the matter and respond to the complainant, in writing. If the Board has not responded to the complainant, in writing, or if the complainant is not satisfied with the Board's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the Board has complied with the terms of the settlement agreement or decision. The complainant may file such an appeal 35 days after he or she has served the Board with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of the Board's determination. The complainant must serve a copy of the appeal on the Board and the Board may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the Board is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints under §§ 268.105 or 268.204, as appropriate, rather than under this section.

§ 268.505 Interim relief.

(a)(1) When the Board appeals and the case involves removal, separation, or suspension continuing beyond the date of the appeal, and when the administrative judge orders retroactive restoration, the Board shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified in the decision, pending the outcome of the Board appeal. The employee may decline the offer of interim relief.

(2) Service under the temporary or conditional restoration provisions of paragraph (a)(1) of this section shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds the decision on appeal. Such service shall not be credited toward the completion of any applicable probationary or trial period or the completion of the service requirement for career tenure if the Commission reverses the decision on appeal.

(3) When the Board appeals, it may delay the payment of any amount, other than prospective pay and benefits, ordered to be paid to the complainant until after the appeal is resolved. If the Board delays payment of any amount pending the outcome of

the appeal and the resolution of the appeal requires the Board to make the payment, then the Board shall pay interest from the date of the original decision until payment is made.

(4) The Board shall notify the Commission and the employee in writing at the same time it appeals that the relief it provides is temporary or conditional and, if applicable, that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this section. Failure of the Board to provide notification will result in the dismissal of the Board's appeal.

(5) The Board may, by notice to the complainant, decline to return the complainant to his or her place of employment if it determines that the return or presence of the complainant will be unduly disruptive to the work environment. However, prospective pay and benefits must be provided. The determination not to return the complainant to his or her place of employment is not reviewable. A grant of interim relief does not insulate a complainant from subsequent disciplinary or adverse action.

(b) If the Board files an appeal and has not provided required interim relief, the complainant may request dismissal of the Board's appeal. Any such request must be filed with the Office of Federal Operations within 25 days of the date of service of the Board's appeal. A copy of the request must be served on the Board at the same time it is filed with EEOC. The Board may respond with evidence and argument to the complainant's request to dismiss within 15 days of the date of service of the request.

Subpart G—Matters of General Applicability

§ 268.601 EEO group statistics.

(a) The Board shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and disability(ies) of its employees.

(b) Data on race, national origin and sex shall be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the Board shall advise the employee of the importance of the data and of the Board's obligation to report it. If the employee still refuses to provide the information, the Board must make a visual identification and inform the employee of the data it will be reporting. If the Board believes that information provided by an employee is inaccurate, the Board shall advise the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the Board's recognition of the sensitivity of the information and the existence of procedures to prevent its unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self identification, the Board must accept it.

(c) Subject to applicable law, the information collected under paragraph (b) of this section shall be disclosed only in the form of gross statistics. The Board shall not collect or maintain any information on the race, national origin or sex of individual employees except in accordance with applicable law and when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel records.

(d) The Board's system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used.

(e) The Board may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the Board's equal employment opportunity program. The Board shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(f) Data on disabilities shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the Board shall advise the employee of the importance of the data and of the Board's obligation to report

it. If an employee who has been appointed pursuant to a special Board program for hiring individuals with a disability still refuses to provide the requested information, the Board must identify the employee's disability based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information that the Board believes to be inaccurate, the Board should report the employee's disability status as unknown.

(g) The Board shall report to the Commission on employment by race, national origin, sex and disability in the form and at such times as the Board and Commission shall agree.

§ 268.602 Reports to the Commission.

(a) The Board shall report to the Commission information concerning pre-complaint counseling and the status, processing, and disposition of complaints under this part at such times and in such manner as the Board and Commission shall agree.

(b) The Board shall advise the Commission whenever it is served with a Federal court complaint based upon a complaint that is pending on appeal at the Commission.

(c) The Board shall submit annually for the review and approval of the Commission written equal employment opportunity plans of action. Plans shall be submitted in the format prescribed by the Commission and shall include, but not be limited to:

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the Board's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the Board to carry out its equal employment opportunity program.

§ 268.603 Voluntary settlement attempts.

The Board shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the claims resolved.

§ 268.604 Filing and computation of time.

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

§ 268.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage under § 268.104, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the Board, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to Board and EEOC requests for information. If the complainant is an employee of the Board and he designates another employee of the Board as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to Board and EEOC requests for information. The Board is not obligated to change

work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and the representative, if employed by the Board and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the Board or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or the Board would conflict with the official or collateral duties of the representative, the Commission or the Board may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the Board has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of all official correspondence shall be made on the attorney and the complainant, but time frames for receipt of material shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the Board.

(e) The complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are Board employees shall be in a duty status when their presence is authorized or required by Commission or Board officials in connection with a complaint.

§ 268.606 Joint processing and consolidation of complaints.

Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the Board or the Commission for joint processing after appropriate notification to the parties. Two or more complaints of discrimination filed by the same complainant shall be consolidated by the Board for joint processing after appropriate notification to the complainant. When a complaint has been consolidated with one or more earlier filed complaints, the Board shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint. Administrative judges or the Commission may, in their discretion, consolidate two or more complaints of discrimination filed by the same complainant.

§ 268.607 Delegation of authority.

The Board of Governors may delegate authority under this part, to one or more designees.

Subpart H—Prohibition Against Discrimination in Board Programs and Activities Because of Physical or Mental Disability

§ 268.701 Purpose and application.

(a) *Purpose*. The purpose of this subpart H is to prohibit discrimination on the basis of a disability in programs or activities conducted by the Board.

(b) *Application*. (1) This subpart H applies to all programs and activities conducted by the Board. Such programs and activities include:

(i) Holding open meetings of the Board or other meetings or public hearings at the Board's office in Washington, DC;

(ii) Responding to inquiries, filing complaints, or applying for employment at the Board's office;

(iii) Making available the Board's library facilities; and

(iv) Any other lawful interaction with the Board or its staff in any official matter with people who are not employees of the Board.

(2) This subpart H does not apply to Federal Reserve Banks or to financial institutions or other companies supervised or regulated by the Board.

§ 268.702 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Board. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

(b) *Complete complaint* means a written statement that contains the complainant's name and address and describes the Board's alleged discriminatory action in sufficient detail to inform the Board of the nature and date of the alleged violation. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

(c) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

(d) *Person with a disability* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) Physical or mental impairment includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) Major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Board as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (d)(1) of this section but is treated by Board as having such an impairment.

(e) *Qualified person with a disability* means—

(1) With respect to any Board program or activity under which a person is required to perform services or to achieve a level of accomplishment, a person with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Board can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a person with a disability who meets the essential eligibility requirements for participation

in, or receipt of benefits from, that program or activity.

(3) Qualified individual with a disability is defined for purposes of employment in § 268.203 of this part, which is made applicable to this subpart by § 268.705.

§ 268.703 Notice.

The Board shall make available to employees, applicants for employment, participants, beneficiaries, and other interested persons information regarding the provisions of this subpart and its applicability to the programs and activities conducted by the Board, and make this information available to them in such manner as the Board finds necessary to apprise such persons of the protections against discrimination assured them by this subpart.

§ 268.704 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of a disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity conducted by the Board.

(b)(1) The Board, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of a disability:

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that provided to others;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with a disability or to any class of individuals with a disability than is provided to others unless such action is necessary to provide qualified individuals with a disability with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Board may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Board may not, directly or through contractual or other arrangements, utilize criteria or methods of administration, the purpose or effect of which would:

(i) Subject qualified individuals with a disability to discrimination on the basis of a disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability.

(4) The Board may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(i) Exclude individuals with a disability from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Board; or

(ii) Defeat or substantially impair the accomplishment of the objectives or a program or activity with respect to individuals with a disability.

(5) The Board, in the selection of procurement contractors, may not use criteria that subject qualified individuals with a disability to discrimination on the basis of a disability.

(6) The Board may not administer a licensing or certification program in a manner that subjects qualified individuals with a disability to discrimination on the basis of a disability, nor may the Board establish requirements for the programs and activities of licensees or certified entities that subject qualified individuals with a disability

to discrimination on the basis of a disability. However, the programs and activities of entities that are licensed or certified by the Board are not, themselves, covered by this subpart.

(c) The exclusion of individuals who do not have a disability from the benefits of a program limited by Federal statute or Board order to individuals with a disability or the exclusion of a specific class of individuals with a disability from a program limited by Federal statute or Board order to a different class of individuals with a disability is not prohibited by this subpart.

(d) The Board shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with a disability.

§ 268.705 Employment.

No qualified individual with a disability shall, on the basis of a disability, be subjected to discrimination in employment under any program or activity conducted by the Board. The definitions, requirements and procedures of § 268.203 of this part shall apply to discrimination in employment in federally conducted programs or activities.

§ 268.706 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 268.707 of this subpart, no qualified individual with a disability shall, because the Board's facilities are inaccessible to or unusable by individuals with a disability, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Board.

§ 268.707 Program accessibility: Existing facilities.

(a) *General*. The Board shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with a disability. This paragraph (a) does not:

(1) Necessarily require the Board to make each of its existing facilities accessible to and usable by individuals with a disability; or

(2) Require the Board to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where the Board believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Board has the burden of proving that compliance with this paragraph (a) would result in such alterations or burdens. The decision that compliance would result in such alterations or burdens shall be made by the Board of Governors or their designee after considering all Board resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Board shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with a disability receive the benefits and services of the program or activity.

(b) *Methods*. The Board may comply with the requirements of this subpart H through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to individuals with a disability, home visits, delivery of service at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with a disability. The Board is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. In choosing among available methods for meeting the requirements of this section, the Board shall give priority to those methods that offer programs and activities to qualified individuals with a disability in the most integrated setting appropriate.

(c) *Time period for compliance.* The Board shall comply with any obligations established under this section as expeditiously as possible.

§ 268.708 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Board shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with a disability.

§ 268.709 Communications.

(a) The Board shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The Board shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Board.

(i) In determining what type of auxiliary aid is necessary, the Board shall give primary consideration to the requests of the individual with a disability.

(ii) The Board need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Board communicates with employees and others by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The Board shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Board shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Board to take any action that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where the Board believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Board has the burden of proving that compliance with section 268.709 would result in such alterations or burdens. The determination that compliance would result in such alteration or burdens must be made by the Board of Governors or their designee after considering all Board resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Board shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with a disability receive the benefits and services of the program or activity.

§ 268.710 Compliance procedures.

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section, rather than subpart B and § 268.203 of this part, applies to all allegations of discrimination on the basis of a disability in programs or activities conducted by the Board.

(b) *Employment complaints.* The Board shall process complaints alleging discrimination in employment on the basis of a disability in accordance with subparts A through G of this part.

(c) *Responsible official.* The EEO Programs Director shall be responsible for coordinating implementation of this section.

(d) *Filing the complaint*—(1) *Who may file.* Any person who believes that he or she has been subjected to discrimination prohibited by this subpart may, personally or by his or her authorized representative, file a complaint of discrimination with the EEO Programs Director.

(2) *Confidentiality.* The EEO Programs Director shall not reveal the identity of any person submitting a complaint, except when authorized to do so in

writing by the complainant, and except to the extent necessary to carry out the purposes of this subpart , including the conduct of any investigation, hearing, or proceeding under this subpart.

(3) *When to file*. Complaints shall be filed within 180 days of the alleged act of discrimination. The EEO Programs Director may extend this time limit for good cause shown. For the purpose of determining when a complaint is timely filed under this paragraph (d), a complaint mailed to the Board shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the Board.

(4) *How to file*. Complaints may be delivered or mailed to the Administrative Governor, the Staff Director for Management, the EEO Programs Director, the Federal Women's Program Manager, the Hispanic Employment Program Coordinator, or the People with Disabilities Program Coordinator. Complaints should be sent to the EEO Programs Director, Board of Governors of the Federal Reserve System, 20th and C Street NW., Washington, DC 20551. If any Board official other than the EEO Programs Director receives a complaint, he or she shall forward the complaint to the EEO Programs Director.

(e) *Acceptance of complaint*. (1) The EEO Programs Director shall accept a complete complaint that is filed in accordance with paragraph (d) of this section and over which the Board has jurisdiction. The EEO Programs Director shall notify the complainant of receipt and acceptance of the complaint.

(2) If the EEO Programs Director receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the EEO Programs Director shall dismiss the complaint without prejudice.

(3) If the EEO Programs Director receives a complaint over which the Board does not have jurisdiction, the EEO Programs Director shall notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) *Investigation/conciliation*. (1) Within 180 days of the receipt of a complete complaint, the EEO Programs Director shall complete the investigation of the complaint, attempt informal resolution of the complaint, and if no informal resolution is achieved, the EEO Programs Director shall forward the investigative report to the Staff Director for Management.

(2) The EEO Programs Director may request Board employees to cooperate in the investigation and attempted resolution of complaints. Employees who are requested by the EEO Programs Director to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) The EEO Programs Director shall furnish the complainant with a copy of the investigative report promptly after completion of the investigation and provide the complainant with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made a part of the complaint file, with a copy of the agreement provided to the complainant. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant has agreed.

(g) *Letter of findings*. (1) If an informal resolution of the complaint is not reached, the EEO Programs Director shall transmit the complaint file to the Staff Director for Management. The Staff Director for Management shall, within 180 days of the receipt of the complete complaint by the EEO Programs Director, notify the complainant of the results of the investigation in a letter sent by certified mail, return receipt requested, containing:

(i) Findings of fact and conclusions of law;

(ii) A description of a remedy for each violation found;

(iii) A notice of right of the complainant to appeal the letter of findings under paragraph (k) of this section; and

(iv) A notice of right of the complainant to request a hearing.

(2) If the complainant does not file a notice of appeal or does not request a hearing within the times prescribed in paragraph (h)(1) and (j)(1) of this section, the EEO Programs Director shall certify that the letter of findings under this paragraph (g) is the final decision of the Board at the expiration of those times.

(h) *Filing an appeal.* (1) Notice of appeal, with or without a request for hearing, shall be filed by the complainant with the EEO Programs Director within 30 days of receipt from the Staff Director for Management of the letter of findings required by paragraph (g) of this section.

(2) If the complainant does not request a hearing, the EEO Programs Director shall notify the Board of Governors of the appeal by the complainant and that a decision must be made under paragraph (k) of this section.

(i) *Acceptance of appeal.* The EEO Programs Director shall accept and process any timely appeal. A complainant may appeal to the Administrative Governor from a decision by the EEO Programs Director that an appeal is untimely. This appeal shall be filed within 15 calendar days of receipt of the decision from the EEO Programs Director.

(j) *Hearing.* (1) Notice of a request for a hearing, with or without a request for an appeal, shall be filed by the complainant with the EEO Programs Director within 30 days of receipt from the Staff Director for Management of the letter of findings required by paragraph (g) of this section. Upon a timely request for a hearing, the EEO Programs Director shall request that the Board of Governors, or its designee, appoint an administrative law judge to conduct the hearing. The administrative law judge shall issue a notice to the complainant and the Board specifying the date, time, and place of the scheduled hearing. The hearing shall be commenced no earlier than 15 calendar days after the notice is issued and no later than 60 days after the request for a hearing is filed, unless all parties agree to a different date.

(2) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557. The administrative law judge shall have the duty to conduct a fair hearing, to take all necessary actions to avoid delay, and to maintain order. He or she shall have all powers necessary to these ends, including (but not limited to) the power to:

(i) Arrange and change the dates, times, and places of hearings and prehearing conferences and to issue notice thereof;

(ii) Hold conferences to settle, simplify, or determine the issues in a hearing, or to consider other matters that may aid in the expeditious disposition of the hearing;

(iii) Require parties to state their positions in writing with respect to the various issues in the hearing and to exchange such statements with all other parties;

(iv) Examine witnesses and direct witnesses to testify;

(v) Receive, rule on, exclude, or limit evidence;

(vi) Rule on procedural items pending before him or her; and

(vii) Take any action permitted to the administrative law judge as authorized by this subpart G or by the provisions of the Administrative Procedures Act (5 U.S.C. 554–557).

(3) Technical rules of evidence shall not apply to hearings conducted pursuant to this paragraph (j), but rules or principles designed to assure production of credible evidence and to subject testimony to cross-examination shall be applied by the administrative law judge wherever reasonably necessary. The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties, and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record.

(4) The costs and expenses for the conduct of a hearing shall be allocated as follows:

(i) Employees of the Board shall, upon the request of the administrative

law judge, be made available to participate in the hearing and shall be on official duty status for this purpose. They shall not receive witness fees.

(ii) Employees of other Federal agencies called to testify at a hearing, at the request of the administrative law judge and with the approval of the employing agency, shall be on official duty status during any absence from normal duties caused by their testimony, and shall not receive witness fees.

(iii) The fees and expenses of other persons called to testify at a hearing shall be paid by the party requesting their appearance.

(iv) The administrative law judge may require the Board to pay travel expenses necessary for the complainant to attend the hearing.

(v) The Board shall pay the required expenses and charges for the administrative law judge and court reporter.

(vi) All other expenses shall be paid by the parties incurring them.

(5) The administrative law judge shall submit in writing recommended findings of fact, conclusions of law, and remedies to the complainant and the EEO Programs Director within 30 days, after the receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcripts are made. This time limit may be extended with the permission of the EEO Programs Director.

(6) Within 15 calendar days after receipt of the recommended decision of the administrative law judge, the complainant may file exceptions to the recommended decision with the EEO Programs Director. On behalf of the Board, the EEO Programs Director may, within 15 calendar days after receipt of the recommended decision of the administrative law judge, take exception to the recommended decision of the administrative law judge and shall notify the complainant in writing of the Board's exception. Thereafter, the complainant shall have 10 calendar days to file reply exceptions with the EEO Programs Director. The EEO Programs Director shall retain copies of the exceptions and replies to the Board's exception for consideration by the Board. After the expiration of the time to reply, the recommended decision shall be ripe for a decision under paragraph (k) of this section.

(k) *Decision*. (1) The EEO Programs Director shall notify the Board of Governors when a complaint is ripe for decision under this paragraph (k). At the request of any member of the Board of Governors made within 3 business days of such notice, the Board of Governors shall make the decision on the complaint. If no such request is made, the Administrative Governor, or the Staff Director for Management if he or she is delegated the authority to do so, shall make the decision on the complaint. The decision shall be made based on information in the investigative record and, if a hearing is held, on the hearing record. The decision shall be made within 60 days of the receipt by the EEO Programs Director of the notice of appeal and investigative record pursuant to paragraph (h)(1) of this section or 60 days following the end of the period for filing reply exceptions set forth in paragraph (j)(6) of this section, whichever is applicable. If the decision-maker under this paragraph (k) determines that additional information is needed from any party, the decision-maker shall request the information and provide the other party or parties an opportunity to respond to that information. The decision-maker shall have 60 days from receipt of the additional information to render the decision on the appeal. The decision-maker shall transmit the decision by letter to all parties. The decision shall set forth the findings, any remedial actions required, and the reasons for the decision. If the decision is based on a hearing record, the decision-maker shall consider the recommended decision of the administrative law judge and render a final decision based on the entire record. The decision-maker may also remand the hearing record to the administrative law judge for a fuller development of the record.

(2) The Board shall take any action required under the terms of the decision promptly. The decision-maker may require periodic compliance reports specifying:

(i) The manner in which compliance with the provisions of the decision has been achieved;

(ii) The reasons any action required by the final Board decision has not been taken; and

(iii) The steps being taken to ensure full compliance.

(3) The decision-maker may retain responsibility for resolving disputes that arise between parties over interpretation of the final Board decision, or for specific adjudicatory decisions arising out of implementation.

PART 269—POLICY ON LABOR RELATIONS FOR THE FEDERAL RESERVE BANKS

Sec.
269.1 Definition of a labor organization.
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269.3 Recognition of a labor organization and its relationship to a Federal Reserve Bank.
269.4 Determination of appropriate bargaining unit.
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269.10 Time for internal labor organization business, consultations and negotiations.
269.11 Federal Reserve System Labor Relations Panel.
269.12 Amendment.

AUTHORITY: Sec. 11, 38 Stat. 261; 12 U.S.C. 248.

SOURCE: 48 FR 32331, July 15, 1983, unless otherwise noted.

§ 269.1 Definition of a labor organization.

When used in this part, the term *labor organization* means any lawful organization of any kind, or any employee representation group, which exists for the purpose, in whole or in part, of dealing with any Federal Reserve Bank concerning grievances, personnel policies and practices, or other matters affecting the working conditions of its employees, but the term shall not include any organization:

(a) Which asserts the right to strike against the government of the United States, the Board of Governors of the Federal Reserve System, or any Federal Reserve Bank, or to assist or participate in any such strike, or which imposes a duty or obligation to conduct, assist or participate in any such strike; or

(b) Which fails to agree to refrain from seeking or accepting support from any organization which employs coercive tactics affecting any Federal Reserve Bank's operations; or

(c) Which advocates the overthrow of the constitutional form of the government of the United States; or

(d) Which discriminates with regard to the terms or conditions of membership because of race, color, sex, creed, age or national origin.

§ 269.2 Membership in a labor organization.

(a) Any employee of a Federal Reserve Bank (hereinafter referred to as ''Bank'') is free to join and assist any existing labor organization or to participate in the formation of a new labor organization, or to refrain from any such activities except that officers and their administrative or confidential assistants, managers and other supervisory personnel, secretaries to all such persons and all employees engaged in Bank personnel work shall not be represented by any labor organization.

(b) The rights described in paragraph (a) of this section for employees do not extend to participation in the management of a labor organization, or acting as a representative of any such organization, where such participation or activity would conflict with law or the duties of an employee.

(c) Notwithstanding anything stated in paragraph (a) of this section, professional employees of a Bank shall not be represented by a labor organization which represents other employees of the Bank unless a majority of the professional employees eligible to vote specifically elect to be represented by such labor organization. However, the professional employees of a Bank may, if they so choose, be represented by a separate labor organization of their own, or by no labor organization at all.

(d) Notwithstanding anything stated in paragraph (a) of this section, the guards of a Bank shall not be members of a labor organization which represents other categories of employees of the Bank. However, the guards of a

Bank may, if they so choose, be represented by a separate labor organization of their own, or by no labor organization at all.

§ 269.3 Recognition of a labor organization and its relationship to a Federal Reserve Bank.

(a) Any labor organization shall be recognized as the exclusive bargaining representative of the employees in an appropriate unit of a Bank when that organization has been selected by the employees in said unit pursuant to the procedure set forth in § 269.5. A unit may be established in a Bank on any basis which will ensure a clear and identifiable community of interest among the employees concerned, and will promote effective relationships and the efficiency of the Bank's operations, but no unit shall be established solely on the basis of the extent to which a labor organization or employees in the proposed unit may have sought organization.

(b) When a labor organization has been recognized as the exclusive representative of employees in an appropriate unit, it shall be entitled to act for and to negotiate agreements in good faith covering all employees in the unit, and it shall be responsible for representing the interests of all such employees without discrimination and without regard to whether they are members of that labor organization or not, provided that nothing in this Policy shall prevent an employee from adjusting his or her grievance without the intervention of the recognized labor organization. The labor organization shall be given notice of the adjustment and a reasonable opportunity to object on the sole ground that it is in conflict with the terms of the collective bargaining agreement.

(c) A Bank, through appropriate officials, shall have the obligation to meet at reasonable times with representatives of a recognized labor organization to negotiate, in good faith, with respect to personnel policies and practices affecting working conditions for employees, provided that they do not involve matters in any of the following areas:

(1) The purposes and functions of the Bank; the compensation of and hours worked by employees; any classification system used to evaluate positions; the budget of the Bank; the retirement system; any insurance or other benefit plans; internal security operations; maintenance of the efficiency of Bank operations including the determination of work methods; the right to contract out; the determination as to manpower requirements; use of technology and organization of work; and action to meet emergency situations;

(2) Management rights as to the direction of employees, including hiring, promotion, transfer, classification, assignment, layoffs, retention, suspension, demotion, discipline and discharge, provided that on matters involving the procedures to be followed by a Bank for the exercise of its rights under this subparagraph, a Bank shall, upon request, discuss such procedures with a recognized labor organization, but shall not be required to negotiate for an agreement as to them;

(3) All Bank matters specifically governed by applicable laws or regulations.

The obligation under this paragraph to negotiate with regard to certain matters shall include the execution of a written contract incorporating any agreement reached, but does not compel either a Bank or a labor organization to agree to a particular proposal or to make any concession during such negotiations.

(d) At the time it requests an election to be held, any labor organization seeking recognition shall submit to a Bank a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(e) Subject to the provisions of § 269.8, the exclusive recognition of a labor organization shall not preclude any employee, regardless of labor organization membership, from bringing matters of personal concern not governed by a collective bargaining agreement to the attention of appropriate officers, managers or supervisory personnel in accordance with applicable law, rule, regulation, or established Bank policy, or from choosing his or her own representative in such matters.

§ 269.4 Determination of appropriate bargaining unit.

(a) If a labor organization asserts in writing to a Bank that it holds cards requesting a representation election signed by at least thirty percent (30%) of the employees in a unit which that organization considers to be an appropriate bargaining unit, the labor organization and the Bank shall each designate a representative who together shall request the American Arbitration Association (hereinafter referred to as ''Association'') to submit to them from its National Panel of Professional Labor Arbitrators a list of seven (7) impartial, qualified professional arbitrators. The two designated representatives shall meet promptly and, by alternately striking names from the list, arrive at the remaining person who, together with the two representatives, shall constitute a Special Tribunal to rule on the labor organization's request for an election. The impartial arbitrator shall always act as the Chairperson of any Special Tribunal duly constituted under this section.

(b) In the absence of an agreement between the labor organization and the Bank on the appropriate unit, the Tribunal shall investigate the facts, hold hearings if necessary, and issue a decision as to the appropriateness of the unit for the purposes of conducting a representation election for exclusive recognition and as to related issues submitted for consideration. The expenses for this proceeding, including the fees of the association and of the arbitrator, shall be borne equally by the labor organization and the Bank. If either the Bank or the labor organization should disagree with the Special Tribunal's decision, the party in disagreement may appeal within thirty (30) calendar days to the Federal Reserve System Labor Relations Panel referred to in § 269.11, and the decision of the System Panel shall be final and binding on the parties.

(c) If there is any dispute as to whether a labor organization holds cards signed by at least thirty percent (30%) of the employees in a unit claimed by a labor organization as appropriate or subsequently determined by the Special Tribunal as appropriate, the dispute shall be resolved by the Chairperson of the Special Tribunal, acting as a single impartial arbitrator. The expenses of such procedure, including the impartial arbitrator's fee, shall be borne equally by the labor organization and the Bank. The decision of the Chairperson of the Special Tribunal shall be final and binding and shall not be subject to appeal to the Federal Reserve System Labor Relations Panel.

§ 269.5 Elections.

(a) Once there has been a final determination of the existence of an appropriate bargaining unit under the procedure in § 269.4, and a showing by a labor organization that it has cards signed by at least thirty percent (30%) of the employees in such unit requesting a representation election, an election shall be ordered by the Special Tribunal. A labor organization shall be recognized as the exclusive bargaining representative of the unit if it is selected by a majority of the employees in the unit actually voting.

(b) The election shall be held under the auspices of the Association and shall be subject to its election rules and regulations. However, if there should be any conflict between such rules and regulations and the provisions of this Policy, the latter shall prevail. The fees charged by the Association for its election service shall be borne equally by the labor organization and the Bank.

(c) An election to determine whether a labor organization should continue as the exclusive bargaining representative of a particular unit shall be held when requested by a petition or other bona fide showing by at least thirty percent (30%) of the employees of that unit. Any dispute as to whether thirty percent (30%) of the employees requested such an election shall be resolved by the same procedure as that set forth in § 269.4(b). The election shall be held under the auspices of the Association in the same manner described in paragraph (b) of this section. The recognition of a labor organization as the exclusive bargaining representative of a unit shall be revoked if a majority of the employees in the unit who actually vote signify approval of such revocation.

(d) Only one election may be held in any unit in a twelve (12) month period to determine whether a labor organization should become, or continue to be recognized as, the exclusive representative of the employees in that unit.

(e) Upon receipt of a request for an election from a labor organization under § 269.4(a), it shall be incumbent on the Bank, labor organization and all others to refrain from any conduct, action or policy that interferes with or restrains employees from making a fair and free choice in selecting or rejecting a bargaining representative consistent with the right of the Bank, labor organization or employees to exercise privileges of free speech in the expression of any views, argument or opinion, or the dissemination thereof, whether in oral, written, printed, graphic or visual form.

(f) The Special Tribunal shall hear and decide any post-election objections of a Bank or labor organization filed with it claiming that a violation of paragraph (e) of this section has improperly affected the outcome of the election. Such objections must be filed with the Special Tribunal no later than five (5) business days after the date of election. In the event of such violation by a Bank, labor organization or other individuals or organizations which the Special Tribunal finds sufficient to have prejudiced the outcome of an election, appropriate remedial action shall be taken in the form of setting aside the election results and ordering a new election, provided, however, that an appeal from the order of the Special Tribunal may be taken within thirty (30) calendar days to the Federal Reserve System Labor Relations Panel by either the affected Bank or labor organization. The ruling of the System Panel shall be final and binding. Neither the Special Tribunal nor the Federal Reserve System Labor Relations Panel shall have the authority to direct a Bank to recognize a labor organization as the exclusive collective bargaining representative without a valid election being held in which a majority of the employees actually voting have so designated such labor organization.

(g) The Special Tribunal and the Federal Reserve System Labor Relations Panel will adhere to any rules and regulations promulgated by the Board of Governors for the administration of the provisions of paragraphs (e) and (f) of this section.

§ 269.6 Unfair labor practices.

(a) It shall be an unfair labor practice for a Bank to: (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 269.2(a); (2) dominate or interfere with the formation or administration of any labor organization, or to contribute financial or other support to it; (3) encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment; (4) refuse to bargain collectively with the representatives of its employees subject to the provisions of § 269.3 (b) and (c).

(b) It shall be an unfair labor practice for a labor organization, its agents or representatives to: (1) Restrain or coerce employees in the exercise of the rights guaranteed in § 269.2(a); (2) cause or attempt to cause a Bank to Discriminate against an employee in violation of paragraph (a)(3) of this section; (3) refuse to bargain collectively with a Bank, provided the labor organization is the exclusive representative of a unit of employees.

(c) Notwithstanding anything previously stated in this section, the expression of any view, argument or opinion, or the dissemination thereof, whether in oral, written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice, if such expression contains no threat of reprisal or force, or promise of benefit.

(d) The Federal Reserve System Labor Relations Panel will adhere to the rules and regulations promulgated by the Board of Governors for the prevention and remedy of the unfair labor practices listed herein.

§ 269.7 Approval of agreement and required contents.

Any agreement entered into with a labor organization as the exclusive representative of employees in a unit must be approved by the President of the Bank or a designated officer representative. All agreements with labor

organizations shall also be subject to the requirement that the administration of all matters covered by the agreement shall be governed by the provisions of applicable laws and Federal Reserve System rules and regulations, and the agreement shall at all times be applied subject to such laws and regulations.

§ 269.8 Grievance procedures.

(a) Subject to the provisions of § 269.3(b), an agreement entered into with a labor organization as the exclusive representative of employees in a unit may contain a grievance procedure, applicable only to employees in such unit and which shall be the exclusive means for a labor organization and/or an employee to obtain resolution of a grievance arising under such agreement.

(b) Grievance procedures established by a labor agreement may also include provisions for arbitration of unresolved grievances by a tripartite panel under the Voluntary Labor Arbitration Rules of the Association with the impartial arbitrator selected by the Bank and labor organization representatives on the arbitration panel to be the Chairperson. In such event, arbitration shall extend only to grievances which involve the interpretation and application of specific provisions of a labor agreement and not to any other matters or to changes in or proposed changes in the agreement. Arbitration may only be invoked by labor organization on behalf of individual employees with their concurrence.

§ 269.9 Mediation of negotiation impasses.

In the event of an impasse in negotiations between the parties for a collective bargaining agreement, either the labor organization or the Bank may request the appointment of a qualified neutral person as a mediator to assist the parties in attempting to resolve the impasse. The parties will meet promptly with the mediator, and all matters discussed, as well as any documents submitted, shall not be publicly divulged for any reason. The cost of the mediator shall be borne equally by the parties.

§ 269.10 Time for internal labor organization business, consultations and negotiations.

Solicitation of memberships, dues or other internal labor organization business shall be conducted during the nonduty hours of the employees concerned. Officially requested or approved consultation between management executives and representatives of a labor organization shall, whenever practicable, be conducted on official time, but the President or a duly authorized officer of a Bank may require that negotiations with a labor organization be conducted during the nonduty hours of the Bank.

§ 269.11 Federal Reserve System Labor Relations Panel.

There shall be established a Federal Reserve System Labor Relations Panel, which shall consist of three members: one member of the Board of Governors of the Federal Reserve System, who shall be Chairperson of the Panel, and two public members. Each member shall be selected by the Board of Governors; provided, however, that the public members shall not have any present or past affiliation with the Federal Reserve System. Initially, one of the two public members shall be appointed for a term of two years, and the other for a term of three years. Thereafter, each public member shall be appointed for a term of three years, except that in the case of an unexpired term of a former member, the successor shall be appointed to fill such unexpired term. Upon the expiration of their term of office, public members may continue to serve until their successors are appointed and have qualified. A public member may be removed by the Board only upon notice and hearing, and only for neglect of duty or malfeasance in office. The Panel shall be responsible for the duties assigned to it as set forth in this Policy.

§ 269.12 Amendment.

This policy may be amended upon appropriate legal notice to all Federal Reserve Banks and labor organizations recognized, or seeking recognition, at any such Bank under this Policy. In no instance shall an amendment be applied retroactively.

PART 269a—DEFINITIONS

Sec.
269a.1 Party.
269a.2 Party in interest.
269a.3 Intervenor.
269a.4 Investigator.
269a.5 Hearing officer.

AUTHORITY: Sec. 11, 38 Stat. 261 (12 U.S.C. 248).

SOURCE: 35 FR 8919, June 10, 1970, unless otherwise noted. Redesignated at 48 FR 32334, July 15, 1983.

§ 269a.1 Party.

The term *Party* means any person, employee, group of employees, labor organization, or bank as defined in § 269.2 of this chapter (a) filing a charge, petition, application, or rquest pursuant to these rules and regulations, (b) named as a party in a charge, complaint, petition, application, or request, or (c) whose intervention has been permitted or directed by the investigator, the hearing officer, or the panel, as the case may be, but nothing shall be construed to prevent the panel, or any officer designated by it, from limiting any party's participation in the proceedings to the extent of his interest as determined by the investigator, hearing officer, or panel.

§ 269a.2 Party in interest.

The term *party in interest* means any person, employee, group of employees, labor organization, or bank that will be or is directly affected by the resolution of any charge, complaint, petition, application, or request presented to or being considered by the panel or its designated officers. Any (a) labor organization (not a charging party nor a charged party) attempting to organize the employees of a bank or that is or was recently a party to a collective bargaining agreement with a bank named as a party in a charge, complaint, petition, application, or a request, or (b) bank (not a charging party nor a charged party) that acts as the employer of any person named in a charge, complaint, petition, or request shall be deemed to be also a party in interest and shall be entitled to notification and service of all relevant procedures and documents.

§ 269a.3 Intervenor.

The term *intervenor* means the party in a proceeding whose intervention has been permitted or directed by the panel or its designated officer.

§ 269a.4 Investigator.

The term *investigator* means the officer designated by the panel to investigate and determine whether or not a complainant has established a prima facie case, as defined in § 269b.210 of this subchapter.

[35 FR 8919, June 10, 1970. Redesignated at 48 FR 32334, July 15, 1983, as amended at 65 FR 2530, Jan. 18, 2000.

§ 269a.5 Hearing officer.

The term *hearing officer* means the officer designated by the panel to conduct hearings pursuant to § 269b.420 *et seq.* of this subchapter and whose duties and power are enumerated in § 269b.442 of this subchapter.

[35 FR 8919, June 10, 1970. Redesignated at 48 FR 32334, July 15, 1983, as amended at 65 FR 2530, Jan. 18, 2000.

PART 269b—CHARGES OF UNFAIR LABOR PRACTICES

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AUTHORITY: Sec. 11, 38 Stat. 261 (12 U.S.C. 248).

SOURCE: 35 FR 8920, June 10, 1970, unless otherwise noted. Redesignated at 48 FR 32334, July 15, 1983.

CHARGES OF VIOLATIONS OF § 269.6 (OF THE POLICY)

§ 269b.110 Charges.

A charge that any bank or labor organization, or agents or representatives of a bank or labor organization, has engaged in or is engaging in any act prohibited under § 269.6 of the policy or has failed to take any action required by § 269.6 of the policy may be filed by any party in interest, or its representative, within 60 days after the alleged violations or within 60 days after the charging party has become or should have become aware of the alleged violation.

§ 269b.111 Filing of charges.

Any charge pursuant to § 269b.110 shall be in writing and signed. An original and three copies of such charge, together with one copy for each charged party named, shall be transmitted to the Secretary of the Federal Reserve System Labor Relations Panel, 20th Street and Constitution Avenue NW., Washington, DC 20551. Within 5 days after receipt of a properly filed charge that meets the formal requirements set forth in § 269b.112, the Secretary will cause a copy of such charge to be served on each party against whom the charge is made and upon all other potential parties in interest.

§ 269b.112 Contents of the charge.

A charge shall contain the following:

(a) The full name, address, and telephone number of the person, bank, or labor organization making the charge (hereinafter referred to as the charging party) and of the person signing the charge who shall state also his relation to or his capacity with the complainant. Where discrimination is alleged, all known discriminatees shall be named;

(b) The name, address, and telephone number of the bank or labor organization against whom the charge is made (hereinafter referred to as the respondent) and of any parties in interest;

(c) A clear and concise statement of the facts constituting the alleged unfair labor practice, including the time and place of occurrence of the particular acts, and a statement of the portion or portions of the policy alleged to have been violated. A charge shall not incorporate by reference affidavits or other documents submitted in support of the charge;

(d) A statement of the relief sought;

(e) A statement of any other remedies invoked for the redress of the alleged violations of the policy and the results, if any, of their invocation. If the issue in such charge is subject to an established grievance procedure, the complainant must irrevocably elect, prior to the completion of the first applicable step of the grievance procedure, whether he will invoke the grievance procedure or whether he will invoke the unfair labor practice procedures of the panel. A charge which is withdrawn or rejected by the panel as defective prior to the institution of any formal proceedings by the panel shall not prejudice the filing of a grievance on the same matter, unless the parties otherwise so provide;

(f) A declaration by the person signing the charge, that its contents are true and correct to the best of his knowledge and belief, such declaration to be subject to applicable provisions of the Federal Criminal Code (18 U.S.C. 1001).

§ 269b.113 Withdrawal or settlement.

A charge may be withdrawn or settlement of the matter may be reached without consent of the panel at any time. In connection with any such settlement the parties in interest shall prepare and sign a settlement agreement which shall record that the settlement is mutually satisfactory, shall stipulate any occurrences which constituted unfair labor practices and shall set forth the terms of the settlement.

§ 269b.120 Answer to a charge.

The respondent shall file an answer to the charge with the Secretary of the panel within 15 days after service of the charge. Upon application and for good cause shown, the panel may extend the time within which the answer shall be filed. One copy of the answer shall be served on each party with proof of service furnished to the Secretary, and the original, which shall be signed, and four copies shall be filed with the Secretary.

§ 269b.121 Contents of answer.

The answer shall contain:

(a) A specific admission or denial, and where appropriate, explanation thereof; or if the respondent is without knowledge of the allegation, he shall so state and such statement shall operate as a denial. Admissions or denials may be to all or part of an allegation but shall be responsive to the substance of the allegation;

(b) A specified, detailed statement of any affirmative defense;

(c) A clear and concise statement of the facts and matters of law relied upon constituting the grounds of defense.

Any allegation of the charge not denied in the answer may be deemed admitted and may be so found by the panel.

PRELIMINARY INVESTIGATION

§ 269b.210 Referral to National Center for Dispute Settlement.

(a) Within 5 days after the answer to the charge has been or should have been filed, the panel may refer the matter, accompanied by a general or particularized request, to the National Center for Dispute Settlement of the American Arbitration Association (hereinafter referred to as the Center) to make an investigation and to determine whether the charging party has established a prima facie case.

(b) For the purposes of this part, a *prima facie case* means a case where allegations of an unfair labor practice that have been presented give reasonable cause to believe that such practice may have occurred, but where evidentiary proceedings are necessary for determination of whether the allegations are substantiated.

(c) The Center may use its own personnel or may hire individuals on a contract basis to conduct such investigations. The panel may consolidate or sever proceedings conducted pursuant to this part.

(d) Any party may request the Center or other appointing authority to withdraw appointment of the investigator within 3 days after designation on the basis of previously demonstrated personal bias, conflict of interest, or prejudice. Such a request shall set forth in detail the matter alleged to constitute grounds for disqualification. Denial of a request by the Center or other appointing authority shall be substantiated in writing and transmitted to the requesting party, and shall be submitted to the panel together with the complete report of the investigator required in § 269b.240(b).

§ 269b.220 Priority; acceleration of proceedings.

(a) A charge of ''refusal to bargain'' or a charge that, if sustained, would require the setting aside of an election or the conduct of a new election shall be given priority.

(b) The parties, individually or jointly, may petition the panel at any time to invoke immediately the formal hearing procedures set forth in § 269b.410. They may also petition the

panel to entertain the matter itself without prior investigation and/or without the formal hearing procedure set forth in § 269b.410. The panel is empowered also on its own motion to so accelerate disposition of the case.

(c) Before accelerating a case the panel may utilize whatever proceedings it may deem appropriate and timely to allow parties in interest to comment on the proposed course of action.

§ 269b.230 Assessment of costs; posting of bond.

(a) The panel shall normally bear the costs of an investigation conducted pursuant to § 269b.210, but the panel may require that the charging party, the respondent, and/or other parties in interest or intervenors, or several of them, shall bear a portion or all of the costs therefor. With respect to each case where an investigation is directed by the panel, the charging party may, in the discretion of the panel, be required to file a cost bond, or equivalent security, of $500, unless the panel fixes a different amount.

(b) Among the circumstances that may be the basis for payment of costs by other than the panel are cases where a clearly spurious charge has been filed or where the filing of a charge was necessary to redress the respondent's flagrant misconduct.

(c) The bond or equivalent security shall be to secure the payment of the costs of the investigation as may be assessed by the panel. In those cases where the panel does not assess such costs, the bond posted and the cost thereof shall be reimbursed to the charging party. The panel may require also the posting of a cost bond by the respondent or other party to the proceeding, who shall be entitled to reimbursement of the cost of the bond in the event that no costs of investigation are assessed upon such party by the panel.

(d) Notification of the panel's decision that a bond shall be required shall be effected by registered mail, such notice to advise of the amount of the bond required and the period by which it shall be posted.

(e) Absent good cause shown, failure of a party to file timely such cost bond or equivalent security may be ground for dismissal or other administrative sanctions deemed appropriate by the Panel.

§ 269b.240 The investigation.

(a) The purpose of the investigation is (1) to ascertain, analyze, and apply the relevant facts in order to determine whether or not formal proceedings are warranted and (2) to assist, by mediation and other appropriate means, the parties to reach a mutually satisfactory resolution of the issues as an alternative to the hearing process. In so doing, the investigator is not limited to the allegations set forth in the charge and may advise the charging party to amend his charge. In addition, he should adduce facts pertaining to the remedy as well as to the alleged violation. Investigation should also adduce facts pertaining to the jurisdiction of the panel and the timeliness of the charge. If the charge is untimely on its face, no investigation shall be required except to determine whether or not attending circumstances warrant waiving the time requirements, set forth in § 269b.110. The investigator may request the appearance of parties and witnesses, may cause, the production of relevant document, and may take or cause depositions to be taken.

(b) When the investigation has been completed, the Center shall issue a written determination whether the charging party has established a prima facie case, whether the charge was timely filed, and whether the charge is within the jurisdiction of the panel, and reasons therefor. This determination shall be served upon the panel and all parties. The panel shall receive also the complete report of the investigator.

APPEAL FROM THE CENTER'S DETERMINATION

§ 269b.310 Appeal rights.

Where the investigator has found that a prima facie case does not exist, a party, including an intervenor but excluding the respondent or other parties having the same interest as the respondent, within 5 days after receiving

the Center's determination may petition the panel to set aside the determination and to cause formal proceedings, set forth in § 269b.410, to be invoked. The panel may grant such petition only on grounds that the Center or its agents were arbitrary, capricious, or acted contrary to law or the policy, or that the investigator's determination is clearly erroneous. The filing requirements for such a petition shall be the same as that for the filing of a charge, as set forth in § 269b.111.

§ 269b.320 Proceedings before the panel.

The panel shall issue its decision within 15 days after the receipt of the petition provided for in § 269b.310 or by the end of that period shall announce that it will require briefs by the parties. Such announcement shall specify the requirements as to contents of the briefs, and the time for submission, which shall vary to meet the circumstances of the matter appealed. The panel, at such time, may also require oral argument or the production of evidence or may so order oral argument and/or the production of evidence after examination of the briefs. The panel shall issue its final decision within 20 days after briefs have been filed, evidence has been produced, or oral argument has been conducted.

FORMAL PROCEEDINGS

§ 269b.410 Notice of hearing.

If formal proceedings are found to be needed under the above procedures, and if no satisfactory settlement has been reached within 5 days after finding that a prima facie case exists, the Secretary of the panel, unless there is cause for granting an extension of time, shall issue and cause to be served upon the parties a notice of hearing. The panel shall appoint, pursuant to § 269b.420, a hearing officer to hold a hearing and issue a report to the panel containing findings of fact, conclusions of law, and recommendations including, where appropriate, remedial action to be taken and notices to be posted. The Secretary shall furnish to the hearing officer the investigator's report and all other relevant information in the panel's possession.

§ 269b.420 Designation of hearing officer.

(a) The panel, absent special circumstances, shall employ the center to select the hearing officer to conduct the hearing at a site most convenient to the parties and witnesses. The individual who performed the investigation, pursuant to § 269b.210, shall be barred from acting as a hearing officer on the same matter, unless all parties in interest agree to his participation. The selection of the hearing officer, to the extent practicable, shall be done with the concurrence of the parties.

(b) Any party may request the hearing officer, at any time following his designation and before the filing of his decision, to withdraw on grounds of previously demonstrated personal bias, conflict of interest, or prejudice by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the hearing officer, such affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If he does not so withdraw, he shall so rule upon the record, stating the grounds for his ruling and proceed with the hearing, or, if the hearing has closed, he shall proceed with the issuance of his decision, and his ruling shall be subject to the same review by the panel that is given to the rest of his decision.

(c) The costs of conducting the hearing and of the hearing officer shall be borne by the panel. Witness fees and expenses shall be paid by the party at whose instance the witnesses appear.

§ 269b.430 Contents of notice of hearing.

The notice of hearing shall include:

(a) A copy of the charge;

(b) A statement of the time of the hearing which shall be not less than 10 days after service of the notice of hearing, except in extraordinary circumstances. All charges involving a ''refusal to bargain'' allegation and all charges, if sustained, that would require the setting aside of an election, or the conducting of a new election shall be given first priority;

(c) A statement of the place and nature of hearing;

(d) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(e) A reference to the particular section of the policy and rules and regulations of this chapter involved;

(f) A copy of the determination, if any, made causing the invocation of these formal proceedings.

§ 269b.440 Conduct of hearing.

(a) Hearing shall be public unless otherwise ordered by the hearing officer or the panel. An official reporter shall make the only official transcript of such proceedings.

(b) Copies of the official transcript will not be provided to the parties, but may be purchased by arrangement with the official reporter or with such costs as the panel may otherwise assess, or may be examined in the offices of the panel and/or the hearing officer subject to such conditions as the panel may prescribe.

(c) A charging party in asserting that an unfair labor practice has been committed within the meaning of the policy, shall have the burden of proving the allegations of the charge, or the amended charge, by a preponderance of the evidence.

(d) The parties shall not be bound by the technical rules of evidence, but the hearing officer, may, in his discretion, exclude any evidence or offer of proof if he finds that its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion.

§ 269b.441 Rights of parties.

(a) Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses as may be required for a full and true disclosure of the facts, and to introduce into the record documentary or other relevant evidence, except that the participation of any party shall be limited to the extent permitted by the hearing officer. Five copies of such documentary evidence shall be submitted unless the hearing officer permits a reduced number for good cause shown.

(b) Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

(c) Any party shall be entitled to file a brief to the hearing officer within 10 days after the close of the hearing, but no reply brief may be filed except upon special permission of the hearing officer. A party filing a brief must file the original and one copy with the hearing officer along with proof of service of a copy of such brief to all parties. Requests for extension of time to file briefs must be made to the hearing officer who must receive the request at least 3 days prior to the expiration of time fixed for filing of briefs and notice of the request shall be served simultaneously on all other parties, and proof of service shall be furnished. If a request for extension of time is based on the need for a copy of the transcript prior to filing a brief, such request must be made to the hearing officer before the hearing is closed and must be ruled on prior to the close of the hearing.

§ 269b.442 Duties and powers of the hearing officer.

The hearing officer shall inquire fully into the facts as to whether the respondent has engaged or is engaging in an unfair labor practice as set forth in the charge or the amended charge. The hearing officer shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the panel, subject to the rules and regulations in this subchapter, to:

(a) Grant requests for attendance of witnesses and production of documents;

(b) Rule upon petitions to quash requests made pursuant to paragraph (a) of this section;

(c) Call, examine, and cross-examine parties and witnesses as may be required for a full and true disclosure of the facts and to introduce into the record documentary or other evidence;

(d) Rule upon offers of proof and receive relevant evidence;

(e) Take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) Limit lines of questioning or testimony which are repetitive, cumulative, or irrelevant;

(g) Regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper question;

(h) Hold such prehearing conferences as may be necessary to expedite proceedings and hold such other conferences for the settlement or simplification of the issues by consent of the parties or upon his own motion;

(i) Dispose of procedural requests, motions, or similar matters which shall be made part of the record of the proceeding, including motions referred to the hearing officer by the panel, and motions to amend pleadings, also to recommend dismissal of cases or portions thereof, and to order hearings reopened or, upon motion, consolidated prior to issuance of the hearing officer's report and recommendations;

(j) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(k) Require the parties, if necessary, to file written briefs in support of their positions;

(l) Take any other action necessary under the foregoing and authorized by the rules and regulations in this subchapter.

In the event the hearing officer designated to conduct the hearing becomes unavailable, the panel may designate another hearing officer for the purpose of further hearing or issuance of a report and recommendation on the record as made, or both.

§ 269b.443 Motions before or after a hearing.

All motions (including motions for intervention), other than those made during a hearing, shall be made in writing to the Secretary of the panel, shall briefly state the relief sought, shall set forth the grounds for such motion, and shall be accompanied 3 days thereafter by proof of service on all parties. Answering statements, if any, must be served on all parties and the original thereof, together with two copies and statement of service, shall be filed with the Secretary within 5 days after service of the moving papers, unless the Secretary directs otherwise. Motions may be referred to the hearing officer whose ruling shall be made upon the record or the motion may be stayed until such time as the panel reviews the hearing officer's report and recommendations.

§ 269b.444 Objection to conduct of hearing; other motions during hearing.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, or any other motion during the course of the hearing, including a request to allow intervention, may be stated orally or in writing accompanied by a short statement of the grounds for such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing and such objection shall not stay the conduct of the hearing. Automatic exceptions will be allowed to all adverse rulings and shall be considered by the panel upon its review of the hearing officer's report and recommendations, if exception to the ruling is included in a statement of exceptions submitted to the panel after the close of the hearing, subject to the requirements of § 269b.520.

§ 269b.450 Submission of hearing officer's report to the panel.

After the close of the hearing, and the receipt of briefs, if any, the hearing officer shall prepare a report and recommendations, containing findings of fact, conclusions of law, including judgments as to the credibility of witnesses where appropriate, and the reasons or basis therefor, and recommendations as to the disposition of the case, and, where appropriate, including the remedial action and notices to be posted. After he has caused his report and recommendations to be served promptly on all parties to the proceeding, he shall transfer the case

to the panel including his report and recommendations and the complete record. Such submission shall be made within 20 days after the close of the hearing and the receipt of briefs, if any, unless otherwise extended by the panel. The record shall include the charge, notice of hearing, service sheet, motions, rulings, orders, official transcript of the hearing, stipulations, objections, depositions, documentary evidence, exhibits, and any briefs or other documents submitted to the parties.

PANEL REVIEW OF HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

§ 269b.510 Review by panel.

The panel shall review the report and recommendations of each hearing officer, the record of the hearing, and such other documents as enumerated in § 269b.450, whether or not any party files an appeal, unless the parties file with the panel a settlement agreement within 10 days after service of the hearing officer's report upon them. In the course of such review, the panel may require oral argument or written briefs on any relevant issue within such time limits as the panel may prescribe, and may reopen the record in any case and receive further evidence.

§ 269b.520 Exceptions to hearing officer's report.

(a) Any party may file with the panel exceptions to the hearing officer's report and recommendations, and any ruling contained therein, if made within 10 days after service of the report and recommendations. The Panel may, for good cause shown, extend the time for filing such exceptions upon written request, with copies served simultaneously on the other parties, received not later than 3 days before the date exceptions are due. Requests for oral argument will not be considered unless filed with exceptions.

(b) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived, although the panel may on its own motion rule upon any matter in the report and recommendations.

(c) Any exception which fails to comply with the following requirements may be disregarded:

(1) The exceptions shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken;

(2) The exceptions shall identify the part of the hearing officer's report to which objection is made;

(3) The exceptions shall designate by precise citation of page the portions of the record relied on, shall state the grounds for the exceptions, and shall include the citation of authorities unless set forth in a supporting brief.

(d) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain in the order indicated, the following:

(1) A concise statement of the case containing all that is material to the consideration of the questions presented;

(2) A specification of the questions involved and to be argued;

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied on.

(e) Answering briefs to the exceptions, and cross-exceptions and supporting briefs will not be permitted without special leave of the panel. Requests for oral argument will not be considered unless accompanying such petition for special leave.

(f) Five copies of exceptions and briefs must be filed with the panel along with a statement of service of copies of the exceptions and supporting briefs upon all parties.

§ 269b.530 Briefs in support of the hearing officer's report.

Any party may file a brief in support of the hearing officer's report and recommendations subject to the same time limits and rules pertaining to filing exceptions and briefs in support thereof, as set forth in § 269b.520.

§ 269b.540 Action by the panel.

After considering the hearing officer's report and recommendations, the

record, any other documents, any exceptions filed, and any oral argument permitted, the panel shall issue its written decision. Upon finding that the respondent is engaging in or has engaged in an unfair labor practice, the panel shall order the respondent to cease and desist from such conduct and may require the respondent to take such affirmative corrective action as the panel deems appropriate to effectuate the Policy. Such action by the panel may include, but shall not be limited to, orders to provide back pay, provide reinstatement, set aside an election, bargain, and award recognition. Upon finding no violation of the policy, the panel shall dismiss the case. The panel's decision and order setting forth the remedial action, if any, required shall be conspicuously posted by the parties.

COMPLIANCE

§ 269b.610 Procedures.

Where remedial action is ordered or provided for in a settlement agreement, a report to the panel that such action has been taken and that compliance with the decision and orders of the panel has been effected shall be submitted within the period of time specified in the panel's decision. The panel is empowered to utilize whatever administrative procedures it deems necessary to ascertain compliance.

§ 269b.620 Action by panel.

In any case where it is found, after a hearing, that the respondent has failed to comply with the final decision and order of the panel, the panel shall be empowered to take whatever action may be appropriate and shall expect the full cooperation of the Board of Governors of the Federal Reserve System in obtaining such compliance. Among the actions that may be taken by the panel against a noncomplying respondent labor organization, after a show cause hearing, may be suspension of that labor organization's checkoff privileges or recognition as exclusive bargaining representative for such period of time as determined by the panel.

GENERAL RULES

§ 269b.710 Rules to be liberally construed.

(a) Whenever the panel finds that unusual circumstances or good cause exist and that strict compliance with the terms of the rules and regulations in this subchapter will work an injustice or unfairness, it shall construe the rules and regulations in this subchapter liberally to prevent injustices and to effectuate the purposes of the policy.

(b) When an act is required or allowed to be done at or within a specified time, the panel may at any time, in its discretion, order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the policy.

§ 269b.720 Computation of time for filing papers.

In computing any period of time prescribed by or allowed by the panel, the day of the act, event, or default after which the designated period of time begins to run, shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or the applicable local legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday. When the period of time prescribed, or allowed, is seven days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computations. When the rules and regulations in this subchapter require the filing of any paper, such document must be received by the panel or the officer or agent designated by it to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of the time that may have been granted.

§ 269b.730 Number of copies; form.

Except as otherwise provided in the regulations in this subchapter, any documents or papers shall be filed with four copies in addition to the original. All matters filed shall be printed, typed, or otherwise legibly duplicated; carbon copies of typewritten matter

will be accepted if they are clearly legible.

§ 269b.731 Signature.

The original of each document filed shall be signed by the party or by an attorney or representative of record for the party, or by an officer of the party and shall contain the address and telephone number of the person signing it.

§ 269b.740 Service of pleading and other paper; statement of service.

(a) *Method of service.* Notices of hearings, decisions, orders, and other papers may be served personally or by registered or certified mail or by telegraph.

(b) *Upon whom served.* Unless otherwise provided in the rules and regulations in this subchapter, all papers except complaints, petitions, and papers relating to requests for appearance or production of documents, shall be served upon all counsel of record and upon parties not represented by counsel or by their agents designated by them or by law and upon the panel, or its designated officers or agents, where appropriate. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party.

(c) *Proof of service.* The party or person serving the papers or process shall submit simultaneously to the panel or its designated representative, or the individual conducting the proceeding, a written statement of such service. Failure to file a statement of service shall not affect the validity of the service. Proof of service, except where otherwise provided, shall be required only if subsequent to the receipt of a statement of service a question is raised with respect to proper service.

§ 269b.750 Requests for appearance of witnesses and production of documents.

Parties may request appearance of witnesses and production of documents by filing application therefor, depending upon the stage of the proceedings at which the request is made, with the officer conducting the investigation or hearing, or with the panel. Such application shall name and identify the witnesses or documents sought and shall briefly state the need for such appearance or production. The officer with whom such request is filed shall rule upon each such request and the record of the proceeding shall contain a record of that ruling and the basis therefor. The record shall also contain a statement of reasons for any request for the appearance of witnesses or production of documents initiated by a presiding officer.

SUBCHAPTER B—FEDERAL OPEN MARKET COMMITTEE

PART 270—OPEN MARKET OPERATIONS OF FEDERAL RESERVE BANKS

REGULATIONS RELATING TO OPEN MARKET OPERATIONS OF FEDERAL RESERVE BANKS

Sec.
270.1 Authority.
270.2 Definitions.
270.3 Governing principles.
270.4 Transactions in obligations.

AUTHORITY: Sec. 8, 48 Stat. 168, as amended (12 U.S.C. 263).

SOURCE: 38 FR 2753, Jan. 30, 1973, unless otherwise noted.

REGULATIONS RELATING TO OPEN MARKET OPERATIONS OF FEDERAL RESERVE BANKS

§ 270.1 Authority.

This part is issued by the Federal Open Market Committee (the ''Committee'') pursuant to authority conferred upon it by sections 12A and 14 of the Federal Reserve Act (12 U.S.C. 263, 355).

§ 270.2 Definitions.

(a) The term *obligations* means Government securities, U.S. agency securities, bankers' acceptances, bills of exchange, cable transfers, bonds, notes, warrants, debentures, and other obligations that Federal Reserve banks are authorized by law to purchase and sell.

(b) The term *Government securities* means direct obligations of the United States (i.e., U.S. bonds, notes, certificates of indebtedness, and Treasury bills) and obligations fully guaranteed as to principal and interest by the United States.

(c) The term *U.S. agency securities* means obligations that are direct obligations of, or are fully guaranteed as to principal and interest by, any agency of the United States.

(d) The term *System Open Market Account* means the obligations acquired pursuant to authorizations and directives issued by the Committee and held on behalf of all Federal Reserve banks.

§ 270.3 Governing principles.

As required by section 12A of the Federal Reserve Act, the time, character, and volume of all purchases and sales of obligations in the open market by Federal Reserve banks are governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.

§ 270.4 Transactions in obligations.

(a) Each Federal Reserve bank shall engage in open market operations under section 14 of the Federal Reserve Act only in accordance with this part and with the authorizations and directives issued by the Committee from time to time, and no Reserve bank shall decline to engage in open market operations as directed by the Committee.

(b) Transactions for the System Open Market Account shall be executed by a Federal Reserve bank selected by the Committee. The participations of the several Federal Reserve banks in such account and in the profits and losses on transactions for the account shall be allocated in accordance with principles determined by the Committee from time to time.

(c) In accordance with such limitations, terms, and conditions as are prescribed by law and in authorizations and directives issued by the Committee, the Reserve bank selected by the Committee is authorized and directed—

(1) To buy and sell Government securities and U.S. agency securities in the open market for the System Open Market Account, and to exchange maturing securities with the issuer;

(2) To buy and sell banker's acceptances in the open market for its own account;

(3) To buy Government securities, U.S. agency securities, and banker's acceptances of the kinds described above, under agreements for repurchase of such obligations, in the open market for its own account; and

(4) To buy and sell foreign currencies in the form of cable transfers in the

open market for the System Open Market Account and to maintain for such account reciprocal currency arrangements with foreign banks among those designated by the Board of Governors of the Federal Reserve System under § 214.5 of this chapter (Regulation N).

(d) The Federal Reserve banks are authorized and directed to engage in such other operations as the Committee may from time to time determine to be reasonably necessary to the effective conduct of open market operations and the effectuation of open market policies.

[38 FR 2753, Jan. 30, 1973, as amended at 39 FR 11873, Apr. 1, 1974; 48 FR 32336, July 15, 1983]

PART 271—RULES REGARDING AVAILABILITY OF INFORMATION

Sec.
271.1 Authority and purpose.
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271.9 Fee schedules; waiver of fees.

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 263.

SOURCE: 62 FR 61218, Nov. 17, 1997, unless otherwise noted.

§ 271.1 Authority and purpose.

(a) *Authority*. This part is issued by the Federal Open Market Committee (the Committee) pursuant to the Freedom of Information Act, 5 U.S.C. 552, and also pursuant to the Committee's authority under section 12A of the Federal Reserve Act, 12 U.S.C. 263, to issue regulations governing the conduct of its business.

(b) *Purpose*. This part sets forth the categories of information made available to the public and the procedures for obtaining documents and records.

§ 271.2 Definitions.

(a) *Board* means the Board of Governors of the Federal Reserve System established by the Federal Reserve Act of 1913 (38 Stat. 251).

(b) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(c) *Direct costs* mean those expenditures that the Committee actually incurs in searching for, reviewing, and duplicating documents in response to a request made under § 271.5.

(d) *Duplication* refers to the process of making a copy of a document in response to a request for disclosure of records or for inspection of original records that contain exempt material or that otherwise cannot be inspected directly. Among others, such copies may take the form of paper, microform, audiovisual materials, or machine-readable documentation (*e.g.*, magnetic tape or disk).

(e) *Educational institution* refers to a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, graduate higher education, professional education, or an institution of vocational education that operates a program of scholarly research.

(f) *Federal Reserve Bank* means one of the district Banks authorized by the Federal Reserve Act, 12 U.S.C. 222, including any branch of any such Bank.

(g) *Information of the Committee* means all information coming into the possession of the Committee or of any member thereof or of any officer, employee, or agent of the Committee, the Board, or any Federal Reserve Bank, in the performance of duties for, or pursuant to the direction of, the Committee.

(h) *Noncommercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis (as that term is used in this section) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(i) *Records of the Committee* includes rules, statements, decisions, minutes, memoranda, letters, reports, transcripts, accounts, charts, and other written material, as well as any materials in machine readable form that

constitute a part of the Committee's official files.

(j) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.

(1) The term ''news'' means information about current events or that would be of current interest to the public.

(2) Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of newspapers and other periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public.

(3) ''Freelance'' journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(k)(1) *Review* refers to the process of examining documents, located in response to a request for access, to determine whether any portion of a document is exempt information. It includes doing all that is necessary to excise the documents and otherwise to prepare them for release.

(2) *Review* does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(l)(1) *Search* means a reasonable search, by manual or automated means, of the Committee's official files and any other files containing records of the Committee as seem reasonably likely in the particular circumstances to contain documents of the kind requested. For purposes of computing fees under § 271.9, search time includes all time spent looking for material that is responsive to a request, including line-by-line identification of material within documents. Such activity is distinct from ''review'' of material to determine whether the material is exempt from disclosure.

(2) *Search* does not mean or include research, creation of any document, or extensive modification of an existing program or system that would significantly interfere with the operation of the Committee's automated information system.

§ 271.3 Published information.

(a) FEDERAL REGISTER. The Committee publishes in the FEDERAL REGISTER, in addition to this part:

(1) A description of its organization;

(2) Statements of the general course and method by which its functions are channeled and determined;

(3) Rules of procedure;

(4) Substantive rules of general applicability, and statements of general policy and interpretations of general applicability formulated and adopted by the Committee;

(5) Every amendment, revision, or repeal of the foregoing; and

(6) General notices of proposed rulemaking.

(b) *Annual Report to Congress.* Each annual report made to Congress by the Board includes a complete record of the actions taken by the Committee during the preceding year upon all matters of policy relating to open market operations, showing the reasons underlying the actions, and the votes taken.

(c) *Other published information.* From time to time, other information relating to open market operations of the Federal Reserve Banks is published in the *Federal Reserve Bulletin*, in the Board's annual report to Congress, and in announcements and statements released to the press. Copies of issues of the Bulletin and of annual reports of the Board may be obtained from the Publications Services of the Federal Reserve Board, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 (pedestrian entrance is on C Street, N.W.). Subscription or other charges may apply.

[62 FR 61218, Nov. 17, 1997, as amended at 70 FR 7840, Feb. 16, 2005]

§ 271.4 Records available for public inspection and copying.

(a) *Types of records made available.* Unless they were published promptly and made available for sale or without charge, certain records shall be made available for inspection and copying at the Board's Freedom of Information Office pursuant to 5 U.S.C. 552(a)(2).

(b) *Reading room procedures.* (1) Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 (the pedestrian entrance is on C Street, N.W.).

(2) The Committee may determine that certain classes of publicly available filings shall be made available for inspection and copying only at the Federal Reserve Bank where those records are maintained.

(c) *Electronic records.* Information available under this section that was created on or after November 1, 1996, shall also be available on the Board's Web site, found at *http://www.federalreserve.gov.*

(d) *Privacy protection.* The Committee may delete identifying details from any record to prevent a clearly unwarranted invasion of personal privacy.

[62 FR 61218, Nov. 17, 1997, as amended at 70 FR 7840, Feb. 16, 2005]

§ 271.5 Records available to the public on request.

(a) *Types of records made available.* All records of the Committee that are not available under §§ 271.3 and 271.4 shall be made available upon request, pursuant to the procedures in this section and the exceptions in § 271.7.

(b) *Procedures for requesting records.* (1) A request for identifiable records shall reasonably describe the records in a way that enables the Committee's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Committee's operations.

(2) The request shall be submitted in writing to the Secretary of the Committee, Federal Open Market Committee, 20th & C Street, N.W., Washington, D.C. 20551; or sent by facsimile to the Secretary of the Committee, (202) 452–2921. The request shall be clearly marked *FREEDOM OF INFORMATION ACT REQUEST.*

(c) *Contents of request.* The request shall contain the following information:

(1) The name and address of the requester, and the telephone number at which the requester can be reached during normal business hours;

(2) Whether the requested information is intended for commercial use, and whether the requester represents an educational or noncommercial scientific institution, or news media;

(3) A statement agreeing to pay the applicable fees, or a statement identifying any fee limitation desired, or a request for a waiver or reduction of fees that satisfies § 271.9(f).

(d) *Defective requests.* The Committee need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this section. The Committee may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

§ 271.6 Processing requests.

(a) *Receipt of requests.* The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Committee by another agency or by a Federal Reserve Bank, is the date the Secretary of the Committee actually receives the request.

(b) *Priority of responses.* The Committee shall normally process requests in the order they are received. However, in the Secretary's discretion, or upon a court order in a matter to which the Committee is a party, a particular request may be processed out of turn.

(c) *Expedited processing.* Where a person requesting expedited access to records has demonstrated a compelling need for the records, or where the Committee has determined to expedite the response, the Committee shall process the request as soon as practicable.

(1) To demonstrate a compelling need for expedited processing, the requester shall provide a certified statement, a sample of which may be obtained from the Board's Freedom of Information Office. The statement, certified to be true and correct to the best of the requester's knowledge and belief, shall demonstrate that:

(i) The failure to obtain the records on an expedited basis could reasonably

be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) The requester is a representative of the news media, as defined in §271.2, and there is urgency to inform the public concerning actual or alleged Committee activity.

(2) In response to a request for expedited processing, the Secretary of the Committee shall notify a requester of the determination within ten working days of receipt of the request. In exceptional situations, the Secretary of the Committee has the discretion to waive the formality of certification. If the Secretary of the Committee denies a request for expedited processing, the requester may file an appeal pursuant to the procedures set forth in paragraph (i) of this section, and the Committee shall respond to the appeal within ten working days after the appeal was received by the Committee.

(d) *Time limits*. The time for response to requests shall be 20 working days, except:

(1) In the case of expedited treatment under paragraph (c) of this section;

(2) Where the running of such time is suspended for payment of fees pursuant to §271.9(b)(2);

(3) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B). In such circumstances, the time limit may be extended for a period of time not to exceed:

(i) 10 working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or

(ii) Such alternative time period as mutually agreed to by the Secretary of the Committee and the requester when the Secretary of the Committee notifies the requester that the request cannot be processed in the specified time limit.

(e) *Response to request*. In response to a request that satisfies §271.5, an appropriate search shall be conducted of records of the Committee in existence on the date of receipt of the request, and a review made of any responsive information located. The Secretary shall notify the requester of:

(1) The Committee's determination of the request;

(2) The reasons for the determination;

(3) The amount of information withheld;

(4) The right of the requester to appeal to the Committee any denial or partial denial, as specified in paragraph (i) of this section; and

(5) In the case of a denial of a request, the name and title or position of the person responsible for the denial.

(f) *Referral to another agency*. To the extent a request covers documents that were created by, obtained from, or classified by another agency, the Committee may refer the request to that agency for a response and inform the requester promptly of the referral.

(g) *Providing responsive records*. (1) Copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the Board's Freedom of Information Office or makes other acceptable arrangements, or the Committee deems it appropriate to send the documents by another means.

(2) The Committee shall provide a copy of the record in any form or format requested if the record is readily reproducible by the Committee in that form or format, but the Committee need not provide more than one copy of any record to a requester.

(h) *Appeal of denial of request*. Any person denied access to Committee records requested under §271.5 may file a written appeal with the Committee, as follows:

(1) The appeal shall prominently display the phrase *FREEDOM OF INFORMATION ACT APPEAL* on the first page, and shall be addressed to the Secretary of the Committee, Federal Open Market Committee, 20th and C Street, N.W., Washington, D.C. 20551; or sent by facsimile to the Secretary of the Committee, (202) 452–2921.

(2) An initial request for records may not be combined in the same letter with an appeal.

(3) The Committee, or such member of the Committee as is delegated the authority, shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal by the Secretary, and the determination

letter shall notify the appealing party of the right to seek judicial review of such denial.

§ 271.7 Exemptions from disclosure.

(a) *Types of records exempt from disclosure.* Pursuant to 5 U.S.C. 552(b), the following records of the Committee are exempt from disclosure under this part:

(1) *National defense.* Any information that is specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to the Executive Order.

(2) *Internal personnel rules and practices.* Any information related solely to the internal personnel rules and practices of the Board.

(3) *Statutory exemption.* Any information specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), if the statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) *Trade secrets; commercial or financial information.* Any matter that is a trade secret or that constitutes commercial or financial information obtained from a person and that is privileged or confidential.

(5) *Inter- or intra-agency memorandums.* Information contained in inter- or intra-agency memorandums or letters that would not be available by law to a party (other than an agency) in litigation with an agency, including, but not limited to:

(i) Memorandums;

(ii) Reports;

(iii) Other documents prepared by the staffs of the Committee, Board or Federal Reserve Banks; and

(iv) Records of deliberations of the Committee and of discussions at meetings of the Committee or its staff.

(6) *Personnel and medical files.* Any information contained in personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) *Information compiled for law enforcement purposes.* Any records or information compiled for law enforcement purposes, to the extent permitted under 5 U.S.C. 552(b)(7).

(8) *Examination, inspection, operating, or condition reports, and confidential supervisory information.* Any matter that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, including a state financial institution supervisory agency.

(b) *Segregation of nonexempt information.* The Committee shall provide any reasonably segregable portion of a record that is requested after deleting those portions that are exempt under this section.

(c) *Discretionary release.* Except where disclosure is expressly prohibited by statute, regulation, or order, the Committee may authorize the release of records that are exempt from mandatory disclosure whenever the Committee or designated Committee members determines that such disclosure would be in the public interest.

(d) *Delayed release.* Publication in the FEDERAL REGISTER or availability to the public of certain information may be delayed if immediate disclosure would likely:

(1) Interfere with accomplishing the objectives of the Committee in the discharge of its statutory functions;

(2) Interfere with the orderly conduct of the foreign affairs of the United States;

(3) Permit speculators or others to gain unfair profits or other unfair advantages by speculative trading in securities or otherwise;

(4) Result in unnecessary or unwarranted disturbances in the securities markets;

(5) Interfere with the orderly execution of the objectives or policies of other government agencies; or

(6) Impair the ability to negotiate any contract or otherwise harm the commercial or financial interest of the United States, the Committee, the Board, any Federal Reserve Bank, or any department or agency of the United States.

(e) *Prohibition against disclosure.* Except as provided in this part, no officer, employee, or agent of the Committee or any Federal Reserve Bank shall disclose or permit the disclosure of any unpublished information of the Committee to any person (other than Committee officers, employees, or agents properly entitled to such information for the performance of official duties).

§ 271.8 Subpoenas.

(a) *Advice by person served.* If any person, whether or not an officer or employee of the Committee, of the Board of Governors of the Federal Reserve System, or of a Federal Reserve Bank, has information of the Committee that may not be disclosed by reason of § 271.7 and in connection therewith is served with a subpoena, order, or other process requiring the person's personal attendance as a witness or the production of documents or information upon any proceeding, the person should promptly inform the Secretary of the Committee of such service and of all relevant facts, including the documents and information requested and any facts that may be of assistance in determining whether such documents or information should be made available; and the person should take action at the appropriate time to inform the court or tribunal that issued the process, and the attorney for the party at whose instance the process was issued, if known, of the substance of this part.

(b) *Appearance by person served.* Except as disclosure of the relevant information is authorized pursuant to this part, any person who has information of the Committee and is required to respond to a subpoena or other legal process shall attend at the time and place therein mentioned and decline to disclose such information or give any testimony with respect thereto, basing such refusal upon this part. If, notwithstanding, the court or other body orders the disclosure of such information, or the giving of such testimony, the person having such information of the Committee shall continue to decline to disclose such information and shall promptly report the facts to the Committee for such action as the Committee may deem appropriate.

[62 FR 61218, Nov. 17, 1997, as amended at 70 FR 7840, Feb. 16, 2005]

§ 271.9 Fee schedules; waiver of fees.

(a) *Fee schedules.* The fees applicable to a request for records pursuant to §§ 271.4 and 271.5 are set forth in appendix A to this section. These fees cover only the full allowable direct costs of search, duplication, and review. No fees will be charged where the average cost of collecting the fee (calculated at $5.00) exceeds the amount of the fee.

(b) *Payment procedures.* The Secretary may assume that a person requesting records pursuant to § 271.5 will pay the applicable fees, unless the request includes a limitation on fees to be paid or seeks a waiver or reduction of fees pursuant to paragraph (f) of this section.

(1) *Advance notification of fees.* If the estimated charges are likely to exceed $100, the Secretary of the Committee shall notify the requester of the estimated amount, unless the requester has indicated a willingness to pay fees as high as those anticipated. Upon receipt of such notice, the requester may confer with the Secretary to reformulate the request to lower the costs.

(2) *Advance payment.* The Secretary may require advance payment of any fee estimated to exceed $250. The Secretary may also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. The time period for responding to requests under § 271.6(d), and the processing of the request shall be suspended until the Secretary receives the required payment.

(3) *Late charges.* The Secretary may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717 and accrues from the date of the billing.

(c) *Categories of uses.* The fees assessed depend upon the intended use for the records requested. In determining which category is appropriate, the Secretary shall look to the intended use set forth in the request for records. Where a requester's description of the

use is insufficient to make a determination, the Secretary may seek additional clarification before categorizing the request.

(1) *Commercial use.* The fees for search, duplication, and review apply when records are requested for commercial use.

(2) *Educational, research, or media use.* The fees for duplication apply when records are not sought for commercial use, and the requester is a representative of the news media or an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research. The first 100 pages of duplication, however, will be provided free.

(3) *All other uses.* For all other requests, the fees for document search and duplication apply. The first two hours of search time and the first 100 pages of duplication, however, will be provided free.

(d) *Nonproductive search.* Fees for search and review may be charged even if no responsive documents are located or if the request is denied.

(e) *Aggregated requests.* A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Secretary reasonably believes that a requester is separating a request into a series of requests for the purpose of evading the assessment of fees, the Secretary may aggregate any such requests and charge accordingly. It is considered reasonable for the Secretary to presume that multiple requests of this type made within a 30-day period have been made to avoid fees.

(f) *Waiver or reduction of fees.* A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in § 271.6(d), shall not begin until a determination has been made on the request for a waiver or reduction of fees.

(1) *Standards for determining waiver or reduction.* The Secretary shall grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the following factors shall be considered:

(i) Whether the subject of the records concerns the operations or activities of the government;

(ii) Whether disclosure of the information is likely to contribute significantly to public understanding of government operations or activities;

(iii) Whether the requester has the intention and ability to disseminate the information to the public;

(iv) Whether the information is already in the public domain;

(v) Whether the requester has a commercial interest that would be furthered by the disclosure; and, if so,

(vi) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(2) *Contents of request for waiver.* A request for a waiver or reduction of fees shall include:

(i) A clear statement of the requester's interest in the documents;

(ii) The use proposed for the documents and whether the requester will derive income or other benefit for such use;

(iii) A statement of how the public will benefit from such use and from the Committee's release of the documents;

(iv) A description of the method by which the information will be disseminated to the public; and

(v) If specialized use of the information is contemplated, a statement of the requester's qualifications that are relevant to that use.

(3) *Burden of proof.* The burden shall be on the requester to present evidence or information in support of a request for a waiver or reduction of fees.

(4) *Determination by Secretary.* The Secretary shall make a determination

on the request for a waiver or reduction of fees and shall notify the requester accordingly. A denial may be appealed to the Committee in accordance with § 271.6(h).

(g) *Employee requests*. In connection with any request by an employee, former employee, or applicant for employment, for records for use in prosecuting a grievance or complaint of discrimination against the Committee, fees shall be waived where the total charges (including charges for information provided under the Privacy Act of 1974 (5 U.S.C. 552a) are $50 or less; but the Secretary may waive fees in excess of that amount.

(h) *Special services* The Secretary may agree to provide, and set fees to recover the costs of, special services not covered by the Freedom of Information Act, such as certifying records or information and sending records by special methods such as express mail or overnight delivery.

APPENDIX A TO § 271.9—FREEDOM OF INFORMATION FEE SCHEDULE

Duplication:	
Photocopy, per standard page	$.10
Paper copies of microfiche, per frame	.10
Duplicate microfiche, per microfiche	.35
Search and review:	
Clerical/Technical, hourly rate	20.00
Professional/Supervisory, hourly rate	38.00
Manager/Senior Professional, hourly rate	65.00
Computer search and production:	
Computer operator search, hourly rate	32.00
Tapes (cassette), per tape	6.00
Tapes (cartridge), per tape	9.00
Tapes (reel), per tape	18.00
Diskettes (3½″), per diskette	4.00
Diskettes (5¼″), per diskette	5.00
Computer Output (PC), per minute	.10
Computer Output (mainframe)	actual cost

PART 272—RULES OF PROCEDURE

Sec.
272.1 Authority.
272.2 Functions of the Committee.
272.3 Meetings.
272.4 Committee actions.
272.5 Notice and public procedure.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 38 FR 2754, Jan. 30, 1973, unless otherwise noted.

§ 272.1 Authority.

This part is issued by the Federal Open Market Committee (the Committee) pursuant to the requirement of section 552 of title 5 of the United States Code that every agency shall publish in the FEDERAL REGISTER its rules of procedure.

§ 272.2 Functions of the Committee.

The procedures followed by the Committee are designed to facilitate the effective performance of the Committee's statutory functions with respect to the regulation and direction of open market operations conducted by the Federal Reserve banks and with respect to certain direct transactions between the Reserve banks and the United States. In determining the policies to be followed in such operations, the Committee considers information regarding business and credit conditions and domestic and international economic and financial developments, and other pertinent information gathered and submitted by its staff and the staffs of the Board of Governors of the Federal Reserve System (the Board) and the Federal Reserve banks. Against the background of such information, the Committee takes actions from time-to-time to regulate and direct the open market operations of the Reserve banks. Such policy actions ordinarily are taken through the adoption and transmission to the Federal Reserve banks of regulations, authorizations, and directives.

§ 272.3 Meetings.

(a) *Place and frequency*. The Committee meets in Washington, DC, at least four times each year and oftener if deemed necessary. Meetings are held upon the call of the Chairman of the Board or at the request of any three members of the Committee. Notices of calls by the Chairman of the Board to other members are given by the Secretary of the Committee in writing, by telephone, or electronic means. Requests of any three members for the calling of a meeting shall state the time therefor and shall be filed in writing, by telephone, or electronic means with the Secretary who shall forthwith notify all members of the Committee in writing, by telephone, or electronic means. When the Secretary has sent notices to all members of the Committee that a meeting has been requested by three members and of the time therefor, a meeting is deemed to have been called. If, in the judgment of the Chairman, circumstances require that a meeting be called at such short notice that one or more members cannot be present in person, such members may participate in the meeting by telephone conference arrangements or by electronic means.

(b) *Alternates*. Whenever any member of the Committee representing Federal Reserve banks shall find that the member will be unable to attend a meeting of the Committee, the member shall promptly notify the member's alternate and the Secretary of the Committee in writing, by telephone, or electronic means, and upon receipt of such notice such alternate shall advise the Secretary whether the alternate will attend such meeting.

(c) *Quorum*. Seven members constitute a quorum of the Committee for purposes of transacting business except that, if there are fewer than seven members in office, then the number of members in office constitute a quorum. For purposes of this paragraph (c), members of the Committee include alternates acting in the absence of members. Less than a quorum may adjourn a meeting of the Committee from time to time until a quorum is in attendance.

(d) *Attendance at meetings*. Attendance at Committee meetings is restricted to members and alternate members of the Committee, the Presidents of Federal Reserve Banks who are not at the time members or alternates, staff officers of the Committee, the Manager, and such other advisers as the Committee may invite from time to time.

(e) *Meeting agendas*. The Secretary, in consultation with the Chairman, prepares an agenda of matters to be discussed at each meeting and the Secretary transmits the agenda to the members of the Committee within a reasonable time in advance of such meeting. In general, the agendas include reports by the Manager on open market operations since the previous meeting, and ratification by the Committee of such operations; reports by Economists on, and Committee discussion of, the economic and financial situation and outlook; Committee discussion of monetary policy and action with respect thereto; and such other matters as may be considered necessary.

[38 FR 2754, Jan. 30, 1973, as amended at 44 FR 52823, Sept. 11, 1979; 65 FR 6320, Feb. 9, 2000; 68 FR 6061, Feb. 6, 2003; 70 FR 7840, Feb. 16, 2005]

§ 272.4 Committee actions.

(a) *Actions at meetings*. Actions are taken at meetings of the Committee except as described below.

(b) *Actions between meetings*. Special circumstances may make it desirable in the public interest for Committee members to consider an action to modify an outstanding Committee authorization or directive at a time when it is not feasible to call a meeting. Whenever, in the judgment of the Chairman, such circumstances have arisen, the relevant information and recommendations for action are transmitted to the members by the Secretary, and the members communicate their votes to the Secretary. If the action is approved by a majority of the members, advice to that effect is promptly given by the Secretary to the members of the Committee and to the Reserve bank selected to execute transactions for the System Open Market Account. All communications of recommended actions and votes under this paragraph shall be in writing, by telephone, or

electronic means; if the communication is made orally, the Secretary shall cause a written record to be made without delay. An action taken between meetings has the force and effect of an action at a meeting: *Provided, however,* That if a meeting is held before the execution of any operations pursuant to the action, the action is null and void unless it is ratified and confirmed by the Committee at such meeting.

(c) *Delegations of authority.* In special circumstances, the Committee may delegate authority to take an action, subject to such instructions or guidelines as the Committee deems proper. Such delegations of authority may be made to the Chairman; to a subcommittee consisting of the Chairman and the Vice Chairman of the Committee and the Vice Chairman of the Board (or in the absence of the Chairman or of the Vice Chairman of the Board the members of the Board designated by the Chairman as alternates, and in the absence of the Vice Chairman of the Committee the alternate for the Vice Chairman); or to any other member or members of the Committee. An action taken pursuant to such a delegation of authority has the force and effect of an action taken by the Committee.

(d) *Technical changes to Committee rules.* The Secretary of the Committee (or the acting secretary) is authorized to make technical corrections, such as spelling, grammar, construction, and organization (including removal of obsolete provisions and references), to the Committee's rules, regulations, and orders and other records of Committee action but only with the concurrence of the Committee's General Counsel.

(e) *Effective date.* Committee action ordinarily is made effective as of the time it is taken because the nature of the subject matter and the action taken is such that the public interest and the proper discharge of the Committee's responsibilities so require. Occasionally, however, the Committee may specify that an action is to be effective at some different time.

[38 FR 2754, Jan. 30, 1973, as amended at 65 FR 6320, Feb. 9, 2000; 70 FR 7841, Feb. 16, 2005]

§272.5 Notice and public procedure.

There ordinarily is no published notice of proposed action by the Committee or public procedure thereon, as described in section 553 of title 5 of the United States Code, because such notice and procedure are impracticable, unnecessary, or contrary to the public interest.

PART 281—STATEMENTS OF POLICY

§281.1 Policy regarding the Government in the Sunshine Act.

On September 13, 1976, there was enacted into law the Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (''Sunshine Act''), established for the purpose of providing the public with the ''fullest practicable information regarding the decision-making processes of the Federal Government * * * while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''[1] The Sunshine Act applies only to those Federal agencies that are defined in section 552(e) of Title 5 of the United States Code and ''headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency.''[2]

The Federal Open Market Committee (''FOMC'') is a separate and independent statutory body within the Federal Reserve System. In no respect is it an agent or ''subdivision'' of the Board of Governors of the Federal Reserve System (''Board of Governors''). It was originally established by the Banking Act of 1933 and restructured in its present form by the Banking Act of 1935 and subsequent legislation in 1942 (generally see 12 U.S.C. 263(a)). The FOMC's membership is composed of the seven members of the Board of Governors and five representatives of the Federal Reserve Banks who are selected annually in accordance with the procedures set forth in Section 12A of the Federal Reserve Act, 12 U.S.C. 263(a). Members of the Board of Governors serve in an ex officio capacity on the FOMC by reason of their appointment as Members of the Board of Governors, not as a result of an appointment ''to such position'' (the FOMC) by the President. Representatives of the Reserve Banks serve on the FOMC not as a result of an appointment ''to such position'' by the President, but rather by virtue of their positions with the

[1] Government in the Sunshine Act, Pub. L. 94–409, sec. 2, 90 Stat. 1241 (1976).

[2] Government in the Sunshine Act, Pub. L. 94–409, sec. 3(a), 90 Stat. 1241 (1976).

Reserve Banks and their selection pursuant to Section 12A of the Federal Reserve Act. It is clear therefore that the FOMC does not fall within the scope of an ''agency'' or ''subdivision'' as defined in the Sunshine Act and consequently is not subject to the provisions of that Act.

As explained below, the Act would not require the FOMC to hold its meetings in open session even if the FOMC were covered by the Act. However, despite the conclusion reached that the Sunshine Act does not apply to the FOMC, the FOMC has determined that its procedures and timing of public disclosure already are conducted in accordance with the spirit of the Sunshine Act, as that Act would apply to deliberations of the nature engaged in by the FOMC.

In the foregoing regard, the FOMC has noted that while the Act calls generally for open meetings of multi-member Federal agencies, 10 specific exemptions from the open meeting requirement are provided to assure the ability of the Government to carry out its responsibilities. Among the exemptions provided is that which authorizes any agency operating under the Act to conduct closed meetings where the subject of a meeting involves information ''the premature disclosure of which would—in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to lead to significant financial speculation in currencies, securities, or commodities.''[3]

As to meetings closed under such exemption, the Act requires the maintenance of either a transcript, electronic recording or minutes and sets forth specified, detailed requirements as to the contents and timing of disclosure of certain portions or all of such minutes. The Act permits the withholding from the public of the minutes where disclosure would be likely to produce adverse consequences of the nature described in the relevant exemptions.

The FOMC has reviewed the agenda of its monthly meetings for the past three years and has determined that all such meetings could have been closed pursuant to the exemption dealing with finanical speculation or other exemptions set forth in the Sunshine Act. The FOMC has further determined that virtually all of its substantive deliberations could have been preserved pursuant to the Act's minutes requirements and that such minutes could similarly have been protected against premature disclosure under the provisions of the Act.

The FOMC's deliberations are currently reported by means of a document entitled ''Record of Policy Actions'' which is released to the public approximately one month after the meeting to which it relates. The Record of Policy Actions complies with the Act's minutes requirements in that it contains a full and accurate report of all matters of policy discussed and views presented, clearly sets forth all policy actions taken by the FOMC and the reasons therefor, and includes the votes by individual members on each policy action. The timing of release of the Record of Policy Actions is fully consistent with the Act's provisions assuring against premature release of any item of discussion in an agency's minutes that contains information of a sensitive financial nature. In fact, by releasing the comprehensive Record of Policy Actions to the public approximately a month after each meeting, the FOMC exceeds the publication requirements that would be mandated by the letter of the Sunshine Act.

Recognizing the Congressional purpose underlying the enactment of the Sunshine Act, the FOMC has determined to continue its current practice and timing of public disclosures in the conviction that its operations thus conducted are consistent with the intent and spirit of the Sunshine Act.

(12 U.S.C. 263; 5 U.S.C. 552)

[42 FR 13300, Mar. 10, 1977. Redesignated at 70 FR 7841, Feb. 16, 2005]

SUBCHAPTER C—FEDERAL RESERVE SYSTEM LABOR RELATIONS PANEL

PARTS 290–299 [RESERVED]

[3] Government in the Sunshine Act, Pub. L. 94–409, sec. 3(a), 90 Stat. 1242 (1976).