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SUBCHAPTER A—PROCEDURE AND RULES OF PRACTICE

PARTS 300–302—[RESERVED]

PART 303—APPLICATIONS, REQUESTS, SUBMITTALS, DELEGATIONS OF AUTHORITY, AND NOTICES REQUIRED TO BE FILED BY STATUTE OR REGULATION

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AUTHORITY: 12 U.S.C. 378, 1813, 1815, 1816, 1817(j), 1818, 1819 (Seventh and Tenth), 1828, 1831e, 1831o, 1831p–1; 15 U.S.C. 1607.

§ 303.0 Scope and definitions.

(a) *Scope.* This part prescribes:

(1) Where applications, requests, and notices required to be filed by statute or regulation (hereinafter, collectively, applications) should be filed;

(2) The contents of the application when the application is to be made by letter;

(3) The location where forms and instructions may be obtained when the application is to be made on a form. This part also prescribes procedures to be followed by both the FDIC and applicants during the process of consideration of an application; and

(4) Finally, this part sets forth delegations of authority by the FDIC's Board of Directors to the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs, to their associate directors, to the regional directors and deputy regional directors of the Division of Supervision, and to the regional managers of the Division of Compliance and Consumer Affairs to act on certain applications and other matters pursuant to the conditions, where applicable, that limit such delegations.

(b) *Definitions.* For purposes of this part:

(1) *Corporation* or *FDIC.* The terms *Corporation or FDIC* shall mean the Federal Deposit Insurance Corporation.

(2) *Division* or *DOS.* The terms *division or DOS* shall mean the Division of Supervision, or in the event the Division of Supervision is reorganized, such successor division.

(3) *DCA.* The term *DCA* shall mean the Division of Compliance and Consumer Affairs, or in the event the Division of Compliance and Consumer Affairs is reorganized, such successor division.

(4) *Director (DOS).* The term *Director (DOS)* shall mean the Director of the Division of Supervision, or in the event the title of Director of the Division of Supervision becomes obsolete, any official of equivalent or higher authority.

(5) *Director (DCA).* The term *Director (DCA)* shall mean the Director of the Division of Compliance and Consumer Affairs, or in the event the title of Director of the Division of Compliance and Consumer Affairs becomes obsolete, any official of equivalent or higher authority.

(6) *Associate director.* The term *associate director* shall mean any associate director of the Division of Supervision or the Division of Compliance and Consumer Affairs, as appropriate, or in the event the title of associate director becomes obsolete, any official of equivalent authority within the respective divisions.

(7) *Regional director.* The term *regional director* shall mean any regional director of the Division of Supervision, or in the event the title of regional director becomes obsolete, any official of equivalent authority within the Division of Supervision.

(8) *Deputy regional director.* The term *deputy regional director* shall mean any deputy regional director of the Division of Supervision, or in those FDIC regions where there is no deputy regional director, an assistant regional director. In the event the title of deputy regional director or assistant regional director becomes obsolete, the term deputy regional director shall mean any official of equivalent authority within the same FDIC region of the Division of Supervision.

(9) *Regional manager.* The term *regional manager* shall mean any regional manager in the Division of Compliance and Consumer Affairs, or in the event the title of regional manager becomes obsolete, any official of equivalent authority within the Division of Compliance and Consumer Affairs.

(10) *Associate General Counsel for Compliance and Enforcement.* The term *Associate General Counsel for Compliance and Enforcement* shall mean the head of the Compliance and Enforcement Section of the Legal Division of the FDIC, or in the event the title of Associate General Counsel for Compliance and Enforcement becomes obsolete, any official of equivalent authority within the Legal Division. The authority delegated to the Associate General Counsel for Compliance and Enforcement may be exercised by the Deputy General Counsel for Supervision and Legislation or a counsel in the Compliance and Enforcement Section in the Washington, DC office.

(11) *Regional counsel.* The term *regional counsel* shall mean a regional counsel of the Legal Division, or in the event the title of regional counsel becomes obsolete, any official of equivalent authority within the Legal Division. The authority delegated to a regional counsel may be exercised by a deputy regional counsel, a counsel, or any official of equivalent or higher authority in the Compliance and Enforcement Section of the Legal Division.

(12) *Appropriate FDIC region, appropriate FDIC regional office, appropriate regional director, appropriate deputy regional director, appropriate regional manager, appropriate regional counsel.* The terms *appropriate FDIC region, appropriate FDIC regional office, appropriate regional director, appropriate deputy regional director, appropriate regional manager, and appropriate regional counsel* shall refer to the FDIC region, the regional director, the deputy regional director, the regional manager, and the regional counsel, respectively, of the FDIC region in which:

(i) The applicant depository institution, the proposed or newly organized nonmember bank or savings association, the insured branch of a foreign bank, the resulting or assuming depository institution, or the bank in which stock is being acquired, as appropriate, is or will be located; or

(ii) A depository institution—

(A) Which is the subject of an administrative action; or

(B) With which an individual who is the subject of an administrative action is associated, is located.

(13) *Act.* The term the Act shall mean the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(14) *Institution-affiliated party.* The term *institution-affiliated party* shall have the same meaning as provided in section 3(u) of the Act (12 U.S.C. 1813(u)).

(15) *Notification to primary regulator.* The term *notification to primary regulator* shall mean a notice required under section 8(a)(2)(A) of the Act (12 U.S.C. 1818(a)(2)(A)).

(16) *Section 8(a) order.* The term *section 8(a) order* shall mean an order terminating the insured status of a depository institution under section 8(a) of the Act (12 U.S.C. 1818(a)).

(17) *Notice of charges.* The term *notice of charges* shall mean a notice of charges and of hearing setting forth the allegations of unsafe or unsound

practices and/or violations and fixing the time and place of the hearing issued under section 8(b) of the Act (12 U.S.C. 1818(b)).

(18) *Section 8(b) order and cease-and-desist order.* The terms *section 8(b) order and cease-and-desist order* shall mean a final order to cease and desist issued under section 8(b) of the Act (12 U.S.C. 1818(b)).

(19) *Section 8(c) order and temporary cease-and-desist order.* The terms *section 8(c) order and temporary cease-and-desist order* shall mean a temporary order to cease and desist issued under section 8(c) of the Act (12 U.S.C. 1818(c)).

(20) *Section 8(e) order.* The term *section 8(e) order* shall mean a final order of removal or prohibition issued under section 8(e) of the Act (12 U.S.C. 1818(e)).

(21) *Section 8(e)(3) order and temporary order of suspension.* The terms *section 8(e)(3) order and temporary order of suspension* shall mean a temporary order of suspension or prohibition issued under section 8(e)(3) of the Act (12 U.S.C. 1818(e)(3)).

(22) *Section 8(g) order.* The term *section 8(g) order* shall mean an order of suspension or prohibition issued under section 8(g) of the Act (12 U.S.C. 1818(g)).

(23) *Remote service facility.* The term *remote service facility* shall mean an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received, checks paid, or money lent.

(24) *Notice of assessment of civil money penalties.* The term *notice of assessment of civil money penalties* shall mean a notice of assessment of civil penalties, findings of fact and conclusions of law, and order to pay issued pursuant to sections 7(a)(1), 7(j)(15), 8(i) or 18(j) of the Act (12 U.S.C. 1817(a)(1), 1817(j)(15), 1818(i), or 1828(j)), section 106(b) of the Bank Holding Company Act (12 U.S.C. 1972), section 910(d) of the International Lending Supervision Act of 1983 (12 U.S.C. 3909), or any other provision of law providing for the assessment of civil money penalties by the FDIC.

(25) *Amended order to pay.* The term *amended order to pay* shall mean an order to forfeit and pay civil money penalties, the amount of which has been changed from that assessed in the original notice of assessment of civil money penalties.

(26) *Book capital.* The term *book capital* shall mean total equity capital which is comprised of perpetual preferred stock, common stock, surplus, undivided profits and capital reserves, as those items are defined in the instructions of the Federal Financial Institutions Examination Council (FFIEC) for the preparation of Consolidated Reports of Condition and Income for insured banks.

(27) *Tier 1 capital.* The term *Tier 1 capital* shall have the same meaning as provided in § 325.2(m) of this chapter (12 CFR 325.2(m)).

(28) *Total assets.* The term *total assets* shall have the same meaning as provided in § 325.2(n) of this chapter (12 CFR 325.2(n)).

(29) *Adjusted Part 325 total assets.* The term *adjusted Part 325 total assets* shall mean adjusted 12 CFR part 325 total assets as calculated and reflected in the FDIC's Reports of Examination.

(30) *Protest.* The term *protest* shall include any comment from the public which raises a negative issue relative to the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*), whether or not it is labeled a protest and whether or not a hearing is requested; however, the term protest shall not include any such comment which the appropriate regional manager determines to be frivolous, or to have been filed for competitive reasons by a financial institution, or to have been filed primarily as a means of delaying action on the application, or any comment which raises negative Community Reinvestment Act issues between the commenter and the applicant that have been resolved.

(31) *Standard conditions.* The term *standard conditions* refers to conditions that any delegate may include as a matter of routine in an order approving an application, whether or not the applicant has agreed to their inclusion. The following conditions, or variations thereof, are standard conditions:

(i) That the applicant has obtained all necessary and final approvals from the appropriate state authority or other applicable authority;

(ii) That if the transaction does not take effect within a specified time

limit, or unless, in the meantime, a request for an extension of time has been approved, the consent granted shall expire at the end of the said time period;

(iii) That until the conditional commitment of the FDIC becomes effective, the FDIC retains the right to alter, suspend or withdraw its commitment should any interim development be deemed to warrant such action; and

(iv) In the case of a merger transaction (as defined in § 303.7(b)(1)), including a phantom merger or reorganization, that the proposed transaction not be consummated before the thirtieth calendar day after the date of the order approving the merger.

(c) *Authority delegated to regional manager.* For purposes of this part, and where confirmed in writing, any authority delegated to the regional manager may also be exercised by his or her principal assistant.

(d) *Construction.* Any singular term includes the plural, and the plural includes the singular, if such use would be appropriate. Any use of the masculine, feminine, or neuter gender shall encompass all three, if such use would be appropriate.

[59 FR 52660, Oct. 19, 1994, as amended at 60 FR 31384, June 15, 1995]

§ 303.1 Application by nonmember bank, state savings association, and Federal savings association for deposit insurance.

Application for deposit insurance by an existing or proposed nonmember bank,[1] state savings association or Federal savings association should be filed with the appropriate regional director. The relevant application forms and instructions may be obtained from the appropriate FDIC regional office.

[54 FR 53556, Dec. 29, 1989]

§ 303.2 Applications by insured state nonmember bank to establish a branch, move its main office or relocate a branch.

(a) Application by an insured state nonmember bank (except a District bank) to establish and operate a new branch[2], to move its main office, or relocate a branch should be filed with the appropriate regional director. For purposes of this requirement, a branch relocation is a move within the same immediate neighborhood that does not substantially affect the nature of the business of the branch or the customers of the branch. Under this paragraph, situations where an insured state nonmember bank closes a branch in one location and opens a branch in another location outside the immediate neighborhood of the closed branch are considered the establishment of a new branch and the closing of an existing branch. Applications filed under this paragraph shall indicate whether they are to establish and operate a new branch, move a main office, or relocate a branch office. The application shall be mailed or delivered to the regional director on the date on which the notice required in § 303.6(f)(1) is published or not more than 30 days subsequent to the first required publication of notice. The application shall be in letter form and shall contain the following information:

(1) The exact location of the proposed site, including street address (unless one has not been assigned to the location);

(2) Details concerning any involvement in the proposal by an insider (a director, an officer, or a shareholder who directly or indirectly controls 5 or more percent of any class of the applicant's outstanding voting stock, or the associates and interests of any such person) of the bank, including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(3) The impact of the proposal on the human environment, specifically, information on compliance with local zoning laws and regulations and the effect on traffic patterns;

(4) A statement as to whether or not the site is included in or is eligible for inclusion in the National Register of Historic Places, including evidence

[1] A nonmember bank is a bank which is not a member of the Federal Reserve System.

[2] The term branch includes any domestic branch or foreign branch as those terms are defined in section 3(o) of the Act, as amended (12 U.S.C. 1813(o)).

that clearance has been obtained from the State Historic Preservation Officer;

(5) Comments on any changes in services to be offered, the community to be served, or any other effect the proposal may have on the applicant's compliance with the Community Reinvestment Act; and

(6) The name and address of and the date of publication in the newspaper in which notice required by §303.6(f)(1) is published.

In cases in which additional information is necessary for evaluation of the application, the applicant may be required to furnish specific information on an individual basis. Procedures regarding applications to establish or acquire a branch pursuant to section 38 of the Act, 12 U.S.C. 1831o, are set forth at §303.5(e) of this part.

(b) The appropriate regional director may delay processing, including extending the comment period, for good cause.

(c) *Special procedures for remote service facilities.* (1) For purposes of this section, *establishing* means owning or leasing a remote service facility either individually or jointly.

(2) An insured state nonmember bank or an insured state-licensed branch of a foreign bank whose most recent Community Reinvestment Act rating is Satisfactory or better and who desires to establish and operate or relocate a remote service facility (RSF) shall file a letter with the appropriate regional director. The letter shall contain the exact location of the proposed or relocated RSF, including street address (unless one has not been assigned to the location), and either a representation that the site of the proposed or relocated RSF is not included in or eligible for inclusion in the National Register of Historic Places or written verification that in the opinion of the appropriate state historic preservation officer the establishment or relocation of the RSF will have no adverse effect on a historic site. Unless the institution is notified otherwise by the FDIC within seven days of receipt of the letter, the institution may establish and operate or relocate the RSF. In the event that the institution cannot represent in good faith that the site of the proposed or relocated RSF is not included in or eligible for inclusion in the National Register of Historic Places or evidence that written verification has been obtained from the appropriate state historic preservation officer, the institution shall proceed pursuant to paragraph (c)(3) of this section.

(3) An insured state nonmember bank or an insured state-licensed branch of a foreign bank whose most recent Community Reinvestment Act rating is not Satisfactory or better and who desires to establish and operate or relocate an RSF shall file the letter described in paragraph (c)(2) of this section and comply with the notice provisions of §303.6(f). Unless the institution is notified otherwise by the FDIC within 15 days after completion of processing of the letter, the institution may establish and operate or relocate the RSF; provided however, that in the event that a protest is filed with the FDIC or other objection is taken prior to completion of processing the letter, the institution shall not establish and operate or relocate the RSF until the FDIC provides written notice of its approval.

[54 FR 53556, Dec. 29, 1989, as amended at 58 FR 8216, Feb. 12, 1993; 59 FR 4250, Jan. 31, 1994; 59 FR 43282, Aug. 23, 1994]

§303.3 Application for conversion, merger, consolidation, assumption and sale of asset transactions.

(a) *Merger, consolidation, asset acquisition or assumption transaction between insured depository institutions.* Application by an insured depository institution for the consent of the Corporation to merge or consolidate with, acquire the assets of, or assume the liability to pay any deposits made in, another insured depository institution—when the resulting or assuming depository institution is to be an insured state nonmember bank (except a District bank or a savings bank supervised by the Director of the Office of Thrift Supervision), together with copies of all agreements or proposed agreements relating thereto, including the charter or articles of incorporation of the resulting or assuming depository institution, should be filed with the appropriate regional director. Procedures regarding applications to acquire an interest in

any company or insured depository institution pursuant to section 38 of the Act, 12 U.S.C. 1831o, are set forth at § 303.5(e) of this part.

(b) *Merger of Insured depository institution with noninsured bank or institution.* Application by an insured depository institution for the consent of the Corporation to merge or consolidate with a noninsured bank or institution, or to convert into a noninsured institution, or to assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution, or to transfer assets to any noninsured bank or institution in consideration of the assumption of liability for any portion of the deposits made in such insured depository institution, together with copies of all agreements or proposed agreements relating thereto, should be filed with the appropriate regional director.

(c) *Conversion with diminution of capital or surplus.* Application for the consent of the Corporation to convert into an insured state nonmember bank (except a District bank), when the conversion will result in the converted bank's having less capital stock or surplus than the converted bank at the time of the shareholders' meeting approving such conversion, together with copies of the charter and/or articles of association of the converted bank, should be filed with the appropriate regional director.

(d) *Applications for approval of transactions under section 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)).* Application by an insured state nonmember bank for consent of the Corporation to enter into a transaction under section 5(d)(3) of the Federal Deposit Insurance Act shall be made by submitting a letter accompanying the merger application certifying:

(1) That the application for approval is for a transaction under section 5(d)(3), and

(2) That the transaction will not result in the transfer of any insured depository institution's Federal deposit insurance from one federal deposit insurance fund to the other federal deposit insurance fund.

(e) The appropriate application forms and instructions, as well as instructions concerning notice to depositors, may be obtained upon request from the office of said regional director.

[54 FR 53556, Dec. 29, 1989, as amended at 57 FR 5815, Feb. 18, 1992; 58 FR 8216, Feb. 12, 1993]

§ 303.4 Change in bank control.

(a) *Acquisition of control.*[3] Under the Change in Bank Control Act of 1978, acquisitions by a person[4] or persons acting in concert with the power to vote 25 percent or more of a class of voting securities of an insured depository institution, unless exempted, require prior notice to the Corporation. In addition, a purchase, assignment, transfer, pledge, or other disposition of voting stock through which any person will acquire ownership, control, or the power to vote ten percent or more of a class of voting securities of an insured depository institution will be presumed to be an acquisition by such person of the power to direct that institution's management or policies if:

(1) The institution has issued any class of securities subject to the registration requirements of section 12 of the Securities Exchange Act of 1944 (15 U.S.C. 78*l*); or

(2) Immediately after the transaction, no other person will own a greater proportion of that class of voting securities.

Other transactions resulting in a person's control of less than 25 percent of a class of voting shares of an insured depository institution would not result in control for purposes of the Act. An acquiring person may request an opportunity to contest any presumption established by this paragraph (a) of this section with respect to a proposed transaction. The Corporation will afford the person an opportunity to

[3] *Control* is defined in section 7(j)(8)(B) of the Act as ''*the power, directly or indirectly, to direct the management or policies of an insured bank or to vote over 25 percent or more of any class of voting securities of an insured bank.*'' 12 U.S.C. 1817(j)(8)(B).

[4] *Person* is defined in section 7(j)(8)(A) of the Act as ''*an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein.*'' 12 U.S.C. 1817(j)(8)(A).

present views in writing, or, where appropriate, orally before its designated representatives either at informal conference discussions or at informal presentations of evidence.

(b) *Notices.* (1) Notice of a proposed acquisition of control should be filed with the regional director of the FDIC region in which the depository institution in which stock is being acquired is located. The FDIC will not accept a notice unless the information provided is responsive to every item specified in paragraph 6 of the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(6)) and every item prescribed in the appropriate FDIC forms. With respect to personal financial statements required by paragraph 6(b) of the Change in Bank Control Act of 1978, an acquiring person may include a current statement of assets and liabilities, as of a date not more than ninety days prior to the date the notice is filed, a brief income summary, and a statement of material changes since the date of the statement. The appropriate regional director, the Director (DOS), or the Board of Directors may require additional information with respect to personal financial statements.

(2)(i) Except as otherwise provided in paragraph (b)(2)(ii) or (b)(2)(iii) of this section, within ten days after receiving confirmation that the appropriate FDIC regional office has accepted the notice, the acquiring person(s) shall publish an announcement of such acceptance in the business section of a newspaper having general circulation in the community in which the home office of the depository institution whose stock is sought to be acquired is located. Promptly thereafter, the acquiring person(s) shall send a copy of the newspaper announcement and the publisher's affidavit of publication to the regional director of the FDIC region in which the subject depository institution is located. The newspaper announcement shall contain the name(s) of the proposed acquirer(s), the name of the depository institution whose stock is sought to be acquired, and the date of acceptance by the FDIC of the notice of acquisition of control. The announcement shall also state that any person wishing to comment on the proposed change in control may do so by submitting written comments to the regional director of the FDIC at (give address of the regional office) within twenty days following the required newspaper publication or, if the FDIC has shortened the public comment period pursuant to paragraph (b)(3) of this section, within such shorter period.

(ii) In a community in which there is no daily or weekly community newspaper, the acquiring person(s) may satisfy the publication requirement contained in paragraph (b)(2)(i) of this section by publishing the required newspaper announcement in either a county-wide newspaper (in the county in which the bank's home office is located) or, if there is no county-wide newspaper, in a state-wide newspaper.

(iii) In the case of a notice filed in contemplation of a public tender offer subject to the requirements of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78n) and the FDIC's regulations governing tender offers (12 CFR 335.501 through 335.530), the acquiring person(s) shall publish the required newspaper announcement not later than the earliest of:

(A) The commencement of the tender offer under § 335.502 of the FDIC's regulations (12 CFR 335.502);

(B) Other public announcement of the tender offer; or

(C) Thirty-four days after the FDIC's acceptance of the notice of acquisition of control.

(3)(i) In acting upon a proposed change in control, the FDIC shall consider all public comments received within twenty days following the required newspaper publication. At the FDIC's option, comments received after this twenty-day period may be, but need not be, considered.

(ii) If the FDIC determines in writing that the newspaper publication or comment solicitation requirements of this paragraph would seriously threaten the safety or soundness of the depository institution to be acquired, including situations where the FDIC must act immediately in order to prevent the probable failure of the bank to be acquired, then the FDIC may:

(A) Waive the publication requirement;

(B) Waive the public comment solicitation requirement; or

(C) Act on the proposed change in control prior to the expiration of the public comment period.

(iii) In other circumstances, for good cause, the FDIC may shorten the public comment period to a period of not less than ten days. Such good cause will exist only if the FDIC determines that circumstances beyond the control of the acquiring person or persons warrant a shorter period.

(4) A notice of acquisition of control that is filed in contemplation of a public tender offer subject to sections 13(d) and 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78n) and the FDIC's regulations governing tender offers (12 CFR 335.501 through 335.530) may be given confidential treatment for up to thirty-four days after the notice is accepted if:

(i) The filing party requests confidential treatment under this rule and represents that a public announcement of the tender offer and the filing of appropriate forms with the FDIC will occur within thirty-four days from the acceptance of the notice; and

(ii) The FDIC determines, in its discretion, that it is in the public interest to grant confidential treatment. In its discretion, the FDIC may grant confidential treatment under other circumstances when consistent with the purposes of the Change in Bank Control Act of 1978.

(5) Nothing in this regulation shall affect any obligation which the acquiring person(s) may have to comply with the Federal securities laws or any other laws.

(6)(i) Whenever a notice of a proposed acquisition of control is not filed in accordance with the Change in Bank Control Act of 1978 and these regulations, the acquiring person(s) shall, within ten days of being so directed by the FDIC, publish an announcement of the acquisition of control in the business section of a newspaper having general circulation in the community in which the home office of the depository institution involved is located. In a community in which there is no daily or weekly community newspaper, the required newspaper announcement may be published in a county-wide newspaper (in the county in which the depository institution's home office is located) or, if there is no county-wide newspaper, in a statewide newspaper.

(ii) The newspaper announcement shall contain the name(s) of the acquire(s), the name of the depository institution involved, and the date of the acquisition of the stock. The announcement shall also contain a statement indicating that the FDIC is currently reviewing the acquisition of control. The announcement shall also state that any person wishing to comment on the change in control may do so by submitting written comments to the regional director of the FDIC at (give address of the regional office) within twenty days following the required newspaper publication.

(c) *Exempt transactions.* The following transactions are not subject to the prior notice requirements of the Change in Bank Control Act of 1978:

(1) The acquisition of additional shares of an insured depository institution by a person who continuously since March 9, 1979, held power to vote 25 percent or more of the voting shares of that institution, or by a person who has acquired and maintained control of that institution after complying with the procedures of the Change in Bank Control Act;

(2) The acquisition of additional shares of an insured depository institution by a person who under paragraph (a) of this section would be presumed to have controlled that institution continuously since March 9, 1979, if:

(i) The transaction will not result in that person's direct or indirect ownership or power to vote 25 percent or more of any class of voting securities of the institution; or

(ii) In other cases, the Corporation determines that the person has controlled the institution since March 9, 1979;

(3) The acquisition of shares in satisfaction of a debt previously contracted in good faith or through testate or intestate succession or bona fide gift; *Provided,* The acquirer advises the appropriate regional director within thirty days after the acquisition and provides such of the information specified in paragraph 6 of the Change in Bank

Control Act as the regional director requests;

(4) A transaction subject to approval under section 3 of the Bank Holding Company Act, section 18 of the Act or section 10 of the Home Owners' Loan Act;

(5) A transaction described in sections 2(a)(5) or (3)(a)(5)(A) or (B) of the Bank Holding Company Act, (12 U.S.C. 1841(a)(5) or 1842 (a)(5)) by a person there described;

(6) A customary one-time proxy solicitation and receipt of pro-rata stock dividends; and

(7) The acquisition of shares in foreign banks which have an insured branch or branches in the United States; *Provided, however,* That this exemption does not extend to the reports and information required under sections 7(j)(9), (10), and (12) of the Act.

[54 FR 53557, Dec. 29, 1989, as amended at 59 FR 52662, Oct. 19, 1994]

§303.5 Applications concerning insurance fund conversions, prompt corrective action, and other applications.

(a) *Conversion involving transfer of deposits between the Savings Association Insurance Fund (SAIF*) and the Bank Insurance Fund (*BIF*). Application by any depository institutions to participate in a conversion transaction involving the transfer of deposits from the SAIF Fund to the BIF Fund or *vice versa* should be filed with the appropriate regional director. The application shall be in letter form, signed by representatives of each institution participating in the transaction, and shall contain the following information:

(1) A description of the transaction;

(2) A statement of condition of each institution as of the date of application;

(3) A statement of condition of each institution as of May 1, 1989, with a notation as to the amount of net interest credited to total deposits during the period beginning May 1, 1989, and ending on the expected date of transfer;

(4) The amount of deposits involved in the conversion transaction;

(5) A pro forma balance sheet and income statement for each institution upon consummation of the transaction;

(6) A listing of any other conversion in which either institution has participated since August 9, 1989, or any other conversion transaction in process at the time of filing; and

(7) Any other information that the regional director may from time to time require.

(b) Except as otherwise provided by rule or regulation, all applications, requests, and submittals for which no form of application has been prescribed by the Corporation should:

(1) Be in writing;

(2) (i) Be signed by the president, cashier, or managing officer of the depository institution in the case of:

(A) An application by a depository institution whose insured status has been terminated under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) for permission to continue or resume its status as an insured depository institution; or

(B) An application made by an insured depository institution under part 328 of this title; or

(ii) Be signed by the applicant or a duly authorized agent in all other cases;

(3) Contain a statement of the applicant's interest therein, a complete and concise statement of the action requested, and the reasons and facts relied upon as the basis for such requested action; and

(4) (i) Be addressed to the appropriate regional director in the case of an application, request, or notice of acquisition of control from or relating to a particular bank or institution; or

(ii) The Executive Secretary of the Corporation at the Corporation's Washington, DC headquarters in all other cases.

The applicant shall furnish such other pertinent information as may be required by the Corporation. Forms to be executed in conjunction with an application for consent to exercise trust powers may be obtained from the appropriate FDIC regional office.

(c) In addition to the foregoing, an application by a depository institution whose insured status has been terminated under section 8 of the Act for permission to continue or resume its status as an insured depository institution should:

(1) Be accompanied by a certified copy of the resolution of its board of directors; and

(2) Contain a statement that the depository institution's insured status has been terminated (including the date thereof and the basis therefor) and that the insurance of its deposits has not ceased.

(d) Applications under § 347.4 of this chapter to acquire or hold stock or other evidence of ownership in a foreign bank or other financial entity shall be submitted to the appropriate regional director in letter form and, unless otherwise directed by the Corporation, shall contain full information concerning the foreign bank or other financial entity including (unless previously furnished):

(1) The cost, number, class of shares to be acquired, and the proposed carrying value of such shares on the books of the insured state nonmember bank;

(2) A recent balance sheet and income statement of the foreign bank or other financial entity;

(3) A brief description of the foreign bank's or other financial entity's business (including full information concerning any direct or indirect business transacted in the United States);

(4) Lists of directors and principal officers (with address and principal business affiliation of each) and of all shareholders known to the issuing bank holding 10 percent or more of any class of the foreign bank's or other financial entity's stock or other evidence of ownership, and the amount held by each; and

(5) Information concerning the rights and privileges of the various classes of shares outstanding.

(e) *Applications pursuant to section 38 of the Act and subpart B of part 325 of the FDIC's regulations (prompt corrective action).* An application by any insured depository institution pursuant to section 38 of the Act, 12 U.S.C. 1831o, and subpart B of part 325 of the FDIC's regulations, 12 CFR part 325, should be filed with the DOS regional director of the FDIC region in which the insured depository institution is located. The application shall be in letter form, except as otherwise provided in paragraphs (e)(1) through (5) of this section. Such letter shall be signed by the president, senior officer or a duly authorized agent of the insured depository institution and be accompanied by a certified copy of a resolution adopted by the institution's board of directors or trustees authorizing the application. Each application shall contain the information specified in paragraphs (e)(1) through (5) of this section and any other information requested by the Corporation.

(1) *Capital distributions.* An application to repurchase, redeem, retire or otherwise acquire shares or ownership interests of the insured depository institution shall describe the proposal, the shares or obligations which are the subject thereof, and the additional shares or obligations of the institution which will be issued in at least an amount equivalent to the distribution. The application shall also explain how the proposal will reduce the institution's financial obligations or otherwise improve its financial condition. Where the proposed action also requires an application pursuant to section 18(i) of the Act (12 U.S.C. 1828 (i)), such application should be filed concurrently with or made a part of the application pursuant to section 38 of the Act.

(2) *Acquisitions, branching, and new lines of business.* Applications shall describe the proposal, state the date institution's capital restoration plan was accepted by its primary Federal regulator, describe the institution's status toward implementing the plan, and explain how the proposed action is consistent with and will further the achievement of the plan or otherwise further the purposes of section 38 of the FDI Act. Where the FDIC is not the applicant's primary Federal regulator, the application should also state whether approval has been requested from the applicant's primary Federal regulator, the date of such request and the disposition of the request, if any. Where the proposed action also requires applications pursuant to section 18 (c) or (d) of the FDI Act (12 U.S.C. 1828 (c) or (d) of the FDI Act (12 U.S.C. 1828 (c) or (d)), such applications should be filed concurrently with, or made a part of, the application filed pursuant to section 38 of the Act.

(3) *Bonuses and increased compensation for senior executive officers.* Applications shall list each proposed bonus or increase in compensation, and for the latter shall identify compensation for each of the twelve calendar months preceding the calendar month in which the institution became undercapitalized. Applications shall also state the date the institution's capital restoration plan was accepted by the FDIC, and describe any progress made in implementing the plan.

(4) *Payment of principal or interest on subordinated debt.* Applications shall describe the proposed payment and provide an explanation of action taken under section 38(h)(3)(A)(ii) of the Act. The application shall also explain how such payments would further the purposes of section 38 of the Act. Existing approvals pursuant to requests filed under 18(i)(1) shall not be deemed to be the permission needed pursuant to section 38.

(5) *Restricted activities of Critically Undercapitalized Institutions.* Applications to engage in any of the following activities shall describe the proposed activity and explain how the activity would further the purposes of section 38 of the Act:

(i) Enter into any material transaction other than in the usual course of business including any action with respect to which the institution is required to provide notice to the appropriate Federal banking agency;

(ii) Extend credit for any highly leverage transaction;

(iii) Amend the institution's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;

(iv) Make any material change in accounting methods;

(v) Engage in any covered transaction (as defined in section 23A(b) of the Federal Reserve Act (12 U.S.C. 371A(b))); or

(vi) Pay excessive compensation of bonuses.

[54 FR 53558, Dec. 29, 1989, as amended at 58 FR 8217, Feb. 12, 1993; 59 FR 52662, Oct. 19, 1994]

§ 303.6 Application procedures.

(a) *Scope of section.* Paragraphs (f) through (n) of this section apply to:

(1) Applications for deposit insurance by proposed new depository institutions or operating non-insured institutions;

(2) Applications by insured state nonmember banks to establish branches, including applications to establish remote service facilities by banks whose most recent Community Reinvestment Act rating is not Satisfactory or better or who cannot represent compliance with the National Historic Preservation Act;

(3) Applications by insured state nonmember banks to move their main office or relocate their branch offices, including applications to relocate remote service facilities by banks whose most recent Community Reinvestment Act rating is not Satisfactory or better or who cannot represent compliance with the National Historic Preservation Act;

(4) Applications to merge or to consolidate with, acquire the assets of, or assume the liability to pay any deposits made in, a bank or institution, when the resulting or assuming depository institution is to be an insured state nonmember bank, and all other applications to merge or to consolidate with, or to assume liabilities, which require the Corporation's prior approval under the Bank Merger Act (12 U.S.C. 1828(c));[6] and

(5) Any other applications, requests or submittals which the Board of Directors of the FDIC in its sole discretion deems appropriate.

In the case of applications, requests, or submittals which come within § 303.6(a)(5), the applicant will be notified at the time its application is accepted for filing that the procedures set forth in this section shall be followed in connection therewith.

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[5] [Reserved]

[6] Except as otherwise provided in paragraph (f)(1) of this section, the provisions of this § 303.6 shall not be applicable to any proposed merger or assumption transaction which the Board of Directors of the Corporation determines must be acted upon immediately to prevent the probable default of one of the institutions involved or must be handled with expeditious action due to an existing emergency condition, as permitted by the Bank Merger Act (12 U.S.C. 1828(C)(6)).

(b) *Investigations and examinations.* With respect to all applications, requests, or submittals, the Board of Directors, or the Director (DOS) or the Director (DCA), or their associate directors, or the appropriate regional director, or the appropriate deputy regional director, or the appropriate regional manager acting under delegated authority may require any investigation or examination, or both, to be performed as deemed appropriate. Upon receipt of the report of any investigation or examination and any recommendations based on the report, the Board of Directors, or either director, or their associate directors, or the regional director, or the deputy regional director, or the regional manager acting within the scope of delegated authority will take any action determined necessary or appropriate under the circumstances.

(c) *Opportunity to present views.* With respect to any application, the Corporation may afford the applicant or other properly interested persons, including government agencies, an opportunity to present views orally or in writing before or to its designated representative or representatives, either at informal conference discussions or at informal presentations of evidence.

(d) *Notice of disposition of applications.* Prompt notice will be given of the grant or denial, in whole or in part, of any written application, petition, or other request of any interested person made in connection with any agency proceeding. In the case of a denial of an application by a federal savings association for deposit insurance, such notice will be sent to the Director of the Office of Thrift Supervision, and will be accompanied by a written statement giving specific reasons for the Corporation's determination with reference to the factors described in paragraphs (1), (2), (3), (4) and (5) of section 6 of the Act (12 U.S.C. 1816). In the case of any other denial, except in affirming a prior denial, or where the same is self-explanatory, such notice will be accompanied by a simple statement of the reasons therefor.

(e) *Opportunity to petition for reconsideration of a denied application, petition, or other request.* (1) Within 15 days of its receipt of notice that its application, petition, or request has been denied, any applicant may petition the FDIC for reconsideration of such application, petition, or request (except an application, petition or request already previously denied upon reconsideration). The petition must be in writing and should:

(i) Specify reasons why the FDIC should reconsider its action

(ii) Set forth relevant, substantive information that for good cause was not previously set forth in the application, petition, or request to be reconsidered; and

(iii) A petition or request relating to a safety and soundness matter should be filed with the appropriate regional director. A petition or request relating to compliance with consumer protection, fair lending, community reinvestment or civil rights laws should be filed with the appropriate regional manager. If a particular insured depository institution or insured branch of a foreign bank was not the subject of the application, petition, or request on which reconsideration is sought, the petition should be filed with the Executive Secretary of the FDIC at the FDIC's Washington, DC office.

(2) (i) The Director (DOS) or the Director (DCA) or, where confirmed in writing by the appropriate Director, an associate director, or the appropriate regional director or deputy regional director, or the appropriate regional manager, or, in the case of a petition for reconsideration filed with the Executive Secretary, the General Counsel or his or her designee, shall determine whether the petition for reconsideration satisfies paragraphs (e)(1)(i) and (ii) of this section and shall promptly notify the petitioner of such determination.

(ii) If, pursuant to paragraph (e)(2)(i) of this section, a petition for reconsideration is determined not to satisfy paragraphs (e)(1)(i) and (ii) of this section, an applicant may appeal such decision to the appropriate Director, and where confirmed in writing by that Director, to an associate director, or, in the case of a petition for reconsideration filed with the Executive Secretary, to the Chairperson of the FDIC or his or her designee. An applicant may not submit additional information

or evidence with the appeal and the determination by the appropriate Director or associate director, or the Chairperson of the FDIC or his or her designee whether the petition satisfies paragraphs (e)(1)(i) and (ii) of this section is final, and not appealable to the Board of Directors.

(iii) If a petition for reconsideration is determined to satisfy paragraphs (e)(1)(i) and (ii) of this section, then the previously denied application, petition, or request will be reconsidered:

(A) By the Board of Directors if originally denied by the Board of Directors; or

(B) By the appropriate director, or where confirmed in writing by the director, by an associate director, if originally denied by the director, associate director, regional director, deputy regional director, or regional manager.

(iv) Decisions by either director or their associate directors on petitions for reconsideration are final and not appealable to the Board of Directors.

(f) *Notice of filing of application*—(1) *Notice by publication.* (i) In the case of applications in connection with a *merger transaction* (as defined by the Bank Merger Act, 12 U.S.C. 1828(c)(3)), unless the Corporation determines it must act immediately in order to prevent the probable failure of one of the depository institutions involved, the applicant must publish notice of the proposed transaction on at least three occasions at approximately two week intervals in a newspaper of general circulation in the community or communities where the main offices of the banks or institutions involved are located, or if there is no such newspaper in the community, then in the newspaper of general circulation published nearest thereto. The last publication of the notice shall appear on the 30th day or the newspaper's publication date closest to 30 days after the first publication. The public shall have a minimum of 30 days from the date of first publication to comment on the application. Where the Corporation determines that an emergency exists which requires expeditious action, then notice shall be published twice during a 10 day period, first, as soon as possible after the Corporation notifies the applicant that the merger will be processed as an emergency requiring expeditious action and, second, on the 10th day or the newspaper's publication date closest to 10 days after the date of first publication. The public shall have a minimum of 10 days from the date of first publication to comment on the application. The published notice shall include the name and main office location of all banks or institutions involved in the transactions and the subject matter of the application. If it is contemplated that the continuing bank will operate the offices of the other depository institution(s) as branches, the following statement shall be added to the notice:

> It is contemplated that all of the offices of the above named institutions will continue to be operated (with the exception of [identity and location of each office which will not be operated]).

(ii) In the case of all other applications described in paragraph (a) of this section, on the date the deposit insurance application form or the letter application required in § 303.2 is mailed or delivered to the regional director or not more than 30 days prior to that date, the applicant shall publish notice or begin publication of notice if more than one notice is required, of the proposed transaction. *Provided however,* That no publication shall be required in connection with the granting of insurance to a new depository institution established pursuant to the resolution of a failed institution situation. Publication of notice shall be made at least once each week on the same day for two consecutive weeks for applications to move a main office or relocate a remote service facility and once for other applications described in paragraph (a) of this section and shall be in a newspaper of general circulation in the communities referred to below:

(A) *Applications to establish a branch, including a remote service facility.* In the communities in which the home office and the domestic branch to be established are located; *Foreign Branch:* In the community in which the home office is located.

(B) *Applications to move a main office and relocate a branch (including a remote service facility).* In the communities in which the home office, office to be

closed, and office to be opened are located, provided that a foreign bank having an insured branch need only publish such notice in the communities in which the insured branch is located and is to be relocated.

(C) *Applications for deposit insurance.* In the community in which the home bank office is or will be located, provided that a foreign bank making application for an insured branch need only publish such notice in the community in which the insured branch is to be located.

The published notice required by (f)(1) of this section shall include the name of the applicant, the subject matter of the application, and the location or locations at which the applicant proposes to engage in business.

(iii) In all instances, immediately after final publication, the applicant shall advise the appropriate regional director that the publication requirements have been met.

(2) *Notice by posting.* In the case of applications to move a main office or relocate a branch, in addition to the notice by publication described in paragraph (f)(1) of this section, notice of the publication shall be posted in the public lobby of the office(s) to be moved or relocated, if such public lobby exists, for at least 21 days beginning with the date of the last published notice required by paragraph (f)(1) of this section for applications to move a main office; and for at least 15 days beginning with the date of the publication notice required by paragraph (f)(1) of this section for applications to relocate a branch.

(3) *Comments.* Anyone who wishes to comment on an application may do so by filing comments in writing with the appropriate regional director at any time before the Corporation has completed processing the application. Processing will be completed, for applications other than applications to move a main office, to relocate a remote service facility and to merge, not less than 15 days after the publication of the notice required by paragraph (f)(1) of this section or 15 days after the Corporation's receipt of the application, whichever is later; for applications to move a main office or relocate a remote service facility, not less than 21 days after the last publication or 21 days after the Corporation's receipt of the application, whichever is later; for merger applications for which the Corporation has not determined it must act immediately in order to prevent the probable failure of one of the depository institutions involved, not less than 30 days after the first publication or, if the Corporation has determined that an emergency exists which requires expeditious action, not less than 10 days after the first publication. This time period may be extended by the appropriate regional director for good cause. Such regional director shall report the reasons for such action to the Board of Directors.

(4) *Notice of right to comment.* In order to fully apprise the public of its rights under paragraph (f)(3) of this section, the notice described in paragraph (f)(1) of this section shall include a statement describing the right to comment upon, or protest the granting of, the application. This notice shall consist of the following statement:

Any person wishing to comment on this application may file his or her comments in writing with the regional director of the Federal Deposit Insurance Corporation at its regional office (address of the regional office) before processing of the application has been completed. Processing will be completed no earlier than the (main office moves and remote service facility relocations—21st; nonemergency mergers—30th; emergency mergers—10th; other applications described in paragraph (a) of this section—15th) day following (mergers—the first required publication; all other applications described in paragraph (a) of this section—either the date of the last required publication or the date of receipt of the application by the FDIC, whichever is later). The period may be extended by the regional director for good cause. The nonconfidential portion of the application file is available for inspection within one day following the request for such file. It may be inspected in the Corporation's regional office during regular business hours. Photocopies of information in the nonconfidential portion of the application file will be made available upon request. A schedule of charges for such copies can be obtained from the regional office.

(5) *Solicitation of comments by regional director.* Whenever he deems it appropriate, the regional director may solicit comments from any person or institution which, in his opinion, might

have an interest in or be affected by the pending application.

(g) *Public access to application file*—(1) *Inspection of application file.* Any person may inspect the nonconfidential portions of an application file. For a period extending until 180 days after final disposition of an application, the nonconfidential portions of the file will be available for inspection in the regional office of the FDIC in which an application has been filed. During this period, the nonconfidential portion of the file will be produced for review not more than one working day after receipt by the regional office of the request (either written or oral) to see the file. Photocopies of the nonconfidential portions of the file will be available, upon request, to any person. A charge for making copies will be made in accordance with the fee schedule contained in § 309.5(b) of this chapter. No charge will be imposed for the search for, and review of, the application file. One hundred and eighty (180) days after the final disposition of an application, the nonconfidential portions of an application file will be made available in accordance with the provisions of § 309.5 of this chapter.

(2) *Nonconfidential portions of application file.* Subject to the provisions of paragraph (g)(3) of this section, the following information in an application file will be available for public inspection:

(i) The application with supporting data and supplementary information.

(ii) Data, comments, and other information submitted by interested persons in favor of, or in opposition to, such application.

(iii) Those portions of the investigation report prepared by the Corporation's field examiner in connection with the application which cover the convenience and needs of the community to be served by the applicant or applicants and either the future earnings prospects or the future prospects of the applicant or applicants.

(iv) A summary assessment of the applicant or applicants, based on their Community Reinvestment Act examination.

(v) Where a hearing has been held pursuant to paragraph (i) of this section, any evidence submitted pursuant to paragraph (j)(3) of this section and the hearing transcript described in paragraph (j)(5) of this section.

(3) *Withholding of confidential information.* No material described in paragraph (g)(2) of this section shall be available if it is determined to be confidential under the provisions of 5 U.S.C. 552. The following information generally is considered confidential:

(i) Personal information, the release of which would constitute a clearly unwarranted invasion of privacy.

(ii) Commercial or financial information, the disclosure of which would result in substantial competitive harm to the submitter.

(iii) Information the disclosure of which could seriously affect the financial condition of any financial institution.

(h) *Proceedings*—(1) *Requests for hearing or other proceeding.* Anyone who has made a formal comment within the period specified in paragraph (f)(3) of this section may request a hearing or an oral presentation at the time of making the formal comment. If a hearing or an oral presentation is requested, the request must be accompanied by a brief statement by the person requesting the hearing or presentation of his or her interest in the application and of the matters which he or she wishes to discuss. If the Corporation determines that a hearing or other form of oral presentation should be allowed, the person making the request will be advised of the date, time, and location of the hearing or oral presentation.

(2) *Form of proceeding.* The Corporation may, at its discretion, decide to hold a hearing on the application in accordance with paragraph (i) of this section; it may decide to hold an informal proceeding in accordance with paragraph (h)(3) of this section; or it may decide not to hold a hearing or an informal proceeding in which case, where there has been a request for an opportunity to be heard pursuant to paragraph (h)(1) of this section, it will so advise the applicant and all persons who requested an opportunity to be heard. A decision as to the form of proceeding to be held will be made not more than 30 days after a request for a hearing or oral presentation has been

made pursuant to paragraph (h)(1) of this section.

(3) *Informal proceedings.* If the Corporation decides to hold an informal proceeding, the regional director shall, not less than 10 days prior thereto, notify the applicant and each person who requested a hearing, or oral presentation in accordance with paragraph (h)(1) of this section, of the date, time, and place of the proceeding. The regional director may, if he deems it advisable, notify other persons who have expressed an interest in the application and invite them to attend. The proceeding may assume any form, including a meeting with Corporation representatives, at which the participants will be asked to present their views orally. The regional director shall also have the discretion to hold separate meetings with each of the participants where he deems it desirable.

(i) *Hearings.* Hearings of the kind provided for in this paragraph will not generally be afforded the participants if they have had the opportunity to participate in prior hearings before the appropriate State authority which covered essentially the same issues or if the regional director determines that less formal proceedings would be adequate.

(1) *Notice of hearing*—(i) *Contents.* If the Corporation determines that a hearing on the application is warranted, the regional director shall, not less than 10 days prior thereto, give notice of the scheduling of the hearing, and shall set forth in the notice the subject matter of the application, the significant issues to be presented, and the date, time, and place at which the hearing shall be held.

(ii) *To whom sent.* The above notice shall be sent by registered or certified mail to the applicant and to each person who requested a hearing in accordance with paragraph (h)(1) of this section. The regional director may also notify other persons who have expressed an interest in the application and invite them to participate in the hearing.

(2) *Attendance at hearing.* Each interested person who wishes to attend the hearing shall notify the regional director accordingly with 5 days after the date upon which he receives the above notice. Unless he has already done so, he shall submit a brief written summary of the matters which he wishes to cover at the hearing, together with the number and names of witnesses he wishes to present. The applicant and other interested persons attending the hearing may be represented by counsel.

(3) *Presiding officer.* The presiding officer at the hearing shall be the regional director, his designee, or such other person as may be named by the Board of Directors or the Director (DOS). The presiding officer shall have the authority to appoint a panel to assist him.

(j) *Hearing rules*—(1) *Order of presentation.* The following schedule is intended to serve as a general guide to the conduct of the hearing. It is not fixed and may be varied at the discretion of the presiding officer. The presiding officer shall determine the order of opening and closing statements and presentations to be followed by all participants other than the applicant who in each instance shall have the opportunity to speak first.

(i) *Opening statements.* The applicant and each other participant may make opening statements which should concisely state what the participant intends to show.

(ii) *Applicant's presentation.* Following the opening statement(s), the applicant shall present its data and materials orally or in writing.

(iii) *Requester's presentation.* Following the applicant's presentation, each person who requested the hearing shall present his data and materials orally or in writing. Those who requested the hearing may agree, with the approval of the presiding officer, to have one of their number make their presentation.

(iv) *Other interested persons.* Following the evidence of the applicant and the requesters, the presiding officer will recognize other interested persons who may present their views with respect to the application under consideration.

(v) *Summary statement.* After all the above presentations have been concluded, the applicant and each other participant may make a short concise rebuttal.

(2) *Witnesses.* Each participant is responsible for providing his own witnesses, including the payment of all expenses associated with their appearance at the hearing. All witnesses will be present on their own volition, but any person appearing as a witness may be subject to questioning by any participant, by the presiding officer, or by any member of the panel. The refusal of a witness to answer questions may be considered by the Corporation in determining the weight to be accorded the testimony of that witness. Witnesses shall not be sworn.

(3) *Evidence.* The presiding officer shall have the authority to exclude data or materials which he deems to be improper, irrelevant, or repetitive. Formal rules of evidence shall not be applicable to these hearings. Documentary material submitted as evidence must be of a size consistent with ease of handling, transportation, and filing. Three copies of all such documentary material shall be furnished to the regional director, and any participant who specifically requests the same shall be furnished a copy at his own expense. While large exhibits may be used during the hearing, copies of such exhibits must be provided by the person in reduced size for submission as evidence.

(4) *Procedural questions.* The presiding officer, or any designated member of the panel, shall determine all procedural questions not governed by this section. The presiding officer shall have the authority to limit the number of witnesses to be used by any person and to impose reasonable time limitations.

(5) *Transcript.* A transcript of each hearing will be arranged for by the Corporation. The person or persons who requested the hearing will be expected to pay all the expenses of such service, including the furnishing of one copy of the transcript to the regional director. *Provided, however,* That the Corporation may, for good cause, waive this requirement in individual cases. Where a hearing is held at the Corporation's initiative, the Corporation shall bear the expense of such service. Copies of the transcript will be furnished to any interested person requesting the same at that person's expense.

(6) *The hearing record*—(i) *Contents.* The nonconfidential portions of the application, as described in paragraph (c) of this section, shall automatically be a part of the hearing record.

(ii) *Closing the hearing record—additional statements.* Any person who participates in the hearing may request that the hearing record remain open for 10 days following receipt of the transcript by the regional director during which time the person may submit corrected copies of the transcript, or additional written statements or materials which he agreed to furnish at the hearing, to the regional director. Such person shall simultaneously mail or have delivered copies of the corrected transcript or additional statements or materials to all other persons who participated in the hearing.

(k) *Disposition and notice thereof.* (1) The final disposition of any application or other matter under this section need not be determined exclusively by, or be limited to, the information contained in the public file established by paragraph (g) of this section.

(2) The applicant, and any other person who so requests in writing, shall be notified by the Board of Directors of the final disposition of the application or other matter. The Board of Directors shall also provide a statement of the reasons for the final disposition made.[7]

(l) *Computation of time.* Section 308.22 shall govern the computation of any period of time prescribed or allowed by this section.

(m) *Retained authority.* In acting upon any particular application, the Board of Directors may by resolution adopt procedures which differ from this section when it deems it necessary and in the public interest to do so. Such resolution shall be made available for public inspection and copying in the Office

[7] Where final authority to dispose of an application or other matter has been delegated to the Director (DOS), an associate director, the regional directors and the deputy regional directors pursuant to § 303.7, the delegate will provide the notice and statement described in this paragraph (k)(2).

of the Executive Secretary of the Corporation in accordance with the requirements of 5 U.S.C. 552(a)(2).

[54 FR 53559, Dec. 29, 1989, as amended by 59 FR 4250, Jan. 31, 1994; 59 FR 43282, Aug. 23, 1994; 59 FR 52662, Oct. 19, 1994; 59 FR 66655, Dec. 28, 1994]

§ 303.7 Delegation of authority to the Director (DOS) and to the associate directors, regional directors and deputy regional directors to act on certain applications, requests, and notices of acquisition of control.

The Board of Directors of the FDIC has delegated to officials in the Division of Supervision and other employees of the FDIC the authority on behalf of the Board of Directors to act (subject to the provisions of § 303.10 of this part) on the following applications, requests, and notices of acquisition of control.

(a) *Applications for branches (including remote service facilities, courier services, foreign branches of domestic banks), relocations, and for trust and other banking powers*—(1) *Branch and relocation applications.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to approve applications for consent to establish branch facilities (including remote service facilities, courier services and foreign branches of domestic banks) or relocations where the applicant satisfies the requisites listed in paragraph (a)(1)(iii) of this section and agrees in writing to comply with any condition imposed by the delegate other than those standard conditions listed in § 303.0(b)(31).

(ii) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director:

(A) To deny applications for consent to establish branch facilities (including remote service facilities, courier services and foreign branches of domestic banks) or relocations; and

(B) To approve such applications where the applicant satisfies the requisites listed in paragraph (a)(1)(iii) of this section but does not agree in writing to comply with any condition imposed by the delegate.

(iii) The requisites which must be satisfied before the authority delegated by paragraphs (a)(1)(i) and (ii)(B) of this section to approve applications for consent to establish branch facilities or relocations may be exercised are:

(A) The seven factors set forth in section 6 of the Act (12 U.S.C. 1816) have been considered and favorably resolved (except that this requisite does not apply to applications to establish courier services);

(B) The applicant meets the capital requirements set forth in 12 CFR part 325 and the FDIC's ''Statement of Policy on Capital'' or agrees in writing to increase capital so as to be in compliance with the requirements of 12 CFR part 325 before or at the consummation of the transaction which is the subject of the application, except that this requisite does not apply to applications to establish courier services, remote service facilities, and relocations of branches or main offices;

(C) Any financial arrangements which have been made in connection with the proposed branch or relocation and which involve the applicant's directors, officers, major shareholders, or their interests, are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties; and

(D) The requirements of the National Historic Preservation Act (16 U.S.C. 470), the National Environmental Policy Act (42 U.S.C. 4321), and the Community Reinvestment Act of 1977 (12 U.S.C. 2901 through 2905) and its applicable implementing regulation (12 CFR part 345) have been considered and favorably resolved (except that this requisite does not apply to applications to establish foreign branches): *Provided, however,* That the authority to approve an application may not be subdelegated to a regional director or deputy regional director where a protest (as that term is defined in § 303.0(b)(30)) under the Community Reinvestment Act is filed.

(2) *Applications for consent to exercise trust and other banking powers.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to

approve applications for the FDIC's consent to exercise trust or other banking powers where the applicant satisfies the requisites listed in paragraph (a)(2)(iii) of this section and agrees in writing to comply with any other conditions imposed by the delegate other than those standard conditions listed in § 303.0(b)(31).

(ii) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director:

(A) To deny applications for trust or other banking powers; and

(B) To approve such applications where the applicant satisfies the requisites listed in paragraph (a)(2)(iii) of this section but does not agree in writing to comply with any condition required by the delegate other than those standard conditions listed in § 303.0(b)(31).

(iii) The requisites which must be satisfied before the authority delegated by paragraphs (a)(2)(i) and (ii)(B) of this section to approve applications for trust or other banking powers may be exercised are:

(A) The seven factors set forth in section 6 of the Act (12 U.S.C. 1816) have been considered and favorably resolved;

(B) The proposed management of the trust or other banking business is determined capable of satisfactorily handling the anticipated business; and

(C) In regards to trust applications only, the applicant's board of directors has formally adopted Form 114—

Statement of Principles of Trust Department Management.

(b) *Merger transactions.* (1) Except as provided in paragraphs (b)(4) and (5) of this section and in § 303.10(b) of this part, authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or the appropriate regional director or deputy regional director, to approve any application for permission to merge or consolidate with any other bank or institution or, either directly or indirectly, to acquire the assets of, or assume the liability to pay any deposits made in any other bank, institution, or branch of a foreign bank (hereafter *merger transaction*) where the applicant satisfies the requisites listed in paragraph (b)(7) of this section and (subject to paragraph (b)(6) of this section) where:

(i) The resulting institution, upon consummation of the merger transaction, would not have more than 15% of the individual, partnership and corporate deposits held by commercial banks and/or thrift institutions, as may be appropriate, in the relevant market(s); or

(ii) The resulting institution, upon consummation of the merger transaction, would not have more than 25% of the individual, partnership and corporate deposits held by commercial banks and/or thrift institutions, as may be appropriate, in the relevant market(s), and the Attorney General has determined that the proposed merger transaction would not have a significantly adverse effect on competition.

(2) Except as provided in paragraph (b)(4) of this section, authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to approve applications for merger transactions where the resulting institution, upon consummation of the merger transaction, would not have more than 35% of the individual, partnership and corporate deposits held by commercial banks and/or thrift institutions, as may be appropriate, in the relevant market(s), and the Attorney General has determined that the proposed merger transaction would not have a significantly adverse effect on competition.

(3) In cases where applicable, the delegate will review any reports on the competitive factors involved in the merger transaction that the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Director OTS and the Attorney General may have provided in response to a request for such reports by the FDIC. In the absence of a formal written opinion by the Attorney General, the delegate may also request the FDIC's General Counsel or designee to provide a formal written opinion on the question whether the merger transaction may have a significantly adverse effect on competition. However, the authority delegated under paragraphs (b)(1)(ii) and (2) of this section

may not be exercised in the absence of a formal written opinion by the Attorney General where the resulting bank, upon consummation of the merger transaction, would have more than 15% of the individual, partnership, and corporate deposits held by commercial banks and/or thrift institutions, as may be appropriate, in the relevant market(s).

(4) The delegations contained in paragraphs (b)(1) and (2) of this section to approve applications for merger transactions do not extend to such applications:

(i) Falling within the scope of the *probable failure* or *emergency* provisions of 12 U.S.C. 1828(c)(6); or

(ii) Where the resulting institution, upon consummation of the merger transaction, does not meet the capital requirements set forth in 12 CFR part 325 and the FDIC's ''Statement of Policy on Capital.'' (If the applicant is a foreign bank, the delegated authority to approve does not extend to instances where, upon consummation of the merger transaction, the foreign bank's insured branch is not in compliance with 12 CFR part 346.)

(5) The authority to approve an application may not be subdelegated to a regional director or deputy regional director where a protest (as that term is defined in § 303.0(b)(30)) under the Community Reinvestment Act is filed.

(6) Where the merging institutions operate in different relevant market areas, then the limitations relative to market share percentages set forth in paragraphs (b)(1) and (2) of this section do not apply.

(7) The requisites which must be satisfied before the authority delegated by paragraphs (b)(1) and (2) of this section to approve applications for merger transactions may be exercised are:

(i) That the statutory factors contained in section 18(c)(5) (12 U.S.C. 1828(c)(5) of the Act have been considered and favorably resolved; and

(ii) Compliance with the National Environmental Policy Act (42 U.S.C. 4321), the Community Reinvestment Act (12 U.S.C. 2901 through 2905) and the applicable implementing regulation (12 CFR part 345 or any other applicable implementing regulation) have been considered and favorably resolved.

(8) In approving an application for a merger transaction under this section, a delegate may impose any of the standard conditions listed in § 303.0(b)(31), or any other condition to which the applicant has agreed in writing.

(9) Notwithstanding any limitation or condition imposed by this section, the Director (DOS), and where confirmed in writing by the director, an associate director, or the appropriate regional director or deputy regional director is authorized to approve any transaction involving a merger facilitated by the Resolution Trust Corporation under its authority to assist savings associations in default or in danger of default, provided that the resulting entity from the merger is a state-chartered insured non-member bank.

(c) *Notices of acquisition of control.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to issue a written notice of the FDIC's intent not to disapprove an acquisition of control of an insured depository institution.

(2) The authority delegated by paragraph (c)(1) of this section shall include the power:

(i) To act in situations where information is submitted on acquisitions arising out of testate or intestate succession, bona fide gifts, or foreclosure;

(ii) To extend notice periods;

(iii) To determine the informational adequacy of a notice;

(iv) To determine whether a notice should be filed under section 7(j) of the Act (12 U.S.C. 1817(j)) by a person acquiring less than 25 percent of any class of voting securities of an insured depository institution; and

(v) To waive publication, waive or shorten the public comment period, or act on a proposed acquisition of control prior to the expiration of the public comment period, as provided in 12 CFR 303.4(b)(3).

(3) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to disapprove an acquisition of control of an insured state depository institution.

(d) *Deposit insurance applications*—(1) *Proposed or newly organized depository institutions.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or subject to the limitations set forth in paragraph (d)(1)(iii) of this section, to the appropriate regional director or deputy regional director, to approve applications for deposit insurance by proposed or newly organized depository institutions, where the applicant satisfies the requisites listed in paragraph (d)(1)(ii) of this section, and agrees in writing to comply with any condition imposed by the delegate, other than those listed in paragraph (d)(4) of this section. *Provided however;* That the requisites listed in paragraph (d)(1)(ii) of this section do not apply to any transaction facilitated by the Resolution Trust Corporation under its authority to assist savings associations in default or in danger of default.

(ii) The requisites which must be satisfied before the authority delegated by paragraph (d)(1)(i) of this section to approve applications for deposit insurance by proposed or newly organized depository institutions may be exercised are:

(A) (*1*) As to Federal savings associations, factors (1) through (5) of the seven factors set forth in section 6 of the Act (12 U.S.C. 1816) have each been considered and favorably resolved, and the FDIC has received from the Director of the Office of Thrift Supervision the certificate required under section 5 of the Act (12 U.S.C. 1815);

(*2*) As to all other depository institutions, each of the seven factors set forth in section 6 of the Act (12 U.S.C. 1816) has been considered and favorably resolved; and

(B) The requirements set forth below are met:

(*1*) Equity capital is not less than $1,000,000;

(*2*) Legal fees and other expenses incurred in connection with the proposal are determined to be reasonable;

(*3*) No unresolved *management interlocks,* as prohibited by the Depository Institution Management Interlocks Act (12 U.S.C. 3201 *et seq.*), part 348 of this chapter (12 CFR part 348) or any other applicable implementing regulation, exist;

(*4*) The projected ratio of equity capital and reserves to assets, including projected profits and losses, is at least 10 percent at the end of the third year of operations;

(*5*) Profitable operations are projected at least for the third year of operations;

(*6*) The proposed aggregate direct and indirect investment in fixed assets is determined to be reasonable relative to the applicant's proposed equity capitalization, projected earnings capacity, and other pertinent bases of consideration;

(*7*) Any financial arrangements made or proposed in connection with the proposed depository institution involving the applicant's directors, officers, 5 percent shareholders or their interests are determined to be fair and made on substantially the same terms as those prevailing at the time for comparable transactions with noninsiders and do not involve more than normal risk or present other unfavorable features. The applicant also must have fully disclosed, or agreed to disclose fully, any such arrangement to all of its proposed directors and shareholders prior to the opening of the depository institution;

(*8*) Stock financing arrangements, fidelity coverage and accrual accounting conform to the guidelines established in the FDIC's policy statement on ''Applications for Deposit Insurance;'' and

(*9*) Compliance with the National Historic Preservation Act (16 U.S.C. 470), the National Environmental Policy Act (42 U.S.C. 4321), and the Community Reinvestment Act of 1977 (12 U.S.C. 2901 through 2905) and the applicable implementing regulation (12 CFR part 345 or any other implementing regulation) is adequate and favorably resolved.

(iii) The authority to approve an application may not be subdelegated to a regional director or deputy regional director where:

(A) A protest (as that term is defined in § 303.0(b)(30)) under the Community Reinvestment Act is filed; or

(B) (*1*) There is direct or indirect financing, by proposed directors and officers and 5 percent or more shareholders, of more than 75 percent of the purchase price of the stock subscribed to by any one shareholder;

(*2*) There is aggregate financing of stock subscriptions in excess of 50 percent of the total capital offered, or

(*3*) Warehoused or trusteed stock exceeds 10 percent of initial capital funds.

(2) *Operating noninsured depository institutions and state or privately insured institutions.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or, for applicant institutions with total assets of less than $250,000,000, to the appropriate regional director or deputy regional director, to approve applications for deposit insurance by operating noninsured depository institutions, or state-insured or privately insured institutions where the applicant satisfies the requisites listed in paragraph (d)(2)(ii) of this section and agrees in writing to comply with any condition imposed by the delegate other than those listed in paragraph (d)(4) of this section.

(ii) The requisites which must be satisfied before the authority delegated by paragraph (d)(2)(i) of this section to approve applications for deposit insurance by operating noninsured depository institutions may be exercised are:

(A) The applicant is determined to be eligible for federal deposit insurance for the class of institution to which the applicant belongs in the state (as defined in 12 U.S.C. 1813(a)) in which the applicant is located;

(B) The seven factors set forth in section 6 of the Act (12 U.S.C. 1816) have been considered and favorably resolved;

(C) The applicant meets the minimum capital requirements as set forth in part 325 of this chapter (12 CFR part 325) and the FDIC's ''Statement of Policy on Capital'' or agrees in writing to increase capital so as to be in compliance with the requirements of 12 CFR part 325 before or at the time deposit insurance becomes effective;

(D) All *management interlocks* as prohibited by part 348 of this chapter (12 CFR part 348) or any other applicable implementing regulation have been resolved; and

(E) The applicant has no fewer than five directors.

(3) *Banks withdrawing from Federal Reserve System.* Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director and deputy regional director, to approve applications for deposit insurance by state nonmember banks that have withdrawn from membership in the Federal Reserve System where the applicant agrees in writing to comply with any condition imposed by the delegate other than those listed in paragraph (d)(4) of this section and satisfies the following requisites;

(i) The seven factors set forth in section 6 of the Act (12 U.S.C. 1816) have been considered and favorably resolved; and

(ii) The bank has agreed to continue any corrective program imposed by the Board of Governors of the Federal Reserve System or previously agreed to by the bank where the bank is not in material compliance with that corrective program.

(4) *Conditions for exercise of delegated authority.* The conditions which may be imposed by a delegate in approving applications for deposit insurance without affecting the authority granted under paragraphs (d)(1), (2), and (3) of this section are:

(i) The applicant has provided a specific amount and a specific allocation of beginning paid-in capital;

(ii) Any changes in proposed management or proposed ownership to the extent of 5 or more percent of stock, including new acquisitions of or subscriptions to 5 or more percent of stock shall be approved by the FDIC prior to the opening of the depository institution;

(iii) The applicant adopts an accrual accounting system for maintaining the books of the depository institution;

(iv) Where applicable, Federal deposit insurance will not become effective until the applicant has been established as a state bank (not a member of the Federal Reserve System), has authority to conduct a banking business, and its establishment and operation as

a bank have been fully approved by the state banking authority;

(v) Where applicable, federal deposit insurance will not become effective until the applicant has been established as a state savings association, has authority to conduct a savings association business, and its establishment and operation as a savings association have been fully approved by the appropriate state supervisory authority;

(vi) Where applicable, a registered or proposed bank holding company, or a registered or proposed thrift holding company, has obtained approval of the Board of Governors of the Federal Reserve System to acquire voting stock control of the proposed bank prior to its opening;

(vii) Where applicable, the applicant, has submitted any proposed contracts, leases, or ageements relating to construction or rental of permanent quarters to the appropriate regional director for review and comment;

(viii) Where applicable, full disclosure has been made to all proposed directors and stockholders of the facts concerning the interest of any insider (one who is or stands to be a director, an officer, or an incorporator of an applicant or shareholder who directly or indirectly controls 5 or more percent of any class of the applicant's outstanding voting stock, or the associates and interests of any such person) in any transactions being effected or then contemplated, including the identity of the parties to the transaction and the terms and costs involved;

(ix) The person(s) selected to serve as the principal operating officer(s) shall be acceptable to the regional director;

(x) The applicant has obtained adequate blanket bond coverage;

(xi) That the depository institution obtain an audit of its financial statements by an independent public accountant annually for at least the first three years after deposit insurance is effective, furnish a copy of any reports by the independent auditor (including any management letters) to the appropriate FDIC regional office within 15 days after their receipt by the depository institution and notify the appropriate FDIC regional office within 15 days when a change in its independent auditor occurs; and

(xii) Any standard condition (as defined in § 303.0(b)(31)).

(e) *Applications pursuant to section 19 of the Act.* (1) Authority is delegated to the Director (DOS), or where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to approve applications made by insured depository institutions pursuant to section 19 of the Act (12 U.S.C. 1829) for participation, directly or indirectly, in any manner in the conduct of the affairs of an insured depository institution by any person who has been convicted or is hereafter convicted of any criminal offense involving dishonesty or a breach of trust; *Provided however,* That authority may not be delegated to the regional director or deputy regional director where the applicant depository institution's primary supervisory authority interposes any objection to such application.

(2) (i) Authority is delegated to the Director (DOS), and where confirmed by writing by the director, to an associate director, to deny applications made by insured depository institutions pursuant to section 19 of the Act.

(ii) The authority delegated under paragraph (e)(2)(i) of this section shall be exercised only upon the concurrent certification by the Deputy General Counsel Supervision and Legislation, or the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with section 19 of the Act.

(iii) An applicant may still request a hearing following a denial of the application under this paragraph in accordance with the provisions of part 308 of this chapter (12 CFR part 308).

(3) The conditions which may be imposed by a delegate in approving applications pursuant to section 19, without affecting the authority granted under paragraph (e)(1) of this section are:

(i) That an employee shall be bonded to the same extent as others in similar positions; and

(ii) That, when deemed necessary, the prior consent of the appropriate regional director shall be required for

any proposed significant changes in duties and/or responsibilities of the individual occurring within 12 months subsequent to the approval of the application.

(f) *Insurance fund conversions, applications pursuant to section 38 of the Act (prompt corrective action), and other applications.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to approve or to deny the following applications, requests or petitions:

(i) Applications to establish and operate any new teller's window, drive-in facility, or any like office, as an adjunct to a main office or a branch office (including offices not considered branches under state law);

(ii) Applications to operate temporary banking facilities as a public service for a period not to exceed ninety days during conventions, state and local fairs, college registration periods, and similar occasions, as well as during emergencies;

(iii) Applications filed pursuant to section 18(i)(1) of the Act to reduce the amount or retire any part of common or preferred capital stock, or retire any part of capital notes or debentures;

(iv) Requests for approval of any deviations from requirements prescribed by prior delegated action (to be acted upon by the delegate who acted previously in the matter);

(v) Except as provided in § 303.10(b)(1)(iii) of this part, applications for *phantom mergers*[8] and other mergers which are corporate reorganizations, *i.e.*, transactions involving institutions controlled by the same holding company or transactions involving institutions and their subsidiaries which would have no effect on competition or otherwise have significance under relevant statutory standards as set forth in 12 U.S.C. 1828(c);

(vi) Applications for deposit insurance filed by proposed state nonmember banks or savings associations which are formed in connection with a phantom merger;

(vii) Requests to establish management official interlocks pursuant to 12 CFR 348.4(b) of this chapter or section 205(8) of the Depository Institutions Management Interlocks Act (except that a regional director or deputy regional director may deny such a request only if the request was made pursuant to 12 CFR 348.4(b)(3)); and

(viii) Applications pursuant to section 29 of the Act (12 U.S.C. 1831) for waiver of the prohibition on the acceptance or renewal of brokered deposits by troubled insured depository institutions.

(ix) Applications filed pursuant to section 38 of the Act (prompt corrective action), including applications to make a capital distribution; applications for acquisitions, branching, and new lines of business (except that the delegation is limited to the authority as delegated to approve or deny any concurrent application filed pursuant to 18 (c) or (d)); applications to pay a bonus or increase compensation; applications for an exception to pay principal or interest on subordinated debt; and applications to engage in any restricted activity listed in § 303.5(e)(5).

(2) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director:

(i) To deny a request to establish a management official interlock pursuant to any provision of either 12 CFR 348.4(b) of this chapter, or section 205(8) of the Depository Institutions Management Interlocks Act; and

(ii) To approve or to deny applications for the acquisition and holding of stock or other evidences of ownership in a foreign bank or other financial entity that results in less than 25 percent ownership interest in such bank or entity.

(3)(i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to approve an application

[8] As used in this part 303, the term *phantom merger* applies to any merger or other transaction involving an existing operating institution and a newly chartered institution or corporation which is for the purpose of corporate reorganization and which would have no effect on competition or otherwise have significance under the relevant statutory standards as set forth in 12 U.S.C. 1828(c).

made by an applicant pursuant to section 8(j) of the Act 12 U.S.C. 1818(j)) for the termination or modification of a removal or prohibition order, which was issued by the Board after a hearing, on default, or by consent.

(ii) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to consent to an application pursuant to section 8(j) of the Act (12 U.S.C. 1818(j)) to obtain the prior written approval of the FDIC to participate in the conduct of the affairs of a bank filed by an individual subject to a removal or prohibition order.

(iii) Authority is delegated to the Director (DOS), or where confirmed in writing by the director, to an associate director, to deny an application made by an applicant pursuant to section 8(j) of the Act.

(iv) The authority delegated under paragraphs (f)(3)(i), (ii), and (iii) of this section shall be exercised only upon the concurrent certification by the Deputy General Counsel for Supervision and Legislation, or the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with section 8(j) of the Act.

(4)(i) Authority is delegated to the Director (DOS) and, where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director to approve or deny conversions involving transfers of deposits between the SAIF and BIF funds; *Provided however*, That where the basis for the conversion is that the transaction affects an insubstantial portion of the deposits of each institution, authority is not delegated to the regional director or deputy regional director where the total deposits transferred to or from either institution, accumulated with all other insurance fund transfers involving that institution since August 9, 1989, exceeds the lesser of 35 percent of total deposits of either institution on May 1, 1989, plus net interest credited to the expected date of transfer, or the amount equal to total deposits of either institution on the expected date of transfer.

(ii) The conditions that may be imposed in approving applications for insurance fund conversions without affecting the authority granted in § 303.7(f)(4) of this section are:

(A) That, upon consummation, the deposits involved in the transaction do not exceed 35%, on a cumulative basis with other deposits transferred between the SAIF and BIF funds, for either of the institutions involved, of the lesser of (*1*) total deposits as of May 1, 1989, plus net interest credited during the period from May 1, 1989, to the date of transfer of the deposits, or (*2*) total deposits of the institution as of the date of transfer of the deposits; and

(B) That applicable entrance and exit fees be paid pursuant to FDIC regulations.

(5) Authority is delegated to the Director (DOS) and, where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director to:

(i) Determine whether applicants requesting approval under section 5(d)(3)(A)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)(A)(i)) meet all minimum capital requirements contained in 12 CFR part 325;

(ii) Approve applications where the applicant satisfies the requirements specified in paragraph (f)(5)(i) of this section and the requirements of section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)); and

(iii) Deny such applications if the requirements specified in paragraph (f)(5)(i) of this section are not met.

(6) In approving an application, request or petition under any provision of this paragraph, a delegate may impose any of the standard conditions listed in § 303.0(b)(31), or any other condition to which the applicant has agreed in writing.

(g) *Requests pursuant to section 18(k) of the Act.* Authority is delegated to the Director, and where confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to approve or deny requests pursuant to section 18(k) of the Act to make:

(1) Excess nondiscriminatory severance plan payments as provided by 12 CFR 359.1(f)(2)(v); and

(2) Golden parachute payments permitted by 12 CFR 359.4.

[54 FR 53562, Dec. 29, 1989, as amended at 57 FR 5815, Feb. 18, 1992; 58 FR 8217, Feb. 12, 1993; 59 FR 52663, Oct. 19, 1994; 61 FR 5930, Feb. 15, 1996]

§ 303.8 Other delegations of authority.

(a) *Extensions of time.* (1) Except as provided in paragraph (a)(2) of this section, authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to approve and to deny requests for extensions of time, not to exceed one year on any one request relating to the same application, within which to perform acts or conditions required by prior FDIC action on depository institution applications.

(2) Notwithstanding the delegations in paragraph (a)(1) of this section, no delegate shall have the authority to deny an extension of time request unless that delegate had authority to deny the original application upon which the extension of time is predicated.

(b) *Disclosure laws and regulations.* (1) Except as provided in paragraph (b)(2) of this section, authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to act on disclosure matters under and pursuant to sections 12, 13, 14, 17 and 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78) or parts 335 and 341 of this chapter (12 CFR parts 335 and 341).

(2) Authority to act on disclosure matters is retained by the Board of Directors when such matters involve:

(i) Exemption from disclosure requirements pursuant to section 12(h) of the Securities Exchange Act of 1934 (15 U.S.C. 781(h));

(ii) Exemption from tender offer requirements pursuant to section 14(d)(8) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)(8)); or

(iii) Exemption from registration requirements pursuant to section 17A(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1(c)(1)).

(c) *Security devices and procedures and bank service arrangements.* Authority is delegated to the Director (DOS) and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to administer the provisions of part 326 of this chapter (12 CFR part 326).

(d) *In emergencies.* For the purpose of assuring performance of, and continuity in the management functions and activities of the FDIC, the Board of Directors has delegated, to the extent deemed necessary, authority with respect to the management of the FDIC's affairs, to certain designated offices, such authority to be exercised only in the event of an emergency involving an enemy attack on the continental United States or other warlike occurrence which renders the Board of Directors unable to perform the management functions and activities normally performed by it.

(e) *Competitive factor reports.* Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the regional director or deputy regional director in the appropriate FDIC region in which the applicant depository institution[9] is located, to furnish required reports to the Board of Governors of the Federal Reserve System, or the Comptroller of the Currency on the competitive factors involved in any merger required to be approved by one of those agencies, if the delegate is of the view that the proposed merger would not have a substantially adverse effect on competition.

(f) *Agreements for pledge of assets by foreign banks.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to enter into pledge agreements with foreign banks and depositories in connection with the pledge of asset requirements pursuant

[9] As used in paragraph (e) of this section, the term *applicant depository institution* means the institution which is applying for merger approval to the Board of Governors of the Federal Reserve System the Comptroller of the Currency, or the Director of OTS, whichever is appliable.

to 12 CFR 346.19. This authority shall also extend to the power to revoke such approval and require the dismissal of the depository.

(2) Authority is delegated to the General Counsel or designee to modify the terms of the model deposit agreement used for such deposit agreements.

(g) *National Historic Preservation Act.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to enter into memoranda of agreement pursuant to regulations of the Advisory Council of Historic Preservation which implement the National Historic Preservation Act (16 U.S.C. 470).

(2) The Director (DOS) may limit the delegation of authority to the associate director, the regional director or deputy regional director to applications wherein the applicant has agreed in writing to conditions relating to the National Preservation Act which may be imposed by the FDIC.

(h) *Applications or notices for membership or resumption of business.* Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to provide comments on applications or notices for membership or commencement or resumption of business to the appropriate Federal banking agency pursuant to section 4 of the Act (12 U.S.C. 1814). Such comments, if provided, shall be provided within a reasonable time, not to exceed 30 days from the time such application or notice is received by the delegate. In the event that circumstances preclude comment within 30 days, the delegate shall so notify the appropriate Federal banking agency within 30 days, giving an estimate of when comments may reasonably be expected.

(i) *Depository Institutions Disaster Relief Act of 1992 (DIDRA).* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to accept requests and issue orders permitting an insured depository institution to subtract from total assets the qualifying amount attributable to insurance proceeds for purposes of calculating compliance with the leverage limit prescribed under section 38 of the Act.

(2) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to act on requests for reconsideration of an order of denial issued pursuant to paragraph (i)(1) of this section.

(3) The requisites which must be satisfied before the authority delegated in paragraphs (i)(1) and (i)(2) of this section may be exercised, provide that the insured depository institution:

(i) Had its principal place of business within an area in which the President, pursuant to section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), has determined that a major disaster exists;

(ii) Derives more than 60 percent of its total deposits from persons who normally reside within, or whose principal place of business is normally within, areas of intense devastation caused by the major disaster;

(iii) Was adequately capitalized, pursuant to section 38 of the Act, prior to the major disaster; and

(iv) Has an acceptable plan for managing the increase in its total assets and total deposits.

(4) The authority delegated under paragraphs (i)(1) and (i)(2) of this section shall be exercised only upon the concurrent certification of the Associate General Counsel for Compliance and Enforcement, or in cases where the regional director or deputy regional director issues the order, by the appropriate regional counsel, that the order is not inconsistent with section 38 of the Act.

[54 FR 53567, Dec. 29, 1989, as amended at 58 FR 8217, Feb. 12, 1993; 59 FR 52663, Oct. 19, 1994]

§303.9 Delegation of authority to act on certain enforcement matters.

(a) *Actions pursuant to section 8(a) of the Act (12 U.S.C. 1818(a)).* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or

deputy regional director, to issue notifications to primary regulator when the respondent bank's book capital is less than 2% of total assets; Provided however, That authority may not be delegated to the regional director or deputy regional director whenever the respondent bank has issued any mandatory convertible debt or any form of Tier 2 capital (such as limited life preferred stock/subordinated notes and debentures).

(2) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to issue notifications to primary regulator when the respondent bank's adjusted Tier 1 capital is less than 2% of adjusted part 325 total assets.

(3) The authority delegated under paragraphs (a)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement, or, in cases where a regional director or deputy regional director issues notifications to primary regulator, by the appropriate regional counsel, that the allegations contained in the findings of unsafe or unsound practices or conditions, if proven, constitute a basis for the issuance of a notification to primary regulator pursuant to section 8(a) of the Act (12 U.S.C. 1818(a)).

(b) *Actions pursuant to section 8(b) of the Act (12 U.S.C. 1818(b))*. (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager to issue:

(i) Notices of charges; and

(ii) Cease-and-desist orders (with or without a prior notice of charges) where the respondent bank or individual respondent consents to the issuance of the cease-and-desist order prior to the filing by an administrative law judge of proposed findings of fact, conclusions of law and recommended decision with the Executive Secretary of the FDIC.

(2) The Director (DOS) and the Director (DCA) may issue a joint notice of charges or cease-and-desist order under paragraph (b)(1) of this section, where such notice or order addresses both safety and soundness and consumer compliance matters. A joint notice or order will require the signatures of both directors or, alternatively, the signatures of the appropriate regional director or deputy regional director and regional manager.

(3) The authority delegated under paragraphs (b)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement or, in cases where a regional director, deputy regional director or regional manager issues the notice of charges or the stipulated cease-and-desist order, by the appropriate regional counsel, that the allegations contained in the notice of charges, if proven, constitute a basis for the issuance of a section 8(b) order, or that the stipulated cease-and-desist order is authorized under section 8(b) of the Act, and, upon its effective date, shall be a cease-and-desist order which has become final for purposes of enforcement pursuant to the Act.

(c) *Actions pursuant to section 8(c) of the Act (12 U.S.C. 1818(c))*. (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to issue temporary cease-and-desist orders.

(2) The Director (DOS) and the Director (DCA) may issue a joint temporary cease-and-desist order where such order addresses both safety and soundness and consumer compliance matters. A joint notice or order will require the signatures of both directors or, alternatively, the signatures of the appropriate regional director or deputy regional director and regional manager.

(3) The authority delegated under paragraphs (c)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action is not inconsistent with section 8(c) of the Act (12 U.S.C. 1818(c)) and the temporary cease-and-desist order is enforceable in a United States District Court.

(d) *Actions pursuant to section 8(e) of the Act (12 U.S.C. 1818(e))*. (1) Authority is delegated to the Director (DOS) or

the Director (DCA), and where confirmed in writing by the director, to an associate director, to issue:

(i) Notices of intention to remove an institution-affiliated party from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of an insured depository institution pursuant to sections 8(e)(1) and (2) of the Act (12 U.S.C. 1818(e)(1) and (2)), and temporary orders of suspension pursuant to section 8(e)(3) of the Act (12 U.S.C. 1818(e)(3)); and

(ii) Orders of removal, suspension or prohibition from participation in the conduct of the affairs of an insured depository institution where the institution-affiliated party consents to the issuance of such orders prior to the filing by an administrative law judge of proposed findings of fact, conclusions of law and a recommended decision with the Executive Secretary of the FDIC.

(2) The Director (DOS) and the Director (DCA) may issue joint notices and orders pursuant to paragraph (d)(1) of this section where such notice or order addresses both safety and soundness and consumer compliance matters. A joint notice or order will require the signatures of both directors or their associate directors.

(3) The authority delegated under paragraphs (d)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a notice of intent pursuant to section 8(e) of the Act, or that the stipulated section 8(e) order is not inconsistent with section 8(e) of the Act, and, upon issuance, shall be an order which has become final for purposes of enforcement pursuant to the Act.

(e) *Actions pursuant to section 8(g) of the Act (12 U.S.C. 1818(g)).* (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to issue orders of suspension or prohibition to an institution-affiliated party who is charged in any information, indictment, or complaint as set forth in section 8(g) of the Act when such institution-affiliated party consents to the suspension or prohibition.

(2) The Director (DOS) and the Director (DCA) may issue joint orders pursuant to paragraph (e)(1) of this section where such order addresses both safety and soundness and consumer compliance matters. A joint order will require the signatures of both directors or their associate directors.

(3) The authority delegated under paragraphs (e)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with section 8(g) of the Act (12 U.S.C. 1818(g)) and the order is enforceable in a United States District Court pursuant to sections 8(i) and 8(j) of the Act (12 U.S.C. 1818 (i) and (j)).

(f) *Actions pursuant to section 8(p) of the Act (12 U.S.C. 1818(p)).* (1) Authority is delegated to the Executive Secretary to issue consent orders terminating the insured status of insured depository institutions that have ceased to engage in the business of receiving deposits other than trust funds pursuant to section 8(p) of the Act (12 U.S.C. 1818(p)).

(2) The authority delegated under paragraph (f)(1) of this section shall be exercised only upon the recommendation and concurrence of the Director (DOS) or associate director and the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with section 8(p) of the Act.

(g) *Civil money penalties.* (1)(i) Except as provided for in paragraph (g)(3) of this section, authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to issue notices of assessment of civil money penalties.

(ii) The authority delegated under paragraph (g)(1)((i) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of assessment, if proven, constitute a basis for assessment of civil money penalties.

(2) The Director (DOS) and the Director (DCA) may issue joint notices pursuant to paragraph (g)(1) of this section

where such notice addresses both safety and soundness and consumer compliance matters. A joint notice will require the signatures of both directors or their associate directors.

(3) Authority is delegated to the General Counsel or designee for the levying and enforcement of civil money penalties under section 7(a)(1) of the Act (12 U.S.C. 1817(a)(1)) for the late, inaccurate, false or misleading filing of Reports of Condition and Report of Income, and such other reports as the Board of Directors may require under the authority of that section. In the exercise of the delegated authority, the General Counsel or designee shall consult with the appropriate Director or associate director before imposing any penalty.

(h) *Directives and capital plans under section 38 of the Act (prompt corrective action) and part 325 of this chapter.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to accept, to reject, to require new or revised capital restoration plans or to make any other determinations with respect to the implementation of capital restoration plans and, in accordance with subpart Q of part 308 of this chapter, to issue:

(i) Notices of intent to issue capital directives;

(ii) Directives to insured state nonmember banks that fail to maintain capital in accordance with the requirements contained in part 325 of this chapter;

(iii) Notices of intent to issue prompt corrective action directives, except directives issued pursuant to section 38(f)(2)(F)(ii) of the Act (12 U.S.C. 1831o(f)(2)(F)(ii));

(iv) Directives to insured depository institutions pursuant to section 38 of the Act (12 U.S.C. 1831o), with or without the consent of the respondent bank to the issuance of the directive, except directives issued pursuant to section 38(f)(2)(F)(ii) of the Act (12 U.S.C. 1831o(f)(2)(F)(ii));

(v) Directives to insured depository institutions requiring immediate action or imposing proscriptions pursuant to section 38 of the Act (12 U.S.C. 1831o) and part 325 of this chapter, and in accordance with the requirements contained in § 308.201(a)(2) of this chapter;

(vi) Notices of intent to reclassify insured banks pursuant to §§ 325.103(d) and 308.202 of this chapter;

(vii) Directives to reclassify insured banks pursuant to §§ 325.103(d) and 308.202 of this chapter with the consent of the respondent bank to the issuance of the directive; and

(viii) Orders on request for informal hearings to reconsider reclassifications and designate the presiding officer at the hearing pursuant to § 308.202 of this chapter.

(2) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an Associate Director, to:

(i) Issue notices of intent to issue a prompt corrective action directive ordering the dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the Act, (12 U.S.C. 1831o(f)(2)(F)(ii)), and in accordance with the requirements contained in § 308.203 of this chapter;

(ii) Issue directives ordering the dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the Act, (12 U.S.C. 1831o(f)(2)(F)(ii));

(iii) Issue orders of dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the Act, 12 U.S.C. 1831o(f)(2)(F)(ii) where the individual consents to the issuance of such order prior to the filing of a recommendation by the presiding officer with the FDIC;

(iv) Act on recommended decisions of presiding officers pursuant to a request for reconsideration of a reclassification in accordance with the requirements contained in § 308.202 of this chapter;

(v) Act on requests for rescission of a reclassification; and

(vi) Act on appeals from immediately effective directives issued pursuant to section 38 of the Act, (12 U.S.C. 1831o) and § 308.201 of this chapter.

(3) Authority is delegated to the Executive Secretary of the FDIC to issue orders for informal hearings and designate presiding officers on directives issued pursuant to section 38(f)(2)(F)(ii) of the Act, 12 U.S.C. 1831o(f)(2)(F)(ii).

(4) The authority delegated under paragraphs (h)(1)(i) and (ii) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director or deputy regional director issues the notice of intent to issue a capital directive or capital directives, by the appropriate regional counsel, that the action taken is not inconsistent with the Act and part 325 of this chapter.

(5) The authority delegated under paragraphs (h)(1) (iii), (iv), (v), (vi) and (vii) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director or deputy regional director issues the notice of intent to issue a prompt corrective action directive or prompt corrective action directives, or the notice of intent to reclassify or reclassification directive, by the appropriate regional counsel, that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a final directive pursuant to section 38 of the Act, or that the issuance of a final directive is not inconsistent with section 38 of the Act.

(6) The authority delegated under paragraph (h)(2) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a final directive pursuant to section 38 of the Act or that the issuance of a final directive is not inconsistent with section 38 of the Act or that the stipulated section 38 order is not inconsistent with section 38 and is an order which has become final for purposes of enforcement pursuant to the Act.

(i) *Investigations pursuant to section 10(c) of the Act (12 U.S.C. 1820(c)).* (1) Authority is delegated to the Director (DOS), to the Director (DCA), to the Director of the Division of Depositor and Asset Services, and where confirmed in writing by the director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager, to issue an order of investigation pursuant to section 10(c) of the Act (12 U.S.C. 1820(c)) and subpart K of Part 308 (12 CFR 308.144 through 308.150).

(2) Authority is delegated to the General Counsel, and where confirmed in writing by the General Counsel, to his designee, to issue an order of investigation pursuant to section 10(c) of the Act (12 U.S.C. 1820(c)) and subpart K of Part 308 (12 CFR 308.144 through 308.150).

(3) In issuing an order of investigation that pertains to an open insured depository institution or an institution making application to become an insured depository institution, the authority delegated under paragraphs (i)(1) and (2) of this section shall be exercised only upon the concurrent execution of the order of investigation by the Director (DOS) or the Director (DCA), or their associate directors, or the appropriate regional director, deputy regional director or regional manager, and the General Counsel or designee. In the case of a joint order of investigation, such authority shall be exercised only upon the concurrent execution of the order of investigation by both directors, or their associate directors, or the appropriate regional director, deputy regional director and regional manager, and the General Counsel or designee.

(j) *Truth in Lending Act.* (1) Authority is delegated to the Director (DCA), and where confirmed in writing by the director, to the associate director, or to the appropriate regional manager, to deny requests for relief from the requirements for reimbursement under section 608(a)(2) of the Truth in Lending Simplification and Reform Act (15 U.S.C. 1607(e)(2)); Provided however, that a regional manager is not authorized to deny any request where the estimated amount of reimbursement is greater than $25,000.

(2) Authority is delegated to the Director (DCA), and where confirmed in writing by the director, to an associate director:

(i) To grant request for relief from the requirements for reimbursement under section 608(a)(2) of the Truth in Lending Simplification and Reform Act (15 U.S.C. 1670(a)(2)); and

(ii) To act on applications for reconsideration of any action taken under paragraphs (j) (1) and (2) of this section.

(3) The authority delegated under paragraphs (j) (1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement, or, in cases where a regional manager denies requests for relief, by the appropriate regional counsel, that the action taken is not inconsistent with the Truth in Lending Simplification and Reform Act.

(k) *Unilateral settlement offers.* (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to accept, deny or enter into negotiations for unilateral settlement offers with insured depository institutions, or with an institution-affiliated party, pertaining to a proceeding under 12 CFR part 308. In cases where a proceeding under 12 CFR part 308 was issued jointly by DOS and DCA, both directors, or their associate directors, must agree to accept, deny or enter into negotiations for unilateral settlement offers with insured depository institutions or with an institution-affiliated party.

(2) The authority delegated under paragraph (k)(1) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with the Act.

(l) *Acceptance of written agreements.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to accept or enter into any written agreements with insured depository institutions, or any institution-affiliated party pertaining to any matter which may be addressed by the FDIC pursuant to section 8(a) of the Act (12 U.S.C. 1818(a)).

(2) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to accept or enter into any written agreements with insured depository institutions, or any institution-affiliated party pertaining to any safety and soundness or consumer compliance matter which may be addressed by the FDIC pursuant to section 8(b) of the Act (12 U.S.C. 1818(b)) or any other provision of the Act which addresses safety and soundness or consumer compliance matters. In cases which would address both safety and soundness and consumer compliance matters, the Directors, or their designees, may accept or enter into joint written agreements with insured depository institutions or institution-affiliated parties.

(3) The authority delegated under paragraphs (l) (1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with sections 8 (a) and (b) of the Act.

(m) *Modifications and terminations of enforcement actions*—(1) *Sections 8(a), 8(b) and 8(c) (12 U.S.C. 1818 (a), (b) and (c)) actions upon failure or merger of a depository institution.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to terminate outstanding section 8(a) orders and agreements and to terminate actions and agreements which are pending pursuant to section 8(a) of the Act when the depository institution is closed by a Federal or state authority or merges into another institution.

(ii) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager, to terminate outstanding section 8(b) and section 8(c) orders and agreements and to terminate actions and agreements which are pending pursuant to sections 8(b) and 8(c) of the Act when the depository institution is closed by a Federal or state authority or merges into another institution. In cases where a joint order was issued by DOS and DCA, both directors, or their associate directors, or the appropriate regional director or deputy regional director and regional manager, must agree prior to the termination of outstanding 8(b) and 8(c) orders.

(2) *Section 8(a) (12 U.S.C. 1818(a)) actions issued by the Board of Directors.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to modify or terminate notifications to primary regulator issued by the Board of Directors pursuant to section 8(a) of the Act where the respondent depository institution is in material compliance with such notification or for good cause shown.

(ii) In cases where the Board of Directors has issued a notice of intent to terminate insured status pursuant to section 8(a) of the Act, authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to terminate the actions pending pursuant to such notice of intent to terminate insured status where the respondent depository institution is in material compliance with the applicable notification to primary regulator or for good cause shown.

(3) *Section 8(b) (12 U.S.C. 1818(b)) orders issued by the Board of Directors.* Authority is delegated to the Director (DOS) or the Director (DCA), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager, to terminate outstanding section 8(b) orders issued by the Board of Directors where either material compliance with the section 8(b) order has been achieved by the respondent depository institution or individual respondent or for good cause shown. In cases where an order issued by the Board addresses both safety and soundness and consumer compliance matters, both directors, or their designees, must agree prior to the termination of outstanding 8(b) orders.

(4) *Section 8(g) orders issued by the Board of Directors.* Authority is delegated to the Director (DOS) or the Director (DCA), and where confirmed in writing by the director, to an associate director, to approve requests for modifications or terminations of section 8(g) orders issued by the Board of Directors.

(5) *Other matters not specifically addressed.* For all other outstanding orders or pending actions not specifically addressed in paragraphs (m)(1), (m)(2), (m)(3) and (m)(4) of this section, the delegations of authority contained in paragraphs (a)(1), (a)(2), (b)(1), (c)(1), (d)(1), (e)(1), (g)(1), (g)(2), (h)(1), (h)(2), (l)(1), (l)(2), and (n) of this section shall be construed to include the authority to modify or terminate any outstanding notice, order, directive or agreement, as may be appropriate, issued pursuant to delegated authority and to terminate any pending action initiated pursuant to delegated authority.

(6) *Certification.* Any modifications or terminations pursuant to paragraphs (m)(1), (m)(2), (m)(3), (m)(4), and (m)(5) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director, deputy regional director or regional manager acts under delegated authority, by the appropriate regional counsel, that the action taken is not consistent with the Act.

(n) *Enforcement of outstanding orders.* After consultation with the Director (DOS) or the Director (DCA), or an associate director, or the appropriate regional director, deputy regional director or regional manager, as may be appropriate, the General Counsel or designee is authorized to initiate and prosecute any action to enforce any effective and outstanding order or temporary order issued under 12 U.S.C. 1817, 1818, 1820, 1828, 1829, 1831*l*, 1831o, 1972, or 3909, or any provision thereof, in the appropriate United States District Court.

(o) *Compliance plans under section 39 of the Act (standards for safety and soundness) and part 308 of this chapter.* (1) Authority is delegated to the Director, and where confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to accept, to reject, to require new or revised compliance plans or to make any other

determinations with respect to the implementation of compliance plans pursuant to subpart R of part 308 of this chapter.

(2) Authority is delegated to the Director, and where confirmed in writing by the Director, to an associate director, to:

(i) Issue notices of intent 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 Act (12 U.S.C. 1831p–1) and in accordance with the requirements contained in § 308.304(a)(1) of this chapter;

(ii) Issue an order requiring the bank immediately to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39 of the Act (12 U.S.C. 1831p–1) and in accordance with the requirements contained in § 308.304(a)(2) of this chapter; and

(iii) Act on requests for modification or rescission of an order.

(3) The authority delegated under paragraph (o)(1) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director or deputy regional director accepts, rejects or requires new or revised compliance plans or makes any other determinations with respect to compliance plans, by the appropriate regional counsel, that the action taken is not inconsistent with the Act.

(4) The authority delegated under paragraph (o)(2) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a final order pursuant to section 39 of the Act or that the issuance of a final order is not inconsistent with section 39 of the Act or that the stipulated section 39 order is not inconsistent with section 39 and is an order which has become final for purposes of enforcement pursuant to the Act.

[59 FR 52663, Oct. 19, 1994, as amended at 60 FR 35683, July 10, 1995]

§ 303.10 Applications and enforcement matters where authority is not delegated.

(a) *Authority not specifically delegated is retained by the Board of Directors.* (1) Except as otherwise provided in this part, or with respect to matters which generally involve conditions or circumstances requiring prompt action in the field for the better protection of the interests of the FDIC and to achieve flexibility and expedition in its operations and in the exercise of its functions in connection with the FDIC's litigation and liquidation matters and with the payment of claims for insured deposits, the Board of Directors does not delegate its authority and no delegations of final authority are made by the Board of Directors. Any person having a proper and direct concern therein may ascertain the scope of authority of any officer, agent or employee of the FDIC by communicating with the Executive Secretary of the FDIC.

(2) In all cases where authority to act on applications, requests or enforcement matters listed in this part is not delegated to a Director, or to an associate director, or to a regional director, deputy regional director or regional manager''; the authority to act on such applications, requests, or enforcement matters remains vested in the Board of Directors of the FDIC. In addition, the Board of Directors retains the authority to act on any application, request or enforcement matter upon which any member of the Board of Directors wishes to act even if the authority to act on such application, request or enforcement matter has been delegated.

(b) *Applications and requests.* Without limiting the Board of Directors' authority, the Board of Directors has retained the authority to act upon the following applications and requests:

(1) Except as provided in § 303.7(b)(9) of this part to deny applications for merger transactions, and to approve applications for merger transactions where:

(i) The applicant does not agree in writing to comply with any conditions imposed by the FDIC (other than the standard condition listed in § 303.0(b)(26) which may be imposed

without the applicant's written agreement); or

(ii) The resulting bank, upon consummation of the merger transaction, would have more than 35% of the individual, partnership and corporate deposits held by commercial banks and/or thrift institutions, as may be appropriate, in the relevant market(s); or

(iii) Irrespective of the resulting market share, the Attorney General has determined that the proposed merger transaction may have a significantly adverse effect on competition; or

(iv) The application (including an application for phantom bank merger or reorganization) falls within the *probable failure* or *emergency* provisions of section 18(c)(6) of the FDI Act, or the resultant bank does not meet the minimum capital requirements of part 325.

(2) To deny applications for deposit insurance, and to approve applications for deposit insurance where:

(i) The applicant does not agree in writing to comply with any condition imposed by the FDIC (other than the standard conditions listed in §§ 303.0(b)(31), and 303.7(d)(4), which may be imposed without the applicant's written agreement), or

(ii) The applicant depository institution is a United States branch of a foreign bank; and

(3) To consider an application made by an insured depository institution pursuant to section 19 of the Act (12 U.S.C. 1829) for participation, directly or indirectly, in any manner in the conduct of the affairs of an insured depository institution or any person who has been convicted or is hereafter convicted of any criminal offense involving dishonesty or a breach of trust following a hearing held in accordance with the provisions of part 308 of this chapter (12 CFR part 308).

(c) *Enforcement matters.* Without limiting the Board of Directors' authority, the Board of Directors has retained the authority to act upon the following enforcement matters:

(1) To issue: (i) Notifications to primary regulator when the respondent bank's book capital is at or above 2% of total assets and adjusted Tier 1 capital is at or above 2% of adjusted part 325 total assets;

(ii) Notices of intent to terminate insured status; and

(iii) Orders terminating insured status, pursuant to section 8(a) of the Act (12 U.S.C. 1818(a));

(2) To issue cease-and-desist orders pursuant to section 8(b) of the Act (12 U.S.C. 1818(b)) when the respondent depository institution or individual does not consent to the issuance of such orders;

(3) To issue: (i) Temporary orders of suspension and prohibition pursuant to section 8(e) of the Act (12 U.S.C. 1818(e)); and

(ii) Orders of removal, suspension or prohibition from participation in the conduct of the affairs of an insured depository institution pursuant to section 8(e) of the Act (12 U.S.C. 1818(e)) when the individual does not consent to the issuance of such orders;

(4) To issue orders of suspension or prohibition to an indicted director, officer or person participating in the conduct of the affairs of an insured depository institution and orders of removal or prohibition to a convicted director, officer or person participating in the conduct of the affairs of an insured depository institution pursuant to section 8(g) of the Act (12 U.S.C. 1818(g)) when such director, officer or person does not consent to the suspension or removal;

(5) To issue final orders to pay civil money penalties where respondents do not consent to the assessment of civil money penalties and hearings have been held;

(6) To deny requests for modifications or terminations of orders issued pursuant to section 8(g) of the Act (12 U.S.C. 1818(g)); and

(7) To grant or deny requests for reinstatement to office, whether or not an informal hearing has been requested, pursuant to § 308.203 of this chapter.

[54 FR 53570, Dec. 29, 1989, as amended at 56 FR 23011, May 20, 1991; 58 FR 8219, Feb. 12, 1993; 59 FR 52667, Oct. 19, 1994]

§ 303.11 Confirmation, limitations, rescissions and special cases.

(a) *Written confirmation, limitations or subsequent rescission.* (1) The authority delegated in §§ 303.7, 303.8 and 303.9 of this part by the Board of Directors to the associate director, the appropriate

regional director or deputy regional director is subject, as to each associate director, regional director and deputy regional director, to written confirmation, limitations, or subsequent rescission of any confirmation, by the Director. Such written confirmation, limitations or rescissions shall be filed with the Executive Secretary of the FDIC at its offices in Washington, DC, and at the office of the regional director or deputy regional director concerned, and shall be available for public inspection by interested parties.

(2) The conditions set forth in this part to which the exercise of delegated authority is subject are procedural in nature only, and shall not be construed as standards or criteria which will be used in determining the merits of a specific application, petition, request or enforcement matter.

(b) *Action under delegated authority not mandated.* (1) The Director (DOS) or the Director (DCA) may, in writing, rescind the authority of an associate director, regional director, deputy regional director or regional manager to act on an application, request, notice of acquisition of control or enforcement matter, and may himself act on the same.

(2) (i) An associate director, regional director, deputy regional director or regional manager may, in writing, recommend that the authority to act on an application, request, notice of acquisition of control or enforcement matter not be exercised by him; in such cases, the authority to act on such application, request, notice of acquisition of control or enforcement matter may be exercised by the Director (DOS) or the Director (DCA). The Director may, in writing, recommend that the authority to act on an application, request, notice of acquisition of control or enforcement matter may not be exercised by him; in such cases the Board of Directors will act on the application, request, notice of acquisition of control or enforcement matter.

(ii) A regional counsel may, in writing, recommend that the authority to act on an application made by insured depository institutions pursuant to section 19 of the Act (12 U.S.C. 1829) or an enforcement matter not be exercised by him; in such cases the authority to act in such enforcement matters may be exercised by the Associate General Counsel for Compliance and Enforcement. The Associate General Counsel for Compliance and Enforcement may, in writing, recommend that the authority to act on an application pursuant to section 19 of the Act or enforcement matter not be exercised by him; in such cases, the Board of Directors will act on the application or enforcement matter.

(iii) Upon determining not to act upon the application, request, notice of acquisition of control or enforcement matter under delegated authority, the regional manager, deputy regional director, regional director, associate director, or the Director (DOS) or the Director (DCA), and/or the regional counsel, or the Associate General Counsel for Compliance and Enforcement, as the case may be, shall forward the application, request, notice of acquisition of control or enforcement matter, together with his recommendations as to the disposition of such application, request, notice of acquisition of control or enforcement matter to the appropriate authority as determined by the rules set forth in paragraphs (b)(2) (i) and/or (ii) of this section.

(c) *Request for review.* Any aggrieved party or person may request the Board of Directors to review any action taken under authority delegated in §§ 303.7, 303.8 and 303.9 of this part.

[54 FR 53570, Dec. 29, 1989, as amended by 59 FR 52667, Oct. 19, 1994]

§ 303.12 OMB control number assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This section collects and displays the control numbers assigned to information collection requirements of this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 through 3520). The FDIC intends that this section comply with section 3507(f) of the Paperwork Reduction Act (44 U.S.C. 3507(f)), which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget for each agency information collection requirement.

(b) *Display.*

Section of 12 CFR part 303 where identified and described	Current OMB control No.
303.1	3064.0001
303.1	3064.0069
303.2	3064.0070
303.3	3064.0016
303.4(b)	3064.0019

[54 FR 53571, Dec. 29, 1989]

§ 303.13 Applications and notices by savings associations.

(a) *Definitions.* For the purposes of this section, the following definitions apply:

(1) As used in paragraphs (b) and (c) of this section, the term *activity* includes acquiring or retaining any investment other than an equity investment.

(2) *Control* means the power to vote, directly or indirectly, 25 per centum or more of any class of the voting stock of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.

(3) *Corporate debt securities not of investment grade* refers to any corporate debt security that when acquired was not rated among the four highest rating categories by at least one nationally recognized statistical rating organization. The term shall not include any obligation issued or guaranteed by a corporation that may be held by a federal savings association without limitation as to percentage of assets under subparagraphs (D), (E), or (F) of section 5(c)(1) of the Home Owners' Loan Act (12 U.S.C. 1464(c)(1)).

(4) *Equity investment* means any equity security as defined herein; any partnership interest; any equity interest in real estate as defined herein; and any transaction which in substance falls into any of these categories, even though it may be structured as some other form of business transaction.

(5) *Equity interest in real estate* means any form of direct or indirect ownership of any interest in real property (whether in the form of an equity interest, partnership, joint venture or other form) which is accounted for as an investment in real estate or real estate joint ventures under generally accepted accounting principles or is otherwise determined to be an investment in a real estate venture under Federal Financial Institutions Examination Council instructions for the preparation of reports of condition. The term *equity interest in real estate* shall not include:

(i) An interest in real property that is primarily used or intended to be used for future expansion by a savings association, its subsidiaries, or its affiliates as offices or related facilities for the conduct of its business;

(ii) An interest in real property that is acquired in satisfaction of a debt previously contracted in good faith, acquired by way of deed in lieu of foreclosure, or acquired in sales under judgments, decrees, or mortgages held by a savings association, provided that the property is not intended to be held for real estate investment purposes but is expected to be disposed of in a timely fashion as permitted by applicable law; and

(iii) Interests in real property that are primarily in the nature of charitable contributions to community development.

(6) *Equity security* means any stock, (other than adjustable rate preferred stock and money market (auction rate) preferred stock) certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-trust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing. The term *equity security* does not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(7) *Qualified affiliate* means, in the case of a stock savings association, an affiliate other than a subsidiary or an insured depository institution; and, in the case of a mutual savings association, a subsidiary other than an insured depository institution, so long as

all of the savings association's investments in, and extensions of credit to, the subsidiary are deducted from the savings association's capital.

(8) The term *service corporation* means any corporation the capital stock of which is available for purchase only by savings associations.

(9) *A significant risk* is understood to be present whenever there is a high probability that any insurance fund administered by the FDIC may suffer a loss.

(10) *Subsidiary* means any corporation, partnership, business trust, association, joint venture, pool, syndicate or other similar business organization directly or indirectly controlled by a savings association. For the purposes of § 303.13(f), the term does not include an *insured depository institution* as that term is defined in section 3(c)(2) of the Federal Deposit Insurance Act, (*FDI Act*, 12 U.S.C. 1813(c)(2)).

(b) *Engaging other than as agent on behalf of customers in activities not permissible for Federal savings associations*—(1) After January 1, 1990, no state savings association may directly engage, other than as agent on behalf of its customers, in an activity that is not expressly authorized for federal savings associations by the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) or any other statute, regulations issued by the Office of Thrift Supervision (OTS), official OTS Regulatory or Thrift Bulletins, or any order or interpretation issued in writing by OTS unless the state savings association obtains the approval of the FDIC. Any state savings association that wishes to obtain approval to initiate or continue such an activity, as well as any state savings association that wishes to make, or already has, nonresidential real property loans in an amount exceeding that described in section 5(c)(2)(B) of the HOLA (12 U.S.C. 1464(c)(2)(B)) must file a letter application with the DOS regional director for the region in which the state savings association's principal office is located. The letter application should contain the following information:

(i) A brief description of the activity and the manner in which it is (or will be) conducted;

(ii) A copy, if available, of any feasibility study, management plan, financial projections, business plan, or similar document concerning the conduct of the activity;

(iii) An estimate of the present or expected dollar volume of the activity;

(iv) Resolutions by the board of directors (or the board of trustees in a mutual association) of the savings association authorizing the conduct of such activity and the filing of this submission;

(v) A current statement of the association's assets, liabilities, and capital on both a consolidated and a non-consolidated basis, respectively;

(vi) A discussion by management of its analysis regarding the impact of the proposed activity on the association's earnings, capital adequacy, and general condition;

(vii) A statement by the savings association of whether or not it is in compliance with the fully phased-in capital standards prescribed under section 5(t) of HOLA (12 U.S.C. 1464(t)), including a calculation of the relevant capital ratio; and

(viii) A statement of the authority the savings association is relying upon for the conduct of the activity in the amount set forth in the letter application.

The regional director may request that the state savings association provide such other information as the director deems appropriate. Approval will not be granted if it is determined by the FDIC that engaging in the activity poses a significant risk to the affected deposit insurance fund. Furthermore, no savings association will be granted approval unless it is in compliance with the fully phased-in capital standards prescribed in section 5(t) of HOLA. Consequently, no application to engage in an activity after January 1, 1990 should be filed if a state association is not in compliance with the fully phased-in capital requirements.

(2) Paragraph (b)(1) of this section shall not be read to require the divestiture by a state savings association of any asset (including a nonresidential real estate loan) it had on its books prior to August 9, 1989 despite the fact that such asset may be held in connection with the conduct of an activity for

which the state savings association must obtain the FDIC's approval under § 303.13(b)(1). A notice describing the activities and those assets is nevertheless required by this section.

(c) *Engaging other than as agent on behalf of customers in activities authorized for Federal savings associations but to an extent not so authorized*—(1) *Activities conducted as of December 29, 1989.* (i) Any state savings association which as of December 29, 1989 is directly engaging, other than as agent on behalf of its customers, in an activity expressly authorized to all federal savings associations by statute or regulation adoped by OTS, or an official OTS Regulatory or Thrift Bulletin interpreting such statutes or regulations, in an amount in excess of that permitted to federal savings associations and intends to continue to do so after January 1, 1990, must file a notice, return receipt requested, with the DOS regional director for the region in which the state savings association's principal office is located. The notice must contain the same information that is required to be included in a letter application filed pursuant to § 303.13(b)(1). The regional director may request such other information as the regional director deems appropriate. The notice must be received by the regional director no later than January 29, 1990.

(ii) A state savings association which is, and continues to be, in compliance with the fully phased-in capital standards prescribed under section 5(t) of HOLA and which has filed notice with the FDIC pursuant to paragraph (c)(1)(i) of this section may continue the activities that are the subject of the 30-day notice in the amount set forth in the notice unless the FDIC notifies the state savings association to the contrary. No state savings association will be permitted to continue the activities at the level described in a notice filed pursuant to this section if it is determined that to do so poses a significant risk to the affected deposit insurance fund. A state savings association which is not in compliance with the fully phased-in capital standards as of December 29, 1989 must decrease the level of the activity to that allowed to a federal savings association in order for continuation of the activity to be permissible.

(iii) Paragraph (c)(1) of this section shall not be read to require the divestiture by a state savings association of any asset it had on its books before August 9, 1989. A notice describing those assets is nevertheless required by this section if the assets are held in connection with the conduct of an activity in an amount that triggers notice under § 303.13(c)(1)(i).

(2) *Initiation of activities after December 29, 1989.* Any state savings association that intends to initiate activities of a type and in an amount described in paragraph (c)(1)(i) of this section must file a notice, return receipt requested, with the (DOS) regional director for the region in which the state savings association's principal office is located at least 60 days prior to the initiation of the level of the activity described in the notice. The notice must contain the same information required by § 303.13(b)(1). The regional director may request such other information as the regional director deems appropriate. A state savings association that files a 60-day notice may initiate the level of activity as described in its notice 60 days after the FDIC accepts the notice as complete, or 60 days after the FDIC accepts as complete the additional information, if any, that has been requested *provided that* the association is in compliance with the fully phased-in capital standards prescribed in section 5(t) of HOLA and *provided that* the FDIC does not, prior to that date, pose an objection to the association doing so. A state savings association may inititate the level of activity described in its notice prior to the expiration of the 60-day period if so notified. The continued conduct of the activities as described in the notice is conditioned upon the association's continued compliance with the fully phased-in capital standards and the FDIC's continued non-objection to those activities.

The 60-day period may be extended upon notice to the state savings association if the notice as received is incomplete or the notice raises issues that require additional information or time for analysis. If the 60-day period

is extended, the state savings association may begin the conduct of the activities only upon receipt of written notification to that effect. No state savings association will be permitted to initiate activities subject to this paragraph if it is determined that to do so would pose a significant risk to the affected deposit insurance fund.

(d) *Equity investments*—(1) *General.* No state savings association may directly acquire or retain any equity investment after August 9, 1989 of a type or in an amount that is not expressly authorized for federal savings associations by HOLA, regulations issued by OTS, official OTS Regulatory or Thrift Bulletins, or any order or interpretation issued in writing by OTS. Any state savings association which, as of August 9, 1989, had one or more such equity investments must file an application, return receipt requested, with the DOS regional director for the region in which the state savings association's principal office is located no later than 30 days from December 29, 1989. The application shall:

(i) Describe the obligor, type, amount, and book and market values of the equity investment;

(ii) Set forth the association's plans to comply with the requirements of section 28(c) of the FDI Act to divest the investment as quickly as prudently possible, but in any event not later than July 1, 1994;

(iii) Describe the anticipated gain or loss (anticipated or realized) from the sale of the investment and the impact thereof on the association's capital (including capital ratios before and after their sale);

(iv) Include a copy of a resolution by the board of directors, or board of trustees in the case of a mutual association, authorizing the filing of this submission; and

(v) Request the FDIC's permission to accomplish divestiture in accordance with said plans.

The regional director may request such additional information as the regional director deems appropriate. Upon review of the application and such additional information as requested, and at any time during the divestiture period thereafter, the FDIC may impose such conditions and requirements as it deems appropriate in its sole discretion with regard to the divestiture of the equity investment, including requiring completion of divestiture in advance of July 1, 1994.

(2) *Service corporations*—(i) *General.* Section 303.13(d)(1) notwithstanding, a state savings association may acquire or retain an equity investment in a service corporation, provided that the service corporation's activities are limited solely to those expressly authorized by HOLA or any other statute, regulations issued by OTS, official OTS Regulatory or Thrift Bulletins, or any order or interpretation issued in writing by OTS for all service corporations owned by federal savings associations *and* provided that the investment in such service corporation does not exceed that permissible for a federal savings association pursuant to statute or regulation of OTS. If either of these two conditions does not exist, the state association must file a letter application under paragraph (d)(2)(ii) of this section with the DOS regional director for the region in which the state savings association's principal office is located requesting permission to acquire or retain the equity investment in the service corporation in question.

(ii) *Content and filing of application.* An application requesting permission to retain an equity investment in a service corporation in which a federal association could not invest that was held as of August 9, 1989 must be filed with the regional office no later than January 29, 1990. Approval of the acquisition or retention of an equity investment in a service corporation in which a federal association could not invest will not be granted if the state association is not in compliance with the fully phased-in capital standards prescribed by section 5(t) of HOLA. Consequently, no application to acquire or retain an equity investment in such a service corporation should be filed if a state association is not in compliance with these capital requirements. In addition, approval of the retention or acquisition of such investments will not be granted if the acquisition or retention is determined to pose a significant risk to the affected deposit insurance

fund. If an application to retain an investment is denied, the state association must file a divestiture plan with the regional director requesting the FDIC's permission to accomplish divestiture in accordance with said plan.

The letter application required hereby should contain the information required by § 303.13(b)(1), as it relates both to the service corporation and to its parent state savings association. In addition, the application should contain: A listing of the officers (contemplated officers) of the service corporation, a listing of any other shareholders of the service corporation (existing or prospective) and their respective holdings, and a listing of the locations (expected locations) of all of the offices of the service corporation. The regional director may request such other information as the regional director deems appropriate.

(e) *Corporate debt securities not of investment grade.* Notwithstanding anything to the contrary in § 303.13, no state or federal savings association may, directly or through a subsidiary (other than a subsidiary that is a qualified affiliate), acquire or retain after August 9, 1989 any corporate debt security that is not of investment grade. Any state or federal savings association which, as of August 9, 1989, held corporate debt securities not of investment grade must divest those securities as quickly as can prudently be done, but in no event later than July 1, 1994. Any state or federal savings association that must divest corporate debt securities shall file an application with the DOS regional director for the region in which the state or Federal savings association's principal office is located not later than 30 days from December 29, 1990. The application shall:

(1) Describe the obligor, type, amount, and book and market values of the corporate debt securities;

(2) Set forth the state or federal association's plans to comply with the requirements of section 28(d) of the FDI Act to divest the securities as quickly as prudently possible, but in any event not later than July 1, 1994;

(3) Describe the gain or loss (anticipated or realized) from the sale of the securities and the impact thereof on the association's capital (including capital ratios before and after the sale);

(4) Include a copy of the resolution by the board of directors, or the board of trustees in the case of a mutual association, authorizing the filing of this submission; and

(5) Request the FDIC's permission to accomplish divestiture in accordance with said plans.

The regional director may request such additional information as the regional director deems appropriate. Upon review of the application and such additional information as requested, and at any time during the divestiture period thereafter, the FDIC may impose such conditions and requirements as it deems appropriate in its sole discretion with regard to the divestiture of the debt securities, including requiring completion of divestiture in advance of July 1, 1994.

(f) *Notice of acquisition or establishment of a subsidiary or the conduct of new activities through a subsidiary.* (1) No insured savings association may establish or acquire a subsidiary, or conduct any new activity through a subsidiary, without providing the DOS regional director for the region in which the insured savings association's principal office is located prior notice of the association's intent to do so. Notice must be sent return receipt requested and be received by the regional director at least 30 days prior to the establishment or acquisition of the subsidiary or the commencement of the new activity. The notice shall contain the same information required to be in a letter application filed pursuant to § 303.13(b)(1) plus the following:

(i) A description of how the activities of the subsidiary will be funded;

(ii) The amount of the insured savings association's investment in the subsidiary and the form of the investment;

(iii) The percentage ownership the insured savings association will have in the subsidiary;

(iv) A listing of the other owners of the subsidiary if any; and

(v) In the case of the acquisition of an existing concern, the terms and conditions of the acquisition including an appraisal, assessment of value, or other substantiation of the purchase price

and operating statements for the previous three years (if applicable).

If the insured savings association's filing with the OTS under section 18(m)(1) of the FDI Act contains all of the information required, that filing may be submitted to the FDIC in satisfaction of this provision. In any case, the regional director may request such additional information as the regional director deems appropriate. In all such cases, the 30-day period will not begin to run until the response to the request for additional information is complete.

(2) Any Federal savings bank that was chartered prior to October 15, 1982 as a savings bank under state law, and any savings association that acquired its principal assets from such an institution, is not required to file prior notice in accordance with paragraph (f)(1) of this section.

(3) Any insured savings association that had one or more subsidiaries prior to August 9, 1989 must file a notice with the DOS regional director for the region in which the insured savings association's principal office is located within 30 days from December 29, 1989. The notice should set forth the name, location, and type of activity conducted by the subsidiary and the amount of the insured savings association's investment in the subsidiary.

(4) Section 303.13(f)(1) notwithstanding, an insured savings assocaition may establish or acquire one or more subsidiaries whose sole purpose is to hold interests in real property acquired by the savings association that fit the description in § 303.13(a)(5)(ii) provided that the savings association files a written notice, return receipt requested, with the DOS regional director for the region in which the savings association's principal office is located indicating that the association intends to establish or acquire one or more subsidiaries that will be engaged solely in the disposition of such property. Notice must be received by the regional director at least 30 days prior to the establishment or acquisition of any such subsidiary. An association that has filed a notice pursuant to this paragraph may thereafter establish or acquire additional such subsidiaries provided that each time within 14 days after doing so the association notifies the regional director in writing. The notice shall identify the savings association, give the date of the initial notice, identify the new subsidiary, and state the value of the property at the time it was transferred to the subsidiary.

(g) *Notice by Federal savings associations conducting grandfathered activities.* Any federal savings association authorized by section 5(i)(4) of HOLA (12 U.S.C. 1464(i)(4)) to make any investment or engage in any activity not otherwise generally authorized to federal savings association by section 5 of HOLA must file a notice with the DOS regional director for the region in which the federal savings association's principal office is located within 30 days after December 29, 1989 or within 30 days after the date the federal savings association is first able to rely upon section 5(i)(4) of HOLA as a result of the acquisition of an association that is covered by such section. The notice should briefly describe the activity or investment.

(h) *Delegations.* The authority to act on applications and notices filed pursuant to § 303.13, and to make any and all determinations called for in regard to the same, is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the regional director or deputy regional director.

(Approved by the Office of Management and Budget under control number 3064–0104)

[54 FR 53548, Dec. 29, 1989, as amended at 55 FR 38042, Sept. 17, 1990; 58 FR 64458, Dec. 8, 1993; 59 FR 52667, Oct. 19, 1994]

§ 303.14 Change in senior executive officer or board of directors.

(a) *Definitions.* For the purposes of this section:

(1) The term *individual* means any natural person, as well as any other entity and/or its employees substituted for such natural person.

(2) The term *insured nonmember bank* means any bank, including any foreign bank having an insured branch the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act, which is not a member of the Federal Reserve System. The term does not include any institution chartered by the Comptroller

of the Currency, any branch licensed by the Comptroller of the Currency, any District bank, or any federal savings bank.

(3) The term *senior executive officer* means any individual who exercises significant influence over, or participates in, major policymaking decisions of an insured nonmember bank, without regard to title, salary, or compensation. The term includes, but is not limited to, the following positions: president, chief executive officer, chief managing official (in an insured state branch of a foreign bank), chief operating officer, chief financial officer, chief lending officer, or chief investment officer. The term also includes employees of entities retained by an insured nonmember bank to perform such functions in the insured nonmember bank, when such firm is hired in lieu of directly hiring the individuals.

(4) The term *troubled condition* means any insured nonmember bank that:

(i) Has been assigned a composite rating by the FDIC of 4 or 5 under the Uniform Financial Institutions Rating System, or, in the case of an insured state-licensed branch of a foreign bank (*State branch*), an equivalent rating;

(ii) Is subject to a proceeding initiated by the FDIC for termination or suspension of deposit insurance;

(iii) Is subject to a written agreement which requires action to improve or maintain the safety and soundness of the institution and which is issued by either the FDIC or by the appropriate state banking authority, a cease and desist order issued by either the FDIC or the appropriate state banking authority, a cease and desist order or proceeding initiated by either the FDIC or the appropriate state banking authority, or a capital directive issued by either the FDIC or the appropriate state banking authority; or

(iv) Is informed in writing by the DOS regional director of the region in which the institution is located (*appropriate regional director*) or his or her designee, based on a visitation, examination, or report of condition, that it has been designated a *troubled institution* for the purposes of § 303.14.

(b) *Prior Notice Requirement.* An insured nonmember bank shall give the FDIC written notice at least 30 days prior to the effective date of any addition or replacement of a member of the board of directors (or a member of the board of trustees in an insured nonmember bank held in a mutual form of ownership) or the employment or change in responsibilities of any individual to a position as a senior executive officer if:

(1) The bank has been chartered or the insured state branch has been licensed less than two years;

(2) Within the two years preceding the proposed addition or employment;

(i) The insured nonmember bank or any of its parents has undergone a change in control which required a notice under section 7(j) of the Federal Deposit Insurance Act or regulations issued pursuant to that statute; or

(ii) The insured nonmember bank has undergone a transaction subject to section 3 of the Bank Holding Company Act or section 10 of the Home Owners Loan Act or regulations issued pursuant to either of those statutes;

(3) The insured nonmember bank is not in compliance with the minimum capital requirements applicable to it and which are imposed by 12 CFR part 325 or by other regulatory action of the FDIC or the appropriate state banking authority; or

(4) The insured nonmember bank is otherwise in a troubled condition.

In the case of the addition of a member of the board of directors or a change in senior executive officer in a foreign bank having an insured State branch, the notice requirement shall not apply to such additions and changes in the foreign bank parent, but only to changes in senior executive officers in the State branch. The notice requirement also does not apply in the case of an advisory director who is not elected by the shareholders of the bank or any of its parents, who is not authorized to vote on matters before the board of directors, and who provides solely general policy advice to the board of directors.

(c) *Procedures for notice of proposed change in Director or Senior Executive Officer*—(1) *Filing and acceptance.* Notices shall be filed with the appropriate

regional director and shall contain information pertaining to the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted, as prescribed in the designated FDIC form, subject to the authority of the regional director or his or her designee to require additional information. Each individual on whose behalf the notice is filed must attest to the validity of the information filed which pertains to that individual. At the option of the individual, the information may be forwarded to the regional director by the individual; however, in such cases, the insured nonmember bank must file a notice to that effect. The 30-day notice period will begin to run on the date all required information is received by the appropriate regional director. The bank submitting the notice shall be notified of the date on which all such required information is received and the notice is accepted for processing.

(2) *Waiver of prior notice requirement*—(i) *Procedure for obtaining.* Parties may petition the appropriate regional director for a waiver of the prior notice required under this section. Waiver may be granted if it is found that delay could harm the bank or the public interest. Any waiver shall not affect the authority of the FDIC to issue a notice of disapproval within 30 days of the waiver.

(ii) *Election of directors.* In the case of the election of a new member of the board of directors at a meeting of the shareholders of an insured nonmember bank, such waiver is hereby granted, but a completed notice must be filed with the appropriate regional director within 48 hours of the election.

(3) *Notice of intent not to disapprove.* A proposed director or senior executive officer may begin service before the expiration of the 30-day period if the FDIC notifies the bank and the individual in writing of the FDIC's intention not to disapprove the proposed addition or employment.

(4) *Commencement of service.* A proposed senior executive officer or director may begin service upon the expiration of the 30-day period following acceptance of a complete notice, unless the FDIC issues a notice of disapproval before the end of the 30-day period.

(d) *Notice of disapproval.* The FDIC may disapprove the individual's serving as a director or senior executive officer if it finds that the competence, experience, character, or integrity of the individual with respect to whom a notice under this section is submitted indicates that it would not be in the best interests of the depositors of the bank or in the best interests of the public to permit the individual to be employed by, or associated with, the bank. The notice of disapproval will advise the parties of their rights of appeal.

(e) *Delegations.* The authority to issue notices of disapproval or notices of intent not to disapprove under this section; to grant waivers of the prior notice requirement; to determine the informational adequacy of a notice; to designate an insured nonmember bank as a troubled institution; and to determine when the 30-day period begins to run is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the regional director or deputy regional director.

[54 FR 53042, Dec. 27, 1989 as amended by 59 FR 52667, Oct. 19, 1994]

§ 303.15 Mutual-to-stock conversions of mutually owned state-chartered savings banks.

(a) *Prior notice requirement.* In addition to complying with the substantive requirements in § 333.4 of this chapter, an insured state-chartered mutually owned savings bank that proposes to convert from mutual to stock form shall file with the FDIC a notice of intent to convert to stock form and copies of all documents filed with state and federal banking and/or securities regulators in connection with the proposed conversion. An institution that is in the process of converting to stock form that has filed a proposed stock conversion application with the applicable state and federal regulators (or otherwise has initiated a stock conversion) prior to the effective date of this section shall file the required materials with the FDIC as soon as practicable. An insured mutual savings bank chartered by a state that does not

require the filing of application materials to convert from mutual to stock form that proposes to convert to the stock form shall notify the FDIC of the proposed conversion and provide the materials requested by the FDIC.

(b) *Content and filing of notice*—(1) *Content of notice.* The notice required to be filed under paragraph (a) of this section shall provide a description of the proposed conversion and include a copy of all notices or applications concerning the proposed conversion, including all attachments or appendices thereto, that have been filed with any state and federal banking and/or securities regulators. Copies of all agreements entered into as part of the mutual-to-stock conversion between the institution, its officers, directors/trustees and any other institution and/or its successors also must be provided.

(2) *Filing of notice.* Notices shall be filed with the regional director (DOS) in the region in which the institution seeking to convert is headquartered at the same time as the conversion application materials are filed with the institution's primary state regulator.

(c) *Review by FDIC.* (1) The FDIC shall review the materials submitted by the institution seeking to convert from mutual to stock form. The FDIC, in its discretion, may request any additional information it deems necessary to evaluate the proposed conversion and the institution shall provide such information to the FDIC expeditiously. Among the factors to be reviewed by the FDIC are:

(i) The use of the proceeds from the sale of stock, as prescribed in the business plan;

(ii) The adequacy of the disclosure materials;

(iii) The participation of depositors in approving the transaction;

(iv) The form of the proxy statement required for the vote of the depositors/members on the conversion;

(v) Any increased compensation and other remuneration (including stock grants, stock option rights and other similar benefits) to be obtained by officers and directors/trustees of the bank in connection with the conversion;

(vi) The adequacy and independence of the appraisal of the value of the mutual savings bank for purposes of determining the price of the shares of stock to be sold;

(vii) The process by which the bank's trustees approved the appraisal, the pricing of the stock and the compensation arrangements for insiders;

(viii) The nature and apportionment of stock subscription rights; and

(ix) The bank's plans to fulfill its commitment to serving the convenience and needs of its community.

(2) In reviewing the materials required to be submitted under this section, the FDIC will take into account the extent to which the proposed conversion conforms with the various provisions of the mutual-to-stock conversion regulations of the Office of Thrift Supervision (12 CFR Part 563b), as currently in effect at the time the FDIC reviews the required materials related to the proposed conversion. Any nonconformity with those provisions will be closely scrutinized. Conformity with the OTS requirements, however, will not be sufficient for FDIC regulatory purposes if the FDIC determines that the proposed conversion would pose a risk to the institution's safety and soundness, violate any law or regulation or present a breach of fiduciary duty.

(d) *Notification of completed filing of materials.* The FDIC shall notify the institution when all the required materials related to the proposed conversion have been filed with the FDIC and the notice is thereby complete for purposes of computing the time periods designated in paragraphs (e) and (g) of this section.

(e) *Notice of intent not to object.* If the FDIC determines, in its discretion, that the proposed conversion would not pose a risk to the institution's safety and soundness, violate any law or regulation or present a breach of fiduciary duty, then the FDIC shall issue to the bank seeking to convert, within 60 days of receipt of a complete notice of proposed conversion or within 20 days after the last applicable state or other federal regulator has acted on the proposed conversion, whichever is later, a notice of intent not to object to the proposed conversion. The FDIC may, in its discretion, extend by written notice to the institution the initial 60-day period by an additional 60 days.

(f) *Letter of objection.* If the FDIC determines, in its discretion, that the proposed conversion poses a risk to the institution's safety and soundness, violates any law or regulation or presents a breach of fiduciary duty, then the FDIC shall issue a letter to the institution stating its objection(s) to the proposed conversion and advising the institution that the conversion shall not be consummated until such letter is rescinded. A copy of the letter of objection shall be furnished to the institution's primary state regulator and any other state or federal banking and/or securities regulator involved in the conversion. The letter of objection shall advise the institution of its right to petition the FDIC for reconsideration under § 303.6(e). Such action shall not, in any way, prohibit the FDIC from taking any other action(s) that it may deem necessary.

(g) *Consummation of the conversion.* An institution may consummate the proposed conversion upon either:

(1) The receipt of a notice of intent not to object; or

(2) The expiration of the 60-day period following acceptance of a complete notice by the FDIC or the 20-day period after the last applicable state or other federal regulator has acted on the proposed conversion, whichever is later, unless the FDIC issues a notice of objection before the end of that period and, in which case, the conversion shall not be consummated until such letter is rescinded. The FDIC may, in its discretion, extend by written notice to the institution the initial 60-day period by an additional 60 days.

[59 FR 61245, Nov. 30, 1994]

PART 304—FORMS, INSTRUCTIONS AND REPORTS

Sec.
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304.2 Forms and instructions—general.
304.3 Certified statements.
304.4 Reports of condition and income.
304.5 Other forms.
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APPENDIX A TO PART 304—LIST OF FORMS
APPENDIX B TO PART 304—FEDERAL DEPOSIT INSURANCE CORPORATION REGIONAL OFFICES—BANK SUPERVISION

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1817, 1818, 1819, 1820; Public Law 102–242, 105 Stat. 2251 (12 U.S.C. 1817 note).

SOURCE: 51 FR 36684, Oct. 15, 1986, unless otherwise noted.

§ 304.1 Purpose and scope.

This part is issued under section 552 of title 5 of the United States Code (5 U.S.C. 552), which requires that each agency shall make available to the public information pertaining to the description of forms available or the places at which forms may be obtained, and instructions as to the scope and content of reports and other submittals. The forms mentioned in this part are limited to those which are not already mentioned elsewhere within the rules and regulations of the Federal Deposit Insurance Corporation. However, appendix A to this part lists all forms required by the FDIC and identifies the sections of FDIC's regulations where the forms are referenced.

§ 304.2 Forms and instructions—general.

Necessary forms with their related instructions to be used in connection with applications, reports, and other submittals can be obtained from FDIC regional offices—bank supervision. Appendix B to this part lists FDIC regional offices—bank supervision.

§ 304.3 Certified statements.

The certified statements required to be filed by insured depository institutions under the provisions of section 7 of the Federal Deposit Insurance Act as amended (12 U.S.C. 1817) shall be filed in accordance with part 327 of this chapter. The applicable forms are as follows:

(a) *Form 6420/07: Certified Statement.* Form 6420/07 shows the computation of the semiannual assessment due to the Corporation from an insured depository institution. As provided for in part 327 of this chapter, the form will be furnished to insured depository institutions by the Corporation twice each calendar year and the completed statement must be returned to the Corporation by each institution, except that newly insured institutions must submit their first certified statement on Form 6420/10.

(b) *Form 6420/10: First Certified Statement.* Form 6420/10 shows the computation of the semiannual assessment due to the Corporation from an institution in the first semiannual period after the semiannual period during which the institution becomes an insured depository institution, as provided for in part 327 of this chapter.

[59 FR 67160, Dec. 29, 1994]

§304.4 Reports of condition and income.

Forms FFIEC 031, 032, 033, and 034: Consolidated Reports of Condition and Income. Forms FFIEC 031, 032, 033, and 034 are quarterly reports, for insured state nonmember banks (except District banks) of different asset sizes or with foreign offices, as appropriate, in the form of an income statement, a reconciliation of changes in total equity capital accounts, and a balance sheet of the reporting bank. Supporting schedules request additional detail with respect to charge-offs and recoveries, income from international operations, specific asset and liability accounts, off-balance sheet items, past due and nonaccrual assets, information for assessment purposes, and risk-based capital. Reporting banks must also submit annually such information on small business and small farm lending as the FDIC may need to assess the availability of credit to these sectors of the economy. In addition, insured state nonmember savings banks must file quarterly a supplemental schedule which primarily contains interest rate sensitivity data. Consolidated Reports of Condition and Income must be prepared in accordance with the appropriate instructions contained in the Federal Financial Institutions Examination Council booklet entitled ''Instructions—Consolidated Reports of Condition and Income.'' All insured state nonmember banks (except District banks) shall file their completed reports either electronically, on diskette, or in hard copy (paper) form with the appropriate collection agent for the FDIC as designated in the materials accompanying the report forms each quarter. The report forms, the instructions for completing the reports, and the accompanying materials will be furnished to all insured state nonmember banks (except District banks) by, or may be obtained upon request from, the Call Reports Analysis Unit, Division of Supervision, FDIC, Washington, DC 20429.

[57 FR 23932, June 5, 1992]

§304.5 Other forms.

The forms described below have been prepared by the Corporation for the use of banks.

(a) *Form 8020/05: Summary of Deposits (Commercial and Mutual and Stock Savings Banks).* Form 8020/05 is a report on the amount of deposits in various types of categories for each authorized office of an insured bank with branches; unit banks do not report. Reports as of June 30 of each year must be submitted no later than the immediately succeeding July 30. The report is filed with the Division of Supervision, FDIC, Washington, DC 20429. The report forms and the instructions for completing the reports will be furnished to all such banks by, or may be obtained upon request from, the Division of Supervision, FDIC, Washington, DC 20429.

(b) *Form 6120/06: Notification of Performance of Bank Services.* Form 6120/06 may be used to satisfy the notice requirement for bank service arrangements that is contained in section 7 of the Bank Service Corporation Act (12 U.S.C. 1867), as amended. In lieu of the form, a bank may satisfy the requirement by submitting a letter stating: The name of the servicer; the address at which the service is performed; the service being performed; and the date the service commenced. Either the form or the letter containing the notice information must be submitted to the regional director—bank supervision of the region in which the bank's main office is located within 30 days of the making of the bank service contract or the performance of the bank service, whichever occurs first.

(c) *Form FFIEC 001: Annual Report of Trust Assets.* This is an interagency report developed by the Federal Financial Institutions Examination Council. All insured state nonmember commercial and savings banks operating trust departments or banks granted consent by the Corporation to exercise trust powers, and their trust subsidiaries, are required to submit the December 31

report no later than February 15th of each year. When circumstances necessitate, additional information may be required about certain operations of the trust department. The report is filed with the Division of Supervision, FDIC, Washington, DC 20429. The report forms and instructions for completing the report will be furnished to all such banks by, or may be obtained upon request from, the Division of Supervision, FDIC, Washington, DC 20429.

(d) *Form FFIEC 002: Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.* Form FFIEC 002 is a report in the form of a statement of the assets and liabilities of U.S. branches and agencies of foreign banks together with an additional detailed breakdown of selected items and, in the case of insured branches, information for assessment purposes. Insured branches must also submit annually such information on small business and small farm lending as the FDIC may need to assess the availability of credit to these sectors of the economy. The report must be prepared in accordance with the instructions contained in the instruction booklet for the report, copies of which are furnished to all U.S. branches and agencies of foreign banks by the Federal Reserve System. The Board of Governors of the Federal Reserve System collects and processes the report on behalf of FDIC-supervised branches. The report is submitted quarterly to the appropriate Federal Reserve District Bank.

(e) *Form FFIEC 004: Report on Indebtedness of Executive Officers and Principal Shareholders and their Related Interests to Correspondent Banks.* Form FFIEC 004 is a recommended form that may be used by the executive officers and principal shareholders of an insured State nonmember bank to report to the board of directors of their bank on their indebtedness (and that of their related interests) to correspondent banks, as required by part 349 of the FDIC's regulations. The reports are due January 31 of each year and cover indebtedness to correspondent banks during the preceding calendar year. Form FFIEC 004 is mailed annually by the FDIC to each bank.

[51 FR 36684, Oct. 15, 1986, as amended at 57 FR 23933, June 5, 1992; 60 FR 31384, June 15, 1995]

§ 304.6 [Reserved]

§ 304.7 Display of control numbers.

The following sections of this part of FDIC's regulations containing collection of information requirements are listed with the control numbers assigned by the Office of Management and Budget:

Section of 12 CFR Part 304	Currently Assigned OMB Control No.
304.3	3064–0057
304.4(a)	3064–0052
304.4(b)	3064–0054
304.5(a)	3064–0061
304.5(b)	3064–0029
304.5(c)	3064–0024
304.5(d)	7100–0032
304.5(e)	3064–0023

APPENDIX A TO PART 304—LIST OF FORMS

[NOTE: See footnotes at end of table.]

Form	Title	Section of FDIC's regulations (12 CFR Chapter III) where the form is referenced	OMB No.
FDIC 6112/01	Initial Statement of Beneficial Ownership of Equity Securities (Form F–7).	335.413	3064–0030.
FDIC 6112/02	Statement of Changes in Beneficial Ownership of Equity Securities (Form F–8).	335.414	3064–0030.
FDIC 6120/06	Notification of Performance of Bank Services	304.5(b)	3064–0029.
FDIC 6140/03	Report of Compliance with the Bank Protection Act	326.5	
FDIC 6200/05	Application for Federal Deposit Insurance (Commercial Banks)	303.1	3064–0001.
FDIC 6200/06	Financial Report	(1)	3064–0006.
FDIC 6200/07	Application for Federal Deposit Insurance for Operating Noninsured Institutions.	303.1	3064–0069.
FDIC 6200/09	Application for Consent to Exercise Trust Powers	(2)	3064–0025.
FDIC 6220/01	Application for a Merger or Other Transaction Pursuant to section 18(c) of the Federal Deposit Insurance Act.	303.3	3064–0016.

APPENDIX A TO PART 304—LIST OF FORMS—Continued

[NOTE: See footnotes at end of table.]

Form	Title	Section of FDIC's regulations (12 CFR Chapter III) where the form is referenced	OMB No.
FDIC 6220/07	Application for a Merger or Other Transaction Pursuant to section 18(c) of the Federal Deposit Insurance Act (Phantom or Corporate Reorganization).	303.7(b)(1) and 303.3	3064–0015.
FDIC 6420/07	Certified Statement	304.3(a)	3064–0057.
FDIC 6420/10	First Certified Statement	304.3(b)	3064–0057.
FDIC 6500/70	Fair Housing Home Loan Application Log Sheet	338.4(a)(2)(iv)	3064–0046.
FDIC 6710/06	Report of Apparent Crime (Short Form)	353.1	3064–0077.
FDIC 6710/06A	Report of Apparent Crime (Long Form)	353.1	3064–0077.
FDIC 6710/07	Application Pursuant to section 19 of the Federal Deposit Insurance Act.	([3])	3064–0018.
FDIC 6822/01	Notice of Acquisition of Control	303.4(b)	3064–0019.
FDIC 8020/05	Summary of Deposits	304.5(a)	3064–0061.
FDIC 8040/60	Report of Income and Condition—Monthly (FDIC-Insured Savings Banks—Large).	([4])	3064–0058.
FFIEC 001	Annual Report of Trust Assets	304.5(c)	3064–0024
FFIEC 002	Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.	304.5(d)	7100–0032
FFIEC 004	Report on Indebtedness of Executive Officers and Principal Shareholders and their Related Interests to Correspondent Banks.	304.5(e)	3064–0023
FFIEC 009	Country Exposure Report	351.3	3064–0017
FFIEC 009a	Country Exposure Information Report	351.3	3064–0017
FFIEC 019	Country Exposure Report for U.S. Branches and Agencies of Foreign Banks.	([5])	7100–0213
FFIEC 030	Foreign Branch Report of Condition	347.6(b)	3064–0011
FFIEC 031	Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices.	304.4	3064–0052
FFIEC 032	Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets of $300 Million or More.	304.4	3064–0052
FFIEC 033	Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets of $100 Million or More But Less Than $300 Million.	304.4	3064–0052
FFIEC 034	Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets of Less than $100 Million.	304.4	3064–0052
FFIEC 035	Monthly Consolidated Foreign Currency Report of Banks in the United States.	([6])	1557–0156
TA–1	Registered Transfer Agents—Form TA–1 for Registrations and Amendments.	341.6	3064–0026
MSD–4	Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.	343.3	3064–0022
MSD–5	Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.	343.3	3064–0022

[1] Not referenced in 12 CFR chapter III. The report form is submitted by each individual director or officer of a proposed or operating bank applying to the FDIC for Federal deposit insurance as a state nonmember bank, or by a person proposing to acquire ownership or control of an insured state nonmember bank.

[2] Not referenced in 12 CFR chapter III. The application form is submitted by insured state nonmember banks applying for FDIC consent to exercise trust powers.

[3] Not referenced in 12 CFR chapter III. The application form is submitted by FDIC–insured banks applying for FDIC consent to employ persons who have been convicted of crimes involving dishonesty or breach of trust.

[4] Not referenced in 12 CFR chapter III. The report form is submitted monthly by large FDIC-insured savings banks (assets of $500 million or more) to the Division of Research and Strategic Planning, FDIC, Washington, DC 20429.

[5] Not referenced in 12 CFR chapter III. The report form is submitted by State chartered and Federally-licensed branches and agencies of foreign banks in the U.S. with $30 million or more in total direct claims on foreign residents. The Federal Reserve Board collects and processes the report on behalf of FDIC-supervised branches. The report is submitted quarterly to the appropriate Federal Reserve District Bank.

[6] Not referenced in 12 CFR chapter III. The report form is submitted by banks (other than savings banks) and bank holding companies with a dollar equivalent of $100 million or more in assets, liabilities, foreign exchange contracts bought, and foreign exchange contracts sold in any six specific foreign currencies as of the end of a month. The Office of the Comptroller of the Currency collects and processes this montly report on behalf of insured state nonmember banks.

[51 FR 36684, Oct. 15, 1986, as amended at 57 FR 23933, June 5, 1992; 59 FR 50828, Oct. 6, 1994; 59 FR 67160, Dec. 29, 1994]

APPENDIX B TO PART 304—FEDERAL DEPOSIT INSURANCE CORPORATION REGIONAL OFFICES—BANK SUPERVISION

ATLANTA REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, Marquis One Tower, Suite 1200, 245 Peachtree Center Avenue, NE., Atlanta, GA 30303

Alabama, Florida, Georgia, North Carolina, South Carolina, Virginia

BOSTON REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 60 State Street, 17th Floor, Boston, MA 02109

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

CHICAGO REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 30 S. Wacker Drive, Suite 3100, Chicago, IL 60606

Illinois, Indiana, Wisconsin

COLUMBUS REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 1 Nationwide Plaza, Suite 2600, Columbus, OH 43215

Kentucky, Michigan, Ohio, West Virginia

DALLAS REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 1910 Pacific Avenue, Suite 1900, Dallas, TX 75201

Colorado, New Mexico, Oklahoma, Texas

KANSAS CITY REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 2345 Grand Avenue, Suite 1500, Kansas City, MO 64108

Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota

MEMPHIS REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 1 Commerce Square, Suite 1800, Memphis, TN 38103

Arkansas, Louisiana, Mississippi, Tennessee

NEW YORK REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 452 Fifth Avenue, 21st Floor, New York, NY 10018

Delaware, District of Columbia, Maryland, New Jersey, New York, Pennsylvania, Puerto Rico, Virgin Islands

SAN FRANCISCO REGIONAL OFFICE

Regional Director (Bank Supervision), Federal Deposit Insurance Corporation, 25 Ecker Street, Suite 2300, San Francisco, CA 94105

Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, Wyoming

PARTS 305–306—[RESERVED]

PART 307—NOTIFICATION OF CHANGES OF INSURED STATUS

AUTHORITY: Sec. 2, Pub. L. 797, 64 Stat. 879, 880 as amended by secs. 202, 204, Pub. L. 89–694, 80 Stat. 1046, 1054, and sec. 6(c)(14), Pub. L. 95–369, 92 Stat. 618 (12 U.S.C. 1818(a), 1818(o)); sec. 304, Pub. L. 95–630, 92 Stat. 3676 (12 U.S.C. 1818(q); sec. 9, Pub. L. 797, 64 Stat. 881 (12 U.S.C. 1819).

§ 307.1 Certification of assumption of deposit liabilities.

Whenever the deposit liabilities of an insured bank or insured branch of a foreign bank are assumed by another insured bank (whether by merger, consolidation, or other statutory assumption, or by contract), the assuming or resulting bank shall certify to the FDIC that it has agreed to assume the deposit liabilities of the bank whose deposits were assumed. The certification shall be made within 30 days after the assumption takes effect and shall state the date the assumption took effect. This certification shall be considered satisfactory evidence of the assumption.

[48 FR 24031, May 31, 1983]

§ 307.2 Notice to be given when deposit liabilities are not assumed.

Any insured bank or insured branch of a foreign bank whose insured status is voluntarily terminated, but whose deposit liabilities are not assumed shall give notice to each of its depositors of the date of the termination of its insured status under the Federal Deposit Insurance Act. The notice to depositors shall be given in a form, in a manner and at a time approved by the appropriate FDIC Regional Director. The FDIC may require the bank to take other steps that it considers necessary for the protection of depositors.

[48 FR 24031, May 31, 1983]

PART 308—RULES OF PRACTICE AND PROCEDURE

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AUTHORITY: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1817, 1818, 1820, 1828, 1829, 1829b, 1831o, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717; 15 U.S.C. 78 (h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, and 78w; 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–358.

SOURCE: 56 FR 37975, Aug. 9, 1991, unless otherwise noted.

Subpart A—Uniform Rules of Practice and Procedure

§308.1 Scope.

This subpart prescribes rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by 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 Federal Deposit Insurance Corporation (''FDIC''), should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution 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 FDIC is the appropriate regulatory agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (''FRA''), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j);

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 (''BHCA Amendments of 1970''), and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(3) Any provision of the Change in Bank Control Act of 1978, as amended (the ''CBCA''), 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);

(4) Section 7(a)(1) of the FDIA, pursuant to 12 U.S.C. 1817(a)(1);

(5) 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;

(6) 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;

(7) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(8) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (12 U.S.C. 3349), or any order or regulation issued thereunder;

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC, the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(10) 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; and

(11) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g)); and

(g) 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 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§ 308.2 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.

§ 308.3 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) *Board of Directors* or *Board* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee.

(d) *Decisional employee* means any member of the Federal Deposit Insurance Corporation'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 Board of Directors or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Designee* of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors as provided in 12 CFR part 303 of this chapter or by specific resolution of the Board of Directors.

(f) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

(g) *Executive Secretary* means the Executive Secretary of the Federal Deposit Insurance Corporation or his or her designee.

(h) *FDIC* means the Federal Deposit Insurance Corporation.

(i) *Final order* means an order issued by the FDIC 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.

(j) *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 BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) 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; and

(6) Any federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

(k) *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)).

(l) *Local Rules* means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

(m) *Office of Financial Institution Adjudication* (''OFIA'') means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (''OCC''), the Board of Governors of the Federal Reserve Board (''FRB''), the FDIC, the Office of Thrift Supervision (''OTS'') and the National Credit Union Administration (''NCUA'').

(n) *Party* means the FDIC and any person named as a party in any notice.

(o) *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 (j) of this section.

(p) *Respondent* means any party other than the FDIC.

(q) *Uniform Rules* means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at §308.01 and as specified in subparts B through P of this part.

(r) *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.

§308.4 Authority of Board of Directors.

The Board of Directors 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.

§308.5 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 §308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors 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 of Directors 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.

§ 308.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the FDIC 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 FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(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 FDIC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the FDIC, 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 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§ 308.7 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 statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 308.8 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 §308.6(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 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§308.9 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 FDIC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Board of Directors, 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 FDIC until the date that the Board of Directors issues its final decision pursuant to §308.40(c):

(1) No interested person outside the FDIC shall make or knowingly cause to be made an ex parte communication to any member of the Board of Directors, the administrative law judge, or a decisional employee; and

(2) No member of the Board of Directors, no administrative law judge, or decisional employee shall make or knowingly cause to be made to any interested person outside the FDIC any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, any member of the Board of Directors or 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 that they believe to be appropriate under the circumstances. The administrative law judge or the Board of Directors shall then determine whether any action should be taken concerning the ex parte communication in accordance with paragraph (d) of this section.

(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 of Directors 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 FDIC 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 § 308.40 except as witness or counsel in public proceedings.

[56 FR 37975, Aug. 9, 1991, as amended at 60 FR 24762, May 10, 1995]

§ 308.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors 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 of Directors 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 8½×11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 308.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the FDIC 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 of Directors, 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.

§ 308.11 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 § 308.10(c).

(c) *By the Board of Directors.* (1) All papers required to be served by the Board of Directors or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 308.6, 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 § 308.6, the Board of Directors 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 party'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) In such other manner 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 37975, Aug. 9, 1991, as amended at 61 FR 20347, May 6, 1996]

§308.12 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 of Directors 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 of Directors or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20348, May 6, 1996]

§308.13 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 of Directors pursuant to § 308.38, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or of the Board of Directors after notice and opportunity to respond is afforded all non-moving parties, or on the administrative law judge's own motion.

§ 308.14 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 FDIC is the party requesting the subpoena. The FDIC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

§ 308.15 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 FDIC 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.

§ 308.16 FDIC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

§ 308.17 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.

§ 308.18 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 FDIC.

(ii) The notice must be served by the Executive Secretary upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the 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 FDIC.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the FDIC 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.

§308.19 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 of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors 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.

§308.20 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 of Directors 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 20348, May 6, 1996]

§308.21 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 of Directors a recommended decision containing the findings and the relief sought in the notice.

§308.22 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 must 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.

§ 308.23 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 Executive Secretary for disposition by the Board of Directors.

(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 Executive Secretary, 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 §§ 308.29 and 308.30.

§ 308.24 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 subpart I 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 §308.25.

(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 37975, Aug. 9, 1991, as amended at 61 FR 20348, May 6, 1996]

§308.25 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 310 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 §308.23 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 §308.23 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 § 308.23 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 37975, Aug. 9, 1991, as amended at 61 FR 20348, May 6, 1996]

§ 308.26 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 § 308.24(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 §308.25(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.

§308.27 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' 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 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' 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.

§ 308.28 Interlocutory review.

(a) *General rule.* The Board of Directors may review a ruling of the administrative law judge prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of, the administrative law judge if the Board of Directors 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 § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board of Directors.

§ 308.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Board of Directors 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 of Directors. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§308.30 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.

§308.31 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.

§ 308.32 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.

§ 308.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its 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 Executive Secretary 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 Executive Secretary. The form of, and procedure for, these requests and replies are governed by § 308.23. 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 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§ 308.34 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 §308.26(c).

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§308.35 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 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§308.36 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 of Directors 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 of Directors.

(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.

§ 308.37 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 37975, Aug. 9, 1991, as amended at 61 FR 20349, May 6, 1996]

§308.38 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 §308.37(b), the administrative law judge shall file with and certify to the Executive Secretary, 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 Executive Secretary for final determination the record of the proceeding, the administrative law judge shall furnish to the Executive Secretary 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 20350, May 6, 1996]

§308.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under §308.38, a party may file with the Executive Secretary 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 of Directors 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.

§ 308.40 Review by Board of Directors.

(a) *Notice of submission to Board of Directors.* When the Executive Secretary determines that the record in the proceeding is complete, the Executive Secretary shall serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors.* Upon the initiative of the Board of Directors or on the written request of any party filed with the Executive Secretary within the time for filing exceptions, the Board of Directors 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 of Directors' final decision. Oral argument before the Board of Directors must be on the record.

(c) *Final decision.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the Board of Directors 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 of Directors 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 of Directors 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 of Directors shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate state or Federal supervisory authority.

§ 308.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors 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—General Rules of Procedure

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.01 of the Uniform Rules.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules shall not apply to subparts D through P of the Local Rules.

(c) Subpart C of the Local Rules shall apply to any administrative proceeding initiated by the FDIC.

§ 308.102 Authority of Board of Directors and Executive Secretary.

(a) *The Board of Directors.* (1) The Board of Directors 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 Executive Secretary.

(2) Nothing contained in this part 308 shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Executive Secretary.* When no administrative law judge has jurisdiction over a proceeding, the Executive Secretary may act in place of, and with the same authority as, an administrative law judge, except that the Executive Secretary may not hear a case on

the merits or make a recommended decision on the merits to the Board of Directors.

§ 308.103 Appointment of administrative law judge.

(a) *Appointment.* Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part 308 shall be held before an administrative law judge of the Office of Financial Institution Adjudication (''OFIA'').

(b) *Procedures.* (1) The Executive Secretary shall promptly after issuance of the notice refer the matter to the OFIA which shall secure the appointment of an administrative law judge to hear the proceeding.

(2) OFIA shall advise the parties, in writing, that an administrative law judge has been appointed.

§ 308.104 Filings with the Board of Directors.

(a) *General Rule.* All materials required to be filed with or referred to the Board of Directors in any proceedings under this part 308 shall be filed with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(b) *Scope.* Filings to be made with the Executive Secretary include pleadings and motions filed during the proceeding; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part 308.

§ 308.105 Custodian of the record.

The Executive Secretary is the official custodian of the record when no administrative law judge has jurisdiction over the proceeding. As the official custodian, the Executive Secretary shall maintain the official record of all papers filed in each proceeding.

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule.* (1) At any time more than fifteen days before the hearing is to commence, on the motion of any party or on his or her own motion, the administrative law judge may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such statements as evidence, provided that if any party objects, the administrative law judge shall not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order shall provide that each party shall, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order shall also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony.* (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the administrative law judge shall require that it be filed within the time period for commencement of the hearing, and the hearing shall be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, shall be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The administrative law judge shall direct, unless good cause requires otherwise, that—

(i) All parties shall simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties shall simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file

written testimony or exhibits at the time and in the manner required under this section shall be deemed a waiver of that party's right to present any evidence, except testimony of a previously identified adverse party or hostile witness. Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.01 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

(b) Any questioning at a deposition of a person producing documents pursuant to a document subpoena shall be strictly limited to the identification of documents produced by that person and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents.

Subpart C—Rules of Practice Before the FDIC and Standards of Conduct

§ 308.108 Sanctions.

(a) *General rule.* Appropriate sanctions may be imposed when any counsel or party has acted, or failed to act, in a manner required by applicable statute, regulations, or order, and that act or failure to act:

(1) Constitutes contemptuous conduct;

(2) Has in a material way injured or prejudiced some other party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Has unduly delayed the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Limits on dismissal as a sanction.* No recommendation of dismissal shall be made by the administrative law judge or granted by the Board of Directors based on the failure to hold a hearing within the time period called for in this part 308, or on the failure of an administrative law judge to render a recommended decision within the time period called for in this part 308, absent a finding:

(1) That the delay resulted solely or principally from the conduct of the FDIC enforcement counsel;

(2) That the conduct of the FDIC enforcement counsel is unexcused;

(3) That the moving respondent took all reasonable steps to oppose and prevent the subject delay;

(4) That the moving respondent has been materially prejudiced or injured; and

(5) That no lesser or different sanction is adequate.

(d) *Procedure for imposition of sanctions.* (1) The administrative law judge, upon the request of any party, or on his or her own motion, may impose sanctions in accordance with this section, provided that the administrative law judge may only recommend to the Board of Directors the sanction of entering a final order determining the case on the merits.

(2) No sanction, other than refusing to accept late papers, authorized by this section shall be imposed without prior notice to all parties and an opportunity for any counsel or party against whom sanctions would be imposed to be heard. Such opportunity to be heard

may be on such notice, and the response may be in such form, as the administrative law judge directs. The opportunity to be heard may be limited to an opportunity to respond orally immediately after the act or inaction covered by this section is noted by the administrative law judge.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, shall be treated for interlocutory review purposes in the same manner as any other ruling by the administrative law judge.

(4) *Section not exclusive.* Nothing in this section shall be read as precluding the administrative law judge or the Board of Directors from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 308.109 Suspension and disbarment.

(a) *Discretionary suspension and disbarment.* (1) The Board of Directors may suspend or revoke the privilege of any counsel to appear or practice before the FDIC if, after notice of and opportunity for hearing in the matter, that counsel is found by the Board of Directors:

(i) Not to possess the requisite qualifications to represent others;

(ii) To be seriously lacking in character or integrity or to have engaged in material unethical or improper professional conduct;

(iii) To have engaged in, or aided and abetted, a material and knowing violation of the FDIA; or

(iv) To have engaged in contemptuous conduct before the FDIC. Suspension or revocation on the grounds set forth in paragraphs (a)(1) (ii), (iii), and (iv) of this section shall only be ordered upon a further finding that the counsel's conduct or character was sufficiently egregious as to justify suspension or revocation.

(2) Unless otherwise ordered by the Board of Directors, an application for reinstatement by a person suspended or disbarred under paragraph (a)(1) of this section may be made in writing at any time more than three years after the effective date of the suspension or disbarment and, thereafter, at any time more than one year after the person's most recent application for reinstatement. The suspension or disbarment shall continue until the applicant has been reinstated by the Board of Directors for good cause shown or until, in the case of a suspension, the suspension period has expired. An applicant for reinstatement under this provision may, in the Board of Directors' sole discretion, be afforded a hearing.

(b) *Mandatory suspension and disbarment.* (1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any state, territory, district, commonwealth, or possession; or any person who has been and remains suspended or barred from practice before the OCC, Board of Governors, the OTS, the NCUA, the Securities and Exchange Commission, or the Commodity Futures Trading Commission; or any person who has been convicted of a felony, or of a misdemeanor involving moral turpitude, within the last ten years, shall be suspended automatically from appearing or practicing before the FDIC. A disbarment, suspension, or conviction within the meaning of this paragraph (b) shall be deemed to have occurred when the disbarring, suspending, or convicting agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken, and includes a judgment or an order on a plea of nolo contendere or on consent, regardless of whether a violation is admitted in the consent.

(2) Any person appearing or practicing before the FDIC who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall promptly file with the Executive Secretary a copy thereof, together with any related opinion or statement of the agency or tribunal involved. Failure to file any such paper shall not impair the operation of any other provision of this section.

(3) A suspension or disbarment under paragraph (b)(1) of this section from practice before the FDIC shall continue until the applicant has been reinstated by the Board of Directors for good cause shown, provided that any person suspended or disbarred under paragraph (b)(1) of this section shall be

automatically reinstated by the Executive Secretary, upon appropriate application, if all the grounds for suspension or disbarment under paragraph (b)(1) of this section are subsequently removed by a reversal of the conviction (or the passage of time since the conviction) or termination of the underlying suspension or disbarment. An application for reinstatement on any other grounds by any person suspended or disbarred under paragraph (b)(1) of this section may be filed at any time not less than one year after the applicant's most recent application. An applicant for reinstatement under this provision may, in the Board of Directors' sole discretion, be afforded a hearing.

(c) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under the Uniform Rules, provided that in proceedings to terminate an existing FDIC suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application and with proof, and that the Board of Directors may, in its sole discretion, direct that any proceeding to terminate an existing suspension or disbarment by the FDIC be limited to written submissions.

(d) *Summary suspension for contemptuous conduct.* A finding by the administrative law judge of contemptuous conduct during the course of any proceeding shall be grounds for summary suspension by the administrative law judge of a counsel or other representative from any further participation in that proceeding for the duration of that proceeding.

(e) *Practice defined.* Unless the Board of Directors orders otherwise, for the purposes of this section, practicing before the FDIC includes, but is not limited to, transacting any business with the FDIC as counsel or agent for any other person and the preparation of any statement, opinion, or other paper by a counsel, which statement, opinion, or paper is filed with the FDIC in any registration statement, notification, application, report, or other document, with the consent of such counsel.

Subpart D—Rules and Procedures Applicable to Proceedings Relating to Disapproval of Acquisition of Control

§ 308.110 Scope.

Except as specifically indicated in this subpart, the rules and procedures in this subpart, subpart B of the Local Rules, and the Uniform Rules shall apply to proceedings in connection with the disapproval by the Board of Directors or its designee of a proposed acquisition of control of an insured nonmember bank.

§ 308.111 Grounds for disapproval.

The following are grounds for disapproval of a proposed acquisition of control of an insured nonmember bank:

(a) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the banking business in any part of the United States;

(b) The effect of the proposed acquisition of control in any section of the United States may be to substantially lessen competition or to tend to create a monopoly or would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(c) The financial condition of any acquiring person might jeopardize the financial stability of the bank or prejudice the interests of the depositors of the bank;

(d) The competence, experience, or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the depositors of the bank, or in the interest of the public, to permit such person to control the bank;

(e) Any acquiring person neglects, fails, or refuses to furnish to the FDIC all the information required by the FDIC; or

(f) The FDIC determines that the proposed acquisition would result in an

adverse effect on the Bank Insurance Fund or the Savings Association Insurance Fund.

§308.112 Notice of disapproval.

(a) *General rule.* (1) Within three days of the decision by the Board of Directors or its designee to disapprove a proposed acquisition of control of an insured nonmember bank, a written notice of disapproval shall be mailed by first class mail to, or otherwise served upon, the party seeking acquire control.

(2) The notice of disapproval shall:

(i) Contain a statement of the basis for the disapproval; and

(ii) Indicate that a hearing may be requested by filing a written request with the Executive Secretary within ten days after service of the notice of disapproval; and if a hearing is requested, that an answer to the notice of disapproval, as required by §308.113, must be filed within 20 days after service of the notice of disapproval.

(b) *Waiver of hearing.* Failure to request a hearing pursuant to this section shall constitute a waiver of the opportunity for a hearing and the notice of disapproval shall constitute a final and unappealable order.

(c) Section 308.18(b) of the Uniform Rules shall not apply to the content of the Notice of Disapproval.

§308.113 Answer to notice of disapproval.

(a) *Contents.* (1) An answer to the notice of disapproval of a proposed acquisition of control shall be filed within 20 days after service of the notice of disapproval and shall specifically deny those portions of the notice of disapproval which are disputed. Those portions of the notice of disapproval which are not specifically denied are deemed admitted by the applicant.

(2) Any hearing under this subpart shall be limited to those parts of the notice of disapproval that are specifically denied.

(b) *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 of disapproval. 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 a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§308.114 Burden of proof.

The ultimate burden of proof shall be upon the person proposing to acquire a depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

Subpart E—Rules and Procedures Applicable to Proceedings Relating to Assessment of Civil Penalties for Willful Violations of the Change in Bank Control Act

§308.115 Scope.

The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to assess civil penalties against any person for willful violation of the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)), or any regulation or order issued pursuant thereto, in connection with the affairs of an insured nonmember bank.

§308.116 Assessment of penalties.

(a) *In general.* The civil money penalty shall be assessed upon the service of a Notice of Assessment which shall become final and unappealable unless the respondent requests a hearing pursuant to §308.19(c)(2).

(b) *Amount.* (1) Any person who violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto, shall forfeit and pay a civil money penalty of not more than $5,000 for each day the violation continues.

(2) Any person who violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto; or

recklessly engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or breaches any fiduciary duty; which violation, practice or breach is part of a pattern of misconduct; or causes or is likely to cause more than a minimal loss to such institution; or results in pecuniary gain or other benefit to such person, shall forfeit and pay a civil money penalty of not more than $25,000 for each day such violation, practice or breach continues.

(3) Any person who knowingly violates any provision of the Change in Bank Control Act or any rule, regulation, or order issued by the FDIC pursuant thereto; or engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or breaches any fiduciary duty; and knowingly or recklessly causes a substantial loss to such institution or a substantial pecuniary gain or other benefit to such institution or a substantial pecuniary gain or other benefit to such person by reason of such violation, practice or breach, shall forfeit and pay a civil money penalty not to exceed:

(i) In the case of a person other than a depository institution—$1,000,000 per day for each day the violation, practice or breach continues; or

(ii) In the case of a depository institution—an amount not to exceed the lesser of $1,000,000 or one percent of the total assets of such institution for each day the violation, practice or breach continues.

(4) *Adjustment of civil money penalties by the rate of inflation pursuant to section 31001(s) of the Debt Collection Improvement Act.* After November 12, 1996:

(i) Any person who engages in a violation as set forth in paragraph (b)(1) of this section shall forfeit and pay a civil money penalty of not more than $5,500 for each day the violation continues.

(ii) Any person who engages in a violation, unsafe or unsound practice or breach of fiduciary duty, as set forth in paragraph (b)(2) of this section, shall forfeit and pay a civil money penalty of not more than $27,500 for each day such violation, practice or breach continues.

(iii) Any person who knowingly engages in a violation, unsafe or unsound practice or breach of fiduciary duty, as set forth in paragraph (b)(3) of this section, shall forfeit and pay a civil money penalty not to exceed:

(A) In the case of a person other than a depository institution—$1,100,000 per day for each day the violation, practice or breach continues; or

(B) In the case of a depository institution—an amount not to exceed the lesser of $1,100,000 or one percent of the total assets of such institution for each day the violation, practice or breach continues.

(c) *Mitigating factors.* In assessing the amount of the penalty, the Board of Directors or its designee shall consider the gravity of the violation, the history of previous violations, respondent's financial resources, good faith, and any other matters as justice may require.

(d) *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 of disapproval. 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 a recommended decision containing the findings and relief sought in the notice. A final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 57990, Nov. 12, 1996]

§ 308.117 Effective date of, and payment under, an order to pay.

If the respondent both requests a hearing and serves an answer, civil penalties assessed pursuant to this subpart are due and payable 60 days after an order to pay, issued after the hearing or upon default, is served upon the respondent, unless the order provides for a different period of payment. Civil penalties assessed pursuant to an order to pay issued upon consent are due and payable within the time specified therein.

§ 308.118 Collection of penalties.

The FDIC may collect any civil penalty assessed pursuant to this subpart

by agreement with the respondent, or the FDIC may bring an action against the respondent to recover the penalty amount in the appropriate United States district court. All penalties collected under this section shall be paid over to the Treasury of the United States.

Subpart F—Rules and Procedures Applicable to Proceedings for Involuntary Termination of Insured Status

§ 308.119 Scope.

(a) *Involuntary termination of insurance pursuant to section 8(a) of the FDIA.* The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings in connection with the involuntary termination of the insured status of an insured bank depository institution or an insured branch of a foreign bank pursuant to section 8(a) of the FDIA (12 U.S.C. 1818(a)), except that the Uniform Rules and subpart B of the Local Rules shall not apply to the temporary suspension of insurance pursuant to section 8(a)(8) of the FDIA (12 U.S.C. 1818(a)(8)).

(b) *Involuntary termination of insurance pursuant to section 8(p) of the Act.* The rules and procedures in § 308.124 of this subpart F shall apply to proceedings in connection with the involuntary termination of the insured status of an insured depository institution or an insured branch of a foreign bank pursuant to section 8(p) of the FDIA (12 U.S.C. 1818(p)). The Uniform Rules shall not apply to proceedings under section 8(p) of the FDIA.

§ 308.120 Grounds for termination of insurance.

(a) *General rule.* The following are grounds for involuntary termination of insurance pursuant to section 8(a) of the FDIA:

(1) An insured depository institution or its directors or trustees have engaged or are engaging in unsafe or unsound practices in conducting the business of such depository institution;

(2) An insured depository institution is in an unsafe or unsound condition such that it should not continue operations as an insured depository institution; or

(3) An insured depository institution or its directors or trustees have violated an applicable law, rule, regulation, order, condition imposed in writing by the FDIC in connection with the granting of any application or other request by the insured depository institution or have violated any written agreement entered into between the insured depository institution and the FDIC.

(b) *Extraterritorial acts of foreign banks.* An act or practice committed outside the United States by a foreign bank or its directors or trustees which would otherwise be a ground for termination of insured status under this section shall be a ground for termination if the Board of Directors finds:

(1) The act or practice has been, is, or is likely to be a cause of, or carried on in connection with or in furtherance of, an act or practice committed within any state, territory, or possession of the United States or the District of Columbia that, in and of itself, would be an appropriate basis for action by the FDIC; or

(2) The act or practice committed outside the United States, if proven, would adversely affect the insurance risk of the FDIC.

(c) *Failure of foreign bank to secure removal of personnel.* The failure of a foreign bank to comply with any order of removal or prohibition issued by the Board of Directors or the failure of any person associated with a foreign bank to appear promptly as a party to a proceeding pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)), shall be a ground for termination of insurance of deposits in any branch of the bank.

§ 308.121 Notification to primary regulator.

(a) *Service of notification.* (1) Upon a determination by the Board of Directors or its designee pursuant to § 308.120 of an unsafe or unsound practice or condition or of a violation, a notification shall be served upon the appropriate Federal banking agency of the insured depository institution, or the State banking supervisor if the FDIC is the appropriate Federal banking agency.

The notification shall be served not less than 30 days before the Notice of Intent to Terminate Insured Status required by section 8(a)(2)(B) of the FDIA (12 U.S.C. 1818(a)(2)(B)), and § 308.122, except that this period for notification may be reduced or eliminated with the agreement of the appropriate Federal banking agency.

(2) *Appropriate Federal banking agency* shall have the meaning given that term in section 3(q) of the FDIA (12 U.S.C. 1813(q)), and shall be the OCC in the case of a national bank, a District bank or an insured Federal branch of a foreign bank; the FDIC in the case of an insured nonmember bank, including an insured State branch of a foreign bank; the Board of Governors in the case of a state member bank; or the OTS in the case of an insured Federal or state savings association.

(3) In the case of a state nonmember bank, insured Federal branch of a foreign bank, or state member bank, in addition to service of the notification upon the appropriate Federal banking agency, a copy of the notification shall be sent to the appropriate State banking supervisor.

(4) In instances in which a Temporary Order Suspending Insurance is issued pursuant to section 8(a)(8) of the FDIA (12 U.S.C. 1818(a)(8)), the notification may be served concurrently with such order.

(b) *Contents of notification*. The notification shall contain the FDIC's determination, and the facts and circumstances upon which such determination is based, for the purpose of securing correction of such practice, condition, or violation.

§ 308.122 Notice of intent to terminate.

(a) If, after serving the notification under § 308.121, the Board of Directors determines that any unsafe or unsound practices, condition, or violation, specified in the notification, requires the termination of the insured status of the insured depository institution, the Board of Directors or its designee, if it determines to proceed further, shall cause to be served upon the insured depository institution a notice of its intention to terminate insured status not less than 30 days after service of the notification, unless a shorter time period has been agreed upon by the appropriate Federal banking agency.

(b) The Board of Directors or its designee shall cause a copy of the notice to be sent to the appropriate Federal banking agency and to the appropriate state banking supervisor, if any.

§ 308.123 Notice to depositors.

If the Board of Directors enters an order terminating the insured status of an insured depository institution or branch, the insured depository institution shall, on the day that order becomes final, or on such other day as that order prescribes, mail a notification of termination of insured status to each depositor at the depositor's last address of record on the books of the insured depository institution or branch. The insured depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

1. The status of the _____, as an (insured depository institution) (insured branch) under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on the _____ day of_____, 19____.

2. Any deposits made by you after that date, either new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in the (depository institution) (branch) on the _____ day of_____, 19____, will continue to be insured, as provided by Federal Deposit Insurance Act, for *2 years* after the close of business on the _____ day of _____, 19____. Provided, however, that any withdrawals after the close of business on the _____ day of _____, 19____, will reduce the insurance coverage by the amount of such withdrawals.

_____

(Name of (depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§308.124 Involuntary termination of insured status for failure to receive deposits.

(a) *Notice to show cause.* When the Board of Directors or its designee has evidence that an insured depository institution is not engaged in the business of receiving deposits, other than trust funds, the Board of Directors or its designee shall give written notice of this evidence to the depository institution and shall direct the depository institution to show cause why its insured status should not be terminated under the provisions of section 8(p) of the FDIA (12 U.S.C. 1818(p)). The insured depository institution shall have 30 days after receipt of the notice, or such longer period as is prescribed in the notice, to submit affidavits, other written proof, and any legal arguments that it is engaged in the business of receiving deposits other than trust funds.

(b) *Notice of termination date.* If, upon consideration of the affidavits, other written proof, and legal arguments, the Board of Directors determines that the depository institution is not engaged in the business of receiving deposits, other than trust funds, the finding shall be conclusive and the Board of Directors shall notify the depository institution that its insured status will terminate at the expiration of the first full semiannual assessment period following issuance of that notification.

(c) *Notification to depositors of termination of insured status.* Within the time specified by the Board of Directors and prior to the date of termination of its insured status, the depository institution shall mail a notification of termination of insured status to each depositor at the depositor's last address of record on the books of the depository institution. The depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

The status of the _____, as an (insured depository institution) (insured branch) under the Federal Deposit Insurance Act, will terminate on the _____ day of_____, 19___, and its deposits will thereupon cease to be insured.

_____

(Name of depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§308.125 Temporary suspension of deposit insurance.

(a) If, while an action is pending under section 8(a)(2) of the FDIA (12 U.S.C. 1818(a)(2)), the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a special supervisory association to which §308.126 of this subpart applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Board of Directors may issue a Temporary Order Suspending Deposit Insurance, pending completion of the proceedings under section 8(a)(2) of the FDIA (12 U.S.C. 1818(a)(2)).

(b) The temporary order shall be served upon the insured institution and a copy sent to the appropriate Federal banking agency and to the appropriate State banking supervisor.

(c) The temporary order shall become effective ten days from the date of service upon the insured depository institution. Unless set aside, limited, or suspended in proceedings under section 8(a)(8)(D) of the FDIA (12 U.S.C. 1818 (a)(8)(D)), the temporary order shall remain effective and enforceable until an order terminating the insured status of the institution is entered by the Board of Directors and becomes final, or the Board of Directors dismisses the proceedings.

(d) *Notification to depositors of suspension of insured status.* Within the time specified by the Board of Directors and prior to the suspension of insured status, the depository institution shall mail a notification of suspension of insured status to each depositor at the depositor's last address of record on the books of the depository institution.

The depository institution shall also publish the notification in two issues of a local newspaper of general circulation and shall furnish the FDIC with proof of such publications. The notification to depositors shall include information provided in substantially the following form:

Notice

(Date)_____.

1. The status of the _____, as an (insured depository institution) (insured branch) under the provisions of the Federal Deposit Insurance Act, will be suspended as of the close of business on the _____ day of _____, 19___, pending the completion of administrative proceedings under section 8(a) of the Federal Deposit Insurance Act.

2. Any deposits made by you after that date, either new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in the (depository institution) (branch) on the _____ day of _____, 19___, will continue to be insured for _____ after the close of business on the_____ day of _____, 19___. Provided, however, that any withdrawals after the close of business on the _____ day of_____, 19___, will reduce the insurance coverage by the amount of such withdrawals.

_____

(Name of depository institution or branch)

_____

(Address)

The notification may include any additional information the depository institution deems advisable, provided that the information required by this section shall be set forth in a conspicuous manner on the first page of the notification.

§ 308.126 Special supervisory associations.

If the Board of Directors finds that a savings association is a special supervisory association under the provisions of section 8(a)(8)(B) of the FDIA (12 U.S.C. 1818(a)(8)(B)) for purposes of temporary suspension of insured status, the Board of Directors shall serve upon the association its findings with regard to the determination that the capital of the association, as computed using applicable accounting standards, has suffered a material decline; that such association or its directors or officers, is engaging in an unsafe or unsound practice in conducting the business of the association; that such association is in an unsafe or unsound condition to continue operating as an insured association; or that such association or its directors or officers, has violated any law, rule, regulation, order, condition imposed in writing by any Federal banking agency, or any written agreement, or that the association failed to enter into a capital improvement plan acceptable to the Corporation prior to January, 1990.

Subpart G—Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders

§ 308.127 Scope.

(a) *Cease-and-desist proceedings under section 8 of the FDIA.* The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to order an insured nonmember bank or an institution-affiliated party to cease and desist from practices and violations described in section 8(b) of the FDIA, 12 U.S.C. 1818(b); provided that the provisions of the Uniform Rules and subpart B of the Local Rules shall not apply to the issuance of temporary cease-and-desist orders pursuant to section 8(c) of the FDIA (12 U.S.C. 1818(c)).

(b) *Proceedings under the Securities Exchange Act of 1934.* (1) The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors to order a municipal securities dealer to cease and desist from any violation of law or regulation specified in section 15B(c)(5) of the Securities Exchange Act, as amended (15 U.S.C. 78o–4(c)(5)) where the municipal securities dealer is an insured nonmember bank or a subsidiary thereof.

(2) The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors to order a clearing agency or transfer agent to cease and desist from failure to comply with the applicable provisions of section 17, 17A and 19 of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78q, 78q–l, 78s), and the applicable rules and regulations

thereunder, where the clearing agency or transfer agent is an insured nonmember bank or a subsidiary thereof.

§308.128 Grounds for cease-and-desist orders.

(a) *General rule.* The Board of Directors or its designee may issue and have served upon any insured nonmember bank or an institution-affiliated party a notice, as set forth in §308.18 of the Uniform Rules for practices and violations as described in §308.127.

(b) *Extraterritorial acts of foreign banks.* An act, violation or practice committed outside the United States by a foreign bank or an institution-affiliated party that would otherwise be a ground for issuing a cease-and-desist order under paragraph (a) of this section or a temporary cease-and-desist order under §308.131 of this subpart, shall be a ground for an order if the Board of Directors or its designee finds that:

(1) The act, violation or practice has been, is, or is likely to be a cause of, or carried on in connection with or in furtherance of, an act, violation or practice committed within any state, territory, or possession of the United States or the District of Columbia which act, violation or practice, in and of itself, would be an appropriate basis for action by the FDIC; or

(2) The act, violation or practice, if proven, would adversely affect the insurance risk of the FDIC.

§308.129 Notice to state supervisory authority.

The Board of Directors or its designee shall give the appropriate state supervisory authority notification of its intent to institute a proceeding pursuant to subpart G of this part, and the grounds thereof. Any proceedings shall be conducted according to subpart G of this part, unless, within the time period specified in such notification, the state supervisory authority has effected satisfactory corrective action. No insured institution or other party who is the subject of any notice or order issued by the FDIC under this section shall have standing to raise the requirements of this subpart as grounds for attacking the validity of any such notice or order.

§308.130 Effective date of order and service on bank.

(a) *Effective date.* A cease-and-desist order issued by the Board of Directors after a hearing, and a cease-and-desist order issued based upon a default, shall become effective at the expiration of 30 days after the service of the order upon the bank or its official. A cease-and-desist order issued upon consent shall become effective at the time specified therein. All cease-and-desist orders shall remain effective and enforceable, except to the extent they are stayed, modified, terminated, or set aside by the Board of Directors or its designee or by a reviewing court.

(b) *Service on banks.* In cases where the bank is not the respondent, the cease-and-desist order shall also be served upon the bank.

§308.131 Temporary cease-and-desist order.

(a) *Issuance.* (1) When the Board of Directors or its designee determines that the violation, or the unsafe or unsound practice, as specified in the notice, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the bank, or is likely to weaken the condition of the bank or otherwise prejudice the interests of its depositors prior to the completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)) and §308.128 of this subpart, the Board of Directors or its designee may issue a temporary order requiring the bank or an institution-affiliated party to immediately cease and desist from any such violation, practice or to take affirmative action to prevent such insolvency, dissipation, condition or prejudice pending completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)).

(2) When the Board of Directors or its designee issues a Notice of charges pursuant to 12 U.S.C. 1818(b)(1) which specifies on the basis of particular facts and circumstances that a bank's books and records are so incomplete or inaccurate that the FDIC is unable, through the normal supervisory process, to determine the financial condition of the bank or the details or purpose of any transaction or transactions that may have a material effect on the

financial condition of the bank, then the Board of Directors or its designee may issue a temporary order requiring:

(i) The cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) Affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under section 8(b) of the FDIA (12 U.S.C. 1818(b)).

(3) The temporary order shall be served upon the bank or the institution-affiliated party named therein and shall also be served upon the bank in the case where the temporary order applies only to an institution-affiliated party.

(b) *Effective date.* A temporary order shall become effective when served upon the bank or the institution-affiliated party. Unless the temporary order is set aside, limited, or suspended by a court in proceedings authorized under section 8(c)(2) of the FDIA (12 U.S.C. 1818(c)(2)), the temporary order shall remain effective and enforceable pending completion of administrative proceedings pursuant to section 8(b) of the FDIA (12 U.S.C. 1818(b)) and entry of an order which has become final, or with respect to paragraph (a)(2) of this section the FDIC determines by examination or otherwise that the bank's books and records are accurate and reflect the financial condition of the bank.

(c) *Uniform Rules do not apply.* The Uniform Rules and subpart B of the Local Rules shall not apply to the issuance of temporary orders under this section.

Subpart H—Rules and Procedures Applicable to Proceedings Relating to Assessment and Collection of Civil Money Penalties for Violation of Cease-and-Desist Orders and of Certain Federal Statutes, Including Call Report Penalties

§ 308.132 Assessment of penalties.

(a) *Scope.* The rules and procedures of this subpart, subpart B of the Local Rules, and the Uniform Rules shall apply to proceedings to assess and collect civil money penalties, including civil money penalties for violation of section 7(a) of the FDIA (12 U.S.C. 1817(a)).

(b) *Relevant considerations.* In determining the amount of the civil penalty to be assessed, the Board of Directors or its designee shall consider the financial resources and good faith of the bank or official, the gravity of the violation, the history of previous violations, and any such other matters as justice may require.

(c) *Amount.* (1) The Board of Directors or its designee may assess civil money penalties pursuant to section 8(i) of the FDIA (12 U.S.C. 1818(i)), and § 308.01(e)(1) of the Uniform Rules.

(2) The Board of Directors or its designee may assess civil money penalties pursuant to section 7(a) of the FDIA (12 U.S.C. 1817(a)) as follows:

(i) *Late filing—Tier One penalties.* In cases in which a bank fails to make or publish its Report of Condition and Income (Call Report) within the appropriate time periods, a civil money penalty of not more than $2,000 per day may be assessed where the bank maintains procedures in place reasonably adapted to avoid inadvertent error and the late filing occurred unintentionally and as a result of such error; or the bank inadvertently transmitted a Call Report which is minimally late.

(A) *First offense.* Generally, in such cases, the amount assessed shall be $300 per day for each of the first 15 days for which the failure continues, and $600 per day for each subsequent day the failure continues, beginning on the sixteenth day. For banks with less than $25,000,000 in assets, the amount assessed shall be the greater of $100 per day or 1/1000th of the bank's total assets (1/10th of a basis point) for each of the first 15 days for which the failure continues, and $200 or 1/500th of the bank's total assets, 1/5 of a basis point) for each subsequent day the failure continues, beginning on the sixteenth day.

(B) *Second offense.* Where the bank has been delinquent in making or publishing its Call Report within the preceding five quarters, the amount assessed for the most current failure shall generally be $500 per day for each of the first 15 days for which the failure continues, and $1,000 per day for each

subsequent day the failure continues, beginning on the sixteenth day. For banks with less than $25,000,000 in assets, those amounts, respectively, shall be 1/500th of the bank's total assets and 1/250th of the bank's total assets.

(C) *Mitigating factors.* The amounts set forth in paragraph (c)(2)(i)(A) of this section may be reduced based upon the factors set forth in paragraph (b) of this section.

(D) *Lengthy or repeated violations.* The amounts set forth in this paragraph (c)(2)(i) will be assessed on a case-by-case basis where the amount of time of the bank's delinquency is lengthy or the bank has been delinquent repeatedly in making or publishing its Call Reports.

(E) *Waiver.* Absent extraordinary circumstances outside the control of the bank, penalties assessed for late filing shall not be waived.

(ii) *Late filing—Tier Two penalties.* Where a bank fails to make or publish its Call Report within the appropriate time period, the Board of Directors or its designee may assess a civil money penalty of not more than $20,000 per day for each day the failure continues. Pursuant to the Debt Collection Improvement Act of 1996, for violations which occur after November 12, 1996, the maximum Tier Two penalty amount will increase to $22,000 per day for each day the failure continues.

(iii) *False or misleading reports or information—(A) Tier One penalties.* In cases in which a bank submits or publishes any false or misleading Call Report or information, the Board of Directors or its designee may assess a civil money penalty of not more than $2,000 per day for each day the information is not corrected, where the bank maintains procedures in place reasonably adapted to avoid inadvertent error and the violation occurred unintentionally and as a result of such error; or the bank inadvertently transmits a Call Report or information which is false or misleading.

(B) *Tier Two penalties.* Where a bank submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a civil money penalty of not more than $20,000 per day for each day the information is not corrected. Pursuant to the Debt Collection Improvement Act of 1996, for violations which occur after November 12, 1996, the maximum Tier Two penalty amount will increase to $22,000 per day for each day the information is not corrected.

(C) *Tier Three penalties.* Where a bank knowingly or with reckless disregard for the accuracy of any Call Report or information submits or publishes any false or misleading Call Report or other information, the Board of Directors or its designee may assess a civil money penalty of not more than the lesser of $1,000,000 or 1 percent of the bank's total assets per day for each day the information is not corrected. Pursuant to the Debt Collection Improvement Act of 1996, for violations which occur after November 12, 1996, the maximum Tier Three penalty amount will increase to the lesser of $1,100,000 per day or 1 percent of the bank's total assets per day for each day the information is not corrected.

(D) *Mitigating factors.* The amounts set forth in this paragraph (c)(2) may be reduced based upon the factors set forth in paragraph (b) of this section.

(3) *Adjustment of civil money penalties by the rate of inflation pursuant to section 31001(s) of the Debt Collection Act.* Pursuant to section 31001(s) of the Debt Collection Act, for violations which occur after November 12, 1996, the Board of Directors or its designee may assess civil money penalties in the maximum amounts as follows:

(i) *Civil money penalties assessed pursuant to section 8(i)(2) of the FDIA.* Tier One civil money penalties may be assessed pursuant to section 8(i)(2)(A) of the FDIA (12 U.S.C. 1818(i)(2)(A)) in an amount not to exceed $5,500 for each day during which the violation continues. Tier Two civil money penalties may be assessed pursuant to section 8(i)(2)(B) of the FDIA (12 U.S.C. 1818(i)(2)(B)) in an amount not to exceed $27,500 for each day during which the violation, practice or breach continues. Tier Three civil money penalties may be assessed pursuant to section 8(i)(2)(C)(12 U.S.C. 1818(i)(2)(C)) in an amount not to exceed, in the case of any person other than an insured depository institution $1,100,000 or, in the

case of any insured depository institution, an amount not to exceed the lesser of $1,100,000 or 1 percent of the total assets of such institution for each day during which the violation, practice, or breach continues.

(A) Civil money penalties may be assessed pursuant to section 8(i)(2) of the FDIA in the amounts set forth in this paragraph (c)(3)(i) for violations of various consumer laws, including, the Home Mortgage Disclosure Act (12 U.S.C. 2804 et seq. and 12 CFR 203.6), the Expedited Funds Availability Act (12 U.S.C. 4001 et seq.), the Truth in Savings Act (12 U.S.C. 4301 et seq.), the Real Estate Settlement Procedures Act (12 U.S.C. 2601 et seq. and 12 CFR part 3500), the Truth in Lending Act (15 U.S.C. 1601 et seq.), the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.), the Electronic Funds Transfer Act (15 U.S.C. 1693 et seq.) and the Fair Housing Act (42 U.S.C. 3601 et seq.) in the amounts set forth in paragraphs (c)(3)(i) through (c)(3)(iii) of this section.

(ii) *Civil money penalties assessed pursuant to section 7(c) of the FDIA for late filing or the submission false or misleading certified statements.* Tier One civil money penalties may be assessed pursuant to section 7(c)(4)(A) of the FDIA (12 U.S.C. 1817(c)(4)(A)) in an amount not to exceed $2,000 for each day during which the failure to file continues or the false or misleading information is not corrected. Tier Two civil money penalties may be assessed pursuant to section 7(c)(4)(B) of the FDIA (12 U.S.C. 1817(c)(4)(B)) in an amount not to exceed $22,000 for each day during which the failure to file continues or the false or misleading information is not corrected. Tier Three civil money penalties may be assessed pursuant to section 7(c)(4)(C) in an amount not to exceed the lesser of $1,100,000 or 1 percent of the total assets of the institution for each day during which the failure to file continues or the false or misleading information is not corrected.

(iii) *Civil money penalties assessed pursuant to section 10(e)(4) of the FDIA for refusal to allow examination or to provide required information during an examination.* Pursuant to section 10(e)(4) of the FDIA (12 U.S.C. 1820(e)(4)), civil money penalties may be assessed against any affiliate of an insured depository institution which refuses to permit a duly-appointed examiner to conduct an examination or to provide information during the course of an examination as set forth in section 20(b) of the FDIA (12 U.S.C. 1820(b)), in an amount not to exceed $5,500 for each day the refusal continues.

(iv) *Civil money penalties assessed pursuant to section 18(a)(3) of the FDIA for incorrect display of insurance logo.* Pursuant to section 18(a)(3) of the FDIA (12 U.S.C. 1828(a)(3)), civil money penalties may be assessed against an insured depository institution which fails to correctly display its insurance logo pursuant to that section, in an amount not to exceed $110 for each day the violation continues.

(v) *Civil money penalties assessed pursuant to section 18(h) of the FDIA for failure to file a certified statement or to pay assessment.* Pursuant to section 18(h) of the FDIA (12 U.S.C. 1828(h)), a civil money penalty may be assessed against an insured depository institution which wilfully fails or refuses to file a certified statement or pay any assessment required under the FDIA in an amount not to exceed $110 for each day the violation continues.

(vi) *Civil money penalties assessed pursuant to section 19b(j) of the FDIA for recordkeeping violations.* Pursuant to section 19b(j) of the FDIA (12 U.S.C. 1829b(j)), civil money penalties may be assessed against an insured depository institution and any director, officer or employee thereof who wilfully or through gross negligence violates or causes a violation of the recordkeeping requirements of that section or its implementing regulations in an amount not to exceed $11,000 per violation.

(vii) *Civil fine pursuant to 12 U.S.C. 1832(c) for violation of provisions forbidding interest-bearing demand deposit accounts.* Pursuant to 12 U.S.C. 1832(c), any depository institution which violates the prohibition on deposit or withdrawal from interest-bearing accounts via negotiable or transferable instruments payable to third parties shall be subject to a fine of $1,100 per violation.

(viii) *Civil penalties for violations of security measure requirements under 12 U.S.C. 1884.* Pursuant to 12 U.S.C. 1884, an institution which violates a rule establishing minimum security requirements as set forth in 12 U.S.C. 1882, shall be subject to a civil penalty not to exceed $110 for each day of the violation.

(ix) *Civil money penalties assessed pursuant to the Bank Holding Company Act of 1970 for prohibited tying arrangements.* Pursuant to the Bank Holding Company Act of 1970, Tier One civil money penalties may be assessed pursuant to 12 U.S.C. 1972(2)(F)(i) in an amount not to exceed $5,500 for each day during which the violation continues. Tier Two civil money penalties may be assessed pursuant to 12 U.S.C. 1972(2)(F)(ii) in an amount not to exceed $27,500 for each day during which the violation, practice or breach continues. Tier Three civil money penalties may be assessed pursuant to 12 U.S.C. 1972(2)(F)(iii) in an amount not to exceed, in the case of any person other than an insured depository institution $1,100,000 for each day during which the violation, practice, or breach continues or, in the case of any insured depository institution, an amount not to exceed the lesser of $1,100,000 or 1 percent of the total assets of such institution for each day during which the violation, practice, or breach continues.

(x) *Civil money penalties assessed pursuant to the International Banking Act of 1978.* Pursuant to the International Banking Act of 1978 (IBA) (12 U.S.C. 3108(b)), civil money penalties may be assessed for failure to comply with the requirements of the IBA pursuant to section 8(i)(2) of the FDIA (12 U.S.C. 1818(i)(2)), in the amounts set forth in paragraph (c)(3)(i) of this section.

(xi) *Civil money penalties assessed for appraisal violations.* Pursuant to 12 U.S.C. 3349(b), where a financial institution seeks, obtains, or gives any other thing of value in exchange for the performance of an appraisal by a person that the institution knows is not a state certified or licensed appraiser in connection with a federally related transaction, a civil money penalty may be assessed pursuant to section 8(i)(2) of the FDIA (12 U.S.C. 1818(i)(2)) in the amounts set forth in paragraph (c)(3)(i) of this section.

(xii) *Civil money penalties assessed pursuant to International Lending Supervision Act.* Pursuant to the International Lending Supervision Act (ILSA) (12 U.S.C. 3909(d)), the CMP that may be assessed against any banking institution or any officer, director, employee, agent or other person participating in the conduct of the affairs of such banking institution is amount not to exceed $1,100 for each day a violation of the ILSA or any rule, regulation or order issued pursuant to ILSA continues.

(xiii) *Civil money penalties assessed for violations of the Community Development Banking and Financial Institution Act.* Pursuant to the Community Development Banking and Financial Institution Act (Community Development Banking Act) (12 U.S.C. 4717(b)) a civil money penalty may be assessed for violations of the Community Development Banking Act pursuant to section 8(i)(2) of the FDIA (12 U.S.C. 1818(i)(2)), in the amounts set forth in paragraph (c)(3)(i) of this section.

(xiv) *Civil money penalties assessed for violations of the Securities Exchange Act of 1934.* Pursuant to section 21B of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78u–2), civil money penalties may be assessed for violations of certain provisions of the Exchange Act, where such penalties are in the public interest. Tier One civil money penalties may be assessed pursuant to 15 U.S.C. 78u–2(b)(1) in an amount not to exceed $5,500 for a natural person or $55,000 for any other person for violations set forth in 15 U.S.C. 78u–2(a). Tier Two civil money penalties may be assessed pursuant to 15 U.S.C. 78u–2(b)(2) in an amount not to exceed—for each violation set forth in 15 U.S.C. 78u–2(a)—$55,000 for a natural person or $275,000 for any other person if the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Tier Three civil money penalties may be assessed pursuant to 15 U.S.C. 78u–2(b)(3) for each violation set forth in 15 U.S.C. 78u–2(a), in an amount not to exceed $110,000 for a natural person or $550,000 for any other person, if the act or omission involved

fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and such act or omission directly or indirectly resulted in substantial losses, or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(xv) *Civil money penalties assessed for false claims and statements pursuant to the Program Fraud Civil Remedies Act.* Pursuant to the Program Fraud Civil Remedies Act (31 U.S.C. 3802), civil money penalties of not more than $5,500 per day may be assessed for violations involving false claims and statements.

(xvi) *Civil money penalties assessed for violations of the Flood Disaster Protection Act.* Pursuant to the Flood Disaster Protection Act (FDPA)(42 U.S.C. 4012a(f)), civil money penalties may be assessed against any regulated lending institution that engages in a pattern or practice of violations of the FDPA in an amount not to exceed $350 per violation, and not to exceed a total of $105,000 annually.

[56 FR 37975, Aug. 9, 1991, as amended at 61 FR 57991, Nov. 12, 1996]

§ 308.133 Effective date of, and payment under, an order to pay.

(a) *Effective date.* (1) Unless otherwise provided in the Notice, except in situations covered by paragraph (a)(2) of this section, civil penalties assessed pursuant to this subpart are due and payable 60 days after the Notice is served upon the respondent.

(2) If the respondent both requests a hearing and serves an answer, civil penalties assessed pursuant to this subpart are due and payable 60 days after an order to pay, issued after the hearing or upon default, is served upon the respondent, unless the order provides for a different period of payment. Civil penalties assessed pursuant to an order to pay issued upon consent are due and payable within the time specified therein.

(b) *Payment.* All penalties collected under this section shall be paid over to the Treasury of the United States.

Subpart I—Rules and Procedures for Imposition of Sanctions Upon Municipal Securities Dealers or Persons Associated With Them and Clearing Agencies or Transfer Agents

§ 308.134 Scope.

The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings by the Board of Directors or its designee:

(a) To censure, limit the activities of, suspend, or revoke the registration of, any municipal securities dealer for which the FDIC is the appropriate regulatory agency;

(b) To censure, suspend, or bar from being associated with such a municipal securities dealer, any person associated with such a municipal securities dealer; and

(c) To deny registration, to censure limit the activities of, suspend, or revoke the registration of, any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency. This subpart and the Uniform Rules shall not apply to proceedings to postpone or suspend registration of a transfer agent or clearing agency pending final determination of denial or revocation of registration.

§ 308.135 Grounds for imposition of sanctions.

(a) *Action under section 15(b)(4) of the Exchange Act.* The Board of Directors or its designee may issue and have served upon any municipal securities dealer for which the FDIC is the appropriate regulatory agency, or any person associated or seeking to become associated with a municipal securities dealer for which the FDIC is the appropriate regulatory agency, a written notice of its intention to censure, limit the activities or functions or operations of, suspend, or revoke the registration of, such municipal securities dealer, or to censure, suspend, or bar the person from being associated with the municipal securities dealer, when the Board of Directors or its designee determines:

(1) That such municipal securities dealer or such person

(i) Has committed any prohibited act or omitted any required act specified in subparagraph (A), (D), or (E) of section 15(b)(4) of the Exchange Act, as amended (15 U.S.C. 78o);

(ii) Has been convicted of any offense specified in section 15(b)(4)(B) of the Exchange Act within ten years of commencement of proceedings under this subpart; or

(iii) Is enjoined from any act, conduct, or practice specified in section 15(b)(4)(C) of the Exchange Act; and

(2) That it is in the public interest to impose any of the sanctions set forth in paragraph (a) of this section.

(b) *Action under sections 17 and 17A of the Exchange Act.* The Board of Directors or its designee may issue, and have served upon any transfer agent or clearing agency for which the FDIC is the appropriate regulatory agency, a written Notice of its intention to deny registration to, censure, place limitations on the activities or function or operations of, suspend, or revoke the registration of, the transfer agent or clearing agency, when the Board of Directors or its designee determines:

(1) That the transfer agent or clearing agency has willfully violated, or is unable to comply with, any applicable provision of section 17 or 17A of the Exchange Act, as amended, or any applicable rule or regulation issued pursuant thereto; and

(2) That it is in the public interest to impose any of the sanctions set forth in paragraph (b) of this section.

§ 308.136 Notice to and consultation with the Securities and Exchange Commission.

Before initiating any proceedings under § 308.135, the FDIC shall:

(a) Notify the Securities and Exchange Commission of the identity of the municipal securities dealer or associated person against whom proceedings are to be initiated, and the nature of and basis for the proposed action; and

(b) Consult with the Commission concerning the effect of the proposed action on the protection of investors and the possibility of coordinating the action with any proceeding by the Commission against the municipal securities dealer or associated person.

§ 308.137 Effective date of order imposing sanctions.

An order issued by the Board of Directors after a hearing or an order issued upon default shall become effective at the expiration of 30 days after the service of the order, except that an order of censure, denial, or revocation of registration is effective when served. An order issued upon consent shall become effective at the time specified therein. All orders shall remain effective and enforceable except to the extent they are stayed, modified, terminated, or set aside by the Board of Directors, its designee, or a reviewing court, provided that orders of suspension shall continue in effect no longer than 12 months.

Subpart J—Rules and Procedures Relating to Exemption Proceedings Under Section 12(h) of the Securities Exchange Act of 1934

§ 308.138 Scope.

The rules and procedures of this subpart J shall apply to proceedings by the Board of Directors or its designee to exempt, in whole or in part, an issuer of securities from the provisions of sections 12(g), 13, 14(a), 14(c), 14(d), or 14(f) of the Exchange Act, as amended (15 U.S.C. 781, 78m, 78n (a), (c) (d) or (f)), or to exempt an officer or a director or beneficial owner of securities of such an issuer from the provisions of section 16 of the Exchange Act (15 U.S.C. 78p).

§ 308.139 Application for exemption.

Any interested person may file a written application for an exemption under this subpart with the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. The application shall specify the exemption sought and the reason therefor, and shall include a statement indicating why the exemption would be consistent with the public interest or the protection of investors.

§ 308.140 Newspaper notice.

(a) *General rule.* If the Board of Directors or its designee, in its sole discretion, decides to further consider an application for exemption, there shall be served upon the applicant instructions to publish one notification in a newspaper of general circulation in the community where the main office of the issuer is located. The applicant shall furnish proof of such publication to the Executive Secretary or such other person as may be directed in the instructions.

(b) *Contents.* The notification shall contain the name and address of the issuer and the name and title of the applicant, the exemption sought, a statement that a hearing will be held, and a statement that within 30 days of publication of the newspaper notice, interested persons may submit to the FDIC written comments on the application for exemption and a written request for an opportunity to be heard. The address of the FDIC must appear in the notice.

§ 308.141 Notice of hearing.

Within ten days after expiration of the period for receipt of comments pursuant to § 308.140, the Executive Secretary shall serve upon the applicant and any person who has requested an opportunity to be heard written notification indicating the place and time of the hearing. The hearing shall be held not later than 30 days after service of the notification of hearing. The notification shall contain the name and address of the presiding officer designated by the Executive Secretary and a statement of the matters to be considered.

§ 308.142 Hearing.

(a) *Proceedings are informal.* Formal rules of evidence, the adjudicative procedures of the APA (5 U.S.C. 554–557), the Uniform Rules and § 308.108 of subpart B of the Local Rules shall not apply to hearings under this subpart.

(b) *Hearing Procedure.* (1) Parties to the hearing may appear personally or through counsel and shall have the right to introduce relevant and material documents and to make an oral statement.

(2) There shall be no discovery in proceeding under this subpart J.

(3) The presiding officer shall have discretion to permit presentation of witnesses within specified time limits, provided that a list of witnesses is furnished to the presiding officer prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness and each party may cross-examine any witness presented by an opposing party.

(4) The proceedings shall be on the record and the transcript shall be promptly submitted to the Board of Directors. The presiding officer shall make recommendations to the Board of Directors, unless the Board of Directors, in its sole discretion, directs otherwise.

§ 308.143 Decision of Board of Directors.

Following submission of the hearing transcript to the Board of Directors, the Board of Directors may grant the exemption where it determines, by reason of the number of public investors, the amount of trading interest in the securities, the nature and extent of the issuer's activities, the issuer's income or assets, or otherwise, that the exemption is consistent with the public interest or the protection of investors. Any exemption shall be set forth in an order specifying the terms of the exemption, the person to whom it is granted, and the period for which it is granted. A copy of the order shall be served upon each party to the proceeding.

Subpart K—Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA

§ 308.144 Scope.

The procedures of this subpart shall be followed when an investigation is instituted and conducted in connection with any open or failed insured depository institution, any institutions making application to become insured depository institutions, and affiliates thereof, or with other types of investigations to determine compliance with applicable law and regulations, pursuant to section 10(c) of the FDIA (12 U.S.C. 1820(c)). The Uniform Rules

and subpart B of the Local Rules shall not apply to investigations under this subpart.

§ 308.145 Conduct of investigation.

An investigation conducted pursuant to section 10(c) of the FDIA shall be initiated only upon issuance of an order by the Board of Directors; or by the General Counsel, the Director of the Division of Supervision, the Director of the Division of Depositor and Asset Services, or their respective designees as set forth at § 303.9 of this chapter. The order shall indicate the purpose of the investigation and designate FDIC's representative(s) to direct the conduct of the investigation. Upon application and for good cause shown, the persons who issue the order of investigation may limit, quash, modify, or withdraw it. Upon the conclusion of the investigation, an order of termination of the investigation shall be issued by the persons issuing the order of investigation.

[56 FR 37975, Aug. 9, 1991, as amended at 60 FR 31384, June 15, 1995]

§ 308.146 Powers of person conducting investigation.

The person designated to conduct a section 10(c) investigation shall have the power, among other things, to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas and subpoenas duces tecum and to apply for their enforcement to the United States District Court for the judicial district or the United States court in any territory in which the main office of the bank, institution, or affiliate is located or in which the witness resides or conducts business. The person conducting the investigation may obtain the assistance of counsel or others from both within and outside the FDIC. The persons who issue the order of investigation may limit, quash, or modify any subpoena or subpoena duces tecum, upon application and for good cause shown. The person conducting an investigation may report to the Board of Directors any instance where any attorney has been guilty of contemptuous conduct. The Board of Directors, upon motion of the person conducting the investigation, or on its own motion, may make a finding of contempt and may then summarily suspend, without a hearing, any attorney representing a witness from further participation in the investigation.

§ 308.147 Investigations confidential.

Investigations conducted pursuant to section 10(c) shall be confidential. Information and documents obtained by the FDIC in the course of such investigations shall not be disclosed, except as provided in part 309 of this chapter and as otherwise required by law.

§ 308.148 Rights of witnesses.

In an investigation pursuant to section 10(c):

(a) Any person compelled or requested to furnish testimony, documentary evidence, or other information, shall upon request be shown and provided with a copy of the order initiating the proceeding;

(b) Any person compelled or requested to provide testimony as a witness or to furnish documentary evidence may be represented by a counsel who meets the requirements of § 308.06 of the Uniform Rules. That counsel may be present and may:

(1) Advise the witness before, during, and after such testimony;

(2) Briefly question the witness at the conclusion of such testimony for clarification purposes; and

(3) Make summary notes during such testimony solely for the use and benefit of the witness;

(c) All persons testifying shall be sequestered. Such persons and their counsel shall not be present during the testimony of any other person, unless permitted in the discretion of the person conducting the investigation;

(d) In cases of a perceived or actual conflict of interest arising out of an attorney's or law firm's representation of multiple witnesses, the person conducting the investigation may require the attorney to comply with the provisions of § 308.08 of the Uniform Rules; and

(e) Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

§ 308.149 Service of subpoena.

Service of a subpoena shall be accomplished in accordance with § 308.11 of the Uniform Rules.

§ 308.150 Transcripts.

(a) *General rule.* Transcripts of testimony, if any, in an investigation pursuant to section 10(c) shall be recorded by an official reporter, or by any other person or means designated by the person conducting the investigation. A witness may, solely for the use and benefit of the witness, obtain a copy of the transcript of his or her testimony at the conclusion of the investigation or, at the discretion of the person conducting the investigation, at an earlier time, provided the transcript is available. The witness requesting a copy of his or her testimony shall bear the cost thereof.

(b) *Subscription by witness.* The transcript of testimony shall be subscribed by the witness, unless the person conducting the investigation and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the transcript of the testimony is not subscribed by the witness, the official reporter taking the testimony shall certify that the transcript is a true and complete transcript of the testimony.

Subpart L—Procedures and Standards Applicable to a Notice of Change in Senior Executive Officer or Director Pursuant to Section 32 of the FDIA

§ 308.151 Scope.

The rules and procedures set forth in this subpart shall apply to the notice filed by a state nonmember bank pursuant to section 32 of the FDIA (12 U.S.C. 1831i) for the consent of the FDIC to add to or replace an individual on the Board of Directors, or to employ any individual as a senior executive officer, or change the responsibilities of any individual to a position of senior executive officer where the bank:

(a) Has been chartered and operating as an insured nonmember bank for less than two years or the insured state branch has been licensed and operating as an insured branch for less than two years;

(b) Has undergone a change in control within the preceding two years; or

(c) Is not in compliance with the minimum capital requirement applicable to it or is otherwise in a troubled condition as determined by the FDIC on the basis of such institution's most recent report of condition or report of examination or inspection.

§ 308.152 Grounds for disapproval of notice.

The Board of Directors or its designee may issue a notice of disapproval with respect to a notice submitted by a state nonmember bank pursuant to section 32 of the FDIA (12 U.S.C. 1831i) where:

(a) The competence, experience, character, or integrity of the individual with respect to whom such notice submitted indicates that it would not be in the best interests of the depositors of the state nonmember bank to permit the individual to be employed by or associated with such bank; or

(b) The competence, experience, character, or integrity of the individual with respect to whom such notice is submitted indicated that it would not be in the best interests of the public to permit the individual to be employed by, or associated with, the state nonmember bank.

§ 308.153 Procedures where notice of disapproval issues pursuant to § 303.14 of this chapter.

(a) The Notice of Disapproval shall be served upon the insured state nonmember bank and the candidate for director or senior executive officer. The Notice of Disapproval shall:

(1) Summarize or cite the relevant considerations specified in § 308.152;

(2) Inform the individual and the bank that a request for review of the disapproval may be filed within fifteen days of receipt of the Notice of Disapproval; and

(3) Specify that additional information, if any, must be contained in the request for review.

(b) The request for review must be filed at the appropriate regional office.

(c) The request for review must be in writing and should:

(1) Specify the reasons why the FDIC should reconsider its disapproval; and

(2) Set forth relevant, substantive and material documents, if any, that for good cause were not previously set forth in the notice required to be filed pursuant to section 32 of the FDIA (12 U.S.C. 1831i).

§ 308.154 Decision on review.

(a) Within 30 days of receipt of the request for review, the Board of Directors or its designee, shall notify the bank and/or the individual filing the reconsideration (hereafter ''petitioner'') of the FDIC's decision on review.

(b) If the decision is to grant the review and approve the notice, the bank and the individual involved shall be so notified.

(c) A denial of the request for review pursuant to section 32 of the FDIA shall:

(1) Inform the petitioner that a written request for a hearing, stating the relief desired and the grounds therefore, may be filed with the Executive Secretary within 15 days after the receipt of the denial; and

(2) Summarize or cite the relevant considerations specified in § 308.152.

(d) If a decision is not rendered within 30 days, the petitioner may file a request for a hearing within fifteen days from the date of expiration.

§ 308.155 Hearing.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 30 days after receipt of a request for a hearing filed pursuant to § 308.154. Upon request of the petitioner or the FDIC, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the candidate for director or senior executive officer. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102, and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The petitioner may appear at the hearing and shall have the right to introduce relevant and material documents and make an oral presentation. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) 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 shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the petitioner afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (c) of this section the presiding officer shall have 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. Where 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 shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors or its designee, where possible, within fifteen days after the last day

for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The petitioner may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect.

(f) *Decision by Board of Directors or its designee.* Within 45 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected individual whether the denial of the notice will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the petitioner. The Board of Directors or its designee shall promptly rescind or modify the denial where the decision is favorable to the petitioner.

Subpart M—Procedures and Standards Applicable to an Application Pursuant to Section 19 of the FDIA

§ 308.156 Scope.

The rules and procedures set forth in this subpart shall apply to an application filed pursuant to section 19 of the FDIA (12 U.S.C. 1829) by an insured depository institution and a person, who has been convicted of any criminal offense involving dishonesty or a breach of trust or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to seek the prior written consent of the FDIC to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution.

§ 308.157 Relevant considerations.

(a) In proceedings under § 308.156 on an application to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution, the following shall be considered:

(1) Whether the conviction or entry into a pretrial diversion or similar program is for a criminal offense involving dishonesty or breach of trust;

(2) Whether participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured depository institution constitutes a threat to the safety or soundness of the insured depository institution or the interests of its depositors, or threatens to impair public confidence in the insured depository institution;

(3) Evidence of the applicant's rehabilitation;

(4) The position to be held by the applicant;

(5) The amount of influence and control the applicant will be able to exercise over the affairs and operations of the insured depository institution;

(6) The ability of the management at the insured depository institution to supervise and control the activities of the applicant;

(7) The level of ownership which the applicant will have at the insured depository institution;

(8) Applicable fidelity bond coverage for the applicant; and

(9) Additional factors in the specific case that appear relevant.

(b) The question of whether a person, who was convicted of a crime or who agreed to enter a pretrial diversion or similar program, was guilty of that

crime shall not be at issue in a proceeding under this subpart.

§308.158 Filing papers and effective date.

(a) *Filing with the regional office.* Applications pursuant to section 19 shall be filed in the appropriate regional office.

(b) *Effective date.* An application pursuant to section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application pursuant to section 19. The removal and/or prohibition pursuant to section 19 shall continue until the applicant has been reinstated by the Board of Directors or its designee for good cause shown.

§308.159 Denial of applications.

A denial of an application pursuant to section 19 shall:

(a) Inform the applicant that a written request for a hearing, stating the relief desired and the grounds therefor and any supporting evidence, may be filed with the Executive Secretary within 60 days after the denial; and

(b) Summarize or cite the relevant considerations specified in §308.157 of this subpart.

§308.160 Hearings.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed pursuant to §308.159. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the person proposing to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) 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 shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this subsection, the presiding officer shall have 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. Where 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 shall be paid in accordance with §308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days

after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the person shall remain barred under section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following proceedings:

(a) To suspend an institution-affiliated party of an insured state nonmember bank, or to prohibit such party from further participation in the conduct of the affairs of the bank, where the individual is charged in any state, Federal, or territorial information or indictment, or complaint, with the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or Federal law; or

(b) To remove from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of the bank, except with the consent of the Board of Directors or its designee, if continued service or participation by such party poses a threat to the interests of the bank's depositors or threatens to impair public confidence in the depository institution, where a judgment of conviction or an agreement to enter a pre-trial diversion or other similar program is entered against such party, not subject to further appellate review, has been entered against the individual for the commission of, or participation in, a crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or Federal law.

§ 308.162 Relevant considerations.

(a)(1) In proceedings under § 308.161 (a) and (b) for a suspension, removal or prohibition order, the following shall be considered:

(i) Whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under state or Federal law, and which involves dishonesty or breach of trust; and

(ii) Whether continued service or participation by the institution-affiliated party may pose a threat to the interest of the bank's depositors, or threatens to impair public confidence in the bank.

(2) Additional factors in the specific case that appear relevant to its decision to continue in effect, rescind, terminate, or modify a suspension, removal or prohibition order may be considered.

(b) The question of whether an institution-affiliated party charged with a crime is guilty of the crime charged shall not be tried or considered in a proceeding under this subpart.

§ 308.163 Notice of suspension, and orders of removal or prohibition.

(a) *Notice of suspension or prohibition.* (1) The Board of Directors or its designee may suspend or prohibit from further participation in the conduct of

the affairs of the bank an institution-affiliated party by written notice of suspension or prohibition upon a determination by the Board of Directors or its designee that the grounds for such suspension or prohibition exist. The written notice of suspension or prohibition shall be served upon the institution-affiliated party and the bank.

(2) The written notice of suspension shall: (i) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Executive Secretary within 30 days after receipt of the written notice; and

(ii) Summarize or cite to the relevant considerations specified in §308.162 of this subpart.

(3) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors or its designee under the provisions of §308.164 or otherwise.

(b) *Order of removal or prohibition.* (1) The Board of Directors or its designee may issue an order removing or prohibiting from further participation in the conduct of the affairs of the bank an institution-affiliated party, when:

(i) A final judgment of conviction not subject to further appellate review is entered against the individual for a crime referred to in §308.161(b); and

(ii) The Board of Directors or its designee determines that continued service or participation of the institution-affiliated party may threaten the interests of the bank's depositors or may threaten to impair public confidence in the bank.

(2) The order shall be served upon the institution-affiliated party and the bank.

(3) The order shall: (i) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefor, and any supporting evidence, may be filed with the Executive Secretary within 30 days after receipt of the order; and

(ii) Summarize or cite the relevant considerations specified in §308.162 of this subpart.

(4) The order shall be effective immediately upon service on the institution-affiliated party, and shall remain in effect until it is terminated by the Board of Directors or its designee under the provisions of §308.164 or otherwise.

§308.164 Hearings.

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 30 days after receipt of a request for hearing on an application filed pursuant to §308.163. Upon the request of the applicant, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§308.06 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) 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 shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (b) of this section, the presiding officer shall have 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. Where 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 shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within ten days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors. The Executive Secretary's certification shall close the record.

(c) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(d) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect pursuant to § 308.163.

(e) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected individual whether the order of removal or prohibition will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant. The Board of Directors or its designee shall promptly rescind or modify an order of removal or prohibition where the decision is favorable to the applicant.

Subpart O—Liability of Commonly Controlled Depository Institutions

§ 308.165 Scope.

The rules and procedures in this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings in connection with the assessment of cross-guaranty liability against commonly controlled depository institutions.

§ 308.166 Grounds for assessment of liability.

Any insured depository institution shall be liable for any loss incurred or reasonably anticipated to be incurred by the corporation, subsequent to August 9, 1989, in connection with the default of a commonly controlled insured depository institution, or any loss incurred or reasonably anticipated to be incurred in connection with any assistance provided by the Corporation to any commonly controlled depository institution in danger of default.

§ 308.167 Notice of assessment of liability.

(a) The amount of liability shall be assessed upon service of a Notice of Assessment of Liability upon the liable depository institution, within two years of the date the Corporation incurred the loss.

(b) *Contents of Notice.* (1) The Notice of Assessment of Liability shall set forth:

(i) The basis for the FDIC's jurisdiction over the proceeding;

(ii) A statement of the Corporation's good faith estimate of the amount of loss it has incurred or anticipates incurring;

(iii) A statement of the method by which the estimated loss was calculated;

(iv) A proposed order directing payment by the liable institution of the FDIC's estimated amount of loss, and the schedule under which the payment will be due;

(v) In cases involving more than one liable institution, the estimated amount of each institution's share of the liability.

(2) The Notice of Assessment of Liability shall advise the liable institution(s):

(i) That an answer must be filed within 20 days after service of the Notice;

(ii) That, if a hearing is requested, a request for a hearing must be filed within 20 days after service of the Notice;

(iii) That if a hearing is requested, such hearing will be held within the judicial district in which the liable institution is found, or, in cases involving more than one liable institution, within a judicial district in which at least one liable institution is found;

(iv) That, unless the administrative law judge sets a different date, the hearing will commence 120 days after service of the Notice of Assessment of Liability; and

(v) That failure to request a hearing shall render the Notice of Assessment a final and unappealable order.

§ 308.168 Effective date of and payment under an order to pay.

(a) Unless otherwise provided in the Notice of Assessment of Liability, payment of the assessment shall be due on or before the 21st day after service of the Assessment of Liability, under the terms of the schedule for payment set forth therein.

(b) All payments collected shall be paid to the Corporation.

(c) Failure to request a hearing as prescribed herein shall render the order to pay final and unappealable.

Subpart P—Rules and Procedures Relating to the Recovery of Attorney Fees and Other Expenses

§ 308.169 Scope.

This subpart, and the Equal Access to Justice Act (5 U.S.C. 504), which it implements, apply to adversary adjudications before the FDIC. The types of adjudication covered by this subpart are those listed in § 308.01 of the Uniform Rules. The Uniform Rules and subpart B of the Local Rules apply to any proceedings to recover fees and expenses under this subpart.

§ 308.170 Filing, content, and service of documents.

(a) *Time to file.* An application and any other pleading or document related to the application may be filed with the Executive Secretary whenever the applicant has prevailed in the proceeding or in a discrete significant substantive portion of the proceeding within 30 days after service of the final order of the Board of Directors in disposition of the proceeding.

(b) *Content.* The application and related documents shall conform to the requirements of § 308.10 of the Uniform Rules.

(c) *Service.* The application and related documents shall be served on all parties to the adversary adjudication in accordance with § 308.11 of the Uniform Rules, except that statements of net worth shall be served only on counsel for the FDIC.

(d) Upon receipt of an application, the Executive Secretary shall refer the matter to the administrative law judge who heard the underlying adversary proceeding, provided that if the original administrative law judge is unavailable, or the Executive Secretary determines, in his or her sole discretion, that there is cause to refer the matter to a different administrative law judge, the matter shall be referred to a different administrative law judge.

§ 308.171 Responses to application.

(a) *By FDIC.* (1) Within 20 days after service of an application, counsel for the FDIC may file with the Executive Secretary and serve on all parties an answer to the application. Unless counsel for the FDIC requests and is granted an extension of time for filing or files a statement of intent to negotiate under § 308.179 of this subpart, failure to file an answer within the 20-day period will be treated as a consent to the award requested.

(2) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the FDIC'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 § 308.180.

(b) *Reply to answer.* The applicant may file a reply if the FDIC has addressed in its answer any of the following issues: that the position of the FDIC was substantially justified, that the applicant unduly protracted the proceedings, or that special circumstances make an award unjust. The reply shall be filed within 15 days after 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 § 308.180.

(c) *By other parties.* Any party to the adversary adjudication, other than the applicant and the FDIC, may file comments on an application within 20 days after service of the application. If the applicant is entitled to file a reply to the FDIC's answer under paragraph (b) of this section, another party may file comments on the answer within 15 days after service of the answer. A commenting party may not participate in any further proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit additional exploration of matters raised in the comments.

(d) *Additional response.* Additional filings in the nature of pleadings may be submitted only by leave of the administrative law judge.

§ 308.172 Eligibility of applicants.

(a) *Genera1 rule.* To be eligible for an award under this subpart, an applicant must have been named or admitted as a party to the proceeding. In addition, the applicant must show that it meets all other conditions of eligibility set out in paragraph (b) of this section.

(b) *Types of eligible applicant.* The types of eligible applicant are:

(1) An individual with a net worth of not more than $2,000,000 at the time the adversary adjudication was initiated; or

(2) Any 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.

(c) *Factors to be considered.* In determining the types of eligible applicants:

(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 prevails 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 bank shall be established by the net worth information reported in conformity with applicable instructions and guidelines on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the adversary adjudication.

(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 adjudication was initiated. Part-time employees are included as though they were full-time employees.

(5) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. The aggregated net worth shall be adjusted if necessary to avoid counting the net worth of any entity twice. As used in this subpart, *affiliates* are individuals, corporations, and entities that directly or indirectly or acting through one or more entities control a majority of the voting shares of the applicant; and corporations and entities of which the applicant directly or indirectly owns or controls a majority of the voting shares. The Board of Directors may, however, on the recommendation of the administrative law judge, or otherwise, determine that such aggregation with regard to one or more of the applicant's affiliates would be unjust and contrary to the purposes

of this subpart in light of the actual relationship between the affiliated entities. In such a case the net worth and employees of the relevant affiliate or affiliates will not be aggregated with those of the applicant. In addition, the Board of Directors may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(6) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 308.173 Prevailing party.

(a) *General rule.* An eligible applicant who, following an adversary adjudication has gained victory on the merits in the proceeding is a ''prevailing party''. An eligible applicant may be a ''prevailing party'' if a settlement of the proceeding was effected on terms favorable to it or if the proceeding against it has been dismissed. In appropriate situations an applicant may also have prevailed if the outcome of the proceeding has substantially vindicated the applicant's position on the significant substantive matters at issue, even though the applicant has not totally avoided adverse final action.

(b) *Segregation of costs.* When a proceeding has presented a number of discrete substantive issues, an applicant may have prevailed even though all the issues were not resolved in its favor. If such an applicant is deemed to have prevailed, any award shall be based on the fees and expenses incurred in connection with the discrete significant substantive issue or issues on which the applicant's position has been upheld. If such segregation of costs is not practicable, the award may be based on a fair proration of those fees and expenses incurred in the entire proceeding which would be recoverable under § 308.175 if proration were not performed, whether separate or prorated treatment is appropriate, and the appropriate proration percentage, shall be determined on the facts of the particular case. Attention shall be given to the significance and nature of the respective issues and their separability and interrelationship.

§ 308.174 Standards for awards.

A prevailing applicant may receive an award for fees and expenses unless the position of the FDIC during the proceeding was substantially justified or special circumstances make the award unjust. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings. Awards for fees and expenses incurred before the date on which the adversary adjudication was initiated are allowable if their incurrence was necessary to prepare for the proceeding.

§ 308.175 Measure of awards.

(a) *General rule.* Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate, provided that no award under this subpart for the fee of an attorney or agent may exceed $75 per hour. No award to compensate an expert witness may exceed the highest rate at which the FDIC 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, 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, or, if he or she is an employee of the applicant, the fully allocated cost of the 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 for preparation of the applicant's case and not otherwise required by law or sound business or financial practice.

§ 308.176 Application for awards.

(a) *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 each issue with regard to which the applicant believes that the position of the FDIC in the proceeding was not substantially justified;

(3) A statement of the amount of fees and expenses for which an award is sought;

(4) If the applicant is not an individual, a statement of the number of its employees on the date the proceeding was initiated;

(5) A description of any affiliated individuals or entities, as defined in § 308.172(c)(5), or a statement that none exist;

(6) A declaration that the applicant, together with any affiliates, had a net worth not more than the ceiling established for it by § 308.172(b) as of the date the proceeding was initiated; and

(7) Any other matters that the applicant wishes the FDIC to consider in determining whether and in what amount an award should be made.

(b) *Verification.* The application shall be signed by the applicant or an authorized officer or attorney of 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.

§ 308.177 Statement of net worth.

(a) *General rule.* A statement of net worth must 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.

(b) *Contents.* (1) 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 unless the administrative law judge or the Board of Directors otherwise requires. Financial statements or reports to a Federal or state agency, prepared before the initiation of the adversary adjudication for other purposes, and accurate as of a date not more than three months prior to the initiation of the proceeding, are acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the administrative law judge or the Board of Directors 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 § 308.172(c)(2). Assets and liabilities of individuals shall include those beneficially owned within the meaning of the FDIC's rules and regulations.

(3) If the applicant or any of its affiliates is a bank, the portion of the statement of net worth which relates to the bank shall consist of a copy of the bank's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. In all cases the administrative law judge or the Board of Directors may call for additional information needed to establish the applicant's net worth as of the initiation of the proceeding. Except as adjusted by additional information that was called for under the preceding sentence, 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, the total surplus accounts) as reported,

in conformity with applicable instructions and guidelines, on the bank'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 of Directors or required by law, the statement of net worth shall be for the confidential use of counsel for the FDIC, the Board of Directors, and the administrative law judge.

§ 308.178 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 of Directors may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 308.179 Settlement negotiations.

If counsel for the FDIC and the applicant believe that the issues in a fee application can be settled, they may jointly file with the Executive Secretary a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer under § 308.171 for an additional 20 days, and further extensions may be granted by the administrative law judge upon the joint request of counsel for the FDIC and the applicant.

§ 308.180 Further proceedings.

(a) *General rule.* Ordinarily, the determination of a recommended award will be made by the administrative law judge on the basis of the written record. However, on request of either the applicant or the FDIC, or on his or her own initiative, the administrative law judge may order further proceedings such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application and will 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.* Ordinarily, 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.

§ 308.181 Recommended decision.

The administrative law judge shall file with the Executive Secretary a recommended decision on the fee application not later than 90 days after the filing of the application or 30 days after the conclusion of the hearing, whichever is later. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and 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 on whether the FDIC'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 and, at the same time, serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

§ 308.182 Board of Directors action.

(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 FDIC may file

with the Executive Secretary written exceptions thereto. A supporting brief may also be filed.

(b) *Decision of Board of Directors.* The Board of Directors shall render its decision within 60 days after the matter is submitted to it by the Executive Secretary. The Executive Secretary shall furnish copies of the decision and order of the Board of Directors to the parties. Judicial review of the decision and order may be obtained as provided in 5 U.S.C. 504(c)(2).

§ 308.183 Payment of awards.

An applicant seeking payment of an award made by the Board of Directors shall submit to the Executive Secretary a statement that the applicant will not seek judicial review of the decision and order or that the time for seeking further review has passed and no further review has been sought. The FDIC will pay the amount awarded within 30 days after receiving the applicant's statement, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Subpart Q—Issuance and Review of Orders Pursuant to the Prompt Corrective Action Provisions of the Federal Deposit Insurance Act

SOURCE: 57 FR 44897, Sept. 29, 1992, unless otherwise noted.

§ 308.200 Scope.

The rules and procedures set forth in this subpart apply to banks, insured branches of foreign banks and senior executive officers and directors of banks that are subject to the provisions of section 38 of the Federal Deposit Insurance Act (section 38) (12 U.S.C. 1831o) and subpart B of part 325 of this chapter.

[57 FR 44897, Sept. 29, 1992; 57 FR 48426, Oct. 23, 1992]

§ 308.201 Directives to take prompt corrective action.

(a) *Notice of intent to issue directive*—(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized bank prior written notice of the FDIC's intention to issue a directive requiring such bank to take actions or to follow proscriptions described in section 38 that are within the FDIC'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 FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the FDIC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the FDIC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a bank immediately to take actions or to follow proscriptions described in section 38 that are within the FDIC'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 that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC 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 FDIC, 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 FDIC 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 subject to the directive may file with the FDIC 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 a

directive within the time period set by the FDIC. The date shall be at least 14 calendar days from the date of the notice unless the FDIC 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 FDIC 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 regarding the proposed directive.

(d) *FDIC consideration of response.* After considering the response, the FDIC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive 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 FDIC, 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 that is subject to a directive under this subpart may, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

§ 308.202 Procedures for reclassifying a 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 § 325.103(d) of this chapter, the FDIC 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 FDIC determines that the bank is in unsafe or unsound condition; or

(*2*) The FDIC, pursuant to section 8(b)(8) of the FDI Act (12 U.S.C. 1818(b)(8)), 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 § 325.103(d) of this chapter, the FDIC shall issue and serve on the bank a written notice of the FDIC'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 FDIC 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 FDIC 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 FDIC. The response should include:

(i) An explanation of why the bank is not in an unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank regarding the reclassification.

(4) *Failure to file response.* Failure by a bank to file, within the specified

time period, a written response with the FDIC 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 FDIC 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 FDIC 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 FDIC, before a presiding officer(s) designated by the FDIC 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 FDIC 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 this part apply to an informal hearing under this section unless the FDIC 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 FDIC 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 FDIC will decide whether to reclassify the bank and notify the bank of the FDIC'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 FDIC 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 FDIC, 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 FDIC.

§ 308.203 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the FDIC issues and serves a directive on a bank pursuant to § 308.201 of this part requiring the bank to dismiss from office any director or senior executive officer under § 38(f)(2)(F)(ii) of the FDI Act, the FDIC 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 FDIC 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 FDIC 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 FDIC, 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 FDIC 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 FDIC, before a presiding officer(s) designated by the FDIC 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 FDIC 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 this part apply to an informal hearing under this section unless the FDIC 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 FDIC 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 FDIC shall grant or deny the request for reinstatement and notify the Respondent of the FDIC's decision. If the FDIC denies the request for reinstatement, the FDIC shall set forth in the notification the reasons for the FDIC's action.

§ 308.204 Enforcement of directives.

(a) *Judicial remedies.* Whenever a bank fails to comply with a directive issued under section 38, the FDIC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act (12 U.S.C. 1818(i)(1)).

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the FDIC may assess a civil money penalty against any 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, or subpart B of part 325 of this chapter, 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 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 FDIC may seek enforcement of the provisions of section 38 or subpart B of part 325 of this chapter through any other judicial or administrative proceeding authorized by law.

[57 FR 44897, Sept. 29, 1992; 57 FR 48426, Oct. 23, 1992]

Subpart R—Submission and Review of Safety and Soundness Compliance Plans and Issuance of Orders To Correct Safety and Soundness Deficiencies

SOURCE: 60 FR 35684, July 10, 1995, unless otherwise noted.

§ 308.300 Scope.

The rules and procedures set forth in this subpart apply to insured state nonmember banks and to state-licensed insured branches of foreign banks, that are subject to the provisions of section 39 of the Federal Deposit Insurance Act (section 39) (12 U.S.C. 1831p–1).

§ 308.301 Purpose.

Section 39 of the FDI Act requires the FDIC 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 of the FDI Act 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.

§ 308.302 Determination and notification of failure to meet a safety and soundness standard and request for compliance plan.

(a) *Determination.* The FDIC may, based upon an examination, inspection, or any other information that becomes available to the FDIC, determine that a bank has failed to satisfy the safety and soundness standards set out in part 364 of this chapter and in the Interagency Guidelines Establishing Standards for Safety and Soundness set forth in appendix A to part 364 of this chapter.

(b) *Request for compliance plan.* If the FDIC determines that a bank has failed a safety and soundness standard pursuant to paragraph (a) of this section, the FDIC 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 FDIC or delivery of the report of examination.

§ 308.303 Filing of safety and soundness compliance plan.

(a) *Schedule for filing compliance plan*—(1) *In general.* A bank shall file a written safety and soundness compliance plan with the FDIC within 30 days of receiving a request for a compliance

plan pursuant to § 308.302(b), unless the FDIC notifies the bank in writing that the plan is to be filed within a different period.

(2) *Other plans.* If a 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 FDIC, 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 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 FDIC 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 FDIC 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 bank fails to submit an acceptable plan within the time specified by the FDIC or fails in any material respect to implement a compliance plan, then the FDIC 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 FDIC 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 bank that has filed an approved compliance plan may, after prior written notice to and approval by the FDIC, 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.

§ 308.304 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 FDIC shall provide a bank prior written notice of the FDIC'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 FDIC under paragraph (c) of this section.

(2) *Immediate issuance of final order.* If the FDIC finds it necessary in order to carry out the purposes of section 39 of the FDI Act, the FDIC 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 bank that is subject to such an immediately effective order may submit a written appeal of the order to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the order, unless the FDIC permits a longer period. The FDIC 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 FDIC, 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 FDIC 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 FDIC 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 FDIC. Such a response must be received by the FDIC within 14 calendar days from the date of the notice unless the FDIC 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 FDIC 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 FDIC 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 FDIC, 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 FDIC reconsider the terms of the order, and may propose that the order be rescinded or modified. Unless otherwise ordered by the FDIC, the order shall continue in place while such request is pending before the FDIC.

§ 308.305 Enforcement of orders.

(a) *Judicial remedies.* Whenever a bank fails to comply with an order issued under section 39, the FDIC 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 FDIC may assess a civil money penalty against any 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 FDIC may seek enforcement of the provisions of section 39 or this part through any other judicial or administrative proceeding authorized by law.

Subpart S—Applications for a Stay or Review of Actions of Bank Clearing Agencies

SOURCE: 61 FR 48403, Sept. 11, 1996, unless otherwise noted.

§ 308.400 Scope.

This subpart is issued by the Corporation pursuant to sections 17A(b)(3)(g), 17A(b)(5)(C), 19 and 23 of the Securities Exchange Act of 1934 (Exchange Act), as amended (15 U.S.C. 78q–1 (b)(3)(g), (b)(5)(C), 78s, 78w). It applies to applications by banks insured by the Corporation (other than members of the Federal Reserve System) for a stay or review of certain actions by clearing agencies registered under the Exchange Act, for which the Securities and Exchange Commission (Commission) is not the appropriate regulatory agency under section 3(a)(34)(B) of the Exchange Act (bank clearing agencies).

§308.401 Applications for stays of disciplinary sanctions or summary suspensions by a bank clearing agency.

Applications to the Corporation for a stay of disciplinary action imposed by registered clearing agencies pursuant to section 17(b)(3)(G) of the Exchange Act, or summary suspension or limitation or prohibition of access under section 17(b)(5)(C) of the Exchange Act shall be made according to the rules adopted by the Commission (17 CFR 240.19d–2). References to the ''Commission'' in 17 CFR 240.19d–2 are deemed to refer to the ''Corporation.''

§308.402 Applications for review of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by bank clearing agencies.

Proceedings on an application to the Corporation under section 19(d)(2) of the Exchange Act for review of any final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by bank clearing agencies shall be conducted according to the procedures set forth in rules adopted by the Commission (17 CFR 240.19d–3). References to the ''Commission'' in 17 CFR 240.19d–3 are deemed to refer to the ''Corporation.''

PART 309—DISCLOSURE OF INFORMATION

Sec.

309.1 Purpose and scope.
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AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 1819 ''Seventh'' and ''Tenth.''

SOURCE: 60 FR 61465, Nov. 30, 1995, unless otherwise noted.

§309.1 Purpose and scope.

This part sets forth the basic policies of the Federal Deposit Insurance Corporation regarding information it maintains and the procedures for obtaining access to such information.

§309.2 Definitions.

For purposes of this part:

(a) The term *depository institution*, as used in §309.6, includes depository institutions that have applied to the Corporation for federal deposit insurance, closed depository institutions, presently operating federally insured depository institutions, foreign banks, branches of foreign banks, and all affiliates of any of the foregoing.

(b) The terms *Corporation* or *FDIC* mean the Federal Deposit Insurance Corporation.

(c) The words *disclose* or *disclosure*, as used in §309.6, mean to give access to a record, whether by producing the written record or by oral discussion of its contents. Where the Corporation employee authorized to release Corporation documents makes a determination that furnishing copies of the documents is necessary, the words *disclose* or *disclosure* include the furnishing of copies of documents or records. In addition, *disclose* or *disclosure* as used in §309.6 is synonymous with the term *transfer* as used in the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 *et seq.*).

(d) The term *examination* includes, but is not limited to, formal and informal investigations of irregularities involving suspected violations of federal or state civil or criminal laws, or unsafe and unsound practices as well as such other investigations as may be conducted pursuant to law.

(e) The term *record* includes records, files, documents, reports, correspondence, books, and accounts, or any portion thereof.

(f) The term *report of examination* includes, but is not limited to, examination reports resulting from examinations of depository institutions conducted jointly by Corporation examiners and state banking authority examiners or other federal financial institution examiners, as well as reports resulting from examinations conducted solely by Corporation examiners. The term also includes compliance examination reports.

(g) The term *customer financial records*, as used in §309.6, means an original of, a copy of, or information known to have been derived from, any record held by a depository institution

pertaining to a customer's relationship with the depository institution but does not include any record that contains information not identified with or identifiable as being derived from the financial records of a particular customer. The term *customer* as used in § 309.6 refers to individuals or partnerships of five or fewer persons.

(h) The term *Director of the Division having primary authority* includes Deputies to the Chairman and directors of FDIC Divisions and Offices that create, maintain custody, or otherwise have primary responsibility for the handling of FDIC records or information.

§ 309.3 Federal Register publication.

The FDIC publishes the following information in the FEDERAL REGISTER for the guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the FDIC;

(e) Every amendment, revision or repeal of the foregoing; and

(f) General notices of proposed rulemaking.

§ 309.4 Publicly available records.

The following records are available upon request or, as noted, available for public inspection during normal business hours, at the listed offices. Certain records are also available on the Internet at the following address: http://www.fdic.gov. To the extent permitted by law, the FDIC may delete identifying details when it makes available or publishes a final opinion, final order, statement of policy, interpretation or staff manual or instruction. Fees for furnishing records under this section are as set forth in § 309.5(c).

(a) At the Office of Corporate Communications, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429, (202) 898–6996:

(1) Documents, including press releases, financial institution letters and proposed and adopted regulations, published by the FDIC and pertaining to its operations and those of insured depository institutions that it supervises.

(2) Reports on the competitive factors involved in merger transactions and the bases for approval of merger transactions as required by sections 18(c)(4) and 18(c)(9) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)(4) and (9)).

(3) Community Reinvestment Act (CRA) Public Evaluations.

(4) Final decisions and orders concerning compliance, enforcement, and other related administrative actions.

(5) At the FDIC's discretion, Summary of Deposits filed by insured depository institutions, except that information on the size and number of accounts filed before June, 1982 is not available.[1]

(6) Annual Report of Trust Assets for commercial banks and state savings banks.[2]

(b) At the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429, which information is available for public inspection:

(1) All final opinions (including concurring and dissenting opinions) and all final orders made in the adjudication of administrative cases.

(2) Statements of policy and interpretations which have been adopted by the FDIC but have not been published in the FEDERAL REGISTER.

(3) A current index of matters covered by paragraphs (b)(1) and (b)(2) of this section that were issued, adopted or promulgated after July 4, 1967. Copies of the index will be provided at the

[1] Summary of Deposits reports are described at 12 CFR 304.5.

[2] Annual Report of Trust Assets, FFIEC Form 001.

direct cost of duplication as set forth in § 309.5(b).

(c) At the Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429:

(1) Filings and reports required under the provisions of 12 CFR Part 335 and the Securities and Exchange Act of 1934, as amended (15 U.S.C. 78a), by insured nonmember banks the securities of which are registered with the FDIC pursuant to section 12 of that Act (15 U.S.C. 78l). These filings and reports are available for public inspection as detailed in 12 CFR 335.702.

(2) Manual of Examination Policies.

(3) Manual of Trust Examination Policies.

(4) Federal Financial Institutions Examination Council (FFIEC) Information Systems Examination Handbook.

(5) In the FDIC's discretion, the Consolidated Reports of Condition and Income filed by insured nonmember banks (and certain nonfederally insured depository institutions in the case of reports of condition), except that select sensitive financial information may be withheld.[3]

(d) At the regional office of the FDIC for the region in which the applicant or subject depository institution is located (A list of FDIC's regional offices is available from the Office of Corporate Communications, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429, (202) 898–6996):

(1) In the FDIC's discretion, non-confidential portions of application files as provided in 12 CFR 303.6(g), including applications for deposit insurance, to establish branches, to relocate offices and to merge.

(2)(i) After acceptance by the FDIC of a notice filed pursuant to the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)) (other than a notice filed in contemplation of a public tender offer subject to the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78n) and the FDIC's tender offer regulations (12 CFR 335.501–335.530), the appropriate FDIC regional office will make available, on request, the following information: The name of the depository institution whose stock is to be acquired; the date the notice was accepted; the identity of the acquiring person(s); the number of shares to be acquired; and the number of outstanding shares of stock in the depository institution. (The mere filing of a notice does not automatically constitute ''acceptance'' by the FDIC; a notice is ''accepted'' when the regional office determines that the notice contains all the information required by 12 U.S.C. 1817(j)(6)).

(ii) In the case of a notice filed in contemplation of a public tender offer that is subject to the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78n) and the FDIC's tender offer regulations (12 CFR 335.501–335.530), when public disclosure is determined under § 303.4(b)(4) of the FDIC's regulations (12 CFR 303.4(b)(4)) to be appropriate, the appropriate FDIC regional office will make available, on request, the information described in paragraph (d)(2)(i) of this section.

(iii) After a transaction subject to the Change in Bank Control Act of 1978 has been consummated, the appropriate FDIC regional office will make available, on request, the following information, in addition to the information described in paragraph (d)(2)(i) of this section: The date the shares were acquired; the names of the sellers (or transferors); and the total number of shares owned by the purchasers (or acquirors).

(e) At the Division of Depositor and Asset Services, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC, 20429:

(1) Credit Manual;

(2) Agriculture Manual;

(3) Claims Manual;

(4) Operations Manual;

(5) Closing Manual;

(6) Environmental Guidelines Manual;

(7) Deposit Insurance Manual;

(8) Settlement Manual.

(f) At the Division of Compliance and Consumer Affairs, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429: Compliance Examination Manual.

[3] Reports of income and of condition are described at 12 CFR 304.4.

§ 309.5 Procedures for requesting records.

(a) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a requester who seeks records 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. In determining whether a request falls within this category, the FDIC will determine the use to which a requester will put the records requested and seek additional information as it deems necessary.

(2) *Direct costs* means those expenditures the FDIC actually incurs in searching for, duplicating, and, in the case of commercial requesters, reviewing records in response to a request for records.

(3) *Duplication* means the process of making a copy of a record necessary to respond to a request for records or for inspection of original records that contain exempt material or that cannot otherwise be directly inspected. Such copies can take the form of paper copy, microfilm, audiovisual records, or machine readable records (e.g., magnetic tape or computer disk).

(4) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(5) *Non-commercial scientific institution* means an institution that is not operated on a *commercial* basis as that term is defined in paragraph (a)(1) of 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.

(6) *Representative of the news media* means any person actively gathering news for, or a free-lance journalist who reasonably expects to have his or her work product published or broadcast by, an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the general public.

(7) *Review* means the process of examining records located in response to a request for records to determine whether any portion of any record is permitted to be withheld as exempt information. It includes processing any record for disclosure, e.g., doing all that is necessary to excise them or otherwise prepare them for release.

(8) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within records. Searches may be done manually and/or by computer using existing programming.

(b) *Initial request.* (1) Except as provided in paragraphs (d) and (h) of this section, the FDIC, upon request for any record in its possession, will make the record available to any person who agrees to pay the costs of searching, review and duplication as set forth in paragraph (c) of this section. The request must be in writing, provide information reasonably sufficient to enable the FDIC to identify the requested records and specify a dollar limit which the requester is willing to pay for the costs of searching, review and duplication, unless the costs are believed to be less than the FDIC's cost of processing the requester's remittance, which cost will be set forth in the ''Notice of Federal Deposit Insurance Corporation Records Fees'' as described in paragraph (c)(3) of this section. Requests under this paragraph (b) should be addressed to the Office of the Executive Secretary, FDIC, 550 17th Street, N.W., Washington, DC 20429.

(2) The FDIC will transmit notice to the requester within 10 business days after receipt of the initial request whether it is granted or denied. Denials of requests will be based on the exemptions provided for in paragraph (d) of this section.

(3) Notification of a denial of an initial request will be in writing and will state:

(i) If the denial is in part or in whole;

(ii) The name and title of each person responsible for the denial (when other than the person signing the notification);

(iii) The exemptions relied on for the denial; and

(iv) The right of the requester to appeal the denial to the FDIC's General Counsel within 30 business days following receipt of the notification.

(c) *Fees*—(1) *General rules.* (i) Persons requesting records of the FDIC shall be charged for the direct costs of search, duplication and review as set forth in paragraphs (c)(2) and (c)(3) of this section, unless such costs are less than the FDIC's cost of processing the requester's remittance.

(ii) Requesters will be charged for search and review costs even if responsive records are not located and, if located, are determined to be exempt from disclosure.

(iii) Multiple requests seeking similar or related records from the same requester or group of requesters will be aggregated for the purposes of this section.

(iv) If the FDIC determines that the estimated costs of search, duplication or review of requested records will exceed the dollar amount specified in the request or if no dollar amount is specified, the FDIC will advise the requester of the estimated costs (if greater than the FDIC's cost of processing the requester's remittance). The requester must agree in writing to pay the costs of search, duplication and review prior to the FDIC initiating any records search.

(v) If the FDIC estimates that its search, duplication and review costs will exceed $250.00, the requester must pay an amount equal to 20 percent of the estimated costs prior to the FDIC initiating any records search.

(vi) The FDIC may require any requester who has previously failed to pay the charges under this section within 30 days of mailing of the invoice to pay in advance the total estimated costs of search, duplication and review. The FDIC may also require a requester who has any charges outstanding in excess of 30 days following mailing of the invoice to pay the full amount due, or demonstrate that the fee has been paid in full, prior to the FDIC initiating any additional records search.

(vii) The FDIC may begin assessing interest charges on unpaid bills on the 31st day following the day on which the notice was sent. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the invoice.

(viii) The time limit for FDIC to respond to a request will not begin to run until the FDIC has received the requester's written agreement under paragraph (c)(1)(iv) of this section, and advance payment under paragraph (c)(1) (v) or (vi) of this section, or outstanding charge under paragraph (c)(1)(vi) of this section.

(ix) As part of the initial request, a requester may ask that the FDIC waive or reduce fees if disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Determinations as to a waiver or reduction of fees will be made by the Executive Secretary (or designee) and the requester will be notified in writing of his/her determination. A determination not to grant a request for a waiver or reduction of fees under this paragraph may be appealed to the FDIC's General Counsel (or designee) pursuant to the procedure set forth in paragraph (e) of this section.

(2) *Chargeable fees by category of requester.* (i) Commercial use requesters shall be charged search, duplication and review costs.

(ii) Educational institutions, noncommercial scientific institutions and news media representatives shall be charged duplication costs, except for the first 100 pages.

(iii) Requesters not within the scope of paragraph (c)(2) (i) or (ii) of this section shall be charged the full reasonable direct cost of search and duplication, except for the first two hours of search time and first 100 pages of duplication.

(3) *Fee schedule.* The dollar amount of fees which the FDIC may charge to records requesters will be established by the Chief Financial Officer of the FDIC (or designee), and will be set forth in the ''Notice of Federal Deposit Insurance Corporation Records Fees'' issued in December of each year or in such ''Interim Notice of Federal Deposit Insurance Corporation Records

Fees'' as may be issued. Copies of such notices may be obtained at no charge from the FDIC's Office of the Executive Secretary, FOIA Unit, 550 17th Street NW., Washington, DC 20429. The fees implemented in the December or Interim Notice will be effective 30 days after issuance. The FDIC may charge fees that recoup the full allowable direct costs it incurs. The FDIC may contract with independent contractors to locate, reproduce, and/or disseminate records; provided however, that the FDIC has determined that the ultimate cost to the requester will be no greater than it would be if the FDIC performed these tasks itself. In no case will the FDIC contract out responsibilities which the Freedom of Information Act (FOIA) (5 U.S.C. 552) provides that the FDIC alone may discharge, such as determining the applicability of an exemption or whether to waive or reduce fees. Fees are subject to change as costs change.

(i) *Manual searches for records.* The FDIC will charge for manual searches for records at the basic rate of pay of the employee making the search plus 16 percent to cover employee benefit costs. Where a single class of personnel (e.g., all clerical, all professional, or all executive) is used exclusively, the FDIC, at its discretion, may establish and charge an average rate for the range of grades typically involved.

(ii) *Computer searches for records.* The fee for searches of computerized records is the actual direct cost of the search, including computer time, computer runs, and the operator's time apportionable to the search. The fee for a computer printout is the actual cost. The fees for computer supplies are the actual costs. The FDIC may, at its discretion, establish and charge a fee for computer searches based upon a reasonable FDIC-wide average rate for central processing unit operating costs and the operator's basic rate of pay plus 16 percent to cover employee benefit costs.

(iii) *Duplication of records.* (A) The per-page fee for paper copy reproduction of documents is the average FDIC-wide cost based upon the reasonable direct costs of making such copies.

(B) For other methods of reproduction or duplication, the FDIC will charge the actual direct costs of reproducing or duplicating the documents.

(iv) *Review of records.* The FDIC will charge commercial use requesters for the review of records at the time of processing the initial request to determine whether they are exempt from mandatory disclosure at the basic rate of pay of the employee making the search plus 16 percent to cover employee benefit costs. Where a single class of personnel (e.g., all clerical, all professional, or all executive) is used exclusively, the FDIC, at its discretion, may establish and charge an average rate for the range of grades typically involved. The FDIC will not charge at the administrative appeal level for review of an exemption already applied. When records or portions of records are withheld in full under an exemption which is subsequently determined not to apply, the FDIC may charge for a subsequent review to determine the applicability of other exemptions not previously considered.

(v) *Other services.* Complying with requests for special services is at the FDIC's discretion. The FDIC may recover the full costs of providing such services to the extent it elects to provide them.

(d) *Exempt information.* A request for records may be denied if the requested record contains information which falls into one or more of the following categories.[4] If the requested record contains both exempt and nonexempt information, the nonexempt portions which may reasonably be segregated from the exempt portions will be released to the requester.

(1) Records which are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

[4] Classification of a record as exempt from disclosure under the provisions of § 309.5(d) shall not be construed as authority to withhold the record if it is otherwise subject to disclosure under the Privacy Act of 1974 (5 U.S.C. 552a) or other federal statute, any applicable regulation of FDIC or any other federal agency having jurisdiction thereof, or any directive or order of any court of competent jurisdiction.

(2) Records related solely to the internal personnel rules and practices of the FDIC;

(3) Records specifically exempted from disclosure by statute, 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) Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;

(5) Interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the FDIC;

(6) Personnel, medical, and similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished records on a confidential basis;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(e) *Appeals.* (1) A person whose initial request for records under paragraph (a) of this section, or whose request for a waiver of fees under paragraph (c)(1)(ix) of this section, has been denied, either in part or in whole, has the right to appeal the denial to FDIC's General Counsel (or designee) within 30 business days after receipt of notification of the denial. Appeals of denials of initial requests or for a waiver of fees must be in writing and include any additional information relevant to consideration of the appeal. Appeals should be addressed to the Office of the Executive Secretary, FDIC, 550 17th Street, N.W., Washington, DC 20429.

(2) The FDIC will notify the appellant within 20 business days after receipt of the appeal whether it is granted or denied. Denials of appeals on initial requests for records will be based on the exemptions provided for in paragraph (c) of this section.

(3) Notifications of a denial of an appeal will be in writing and will state:

(i) Whether the denial is in part or in whole;

(ii) The name and title of each person responsible for the denial (if other than the person signing the notification);

(iii) The exemptions relied upon for the denial in the case of initial requests for records; and

(iv) The right to judicial review of the denial under the FOIA.

(f) *Extension of time.* (1) Under unusual circumstances the FDIC may require additional time, up to a maximum of 10 business days, to determine whether to grant or deny an initial request or to respond to an appeal of an initial denial. These circumstances would arise in cases where:

(i) The records are in facilities, such as field offices or storage centers, that are not part of the FDIC's Washington office;

(ii) The records requested are voluminous and are not in close proximity to one another; or

(iii) There is a need to consult with another agency or among two or more components of the FDIC having a substantial interest in the determination.

(2) The FDIC will promptly give written notification to the person making the request of the estimated date it will make its determination and the reasons why additional time is required.

(g) *FDIC procedures.* (1) Initial requests for records will be forwarded by the Executive Secretary to the head of the FDIC division or office which has primary authority over such records. Where it is determined that the requested records may be released, the appropriate division or office head will grant access to the records. A request for records may be denied only by the Executive Secretary (or designee), except that a request for records not responded to within 10 business days following its receipt by the Office of Executive Secretary—by notice to the requester either granting the request, denying the request, or extending the time for making a determination on the request—shall, if the requester chooses to treat such delay in response as a denial, be deemed to have been denied.

(2) Appeals from a denial of an initial request will be forwarded by the Executive Secretary to the General Counsel (or designee) for a determination whether the appeal will be granted or denied. The General Counsel (or designee) may on his or her own motion refer an appeal to the Board of Directors for a determination or the Board of Directors may in its discretion consider such an appeal.

(h) *Records of another agency.* If a requested record is the property of another federal agency or department, and that agency or department, either in writing or by regulation, expressly retains ownership of such record, upon receipt of a request for the record the FDIC will promptly inform the requester of this ownership and immediately shall forward the request to the proprietary agency or department either for processing in accordance with the latter's regulations or for guidance with respect to disposition.

§ 309.6 Disclosure of exempt records.

(a) *Disclosure prohibited.* Except as provided in paragraph (b) of this section or by 12 CFR part 310[5], no person shall disclose or permit the disclosure of any exempt records, or information contained therein, to any persons other than those officers, directors, employees, or agents of the Corporation who have a need for such records in the performance of their official duties. In any instance in which any person has possession, custody or control of FDIC exempt records or information contained therein, all copies of such records shall remain the property of the Corporation and under no circumstances shall any person, entity or agency disclose or make public in any manner the exempt records or information without written authorization from the Director of the Corporation's Division having primary authority over the records or information as provided in this section.

(b) *Disclosure authorized.* Exempt records or information of the Corporation may be disclosed only in accordance with the conditions and requirements set forth in this paragraph (b). Requests for discretionary disclosure of exempt records or information pursuant to this paragraph (b) may be submitted directly to the Division having primary authority over the exempt records or information or to the Office of Executive Secretary for forwarding to the appropriate Division having primary authority over the records sought. Such administrative request must clearly state that it seeks discretionary disclosure of exempt records, clearly identify the records sought, provide sufficient information for the Corporation to evaluate whether there is good cause for disclosure, and meet all other conditions set forth in paragraph (b)(1) through (10) of this section. Information regarding the appropriate FDIC Division having primary authority over a particular record or records may be obtained from the Office of Executive Secretary. Authority to disclose or authorize disclosure of exempt records of the Corporation is delegated as follows:

[5] The procedures for disclosing records under the Privacy Act are separately set forth in 12 CFR part 310.

(1) *Disclosure to depository institutions.* The Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose to any director or authorized officer, employee or agent of any depository institution, information contained in, or copies of, exempt records pertaining to that depository institution.

(2) *Disclosure to state banking agencies.* The Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose to any authorized officer or employee of any state banking or securities department or agency, copies of any exempt records to the extent the records pertain to a state-chartered depository institution supervised by the agency or authority, or where the exempt records are requested in writing for a legitimate depository institution supervisory or regulatory purpose.

(3) *Disclosure to federal financial institutions supervisory agencies and certain other agencies.* The Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose to any authorized officer or employee of any federal financial institution supervisory agency including the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Securities and Exchange Commission, the National Credit Union Administration, or any other agency included in section 1101(7) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et. seq.) (RFPA), any exempt records for a legitimate depository institution supervisory or regulatory purpose. The Director, or designee, may in his or her discretion and for good cause, disclose exempt records, including customer financial records, to certain other federal agencies as referenced in section 1113 of the RFPA for the purposes and to the extent permitted therein, or to any foreign bank regulatory or supervisory authority as provided, and to the extent permitted, by section 206 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 3109).

(4) *Disclosure to prosecuting or investigatory agencies or authorities.* (i) Reports of Apparent Crime pertaining to suspected violations of law, which may contain customer financial records, may be disclosed to federal or state prosecuting or investigatory authorities without giving notice to the customer, as permitted in the relevant exceptions of the RFPA.

(ii) The Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose to the proper federal or state prosecuting or investigatory authorities, or to any authorized officer or employee of such authority, copies of exempt records pertaining to irregularities discovered in depository institutions which are believed to constitute violations of any federal or state civil or criminal law, or unsafe or unsound banking practices, provided that customer financial records may be disclosed without giving notice to the customer, only as permitted by the relevant exceptions of the RFPA. Unless such disclosure is initiated by the FDIC, customer financial records shall be disclosed only in response to a written request which:

(A) Is signed by an authorized official of the agency making the request;

(B) Identifies the record or records to which access is requested; and

(C) Gives the reasons for the request.

(iii) When notice to the customer is required to be given under the RFPA, the Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose customer financial records to any federal or state prosecuting or investigatory agency or authority, provided, that:

(A) The General Counsel, or designee, has determined that disclosure is authorized or required by law; or

(B) Disclosure is pursuant to a written request that indicates the information is relevant to a legitimate law enforcement inquiry within the jurisdiction of the requesting agency and:

(*1*) The Director of the Corporation's Division having primary authority over the exempt records, or designee, certifies pursuant to section 1112(a)[6] of the RFPA that the records are believed relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency; and

(*2*) A copy of such certification and the notice required by section 1112(b)[7] of the RFPA is sent within fourteen days of the disclosure to the customer whose records are disclosed.[8]

(5) *Disclosure to servicers and serviced institutions.* The Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose copies of any exempt record related to a bank data center, a depository institution service corporation or any other data center that provides data processing or related services to an insured institution (hereinafter referred to as ''data center'') to:

(i) The examined data center;

(ii) Any insured institution that receives data processing or related services from the examined data center;

(iii) Any state agency or authority which exercises general supervision over an institution serviced by the examined data center; and

(iv) Any federal financial institution supervisory agency which exercises general supervision over an institution serviced by the examined data center. The federal supervisory agency may disclose any such examination report received from the Corporation to an insured institution over which it exercises general supervision and which is serviced by the examined data center.

(6) *Disclosure to third parties.* (i) Except as otherwise provided in paragraphs (c) (1) through (5) of this section, the Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose copies of any exempt records to any third party where requested to do so in writing. Any such written request shall:

(A) Specify, with reasonable particularity, the record or records to which access is requested; and

(B) Give the reasons for the request.

(ii) Either prior to or at the time of any disclosure, the Director or designee shall require such terms and conditions as he deems necessary to protect the confidential nature of the record, the financial integrity of any depository institution to which the record relates, and the legitimate privacy interests of any individual named in such records.

(7) *Authorization for disclosure by depository institutions or other third parties.* (i) The Director of the Corporation's Division having primary authority over the exempt records, or designee, may, in his or her discretion and for good cause, authorize any director, officer, employee, or agent of a depository institution to disclose copies of any exempt record in his custody to anyone who is not a director, officer or employee of the depository institution. Such authorization must be in response to a written request from the party seeking the record or from management of the depository institution to which the report or record pertains. Any such request shall specify, with reasonable particularity, the record sought, the party's interest therein,

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[6] The form of certification generally is as follows. Additional information may be added:

Pursuant to section 1112(a) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3412), I, _____ [name and appropriate title] hereby certify that the financial records described below were transferred to (agency or department) in the belief that they were relevant to a legitimate law enforcement inquiry, within the jurisdiction of the receiving agency.

[7] The form of notice generally is as follows. Additional information may be added:

Dear Mr./Ms. _____:

Copies of, or information contained in, your financial records lawfully in the possession of the Federal Deposit Insurance Corporation have been furnished to (agency or department) pursuant to the Right to Financial Privacy Act of 1978 for the following purpose: _____. If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Right to Financial Privacy Act of 1978 or the Privacy Act of 1974.

[8] Whenever the Corporation is subject to a court-ordered delay of the customer notice, the notice shall be sent immediately upon the expiration of the court-ordered delay.

and the party's relationship to the depository institution to which the record relates.

(ii) The Director of the Corporation's Division having primary authority over the exempt records, or designee, may, in his or her discretion and for good cause, authorize any third party, including a federal or state agency, that has received a copy of a Corporation exempt record, to disclose such exempt record to another party or agency. Such authorization must be in response to a written request from the party that has custody of the copy of the exempt record. Any such request shall specify the record sought to be disclosed and the reasons why disclosure is necessary.

(iii) Any subsidiary depository institution of a bank holding company or a savings and loan holding company may reproduce and furnish a copy of any report of examination of the subsidiary depository institution to the parent holding company without prior approval of the Director of the Division having primary authority over the exempt records and any depository institution may reproduce and furnish a copy of any report of examination of the disclosing depository institution to a majority shareholder if the following conditions are met:

(A) The parent holding company or shareholder owns in excess of 50% of the voting stock of the depository institution or subsidiary depository institution;

(B) The board of directors of the depository institution or subsidiary depository institution at least annually by resolution authorizes the reproduction and furnishing of reports of examination (the resolution shall specifically name the shareholder or parent holding company, state the address to which the reports are to be sent, and indicate that all reports furnished pursuant to the resolution remain the property of the Federal Deposit Insurance Corporation and are not to be disclosed or made public in any manner without the prior written approval of the Director of the Corporation's Division having primary authority over the exempt records as provided in paragraph (b) of this section;

(C) A copy of the resolution authorizing disclosure of the reports is sent to the shareholder or parent holding company; and

(D) The minutes of the board of directors of the depository institution or subsidiary depository institution for the meeting immediately following disclosure of a report state:

(*1*) That disclosure was made;

(*2*) The date of the report which was disclosed;

(*3*) To whom the report was sent; and

(*4*) The date the report was disclosed.

(iv) With respect to any disclosure that is authorized under this paragraph (b)(7), the Director of the Corporation's Division having primary authority over the exempt records, or designee, shall only permit disclosure of records upon determining that good cause exists. If the exempt record contains information derived from depository institution customer financial records, disclosure is to be authorized only upon the condition that the requesting party and the party releasing the records comply with any applicable provision of the RFPA. Before authorizing the disclosure, the Director (or designee) may require that both the party having custody of a copy of a Corporation exempt record and the party seeking access to the record agree to such limitations as the Director (or designee) deems necessary to protect the confidential nature of the record, the financial integrity of any depository institution to which the record relates and the legitimate privacy interests of any persons named in such record.

(8) *Disclosure by General Counsel.* (i) The Corporation's General Counsel, or designee, may disclose or authorize the disclosure of any exempt record in response to a valid judicial subpoena, court order, or other legal process, and authorize any current or former officer, director, employee, agent of the Corporation, or third party, to appear and testify regarding an exempt record or any information obtained in the performance of such person's official duties, at any administrative or judicial hearing or proceeding where such person has been served with a valid subpoena, court order, or other legal process requiring him or her to testify. The

General Counsel shall consider the relevancy of such exempt records or testimony to the litigation, and the interests of justice, in determining whether to disclose such records or testimony. Third parties seeking disclosure of exempt records or testimony in litigation to which the FDIC is not a party shall submit a request for discretionary disclosure directly to the General Counsel.[9] Such request shall specify the information sought with reasonable particularity and shall be accompanied by a statement with supporting documentation showing in detail the relevance of such exempt information to the litigation, justifying good cause for disclosure, and a commitment to be bound by a protective order. Failure to exhaust such administrative request prior to service of a subpoena or other legal process may, in the General Counsel's discretion, serve as a basis for objection to such subpoena or legal process. Customer financial records may not be disclosed to any federal agency that is not a federal financial supervisory agency pursuant to this paragraph unless notice to the customer and certification as required by the RFPA have been given except where disclosure is subject to the relevant exceptions set forth in the RFPA.

(ii) The General Counsel, or designee, may in his or her discretion and for good cause, disclose or authorize disclosure of any exempt record or testimony by a current or former officer, director, employee, agent of the Corporation, or third party, sought in connection with any civil or criminal hearing, proceeding or investigation without the service of a judicial subpoena, or other legal process requiring such disclosure or testimony, if he or she determines that the records or testimony are relevant to the hearing, proceeding or investigation and that disclosure is in the best interests of justice and not otherwise prohibited by Federal statute. Customer financial records shall not be disclosed to any federal agency pursuant to this paragraph that is not a federal financial supervisory agency, unless the records are sought under the Federal Rules of Civil Procedure (28 U.S.C. appendix) or the Federal Rules of Criminal Procedure (18 U.S.C. appendix) or comparable rules of other courts and in connection with litigation to which the receiving federal agency, employee, officer, director, or agent, and the customer are parties, or disclosure is otherwise subject to the relevant exceptions in the RFPA. Where the General Counsel or designee authorizes a current or former officer, director, employee or agent of the Corporation to testify or disclose exempt records pursuant to this paragraph (b)(8), he or she may, in his or her discretion, limit the authorization to so much of the record or testimony as is relevant to the issues at such hearing, proceeding or investigation, and he or she shall give authorization only upon fulfillment of such conditions as he or she deems necessary and practicable to protect the confidential nature of such records or testimony.

(9) *Authorization for disclosure by the Chairman of the Corporation's Board of Directors.* Except where expressly prohibited by law, the Chairman of the Corporation's Board of Directors may in his or her discretion, authorize the disclosure of any Corporation records. Except where disclosure is required by law, the Chairman may direct any current or former officer, director, employee or agent of the Corporation to refuse to disclose any record or to give testimony if the Chairman determines, in his or her discretion, that refusal to permit such disclosure is in the public interest.

(10) *Limitations on disclosure.* All steps practicable shall be taken to protect the confidentiality of exempt records and information. Any disclosure permitted by paragraph (b) of this section is discretionary and nothing in paragraph (b) of this section shall be construed as requiring the disclosure of information. Further, nothing in paragraph (b) of this section shall be construed as restricting, in any manner,

[9] This administrative requirement does not apply to subpoenas, court orders or other legal process issued for records of depository institutions held by the FDIC as Receiver or Conservator. Subpoenas, court orders or other legal process issued for such records will be processed in accordance with State and Federal law, regulations, rules and privileges applicable to FDIC as Receiver or Conservator.

the authority of the Board of Directors, the Chairman of the Board of Directors, the Director of the Corporation's Division having primary authority over the exempt records, the Corporation's General Counsel, or their designees, or any other Corporation Division or Office head, in their discretion and in light of the facts and circumstances attendant in any given case, to require conditions upon and to limit the form, manner, and extent of any disclosure permitted by this section. Wherever practicable, disclosure of exempt records shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.

§309.7 Service of process.

(a) *Service.* Any subpoena or other legal process to obtain information maintained by the FDIC shall be duly issued by a court having jurisdiction over the FDIC, and served upon either the Executive Secretary (or designee), FDIC, 550 17th Street, N.W., Washington, DC 20429, or the Regional Director or Regional Manager of the FDIC region where the legal action from which the subpoena or process was issued is pending. A list of the FDIC's regional offices is available from the Office of Corporate Communications, FDIC, 550 17th Street, N.W., Washington, DC 20429 (telephone 202–898–6996). Where the FDIC is named as a party, service of process shall be made pursuant to the Federal Rules of Civil Procedure, and upon the Executive Secretary (or designee), FDIC, 550 17th Street N.W., Washington, DC 20429, or upon the agent designated to receive service of process in the state, territory, or jurisdiction in which any insured depository institution is located. Identification of the designated agent in the state, territory, or jurisdiction may be obtained from the Office of the Executive Secretary or from the Office of the General Counsel, FDIC, 550 17th Street N.W., Washington, DC 20429. The Executive Secretary (or designee), Regional Director or designated agent shall immediately forward any subpoena, court order or legal process to the General Counsel. The Corporation may require the payment of fees, in accordance with the fee schedule referred to in §309.5(c)(3), prior to the release of any records requested pursuant to any subpoena or other legal process.

(b) *Notification by person served.* If any current or former officer, director, employee or agent of the Corporation, or any other person who has custody of records belonging to the FDIC, is served with a subpoena, court order, or other process requiring that person's attendance as a witness concerning any matter related to official duties, or the production of any exempt record of the Corporation, such person shall promptly advise the Office of the Corporation's General Counsel of such service, of the testimony and records described in the subpoena, and of all relevant facts which may be of assistance to the General Counsel in determining whether the individual in question should be authorized to testify or the records should be produced. Such person should also inform the court or tribunal which issued the process and the attorney for the party upon whose application the process was issued, if known, of the substance of this section.

(c) *Appearance by person served.* Absent the written authorization of the Corporation's General Counsel, or designee, to disclose the requested information, any current or former officer, director, employee, or agent of the Corporation, and any other person having custody of records of the Corporation, who is required to respond to a subpoena or other legal process, shall attend at the time and place therein specified and respectfully decline to produce any such record or give any testimony with respect thereto, basing such refusal on this section.

PART 310—PRIVACY ACT REGULATIONS

Sec.

310.1 Purpose and scope.
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310.12 Penalties.
310.13 Exemptions.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 40 FR 46274, Oct. 6, 1975, unless otherwise noted.

§ 310.1 Purpose and scope.

The purpose of this part is to establish regulations implementing the Privacy Act of 1974, 5 U.S.C. 552a. These regulations delineate the procedures that an individual must follow in exercising his or her access or amendment rights under the Privacy Act to records maintained by the Corporation in systems of records.

[61 FR 43419, Aug. 23, 1996]

§ 310.2 Definitions.

For purposes of this part:

(a) The term *Corporation* means the Federal Deposit Insurance Corporation;

(b) The term *individual* means a natural person who is either a citizen of the United States or an alien lawfully admitted for permanent residence;

(c) The term *maintain* includes maintain, collect, use, disseminate, or control;

(d) The term *record* means any item, collection or grouping of information about an individual that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual;

(e) The term *system of records* means a group of any records under the control of the Corporation from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual;

(f) The term *designated system of records* means a system of records which has been listed and summarized in the FEDERAL REGISTER pursuant to the requirements of 5 U.S.C. 552a(e);

(g) The term *routine use* means, with respect to disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was created;

(h) The terms *amend* or *amendment* mean any correction, addition to or deletion from a record; and

(i) The term *system manager* means the agency official responsible for a designated system of records, as denominated in the FEDERAL REGISTER publication of ''Systems of Records Maintained by the Federal Deposit Insurance Corporation.''

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977]

§ 310.3 Procedures for requests pertaining to individual records in a system of records.

(a) Any present or former employee of the Corporation seeking access to, or amendment of, his/her official personnel records maintained by the Corporation shall submit his/her request in such manner as is prescribed by the United States Office of Personnel Management in part 297 of its rules and regulations (5 CFR part 297). For access to, or amendment of, other government-wide records systems maintained by the Corporation, the procedures prescribed in the respective FEDERAL REGISTER Privacy Act system notice shall be followed.

(b) Requests by individuals for access to records pertaining to them and maintained within one of the Corporation's designated systems of records should be submitted in writing to the Office of the Executive Secretary, FOIA/PA Unit, Federal Deposit Insurance Corporation, Washington, DC 20429. Each such request should contain a reasonable description of the records sought, the system or systems in which such record may be contained, and any additional identifying information, as specified in the Corporation's FEDERAL REGISTER ''Notice of Systems of Records'' for that particular system, copies of which are available upon request from the FOIA/PA Unit, Office of the Executive Secretary.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977; 61 FR 43419, Aug. 23, 1996]

§ 310.4 Times, places, and requirements for identification of individuals making requests.

(a) Individuals may request access to records pertaining to themselves by

submitting a written request as provided in §310.3 of these regulations, or by appearing in person on weekdays, other than official holidays, at the Office of the Executive Secretary, Records Unit, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429, between the hours of 8:30 a.m. and 5 p.m.

(b) Individuals appearing in person at the Corporation seeking access to or amendment of their records shall present two forms of reasonable identification, such as employment identification cards, driver's licenses, or other identification cards or documents typically used for identification purposes.

(c) Except for records that must be publicly disclosed pursuant to the Freedom of Information Act, 5 U.S.C. 552, where the Corporation determines it to be necessary for the individual's protection, a certification of a duly commissioned notary public, of any state or territory, attesting to the requesting individual's identity, or an unsworn declaration subscribed to as true under the penalty of perjury under the laws of the United States of America, at the election of the individual, may be required before a written request seeking access to or amendment of a record will be honored. The Corporation may also require that individuals provide minimal identifying data such as full name, date and place of birth, or other personal information necessary to ensure proper identity before processing requests for records.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977; 61 FR 43419, Aug. 23, 1996]

§310.5 Disclosure of requested information to individuals.

(a) Except to the extent that Corporation records pertaining to an individual:

(1) Are exempt from disclosure under §§310.6 and 310.13 of this part, or

(2) Were compiled in reasonable anticipation of a civil action or proceeding, the Corporation will make such records available upon request for purposes of inspection and copying by the individual (after proper identity verification as provided in §310.4) and, upon the individual's request and written authorization, by another person of the individual's own choosing.

(b) The Executive Secretary will notify, in writing, the individual making a request, whenever practicable within ten business days following receipt of the request, whether any specified designated system of records maintained by the Corporation contains a record pertaining to the individual. Where such a record does exist, the Executive Secretary also will inform the individual of the system manager's decision whether to grant or deny the request for access. In the event existing records are determined not to be disclosable, the notification will inform the individual of the reasons for which disclosure will not be made and will provide a description of the individual's right to appeal the denial, as more fully set forth in §310.9. Where access is to be granted, the notification will specify the procedures for verifying the individual's identity, as set forth in §310.4.

(c) Individuals will be granted access to records disclosable under this part 310 as soon as is practicable. The Executive Secretary will give written notification of a reasonable period within which individuals may inspect disclosable records pertaining to themselves at the Office of the Executive Secretary during normal business hours. Alternatively, individuals granted access to records under this part may request that copies of such records be forwarded to them. Fees for copying such records will be assessed as provided in §310.11.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977]

§310.6 Special procedures: Medical records.

Medical records shall be disclosed on request to the individuals to whom they pertain, except, if in the judgment of the Corporation, the transmission of the medical information directly to the requesting individual could have an adverse effect upon such individual. In the event medical information is withheld from a requesting individual due to any possible adverse effect such information may have upon the individual, the Corporation shall transmit such information to a medical doctor

named by the requesting individual for release of the patient.

[40 FR 46274, Oct. 6, 1975, as amended at 61 FR 43420, Aug. 23, 1996]

§ 310.7 Request for amendment of record.

The Corporation will maintain all records it uses in making any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in the determination. An individual may request that the Corporation amend any portion of a record pertaining to that individual which the Corporation maintains in a designated system of records. Such a request should be submitted in writing to the Office of the Executive Secretary, Records Unit, Federal Deposit Insurance Corporation, Washington, DC 20429 and should contain the individual's reason for requesting the amendment and a description of the record (including the name of the appropriate designated system and category thereof) sufficient to enable the Corporation to identify the particular record or portion thereof with respect to which amendment is sought.

§ 310.8 Agency review of request for amendment of record.

(a) Requests by individuals for the amendment of records will be acknowledged by the Executive Secretary of the Corporation, and referred to the system manager of the system of records in which the record is contained for determination, within ten business days following receipt of such requests. Promptly thereafter, the Executive Secretary will notify the individual of the system manager's decision to grant or deny the request to amend.

(b) If the system manager denies a request to amend a record, the notification of such denial shall contain the reason for the denial and a description of the individual's right to appeal the denial as more fully set forth in § 310.9.

[40 FR 46274, Oct. 6, 1975, as amended at 42 FR 6796, Feb. 4, 1977]

§ 310.9 Appeal of adverse initial agency determination on access or amendment.

(a) A system manager's denial of an individual's request for access to or amendment of a record pertaining to him/her may be appealed in writing to the Corporation's General Counsel (or designee) within 30 business days following receipt of notification of the denial. Such an appeal should be addressed to the Office of the Executive Secretary, FDIC, 550 17th Street NW., Washington, DC 20429, and contain all the information specified for requests for access in § 310.3 or for initial requests to amend in § 310.7, as well as any other additional information the individual deems relevant for the consideration by the General Counsel (or designee) of the appeal.

(b) The General Counsel (or designee) will normally make a final determination with respect to an appeal made under this part within 30 business days following receipt by the Office of the Executive Secretary of the appeal. The General Counsel (or designee) may, however, extend this 30-day time period for good cause. Where such an extension is required, the individual making the appeal will be notified of the reason for the extension and the expected date upon which a final decision will be given.

(c) If the General Counsel (or designee) affirms the initial denial of a request for access or to amend, he or she will inform the individual affected of the decision, the reason therefor, and the right of judicial review of the decision. In addition, as pertains to a request for amendment, the individual may at that point submit to the Corporation a concise statement setting forth his or her reasons for disagreeing with the Corporation's refusal to amend.

(d) Any statement of disagreement with the Corporation's refusal to amend, filed with the Corporation by an individual pursuant to § 310.9(c), will be included in the disclosure of any records under the authority of § 310.10(b). The Corporation may in its discretion also include a copy of a concise statement of its reasons for not making the requested amendment.

(e) The General Counsel (or designee) may on his or her own motion refer an appeal to the Board of Directors for a determination, and the Board of Directors on its own motion may consider an appeal.

[52 FR 34290, Sept. 10, 1987, as amended at 61 FR 43420, Aug. 23, 1996]

§310.10 Disclosure of record to person other than the individual to whom it pertains.

(a) Except as provided in paragraph (b) of this section, the Corporation will not disclose any record contained in a designated system of records to any person or agency except with the prior written consent of the individual to whom the record pertains.

(b) The restrictions on disclosure in paragraph (a) of this section do not apply to any of the following disclosures:

(1) To those officers and employees of the Corporation who have a need for the record in the performance of their duties;

(2) Which is required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use listed with respect to a designated system of records;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 U.S.C.;

(5) To a recipient who has provided the Corporation with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or his or her designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the Corporation specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if, upon such disclosure, notification is transmitted to the last known address of such individual;

(9) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) To the Comptroller General, or any of his or her authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to the order of a court of competent jurisdiction.

(12) To a consumer reporting agency in accordance with section 3711(f) of Title 31.

(c) The Corporation will adhere to the following procedures in the case of disclosure of any record pursuant to the authority of paragraphs (b)(3) through (b)(12) of this section.

(1) The Corporation will keep a record of the date, nature and purpose of each such disclosure, as well as the name and address of the person or agency to whom such disclosure is made; and

(2) The Corporation will retain and, with the exception of disclosures made pursuant to paragraph (b)(7) of this section, make available to the individual named in the record for the greater of five years or the life of the record all material compiled under paragraph (d)(1) of this section with respect to disclosure of such record.

(d) Whenever a record which has been disclosed by the Corporation under authority of paragraph (b) of this section is, within a reasonable amount of time after such disclosure, either amended by the Corporation or the subject of a statement of disagreement, the Corporation will transmit such additional information to any person or agency to whom the record was disclosed, if such

disclosure was subject to the accounting requirements of paragraph (c)(1) of this section.

[40 FR 46274, Oct. 6, 1975, as amended at 61 FR 43420, Aug. 23, 1996]

§ 310.11 Fees.

The Corporation, upon a request for records disclosable pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), shall charge a fee of $0.10 per page for duplicating, except as follows:

(a) If the Corporation determines that it can grant access to a record only by providing a copy of the record, no fee will be charged for providing the first copy of the record or any portion thereof;

(b) Whenever the aggregate fees computed under this section do not exceed $10 for any one request, the fee will be deemed waived by the Corporation; or

(c) Whenever the Corporation determines that a reduction or waiver is warranted, it may reduce or waive any fees imposed for furnishing requested information pursuant to this section.

[40 FR 46274, Oct. 6, 1975, as amended at 61 FR 43420, Aug. 23, 1996]

§ 310.12 Penalties.

Subsection (i)(3) of the Privacy Act of 1974 (5 U.S.C. 552a(i)(3)) imposes criminal penalties for obtaining Corporation records on individuals under false pretenses. The subsection provides as follows:

> Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

§ 310.13 Exemptions.

The following systems of records are exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules:

(a) Investigatory material compiled for law enforcement purposes in the following systems of records is exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules;

Provided, however, That if any individual is denied any right, privilege, or benefit to which he/she would otherwise be entitled under Federal law, or for which he/she would otherwise be eligible, as a result of the maintenance of such material, such material shall be disclosed to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence:

30–64–0002—Financial institutions investigative and enforcement records system.
30–64–0010—Investigative files and records.

(b) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Corporation employment to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Corporation under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, in the following systems of records, is exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules:

30–64–0001—Attorney-legal intern applicant system.
30–64–0010—Investigative files and records.

(c) Testing or examination material used solely to determine or assess individual qualifications for appointment or promotion in the Corporation's service, the disclosure of which would compromise the objectivity or fairness of the testing, evaluation, or examination process in the following system of records, is exempt from §§ 310.3 through 310.9 and § 310.10(c)(2) of these rules:

30–64–0009—Examiner training and education records.

[42 FR 6797, Feb. 4, 1977, as amended at 42 FR 33720, July 1, 1977; 54 FR 38507, Sept. 19, 1989; 61 FR 43420, Aug. 23, 1996]

PART 311—RULES GOVERNING PUBLIC OBSERVATION OF MEETINGS OF THE CORPORATION'S BOARD OF DIRECTORS

Sec.
311.1 Purpose.
311.2 Definitions.

311.3 Meetings.
311.4 Procedures for announcing meetings.
311.5 Regular procedure for closing meetings.
311.6 Expedited procedure for announcing and closing certain meetings.
311.7 General Counsel certification.
311.8 Transcripts and minutes of meetings.

AUTHORITY: 5 U.S.C. 552b and 12 U.S.C. 1819.

SOURCE: 42 FR 14675, Mar. 16, 1977, unless otherwise noted.

§311.1 Purpose.

This part implements the policy of the ''Government in the Sunshine Act'', section 552b of title 5 U.S.C., which is to provide the public with as much information as possible regarding the decision making process of certain Federal agencies, including the Federal Deposit Insurance Corporation, while preserving the rights of individuals and the ability of the agency to carry out its responsibilities.

§311.2 Definitions.

For purposes of this part:

(a) *Board* means Board of Directors of the Federal Deposit Insurance Corporation and includes any subdivision of the Board authorized to act on behalf of the Corporation.

(b) *Meeting* means the deliberations (including those conducted by conference telephone call, or by any other method) of at least three members where such deliberations determine or result in the joint conduct or disposition of agency business but does not include:

(1) Deliberations to determine whether meetings will be open or closed or whether information pertaining to closed meetings will be withheld;

(2) Informal background discussions among Board members and staff which clarify issues and expose varying views;

(3) Decision-making by circulating written material to individual Board members;

(4) Sessions with individuals from outside the Corporation where Board members listen to a presentation and may elicit additional information.

(c) *Member* means a member of the Board.

(d) *Open to public observation* and *open to the public* mean that individuals may witness the meeting, but not participate in the deliberations. The meeting may be recorded, photographed, or otherwise reproduced if the reproduction does not disturb the meeting.

(e) *Public announcement* and *publicly announce* mean making reasonable effort under the particular circumstances of each case to fully inform the public. This may include posting notice on the Corporation's public notice bulletin board maintained in the lobby of its offices located at 550 17th Street, NW., Washington, DC 20429, issuing a press release and employing other methods of notification that may be desirable in a particular situation.

[42 FR 14675, Mar. 16, 1977, as amended at 42 FR 59494, Nov. 18, 1977; 54 FR 38965, Sept. 22, 1989; 61 FR 38357, July 24, 1996]

§311.3 Meetings.

(a) *Open meetings.* Except as provided in paragraph (b) of this section, every portion of every meeting of the Corporation's Board will be open to public observation. Board members will not jointly conduct or dispose of Corporation business other than in accordance with this part.

(b) *When meetings may be closed and announcements and disclosures withheld.* Except where the Board finds that the public interest requires otherwise, a meeting or portion thereof may be closed, and announcements and disclosure pertaining thereto may be withheld when the Board determines that such meeting or portion of the 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 the internal personnel rules and practices of the Corporation;

(3) Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, 5 U.S.C. 552): *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 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, (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 Corporation or any other agency responsible for the supervision of financial institutions;

(9) Disclose information the premature disclosure of which would be likely to:

(i) (A) Lead to significant financial speculation in currencies, securities, or commodities, or

(B) Significantly endanger the stability of any financial institution; or

(ii) Significantly frustrate implementation of a proposed Corporation action, except that this paragraph (b)(9)(ii) shall not apply in any instance where the Corporation has already disclosed to the public the content or nature of its proposed action, or where the Corporation 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 Corporation's issuance of a subpoena, or the Corporation's 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 by the Corporation of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 311.4 Procedures for announcing meetings.

(a) *Scope.* Except to the extent that such announcements are exempt from disclosure under § 311.3(b), announcements relating to open meetings, and meetings closed under the regular closing procedures of § 311.5, will be made in the manner set forth in this section.

(b) *Time and content of announcement.* The Corporation will make public announcement at least seven days before the meeting of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and telephone number of the official designated by the Corporation to respond to requests for information about the meeting. This announcement will be made unless a majority of the Board determines by a recorded vote that Corporation business requires that a meeting be called on lesser notice. In such cases, the Corporation will make public announcement of the time, place, and subject matter of the meeting, and whether it is open or closed to the public, at the earliest practicable time, which may be later than the commencement of the meeting.

(c) *Changing time or place of meeting.* The time or place of a meeting may be changed following the public announcement required by paragraph (b) of this section only if the Corporation publicly announces the change at the earliest practicable time, which may be later than the commencement of the meeting.

(d) *Changing subject matter or nature of meeting.* The subject matter of a meeting, or the determination to open or close a meeting or a portion of a meeting, may be changed following the public announcement only if:

(1) A majority of the entire Board determines by recorded vote that agency business so requires and that no earlier announcement of the change was possible; and,

(2) The Corporation publicly announces the change and the vote of each member upon such change at the earliest practicable time, which may be later than the commencement of the meeting.

(e) *Publication of announcements in Federal Register.* Immediately following each public announcement under this section, such announcement will be submitted for publication in the FEDERAL REGISTER by the Office of the Executive Secretary.

§311.5 Regular procedure for closing meetings.

(a) *Scope.* Unless §311.6 is applicable, the procedures for closing meetings will be those set forth in this section.

(b) *Procedure.* (1) A decision to close a meeting or portion of a meeting will be taken only when a majority of the entire Board votes to take such action. In deciding whether to close a meeting or portion of a meeting, the Board will consider whether the public interest requires an open meeting. A separate vote of the Board will be taken with respect to each meeting which is proposed to be closed in whole or in part to the public. A single vote may be taken with respect to a series of meetings which are proposed to be closed in whole or in part to the public, or with respect to any information concerning such series of meetings, so long as each meeting in the series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in the series. The vote of each Board member will be recorded and no proxies will be allowed.

(2) Any individual whose interests may be directly affected may request that the Corporation close any portion of a meeting for any of the reasons referred to in paragraph (b) (5), (6), or (b)(7) of §311.3. Requests should be directed to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. After receiving notice that an individual desires a portion of a meeting to be closed, the Board, upon request of any one of its members, will vote by recorded vote whether to close the relevant portion of the meeting. This procedure will apply even if the individual's request is made subsequent to the announcement of a decision to hold an open meeting.

(3) The Corporation's General Counsel will make the public certification required by §311.7.

(4) Within 1 day after any vote taken pursuant to paragraphs (b)(1) or (2) of this section, the Corporation will make publicly available a written copy of the vote, reflecting the vote of each Board member. Except to the extent that such information is exempt from disclosure, if a meeting or portion of a meeting is to be closed to the public, the Corporation will make publicly available within 1 day after the required vote a full written explanation of its action, together with a list of all persons expected to attend the meeting and their affiliation.

(5) The Corporation will publicly announce the time, place, and subject matter of the meeting, with determinations as to open and closed portions, in the manner and within the time limits prescribed in §311.4.

[42 FR 14675, Mar. 16, 1977; 42 FR 16616, Mar. 29, 1977, as amended at 42 FR 59494, Nov. 18, 1977]

§311.6 Expedited procedure for announcing and closing certain meetings.

(a) *Scope.* Since a majority of its meetings may properly be closed pursuant to paragraph (b)(4), (8), (9)(i), or (b)(10) of §311.3, subsection (d)(4) of the Government in the Sunshine Act (5 U.S.C. 552b) allows the Corporation to use expedited procedures in closing meetings under these four subparagraphs. Absent a compelling public interest to the contrary, meetings or portions of meetings that can be expected to be closed using these procedures include, but are not limited to: Administrative enforcement proceedings under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818); appointment of the Corporation as conservator of a depository institution, or as receiver, liquidator or liquidating agent of a closed depository institution or a depository institution in danger of closing; and certain management and liquidation activities pursuant to such appointments; possible financial assistance by the Corporation under section 13 of the Federal Deposit Insurance Act

(12 U.S.C. 1823); certain depository institution applications including applications to establish or move branches, applications to merge, and applications for insurance; and investigatory activity under section 10(c) of the Federal Deposit Insurance Act (12 U.S.C. 1820(c)). In announcing and closing meetings or portions of meetings under this section, the following procedures will be observed.

(b) *Announcement.* Except to the extent that such information is exempt from disclosure under the provisions of § 311.3(b) the Corporation will make public announcement of the time, place and subject matter of the meeting and of each portion thereof at the earliest practicable time. This announcement will be published in the FEDERAL REGISTER if publication can be effected at least 1 day prior to the scheduled date of the meeting.

(c) *Procedure for closing.* (1) The Corporation's General Counsel will make the public certification required by § 311.7.

(2) At the beginning of a meeting or portion of a meeting to be closed under this section, a recorded vote of the Board will be taken. The Board will determine by its vote whether to proceed with the closing. If a majority of the entire Board votes to close, the meeting will be closed to public observation. Even though a meeting or portion thereof could properly be closed under this section, a majority of the entire Board may find that the public interest requires an open session and vote, reflecting the vote of each Board member, will be made available to the public.

[42 FR 14675, Mar. 16, 1977; 42 FR 16616, Mar. 29, 1977, as amended at 54 FR 38965, Sept. 22, 1989]

§ 311.7 General Counsel certification.

For every meeting or portion thereof closed under § 311.5 or § 311.6, the Corporation's General Counsel will publicly certify that, in the opinion of such General Counsel, the meeting may be closed to the public and will state each relevant exemptive provision. In the absence of the General Counsel, the next ranking official in the Legal Division may perform the certification. If the General Counsel and such next ranking official in the Legal Division are both absent, the official in the Legal Division who is then next in rank may provide the required certification. A copy of this 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 in the Board's permanent files.

[42 FR 14675, Mar. 16, 1977, as amended at 61 FR 38357, July 24, 1996]

§ 311.8 Transcripts and minutes of meetings.

(a) *When required.* The Corporation will maintain a complete transcript, identifying each speaker, to record fully the proceedings of each meeting or portion of a meeting closed to the public, except that in the case of a meeting or portions of a meeting closed to the public pursuant to paragraph (b)(8), (9)(i), or (10) of § 311.3, the Corporation may, in lieu of a transcript, maintain a set of minutes.

(b) *Content of minutes.* If minutes are maintained, they will fully and clearly describe all matters discussed and will provide a full and accurate summary of any actions taken, and the reasons for taking such action. Minutes will also include a description of each of the views expressed by each person in attendance on any item and the record of any roll call vote, reflecting the vote of each member. All documents considered in connection with any action will be identified in the minutes.

(c) *Available material.* The Corporation will maintain a complete verbatim copy of the transcript or minutes of each meeting or portion of a meeting closed to the public for a period of at least 2 years after the meeting, or until 1 year after the conclusion of any proceeding with respect to which the meeting or portion was held, whichever occurs later. The Corporation will make promptly available to the public the transcript, identifying each speaker, or minutes of items on the agenda or testimony of any witness received at the closed meeting except that in cases where the Privacy Act of 1974 (5 U.S.C. 552a) does not apply, the Corporation may withhold information exempt from disclosure under § 311.3(b). For the convenience of members of the public

who may be unable to attend open meetings of the Board, the Corporation will maintain for at least 2 years a set of minutes of each meeting of the Board or portion thereof open to public observation.

(d) *Procedures for inspecting or copying available material.* (1) An individual may inspect materials made available under paragraph (c) of this section at the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429, during normal business hours. If the individual desires a copy of such material, the Corporation will furnish copies at a cost of 10 cents per page. Whenever the Corporation determines that in the public interest a reduction or waiver is warranted, it may reduce or waive any fees imposed under this section.

(2) An individual may also submit a written request for transcripts or minutes, reasonably identifying the records sought, to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(e) *Procedures for obtaining documents identified in minutes.* Copies of documents identified in minutes or considered by the Board in connection with any action identified in the minutes may be made available to the public upon request, to the extent permitted by the Freedom of Information Act, under the provisions of 12 CFR part 309, Disclosure of Information.

[42 FR 14675, Mar. 16, 1977, as amended at 61 FR 38357, July 24, 1996]

PART 312—ASSESSMENT OF FEES UPON ENTRANCE TO OR EXIT FROM THE BANK INSURANCE FUND OR THE SAVINGS ASSOCIATION INSURANCE FUND

Sec.

312.1 Definitions.
312.2 Bank Insurance Fund reserve ratio.
312.3 Savings Association Insurance Fund reserve ratio.
312.4 Entrance fees assessed in connection with conversion transactions from the Savings Association Insurance Fund to the Bank Insurance Fund.
312.5 Exit fees assessed in connection with conversion transactions from the Savings Association Insurance Fund to the Bank Insurance Fund.
312.6 Entrance fees assessed in connection with conversion transactions from the Bank Insurance Fund to the Savings Association Insurance Fund.
312.7 Exit fees assessed in connection with conversion transactions from the Bank Insurance Fund to the Savings Association Insurance Fund.
312.8 Entrance and exit fees assessed in connection with insured deposit transfers from the Savings Association Insurance Fund to the Bank Insurance Fund.
312.9 Entrance and exit fees assessed in connection with insured deposit transfers from the Bank Insurance Fund to the Savings Association Insurance Fund.
312.10 Payment of entrance and exit fees.

AUTHORITY: 12 U.S.C. 1815(d); 12 U.S.C. 1819.

§312.1 Definitions.

For purposes of this part:

(a) The term *Bank Insurance Fund* shall mean the fund established by section 11(a)(5) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(a)(5). The term *Savings Association Insurance Fund* shall mean the fund established by section 11(a)(6) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(a)(6).

(b) The terms *Bank Insurance Fund member* and *Savings Association Insurance Fund member* shall have the meanings given them in sections 7(*l*) (4) and (5) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(*l*) (4), (5), respectively.

(c) The term *Bank Insurance Fund reserve ratio* shall mean the ratio of the net worth of the Bank Insurance Fund to the value of the aggregate total domestic deposits held in all Bank Insurance Fund members. The term ''Savings Association Insurance Fund reserve ratio'' shall mean the ratio of the value of the net worth of the Savings Association Insurance Fund to the value of the aggregate total domestic deposits held in all Savings Association Insurance Fund members.

(d) The term *conversion transaction* shall have the meaning given it in section 5(d)(2)(B) of the Federal Deposit Insurance Act, 12 U.S.C. 1815(d)(2)(B).

(e) The terms *default* and *in danger of default* shall have the meanings given them in section 3(x) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(x).

(f) The term *deposit broker* shall have the meaning given it in section 29 of the Federal Deposit Insurance Act, 12 U.S.C. 1831f.

(g) The term *entrance fee deposit base* generally refers to those deposits which the Federal Deposit Insurance Corporation, in its discretion, estimates to have a high probability of remaining with the acquiring or resulting depository institution for a reasonable period of time following the acquisition, in excess of those deposits that would have remained in the insurance fund of the depository institution in default or in danger of default had such institution been resolved by means of an insured deposit transfer. The estimated dollar amount of the entrance fee deposit base shall be determined on a case-by-case basis by the Federal Deposit Insurance Corporation at the time offers to acquire an insured depository institution (or any part thereof) are solicited by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation.

(h) The term *insured deposit transfer* shall mean a transaction wherein the insured deposits of an insured depository institution in default or in danger of default, are paid by means of a transferred deposit pursuant to a written agreement between the Federal Deposit Insurance Corporation or the Resolution Trust Corporation and an insured depository institution. The term *transferred deposit* shall have the meaning given it in section 3(n) of the Federal Deposit Insurance Act, 12 U.S.C. 1813 (n).

(i) The term *premium* shall mean the amount paid by an insured depository institution in consideration for the right to enter into an insured deposit transfer agreement. The premium shall not include the amount of any transferred deposits, nor shall the premium include any amount paid for the purchase of assets or the right to purchase assets of a depository institution in default or in danger of default.

(j) The term *retained deposit base* shall mean the total deposits transferred from a Savings Association Insurance Fund Member to a Bank Insurance Fund Member, or from a Bank Insurance Fund member to a Savings Association Insurance Fund member, less the following deposits:

(1) Any deposit acquired, directly or indirectly, by or through any deposit broker; and

(2) Any portion of any deposit account exceeding $80,000.

[54 FR 40380, Oct. 2, 1989; 54 FR 43521, Oct. 25, 1989, as amended at 55 FR 10412, Mar. 21, 1990]

§ 312.2 Bank Insurance Fund reserve ratio.

The Bank Insurance Fund reserve ratio to be used in computing the entrance fee under this part with respect to any particular conversion transaction shall be the most recent Bank Insurance Fund reserve ratio calculated quarterly by the Federal Deposit Insurance Corporation prior to the date on which deposit liabilities are transferred from a Savings Association Insurance Fund member to a Bank Insurance Fund member in connection with that conversion transaction.

[56 FR 29895, July 1, 1991]

§ 312.3 Savings Association Insurance Fund reserve ratio.

The Savings Association Insurance Fund reserve ratio to be used in computing the entrance fee under this part with respect to any particular conversion transaction shall be the most recent Savings Association Insurance Fund reserve ratio calculated quarterly by the Federal Deposit Insurance Corporation prior to the date on which deposit liabilities are transferred from a Bank Insurance Fund member to a Savings Association Insurance Fund member in connection with that conversion transaction.

[56 FR 29895, July 1, 1991]

§ 312.4 Entrance fees assessed in connection with conversion transactions from the Savings Association Insurance Fund to the Bank Insurance Fund.

(a) Each insured depository institution participating in a conversion transaction as a result of which insured deposits are transferred from a Savings Association Insurance Fund member to a Bank Insurance Fund member shall pay an entrance fee to the Bank Insurance Fund.

(b) The entrance fee shall be the product derived by multiplying the dollar amount of total deposits transferred from the Savings Association Insurance Fund member to the Bank Insurance Fund member by the Bank Insurance Fund reserve ratio.

(c) Notwithstanding paragraph (b) of this section, the entrance fee to be assessed against an insured depository institution participating in a conversion transaction:

(1) Occurring in connection with the acquisition of a Savings Association Insurance Fund member in default or in danger of default, or

(2) Otherwise arranged by the Federal Deposit Insurance Corporation in its capacity as exclusive manager of the Resolution Trust Corporation, shall be the product derived by multiplying the dollar amount of the entrance fee deposit base transferred from the Savings Association Insurance Fund member to the Bank Insurance Fund member by the Bank Insurance Fund ratio.

[55 FR 10413, Mar. 21, 1990]

§312.5 Exit fees assessed in connection with conversion transactions from the Savings Association Insurance Fund to the Bank Insurance Fund.

(a) Each insured depository institution participating in a conversion transaction as a result of which insured deposits are transferred from a Savings Association Insurance Fund member to a Bank Insurance Fund member shall pay an exit fee.

(b) The exit fee shall be the product derived by multiplying the dollar amount of total deposits transferred from the Savings Association Insurance Fund member to the Bank Insurance Fund member by 0.90 percent (0.0090).

(c) Notwithstanding paragraph (b) of this section, the exit fee to be assessed against an insured depository institution participating in a conversion transaction:

(1) Occurring in connection with the acquisition of a Savings Association Insurance Fund member in default or in danger of default, or

(2) Otherwise arranged by the Federal Deposit Insurance Corporation in its capacity as exclusive manager of the Resolution Trust Corporation, shall be the product derived by multiplying the dollar amount of the retained deposit base transferred from the Savings Association Insurance Fund member to the Bank Insurance Fund member by 0.90 percent (0.0090).

(d) The exit fee required to be paid by this section shall be paid to the Savings Association Insurance Fund or, if the Secretary of the Treasury determines that the Financing Corporation has exhausted all other sources of funding for interest payments on the obligations of the Financing Corporation and orders that such exit fee be paid to the Financing Corporation.

(e) Exit fees paid to the Savings Association Insurance Fund pursuant to paragraph (d) of this section shall be held in a reserve account until such time as the Federal Deposit Insurance Corporation and the Secretary of the Treasury determine that it is not necessary to reserve such funds for the payment of interest on the obligations of the Financing Corporation.

(f) Before January 1, 1997, amendments to this section shall be determined jointly by the Federal Deposit Insurance Corporation and the Secretary of the Treasury.

[55 FR 10413, Mar. 21, 1990]

§312.6 Entrance fees assessed in connection with conversion transactions from the Bank Insurance Fund to the Savings Association Insurance Fund.

(a) Each insured depository institution participating in a conversion transaction as a result of which insured deposits are transferred from a Bank Insurance Fund member to a Savings Association Insurance Fund member shall pay an entrance fee to the Savings Association Insurance Fund.

(b) The entrance fee shall be the product derived by multiplying the dollar amount of total deposits transferred from the Bank Insurance Fund member to the Savings Association Insurance Fund member by the Savings Association Insurance Fund reserve ratio, or by .01 percent (0.0001), whichever is greater.

(c) Notwithstanding paragraph (b) of this section, the entrance fee to be assessed against an insured depository

institution participating in a conversion transaction occurring in connection with the acquisition of a Bank Insurance Fund member in default or in danger of default shall be the product derived by multiplying the dollar amount of the entrance fee deposit base transferred from the Bank Insurance Fund member to the Savings Association Insurance Fund member by the Savings Association Insurance Fund reserve ratio, or by .01 percent (0.0001), whichever is greater.

(d) *Interim entrance fee until initial calculation of Savings Association Insurance Fund reserve ratio.* Notwithstanding paragraphs (b) and (c) of this section, until such time as the Savings Association Insurance Fund reserve ratio is initially calculated and made publicly available, the entrance fee for all conversions from the Bank Insurance Fund to the Savings Association Insurance Fund shall be the product derived by multiplying the dollar amount of total deposits transferred from the Bank Insurance Fund member to the Savings Association Insurance Fund member by .01 percent (0.0001), unless the conversion transaction is occurring in connection with the acquisition of a Bank Insurance Fund member in default or in danger of default, where it shall be the product derived by multiplying the dollar amount of the entrance fee deposit base transferred from the Bank Insurance Fund member to the Savings Association Insurance Fund member by 0.01 percent (0.0001).

[55 FR 10413, Mar. 21, 1990]

§ 312.7 Exit fees assessed in connection with conversion transactions from the Bank Insurance Fund to the Savings Association Insurance Fund.

(a) Each insured depository institution participating in a conversion transaction as a result of which insured deposits are transferred from a Bank Insurance Fund member to a Savings Association Insurance Fund member shall pay an exit fee to the Bank Insurance Fund.

(b) The exit fee shall be the product derived by multiplying the dollar amount of total deposits transferred from the Bank Insurance Fund member to the Savings Association Insurance Fund member by .01 percent (0.0001).

(c) Notwithstanding paragraph (b) of this section, the exit fee to be assessed against an insured depository institution participating in a conversion transaction occurring in connection with the acquisition of a Bank Insurance Fund member in default or in danger of default shall be the product derived by multiplying the dollar amount of the retained deposit base transferred from the Bank Insurance Fund member to the Savings Association Insurance Fund member by 0.01 percent (0.0001).

[55 FR 10413, Mar. 21, 1990]

§ 312.8 Entrance and exit fees assessed in connection with insured deposit transfers from the Savings Association Insurance Fund to the Bank Insurance Fund.

(a) Insured deposit transfers resulting in a transfer of insured deposits from a Savings Association Insurance Fund member to a Bank Insurance Fund member, shall be subject to an entrance fee and an exit fee.

(b) The entrance fee shall be the product derived by multiplying the dollar amount of the retained deposit base of the Savings Association Insurance Fund member in default or in danger of default by the Bank Insurance Fund ratio.

(c) The exit fee shall be the product derived by multiplying the dollar amount of the retained deposit base of the Savings Association Insurance Fund member in default or in danger of default by 0.90 percent (0.0090).

(d) Notwithstanding paragraphs (a), (b), and (c) of this section, the sum total of the entrance fee and the exit fee required by this section shall in no event exceed the amount of the premium.

(e) The entrance and exit fees required by this section shall be paid by the acquiring institution from the premium as follows. First, the premium shall be allocated in payment of the exit fee to one-third of the premium received. Second, the remaining premium shall be allocated to the entrance fee. Third, if any premium remains, it shall be applied to the remaining balance (if any) owing on the exit fee. Fourth, any amount remaining after application

pursuant to steps one through three shall be allocated to the Resolution Trust Corporation.

(f) The entrance fee required by this section shall be paid to the Bank Insurance Fund. The exit fee required by this section shall be paid to the Savings Association Insurance Fund or, if the Secretary of the Treasury determines that the Financing Corporaiton has exhausted all other sources of funding for interest payments on the obligations of the Financing Corporation and orders that such exit fee be paid to the Financing Corporation.

(g) Exit fees paid to the Savings Association Insurance Fund pursuant to paragraph (f) of this section shall be held in a reserve account until such time as the Federal Deposit Insurance Corporation and the Secretary of the Treasury determine that it is not necessary to reserve such funds for the payment of interest on the obligations of the Financing Corporation.

(h) Insured deposit transfers occurring before March 21, 1990 shall not be subject to the assessment of entrance or exit fees.

(i) Before January 1, 1997, amendments to this section concerning exit fees assessed in connection with insured deposit transfers from the Savings Association Insurance Fund to the Bank Insurance Fund shall be determined jointly by the Federal Deposit Insurance Corporation and the Secretary of the Treasury.

[55 FR 10414, Mar. 21, 1990]

§312.9 Entrance and exit fees assessed in connection with insured deposit transfers from the Bank Insurance Fund to the Savings Association Insurance Fund.

(a) Insured deposit transfers resulting in a transfer of insured deposits from a Bank Insurance Fund member to a Savings Association Insurance Fund member, shall be subject to an entrance fee and in exit fee.

(b) The entrance fee shall be the product derived by multiplying the dollar amount of the retained deposit base of the Bank Insurance Fund member in default or in danger of default by the Savings Association Insurance Fund ratio or by .01 percent (0.0001), whichever is greater.

(c) The exit fee shall be the product derived by multiplying the dollar amount of the retained deposit base of the Bank Insurance Fund member by 0.01 percent (0.0001).

(d) Notwithstanding paragraphs (a), (b), and (c) of this section, the sum total of the entrance fee and the exit fee required by this section shall in no event exceed the amount of the premium.

(e) The entrance and exit fees required by this section shall be paid by the acquiring institution from the premium as follows. First, the premium shall be allocated in payment of the exit fee to one-third of the premium received. Second, the remaining premium will be allocated to the entrance fee. Third, if any premium remains, it shall be applied to the remaining balance (if any) owing on the exit fee. Fourth, any amount remaining after application pursuant to steps one through three shall be allocated to the Federal Deposit Insurance Corporation.

(f) The entrance fee required by this section shall be paid to the Savings Association Insurance Fund. The exit fee required by this section shall be paid to the Bank Insurance Fund.

(g) Insured deposit transfers occurring before March 21, 1990 shall not be subject to the assessment of entrance or exit fees.

[55 FR 10414, Mar. 21, 1990]

§312.10 Payment of entrance and exit fees.

(a) A resulting or acquiring depository institution shall be liable for the payment of the entrance and exit fees required by this part.

(b) Notwithstanding paragraph (a) of this section, an acquiring depository institution participating in an insured deposit transfer pursuant to §312.8 or §312.9 of this part shall pay the entrance and exit fees from the premium, and in any event, shall not be liable for the payment of that portion of the entrance and exit fees that exceeds the premium paid by such acquiring depository institution.

(c) The ''conversion transaction payment date'' shall be either March 31st or September 30th, whichever occurs first following the expiration of 30 days

from the date the deposits are transferred.

(d) A resulting or acquiring depository institution shall pay the entrance and exit fees required by this part on the conversion transaction payment date.

(e) Notwithstanding paragraph (d) of this section, where the sum of the entrance and exit fees required to be paid by an insured depository institution pursuant to §§312.4, 312.5, 312.6, or 312.7 of this part exceeds $5,000, a resulting or acquiring depository institution may, at its option, and upon notification to the Federal Deposit Insurance Corporation, pay the entrance and exit fees in equal annual installments, interest-free, over a period of not more than five years. The first such installment shall be paid on the date described in paragraph (c) of this section.

(f) Entrance and exit fees required to be paid by an insured depository institution as the result of an insured deposit transfer pursuant to §§312.8 or 312.9 of this part shall be paid on the conversion transaction payment date described in paragraph (c) of this section.

[55 FR 10414, Mar. 21, 1990]

SUBCHAPTER B—REGULATIONS AND STATEMENTS OF GENERAL POLICY

PART 323—APPRAISALS

Sec.
323.1 Authority, purpose, and scope.
323.2 Definitions.
323.3 Appraisals required; transactions requiring a State certified or licensed appraiser.
323.4 Minimum appraisal standards.
323.5 Appraiser independence.
323.6 Professional association membership; competency.
323.7 Enforcement.

AUTHORITY: 12 U.S.C. 1818, 1819 [''Seventh'' and ''Tenth''], and 3331–3352.

SOURCE: 55 FR 33888, Aug. 20, 1990, unless otherwise noted.

§323.1 Authority, purpose, and scope.

(a) *Authority*. This part is issued under 12 U.S.C. 1818, 1819 [''Seventh'' and ''Tenth''] and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (Pub. L. 101–73, 103 Stat. 183, 12 U.S.C. 3331 *et seq*. (1989)).

(b) *Purpose and scope*. (1) Title XI provides protection for federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This part implements the requirements of title XI and applies to all federally related transactions entered into by the FDIC or by institutions regulated by the FDIC (*regulated institutions*).

(2) This part: (i) Identifies which real estate-related financial transactions require the services of an appraiser;

(ii) Prescribes which categories of federally related transactions shall be appraised by a State certified appraiser and which by a State licensed appraiser; and

(iii) Prescribes minimum standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of the FDIC.

§323.2 Definitions.

(a) *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

(b) *Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

(c) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(d) *Business loan* means a loan or extension of credit to any corporation, general or limited partnership, business trust, joint venture, pool, syndicate, sole proprietorship, or other business entity.

(e) *Complex 1-to-4 family residential property appraisal* means one in which the property to be appraised, the form of ownership, or market conditions are atypical.

(f) *Federally related transaction* means any real estate-related financial transactions entered into after the effective date hereof that:

(1) The FDIC or any regulated institution engages in or contracts for; and

(2) Requires the services of an appraiser.

(g) *Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(1) Buyer and seller are typically motivated;

(2) Both parties are well informed or well advised, and acting in what they consider their own best interests;

(3) A reasonable time is allowed for exposure in the open market;

(4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(h) *Real estate* or *real property* means an identified parcel or tract of land, with improvements, and includes easements, rights of way, undivided or future interests and similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights and similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

(i) *Real estate-related financial transaction* means any transaction involving:

(1) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; or

(2) The refinancing of real property or interests in real property; or

(3) The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

(j) *State certified appraiser* means any individual who has satisfied the requirements for certification in a State or territory whose criteria for certification as a real estate appraiser currently meet the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation. No individual shall be a State certified appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualifications Board. In addition, the Appraisal Subcommittee must not have issued a finding that the policies, practices, or procedures of a State or territory are inconsistent with title XI of FIRREA. The FDIC may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(k) *State licensed appraiser* means any individual who has satisfied the requirements for licensing in a State or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the policies, practices, or procedures of the State or territory are inconsistent with title XI. The FDIC may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(l) *Tract development* means a project of five units or more that is constructed or is to be constructed as a single development.

(m) *Transaction value* means: (1) For loans or other extensions of credit, the amount of the loan or extension of credit;

(2) For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and

(3) For the pooling of loans or interests in real property for resale or purchase, the amount of the loan or market value of the real property calculated with respect to each such loan or interest in real property.

[55 FR 33888, Aug. 20, 1990, as amended at 57 FR 9049, Mar. 16, 1992; 59 FR 29501, June 7, 1994]

§ 323.3 Appraisals required; transactions requiring a State certified or licensed appraiser.

(a) *Appraisals required.* An appraisal performed by a State certified or licensed appraiser is required for all real estate-related financial transactions except those in which:

(1) The transaction value is $250,000 or less;

(2) A lien on real estate has been taken as collateral in an abundance of caution;

(3) The transaction is not secured by real estate;

(4) A lien on real estate has been taken for purposes other than the real estate's value;

(5) The transaction is a business loan that:

(i) Has a transaction value of $1 million or less; and

(ii) Is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment;

(6) A lease of real estate is entered into, unless the lease is the economic equivalent of a purchase or sale of the leased real estate;

(7) The transaction involves an existing extension of credit at the lending institution, provided that:

(i) There has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or

(ii) There is no advancement of new monies, other than funds necessary to cover reasonable closing costs;

(8) The transaction involves the purchase, sale, investment in, exchange of, or extension of credit secured by, a loan or interest in a loan, pooled loans, or interests in real property, including mortgaged-backed securities, and each loan or interest in a loan, pooled loan, or real property interest met FDIC regulatory requirements for appraisals at the time of origination;

(9) The transaction is wholly or partially insured or guaranteed by a United States government agency or United States government sponsored agency;

(10) The transaction either:

(i) Qualifies for sale to a United States government agency or United States government sponsored agency; or

(ii) Involves a residential real estate transaction in which the appraisal conforms to the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation appraisal standards applicable to that category of real estate;

(11) The regulated institution is acting in a fiduciary capacity and is not required to obtain an appraisal under other law; or

(12) The FDIC determines 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 the institution.

(b) *Evaluations required.* For a transaction that does not require the services of a State certified or licensed appraiser under paragraph (a)(1), (a)(5) or (a)(7) of this section, the institution shall obtain an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices.

(c) *Appraisals to address safety and soundness concerns.* The FDIC reserves the right to require an appraisal under this part whenever the agency believes it is necessary to address safety and soundness concerns.

(d) *Transactions requiring a State certified appraiser*—(1) *All transactions of $1,000,000 or more.* All federally related transactions having a transaction value of $1,000,000 or more shall require an appraisal prepared by a State certified appraiser.

(2) *Nonresidential transactions of $250,000 or more.* All federally related transactions having a transaction value of $250,000 or more, other than those involving appraisals of 1-to-4 family residential properties, shall require an appraisal prepared by a State certified appraiser.

(3) *Complex residential transactions of $250,000 or more.* All complex 1-to-4 family residential property appraisals rendered in connection with federally related transactions shall require a State certified appraiser if the transaction value is $250,000 or more. A regulated institution may presume that appraisals of 1-to-4 family residential properties are not complex, unless the institution has readily available information that a given appraisal will be complex. The regulated institution shall be responsible for making the final determination of whether the appraisal is complex. If during the course of the appraisal a licensed appraiser identifies factors that would result in the property, form of ownership, or market conditions being considered atypical, then either:

(i) The regulated institution may ask the licensed appraiser to complete the

appraisal and have a certified appraiser approve and co-sign the appraisal; or

(ii) The institution may engage a certified appraiser to complete the appraisal.

(e) *Transactions requiring either a State certified or licensed appraiser.* All appraisals for federally related transactions not requiring the services of a State certified appraiser shall be prepared by either a State certified appraiser or a State licensed appraiser.

(f) *Effective date.* Regulated institutions are required to use state certified or licensed appraisers as set forth in this section no later than December 31, 1992, unless otherwise required by law.

[55 FR 33888, Aug. 20, 1990, as amended at 57 FR 9050, Mar. 16, 1992; 59 FR 29501, June 7, 1994]

§ 323.4 Minimum appraisal standards.

For federally related transactions, all appraisals shall, at a minimum:

(a) Conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation, 1029 Vermont Ave., NW., Washington, DC 20005, unless principles of safe and sound banking require compliance with stricter standards;

(b) Be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction;

(c) Analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units;

(d) Be based upon the definition of market value as set forth in this part; and

(e) Be performed by State licensed or certified appraisers in accordance with requirements set forth in this part.

[59 FR 29502, June 7, 1994]

§ 323.5 Appraiser independence.

(a) *Staff appraisers.* If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an appraisal are involved in the lending, investment, or collection functions of the regulated institution, the regulated institution shall take appropriate steps to ensure that the appraisers exercise independent judgment and that the appraisal is adequate. Such steps include, but are not limited to, prohibiting an individual from performing appraisals in connection with federally related transactions in which the appraiser is otherwise involved and prohibiting directors and officers from participating in any vote or approval involving assets on which they performed an appraisal.

(b) *Fee appraisers.* (1) If an appraisal is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or the transaction.

(2) A regulated institution also may accept an appraisal that was prepared by an appraiser engaged directly by another financial services institution, if:

(i) The appraiser has no direct or indirect interest, financial or otherwise, in the property or the transaction; and

(ii) The regulated institution determines that the appraisal conforms to the requirements of this part and is otherwise acceptable.

[55 FR 33888, Aug. 20, 1990, as amended by 59 FR 29502, June 7, 1994]

§ 323.6 Professional association membership; competency.

(a) *Membership in appraisal organizations.* A State certified appraiser or a State licensed appraiser may not be excluded from consideration for an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* All staff and fee appraisers performing appraisals in connection with federally related transactions must be State certified or licensed, as appropriate. However, a State certified or licensed appraiser

may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as they relate to the particular appraisal assignment for which he or she is being considered.

§323.7 Enforcement.

Institutions and institution-affiliated parties, including staff appraisers and fee appraisers, may be subject to removal and/or prohibition orders, cease and desist orders, and the imposition of civil money penalties pursuant to the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, as amended, or other applicable law.

PART 324—AGRICULTURAL LOAN LOSS AMORTIZATION

Sec.
324.1 Authority.
324.2 Definitions.
324.3 Loss amortization and reappraisal.
324.4 Accounting for amortization.
324.5 Eligibility.
324.6 Conditions on acceptance.
324.7 Submission of proposals.
324.8 Revocation of eligibility.
324.9 Other administrative actions.

AUTHORITY: 12 U.S.C. 1823(j), 1819, and 12 U.S.C. 1811–1831.

SOURCE: 52 FR 41968, Nov. 2, 1987, unless otherwise noted.

EFFECTIVE DATE NOTE: At 61 FR 33843, July 1, 1996, Part 324 was removed, effective Jan. 1, 1999.

§324.1 Authority.

This part is issued by the Federal Deposit Insurance Corporation (*Corporation*) pursuant to 12 U.S.C. 1823(j), 1819, and other provisions of the Federal Deposit Insurance Act (12 U.S.C. 1811–31d).

§324.2 Definitions.

For purposes of this part:

(a) *Agricultural Bank* means a state nonmember bank, except a district bank,

(1) The deposits of which are insured by the Corporation;

(2) Which is located in an area of the country the economy of which is dependent on agriculture;

(3) Which has total assets of $100 million or less as of the most recent Report of Condition; and

(4) Which has—(i) At least 25 percent of its total loans in qualified agricultural loans and agriculturally related other property as defined below; or

(ii) Less than 25 percent of its total loans in qualified agricultural loans and agriculturally related other property, but which bank the appropriate state banking authority has recommended to the Corporation and which the Corporation accepts for eligibility under this part or which the Corporation on its own motion deems eligible hereunder.

(b) *Qualified agricultural loan* means—(1) Loans qualifying as *loans to finance agricultural production and other loans to farmers* or as *loans secured by farmland* for purpose of Schedule RC–C of the FFIEC Consolidated Reports of Condition and Income or such other comparable schedule as may be in effect;

(2) Loans secured by farm machinery;

(3) Other loans and leases that a bank proves to be sufficiently related to agriculture for classification as an agricultural loan by the Corporation;

(4) The remaining unpaid balance of any loans as described in paragraphs (b) (1), (2) and (3) of this section that have been charged-off since January 1, 1984, and that qualify for deferral under this regulation.

(c) *Agriculturally related other property* means any property, real or personal, that a bank owned on January 1, 1983, and any such additional property that it acquires prior to January 1, 1992, in connection with a qualified agricultural loan. For purposes of §§324.2(a)(4)(i) and 324.6(d) the value of such property shall include amounts previously charged-off.

(d) *Accepting Official* means the Director, Division of Supervision, or his designees.

[53 FR 22133, June 14, 1988; 53 FR 36963, Sept. 23, 1988, as amended at 60 FR 31384, June 15, 1995]

§324.3 Loss amortization and reappraisal.

(a) Provided that there is no evidence that the loss resulted from fraud or criminal abuse on the part of the bank, its officers, directors or principal

shareholders, a bank that has been accepted under this part may, in the manner described below, amortize on its Reports of Condition and Income:

(1) Any loss on any qualified agricultural loan that the bank would be required to reflect in its annual financial statements for any year between and including 1984 to 1991; and

(2) Any loss that the bank would be required to reflect in its financial statements for any period between and including 1983 to 1991 resulting from a reappraisal or sale of agriculturally related other property.

(b) Amortization under this section shall be computed over a period not to exceed seven years on a quarterly straight-line basis commencing in the first quarter after the loss was or is charged off so as to be fully amortized not later than December 31, 1998.

[52 FR 41968, Nov. 2, 1987, as amended at 53 FR 22134, June 14, 1988]

§ 324.4 Accounting for amortization.

Any bank which is permitted to amortize losses in accordance with § 324.3 may restate its capital and other relevant accounts and account for future authorized deferrals and amortizations in accordance with the instructions to the FFIEC Consolidated Reports of Condition and Income. Any resulting increase in the capital account shall be included in Tier 2 capital under 12 CFR part 325.

[52 FR 41968, Nov. 2, 1987, as amended at 56 FR 23011, May 20, 1991]

§ 324.5 Eligibility.

A proposal submitted in accord with § 324.7 shall be accepted, subject to the conditions described in § 324.6, if the Accepting Official finds:

(a) The proposing bank is an agricultural bank;

(b) The proposing bank's current capital is in need of restoration, but the bank remains an economically viable, fundamentally sound institution;

(c) There is no evidence that fraud or criminal abuse by the bank or its officers, directors or principal shareholders led to significant losses on qualified agricultural loans and agriculturally related other property; and

(d) The proposing bank has submitted a capital plan approved by the Corporation or the Accepting Official that will restore its capital to an acceptable level.

[52 FR 41968, Nov. 2, 1987, as amended at 53 FR 22134, June 14, 1988]

§ 324.6 Conditions on acceptance.

All acceptances of proposals shall be subject to the following conditions:

(a) The bank shall fully adhere to the approved capital plan and shall obtain the prior approval of the Accepting Official for any modifications to the plan;

(b) With respect to each asset subject to loss deferral under the program, the bank shall maintain accounting records adequate to document the amount and timing of the deferrals, repayments and amortizations;

(c) The financial condition of the bank shall not deteriorate to the point where it is no longer a viable, fundamentally sound institution;

(d) The bank shall agree to make a reasonable effort, consistent with safe and sound banking practices, to maintain a percentage of agricultural loans and agriculturally related other property to total loans which is not lower than the percentage of such loans in its loan portfolio on January 1, 1986; and

(e) The bank shall agree to provide the Accepting Official, upon request, with such information as the Accepting Official deems necessary to monitor the bank's amortization, its compliance with conditions, and its continued eligibility.

[52 FR 41968, Nov. 2, 1987, as amended at 53 FR 22134, June 14, 1988]

§ 324.7 Submission of proposals.

(a) A bank wishing to amortize losses on qualified agricultural loans or agriculturally related other property shall submit a proposal to the Division of Supervision regional director of the region in which the bank is located.

(b) The proposal shall contain the following information:

(1) Name and address of the bank;

(2) Information establishing that the bank is located in an area, the economy of which is dependent on agriculture such as a description of the bank's location, dominant lines of

commerce in its service area, and any other information the bank believes will support the contention that the bank is located in an area dependent on agriculture;

(3) A copy of the bank's most recent Reports of Condition and Income;

(4) If the Report of Condition fails to show that at least 25 percent of the bank's total loans are qualified agricultural loans, the basis upon which the bank believes that it should be declared eligible to amortize losses;

(5) A capital plan demonstrating that the bank will achieve an acceptable capital level not later than the end of the bank's amortization period (the plan should provide for a realistic improvement in the bank's capital, over the course of the bank's amortization period, from earnings retention, capital injections, or other sources and include specific information regarding dividend levels, compensation to directors, executive officers and individuals who have a controlling interest, and payments for services or products furnished by affiliated companies or companies which are related interests of insiders);

(6) A list of the loans and agriculturally related other property upon which the bank proposes to defer loss including, for each such loan or property, the following information:

(i) The name of the borrower, the amount of the loan that resulted in the loss, and the amount of the loss;

(ii) The date on which the loss was declared;

(iii) The basis upon which the loss resulted from a qualified agricultural loan;

(7) A certification by the bank's chief executive officer that there is no evidence that the losses resulted from fraud or criminal abuse by the bank, its officers, directors, or principal shareholders;

(8) A copy of a resolution by the bank's Board of Directors authorizing submission of the proposal; and

(9) Such other information as the Accepting Official may require.

(Approved by the Office of Management and Budget under control number 3064–0091)

[52 FR 41968, Nov. 2, 1987; 52 FR 43190, Nov. 10, 1987, as amended at 53 FR 22134, June 14, 1988; 60 FR 31384, June 15, 1995]

§324.8 Revocation of eligibility.

If the bank fails to continue to meet eligibility requirements or to comply with the capital plan or any condition of an acceptance, the Accepting Official may notify the bank of the intent to revoke authorization for deferral of losses. The bank will have 60 days from receipt of the notice in which it may submit written objections and reasons why authorization should continue. If no written objections are received within 60 days, the revocation shall be final. If the bank submits objections, they will be considered and a final decision, or a request for additional information, shall be made within the next 30 days.

§324.9 Other administrative actions.

Acceptance of a bank for loss amortization does not foreclose any administrative action against the bank that the Corporation may deem appropriate.

PART 325—CAPITAL MAINTENANCE

Subpart A—Minimum Capital Requirements

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Subpart B—Prompt Corrective Action

325.101 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.
325.102 Notice of capital category.
325.103 Capital measures and capital category definitions.
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APPENDIX A TO PART 325—STATEMENT OF POLICY ON RISK-BASED CAPITAL
APPENDIX B TO PART 325—STATEMENT OF POLICY ON CAPITAL ADEQUACY
APPENDIX C TO PART 325—RISK-BASED CAPITAL FOR STATE NON-MEMBER BANKS; MARKET RISK.

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1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

Subpart A—Minimum Capital Requirements

§ 325.1 Scope.

The provisions of this subpart A apply to those circumstances for which the Federal Deposit Insurance Act or this chapter requires an evaluation of the adequacy of an insured depository institution's capital structure. The FDIC is required to evaluate capital before approving various applications by insured depository institutions. The FDIC also must evaluate capital, as an essential component, in determining the safety and soundness of state nonmember banks it insures and supervises and in determining whether depository institutions are in an unsafe or unsound condition. This subpart A establishes the criteria and standards the FDIC will use in calculating the minimum leverage capital requirement and in determining capital adequacy. In addition, appendix A to this subpart sets forth the FDIC's risk-based capital policy statement and appendix B to this subpart includes a statement of policy on capital adequacy that provides interpretational guidance as to how this subpart will be administered and enforced. In accordance with subpart B of part 325, the FDIC also must evaluate an institution's capital for purposes of determining whether the institution is subject to the prompt corrective action provisions set forth in section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

[58 FR 8219, Feb. 12, 1993]

§ 325.2 Definitions.

(a) *Allowance for loan and lease losses* means those general valuation allowances that have been established through charges against earnings to absorb losses on loans and lease financing receivables. Allowances for loan and lease losses exclude allocated transfer risk reserves established pursuant to 12 U.S.C. 3904 and specific reserves created against identified losses.

(b) *Assets classified loss* means:

(1) When measured as of the date of examination of an insured depository institution, those assets that have been determined by an evaluation made by a state or federal examiner as of that date to be a loss; and

(2) When measured as of any other date, those assets:

(i) That have been determined—

(A) By an evaluation made by a state or federal examiner at the most recent examination of an insured depository institution to be a loss; or

(B) By evaluations made by the insured depository institution since its most recent examination to be a loss; and

(ii) That have not been charged off from the insured depository institution's books or collected.

(c) *Bank* means an FDIC-insured, state-chartered commercial or savings bank that is not a member of the Federal Reserve System and for which the FDIC is the appropriate federal banking agency pursuant to section 3(q) of the FDI Act (12 U.S.C. 1813(q)).

(d) *Common stockholders' equity* means the sum of common stock and related surplus, undivided profits, disclosed capital reserves that represent a segregation of undivided profits, and foreign currency translation adjustments, less net unrealized holding losses on available-for-sale equity securities with readily determinable fair values.

(e)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term *controlled* shall be construed consistently with the term *control*.

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate federal banking agency for up to three one-year periods.

(f) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(g)(1) *Highly leveraged transaction* means an extension of credit to or investment in a business by an insured depository institution where the financing transaction involves a buyout, acquisition, or recapitalization of an existing business and one of the following criteria is met:

(i) The transaction results in a liabilities-to-assets leverage ratio higher than 75 percent; or

(ii) The transaction at least doubles the subject company's liabilities and results in a liabilities-to-assets leverage ratio higher than 50 percent; or

(iii) The transaction is designated an HLT by a syndication agent or a federal bank regulator.

(2) Notwithstanding paragraph (g)(1) of this section, loans and exposures to any obligor in which the total financing package, including all obligations held by all participants is $20 million or more, or such lower level as the FDIC may establish by order on a case-by-case basis, will be excluded from this definition.

(h) *Identified losses* means:

(1) When measured as of the date of examination of an insured depository institution, those items that have been determined by an evaluation made by a state or federal examiner as of that date to be chargeable against income, capital and/or general valuation allowances such as the allowance for loan and lease losses (examples of identified losses would be assets classified loss, off-balance sheet items classified loss, any provision expenses that are necessary for the institution to record in order to replenish its general valuation allowances to an adequate level, liabilities not shown on the institution's books, estimated losses in contingent liabilities, and differences in accounts which represent shortages); and

(2) When measured as of any other date, those items:

(i) That have been determined—

(A) By an evaluation made by a state or federal examiner at the most recent examination of an insured depository institution to be chargeable against income, capital and/or general valuation allowances; or

(B) By evaluations made by the insured depository institution since its most recent examination to be chargeable against income, capital and/or general valuation allowances; and

(ii) For which the appropriate accounting entries to recognize the loss have not yet been made on the insured depository institution's books nor has the item been collected or otherwise settled.

(i) *Insured depository institution* means any depository institution (except for a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*)

(j) *Intangible assets* means those assets that are required to be reported as intangible assets in a banking institution's ''Reports of Condition and Income'' (Call Report) or in a savings association's ''Thrift Financial Report.''

(k) *Leverage ratio* means the ratio of Tier 1 capital to total assets, as calculated under this part.

(l) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the bank or related overhead expenses, including payments related to supervisory, executive, managerial, or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the bank.

(m) *Minority interests in consolidated subsidiaries* means minority interests in equity capital accounts of those subsidiaries that have been consolidated for the purpose of computing regulatory capital under this part, except

that minority interests which fail to provide meaningful capital support are excluded from this definition.

(n) *Mortgage servicing rights* means those intagible assets that represent the rights to perform the servicing function for a specific group of mortgage loans that are owned by others. Mortgage servicing rights must be amortized over a period not to exceed 15 years or their estimated useful life, whichever is shorter. For purposes of determining regulatory capital under this part, mortgage servicing rights will be recognized only to the extent the rights meet the conditions, limitations and restrictions described in § 325.5(f).

(o) *Noncumulative perpetual preferred stock* means perpetual preferred stock (and related surplus) where the issuer has the option to waive payment of dividends and where the dividends so waived do not accumulate to future periods nor do they represent a contingent claim on the issuer. Preferred stock issues where the dividend is reset periodically based, in whole or in part, upon the bank's current credit standing, including but not limited to, auction rate, money market and remarketable preferred stock, are excluded from this definition of noncumulative perpetual preferred stock, regardless of whether the dividends are cumulative or noncumulative.

(p) *Perpetual preferred stock* means a preferred stock that does not have a maturity date, that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. It includes those issues of preferred stock that automatically convert into common stock at a stated date. It excludes those issues, the rate on which increases, or can increase, in such a manner that would effectively require the issuer to redeem the issue.

(q) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with the FDIC's Statement of Policy on Risk-Based Capital (appendix A to part 325).

(r) *Savings association* means any federally-chartered savings association, any state-chartered savings association, and any corporation (other than a bank) that the Board of Directors of the FDIC and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association.

(s) *Tangible equity* means the amount of core capital elements as defined in Section I.A.1. of the FDIC's Statement of Policy on Risk-Based Capital (appendix A to this Part 325), plus the amount of outstanding cumulative perpetual preferred stock (including related surplus), minus all intangible assets except mortgage servicing rights to the extent that the FDIC determines pursuant to § 325.5(f) of this part that mortgage servicing rights may be included in calculating the bank's Tier 1 capital.

(t) *Tier 1 capital* or *core capital* means the sum of common stockholders' equity, noncumulative perpetual preferred stock (including any related surplus), and minority interests in consolidated subsidiaries, minus all intangible assets (other than mortgage servicing rights and purchased credit card relationships eligible for inclusion in core capital pursuant to § 325.5(f) and qualifying supervisory goodwill eligible for inclusion in core capital pursuant to 12 CFR part 567), minus deferred tax assets in excess of the limit set forth in § 325.5(g), minus identified losses, (to the extent that Tier 1 capital would have been reduced if the appropriate accounting entries to reflect the identified losses had been recorded on the insured depository institution's books) and minus investments in securities subsidiaries subject to 12 CFR 337.4.

(u) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with the FDIC's Statement of Policy on Risk-Based Capital (appendix A to part 325).

(v) *Total assets* means the average of total assets required to be included in a banking institution's ''Reports of Condition and Income'' (Call Report) or, for savings associations, the consolidated total assets required to be included in the ''Thrift Financial Report,'' as these reports may from time to time be revised, as of the most recent report date (and after making any necessary subsidiary adjustments for state nonmember banks as described in §§ 325.5(c) and 325.5(d) of this part),

minus intangible assets (other than mortgage servicing rights and purchased credit card relationships eligible for inclusion in core capital pursuant to §325.5(f) and qualifying supervisory goodwill eligible for inclusion in core capital pursuant to 12 CFR part 567), minus deferred tax assets in excess of the limit set forth in 325.5(g), and minus assets classified loss and any other assets that are deducted in determining Tier 1 capital. For banking institutions, the average of total assets is found in the Call Report schedule of quarterly averages. For savings associations, the consolidated total assets figure is found in Schedule CSC of the Thrift Financial Report.

(w) *Total risk-based capital ratio* means the ratio of qualifying total capital to risk-weighted assets, as calculated in accordance with the FDIC's Statement of Policy on Risk-Based Capital (appendix A to part 325).

(x) *Written agreement* means an agreement in writing executed by authorized representatives entered into with the FDIC by an insured depository institution which is enforceable by an action under section 8(a) and/or section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818 (a), (b)).

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§325.3 Minimum leverage capital requirement.

(a) *General.* Banks must maintain at least the minimum leverage capital requirement set forth in this section. The capital standards in this part are the minimum acceptable for banks whose overall financial condition is fundamentally sound, which are well-managed and which have no material or significant financial weaknesses. Thus, the FDIC is not precluded from requiring an institution to maintain a higher capital level based on the institution's particular risk profile. Where the FDIC determines that the financial history or condition, managerial resources and/or the future earnings prospects of a bank are not adequate, or where a bank has sizable off-balance sheet or funding risks, significant risks from concentrations of credit or nontraditional activities, excessive interest rate risk exposure, or a significant volume of assets classified substandard, doubtful or loss or otherwise criticized, the FDIC will take these other factors into account in analyzing the bank's capital adequacy and may determine that the minimum amount of capital for that bank is greater than the minimum standards stated in this section. These same criteria will apply to any insured depository institution making an application to the FDIC that requires the FDIC to consider the adequacy of the institution's capital structure.

(b) *Minimum leverage capital requirement.* (1) The minimum leverage capital requirement for a bank (or an insured depository institution making application to the FDIC) shall consist of a ratio of Tier 1 capital to total assets of not less than 3 percent if the FDIC determines that the institution is not anticipating or experiencing significant growth and has well-diversified risk, including no undue interest rate risk exposure, excellent asset quality, high liquidity, good earnings and in general is considered a strong banking organization, rated composite 1 under the Uniform Financial Institutions Rating System (the CAMEL rating system) established by the Federal Financial Institutions Examination Council.

(2) For all but the most highly-rated institutions meeting the conditions set forth in paragraph (b)(1) of this section, the minimum leverage capital requirement for a bank (or for an insured depository institution making an application to the FDIC) shall be 3 percent plus an additional cushion of at least 100 to 200 basis points and therefore shall consist of a ratio of Tier 1 capital to total assets of not less than 4 percent.

(c) *Insured depository institutions with less than the minimum leverage capital requirement.* (1) A bank (or an insured depository institution making an application to the FDIC) operating with less than the minimum leverage capital requirement does not have adequate capital and therefore has inadequate financial resources.

(2) Any insured depository institution operating with an inadequate capital structure, and therefore inadequate financial resources, will not receive approval for an application requiring the FDIC to consider the adequacy of its capital structure or its financial resources.

(3) As required under § 325.104(a)(1) of this part, a bank must file a written capital restoration plan with the appropriate FDIC regional director within 45 days of the date that the bank receives notice or is deemed to have notice that the bank is undercapitalized, significantly undercapitalized or critically undercapitalized, unless the FDIC notifies the bank in writing that the plan is to be filed within a different period.

(4) In any merger, acquisition or other type of business combination where the FDIC must give its approval, where it is required to consider the adequacy of the financial resources of the existing and proposed institutions, and where the resulting entity is either insured by the FDIC or not otherwise federally insured, approval will not be granted when the resulting entity does not meet the minimum leverage capital requirement.

(d) *Exceptions.* Notwithstanding the provisions of paragraphs (a), (b) and (c) of this section:

(1) The FDIC, in its discretion, may approve an application pursuant to the Federal Deposit Insurance Act where it is required to consider the adequacy of capital if it finds that such approval must be taken to prevent the closing of a depository institution or to facilitate the acquisition of a closed depository institution, or, when severe financial conditions exist which threaten the stability of an insured depository institution or of a significant number of depository institutions insured by the FDIC or of insured depository institutions possessing significant financial resources, such action is taken to lessen the risk to the FDIC posed by an insured depository institution under such threat of instability.

(2) The FDIC, in its discretion, may approve an application pursuant to the Federal Deposit Insurance Act where it is required to consider the adequacy of capital or the financial resources of the insured depository institution where it finds that the applicant has committed to and is in compliance with a reasonable plan to meet its minimum leverage capital requirements within a reasonable period of time.

(e) *Small business loans and leases on personal property transferred with recourse.* (1) Notwithstanding other provisions of this part, for purposes of calculating its leverage ratio, a qualifying institution that has transferred small business loans and leases on personal property (small business obligations) with recourse shall exclude from its total assets the outstanding principal amount of the loans and leases transferred with recourse, provided two conditions are met. First, the transaction must be treated as a sale under generally accepted accounting principles (GAAP) and, second, the qualifying institution must establish pursuant to GAAP a non-capital reserve sufficient to meet the institution's reasonably estimated liability under the recourse arrangement. Only loans and leases to businesses that meet the criteria for a small business concern established by the Small Business Administration under section 3(a) of the Small Business Act (12 U.S.C. 631) are eligible for this capital treatment.

(2) For purposes of this part, a qualifying institution is a bank that is well capitalized. In addition, by order of the FDIC, a bank that is adequately capitalized may be deemed a qualifying institution. In determining whether a bank meets the qualifying institution criteria, the prompt corrective action well capitalized and adequately capitalized definitions set forth in § 325.103 shall be used, except that the bank's capital ratios must be calculated *without regard* to the preferential capital treatment for transfers of small business obligations with recourse specified in paragraph (e)(1) of this section. The total outstanding amount of recourse retained by a qualifying institution on transfers of small business obligations receiving the preferential capital treatment cannot exceed 15 percent of the institution's total risk-based capital. By order, the FDIC may approve a higher limit.

(3) If a bank ceases to be a qualifying institution or exceeds the 15 percent of

capital limit under paragraph (e)(2) of this section, the preferential capital treatment will continue to apply to any transfers of small business obligations with recourse that were consummated during the time the bank was a qualifying institution and did not exceed such limit.

(4) The leverage capital ratio of a bank shall be calculated *without regard* to the preferential capital treatment for transfers of small business obligations with recourse specified in paragraph (e)(1) of this section for purposes of:

(i) Determining whether a bank is adequately capitalized, undercapitalized, significantly undercapitalized, or critically undercapitalized under the prompt corrective action capital category definitions specified in §325.103; and

(ii) Applying the prompt corrective action reclassification provisions specified in §325.103(d), regardless of the bank's capital level.

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§325.4 Inadequate capital as an unsafe or unsound practice or condition.

(a) *General.* As a condition of federal deposit insurance, all insured depository institutions must remain in a safe and sound condition.

(b) *Unsafe or unsound practice.* Any bank which has less than its minimum leverage capital requirement is deemed to be engaged in an unsafe or unsound practice pursuant to section 8(b)(1) and/or 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(1) and/or 1818(c)). Except that such a bank which has entered into and is in compliance with a written agreement with the FDIC or has submitted to the FDIC and is in compliance with a plan approved by the FDIC to increase its Tier 1 leverage capital ratio to such level as the FDIC deems appropriate and to take such other action as may be necessary for the bank to be operated so as not to be engaged in such an unsafe or unsound practice will not be deemed to be engaged in an unsafe or unsound practice pursuant to section 8(b)(1) and/or 8(c) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(1) and/or 1818(c)) on account of its capital ratios. The FDIC is not precluded from taking section 8(b)(1), section 8(c) or any other enforcement action against a bank with capital above the minimum requirement if the specific circumstances deem such action to be appropriate. Under the conditions set forth in section 8(t) of the Federal Deposit Insurance Act (12 U.S.C. 1818(t)), the FDIC also may take section 8(b)(1) and/or 8(c) enforcement action against any savings association that is deemed to be engaged in an unsafe or unsound practice on account of its inadequate capital structure.

(c) *Unsafe or unsound condition.* Any insured depository institution with a ratio of Tier 1 capital to total assets that is less than two percent is deemed to be operating in an unsafe or unsound condition pursuant to section 8(a) of the Federal Deposit Insurance Act (12 U.S.C. 1818(a)).

(1) A bank with a ratio of Tier 1 capital to total assets of less than two percent which has entered into and is in compliance with a written agreement with the FDIC (or any other insured depository institution with a ratio of Tier 1 capital to total assets of less than two percent which has entered into and is in compliance with a written agreement with its primary federal regulator and to which agreement the FDIC is a party) to increase its Tier 1 leverage capital ratio to such level as the FDIC deems appropriate and to take such other action as may be necessary for the insured depository institution to be operated in a safe and sound manner, will not be subject to a proceeding by the FDIC pursuant to 12 U.S.C. 1818(a) on account of its capital ratios.

(2) An insured depository institution with a ratio of Tier 1 capital to total assets that is equal to or greater than two percent may be operating in an unsafe or unsound condition. The FDIC is not precluded from bringing an action pursuant to 12 U.S.C. 1818(a) where an insured depository institution has a ratio of Tier 1 capital to total assets

that is equal to or greater than two percent.

[56 FR 10162, Mar. 11, 1991]

§ 325.5 Miscellaneous.

(a) *Intangible assets.* Any intangible assets that were explicitly approved by the FDIC as part of the bank's regulatory capital on a specific case basis will be included in capital under the terms and conditions that were approved by the FDIC, provided that the intangible asset is being amortized over a period not to exceed 15 years or its estimated useful life, whichever is shorter. However, pursuant to section 18(n) of the Federal Deposit Insurance Act (12 U.S.C. 1828(n)), an unidentifiable intangible asset such as goodwill, if acquired after April 12, 1989, cannot be included in calculating regulatory capital under this part.

(b) *Reservation of authority.* Notwithstanding the definition of *Tier 1 capital* in § 325.2(t) of this subpart and the risk-based capital definitions of Tier 1 and Tier 2 capital in appendix A to this subpart, the Director of the Division of Supervision may, if the Director finds a newly developed or modified capital instrument or a particular balance sheet entry or account to be the functional equivalent of a component of Tier 1 or Tier 2 capital, permit one or more insured depository institutions to include all or a portion of such instrument, entry, or account as Tier 1 or Tier 2 capital, permanently, or on a temporary basis, for purposes of this part. Similarly, the Director of the Division of Supervision may, if the Director finds that a particular Tier 1 or Tier 2 capital component or balance sheet entry or account has characteristics or terms that diminish its contribution to an insured depository institution's ability to absorb losses, require the deduction of all or a portion of such component, entry, or account from Tier 1 or Tier 2 capital.

(c) *Securities subsidiary.* For purposes of this part, any securities subsidiary subject to 12 CFR 337.4 shall not be consolidated with its bank parent and any investment therein shall be deducted from the bank parent's Tier 1 capital and total assets.

(d) *Depository institution subsidiary.* Any domestic depository institution subsidiary that is not consolidated in the ''Reports of Condition and Income'' (Call Report) of its insured parent bank shall be consolidated with the insured parent bank for purposes of this part. The financial statements of the subsidiary that are to be used for this consolidation must be prepared in the same manner as the ''Reports of Condition and Income'' (Call Report). A domestic depository institution subsidiary of a savings association shall be consolidated for purposes of this part if such consolidation also is required pursuant to the capital requirements of the association's primary federal regulator.

(e) *Restrictions relating to capital components.* To qualify as Tier 1 capital under this part or Tier 1 or Tier 2 capital under appendix A to this part, a capital instrument must not contain or be subject to any conditions, covenants, terms, restrictions, or provisions that are inconsistent with safe and sound banking practices. A condition, covenant, term, restriction, or provision is inconsistent with safe and sound banking practices if it:

(1) Unduly interferes with the ability of the issuer to conduct normal banking operations;

(2) Results in significantly higher dividends or interest payments in the event of deterioration in the financial condition of the issuer;

(3) Impairs the ability of the issuer to comply with statutory or regulatory requirements regarding the disposition of assets or incurrence of additional debt; or

(4) Limits the ability of the FDIC or a similar regulatory authority to take any necessary action to resolve a problem bank or failing bank situation.

Other conditions and covenants that are not expressly listed in paragraphs (e)(1) through (e)(4) of this section also may be inconsistent with safe and sound banking practices.

(f) *Treatment of mortgage servicing rights and purchased credit card relationships.* For purposes of determining Tier 1 capital under this part, mortgage servicing rights and purchased credit card relationships will be deducted from assets and from equity capital to the extent that the mortgage servicing

rights and purchased credit card relationships do not meet the conditions, limitations, and restrictions described in this section.

(1) *Market valuations.* A valuation of the estimated fair market value of mortgage servicing rights and purchased credit card relationships shall be performed at least quarterly. The quarterly market valuation shall include adjustments for any significant changes in the original valuation assumptions, including changes in prepayment estimates or attrition rates. The valuation shall be based on an analysis of the current fair market value of the mortgage servicing rights and purchased credit card relationships, determined by applying an appropriate market discount rate to the net cash flows expected to be generated from the intangible assets. The FDIC in its discretion may require independent market valuations on a case-by-case basis where it is deemed appropriate for safety and soundness purposes.

(2) *Market value limitation.* For purposes of calculating Tier 1 capital under this part (but not for financial statement purposes), the balance sheet assets for mortgage servicing rights and purchased credit card relationships will be reduced to an amount equal to the lesser of:

(i) 90 percent of the fair market value of the intangible assets, determined in accordance with paragraph (f)(1) of this section; or

(ii) 100 percent of the remaining unamortized book value of the intangible assets, determined in accordance with the instructions for the preparation of Consolidated Reports of Condition and Income (Call Reports).

(3) *Tier 1 capital limitation.* The maximum allowable amount of mortgage servicing rights and purchased credit care relationships, in the aggregate, will be limited to the lesser of:

(i) Fifty percent of the amount of Tier 1 capital that exists before the deduction of any disallowed mortgage servicing rights, any disallowed purchased credit card relationships, and any disallowed deferred tax assets; or

(ii) The amount of mortgage servicing rights and purchased credit card relationships, and any disallowed deferred tax assets determined in accordance with paragraph (f)(2) of this section.

(4) *Purchased credit card relationships limitation.* In addition to the aggregate limitation on mortgage servicing rights and purchased credit card relationships set forth in paragraph (f)(3) of this section, a sublimit will apply to purchased credit card relationships. The maximum allowable amount of purchased credit card relationships will be limited to the lesser of:

(i) Twenty-five percent of the amount of Tier 1 capital that exists before the deduction of any disallowed mortgage servicing rights, any disallowed purchased credit card relationships, and any disallowed deferred tax assets; or

(ii) The amount of purchased credit card relationships determined in accordance with paragraph (f)(2) of this section.

(g) *Treatment of deferred tax assets.* For purposes of calculating Tier 1 capital under this part (but not for financial statement purposes), deferred tax assets are subject to the conditions, limitations, and restrictions described in this section.

(1) *Deferred tax assets that are dependent upon future taxable income.* These assets are:

(i) Deferred tax assets arising from deductible temporary differences that exceed the amount of taxes previously paid that could be recovered through loss carrybacks if existing temporary differences (both deductible and taxable and regardless of where the related deferred tax effects are reported on the balance sheet) fully reverse at the calendar quarter-end date; and

(ii) Deferred tax assets arising from operating loss and tax credit carryforwards.

(2) *Tier 1 capital limitations.* (i) The maximum allowable amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, will be limited to the lesser of:

(A) The amount of deferred tax assets that are dependent upon future taxable income that is expected to be realized within one year of the calendar quarter-end date, based on projected future taxable income for that year; or

(B) Ten percent of the amount of Tier 1 capital that exists before the deduction of any disallowed mortgage servicing rights, any disallowed purchased credit card relationships, and any disallowed deferred tax assets.

(ii) For purposes of this limitation, all existing temporary differences should be assumed to fully reverse at the calendar quarter-end date. The recorded amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, in excess of this limitation will be deducted from assets and from equity capital for purposes of determining Tier 1 capital under this part. The amount of deferred tax assets that can be realized from taxes paid in prior carryback years and from the reversal of existing taxable temporary differences generally would not be deducted from assets and from equity capital. However, notwithstanding the above, the amount of carryback potential that may be considered in calculating the amount of deferred tax assets that a member of a consolidated group (for tax purposes) may include in Tier 1 capital may not exceed the amount which the member could reasonably expect to have refunded by its parent.

(3) *Projected future taxable income.* Projected future taxable income should not include net operating loss carryforwards to be used within one year of the most recent calendar quarter-end date or the amount of existing temporary differences expected to reverse within that year. Projected future taxable income should include the estimated effect of tax planning strategies that are expected to be implemented to realize tax carryforwards that will otherwise expire during that year. Future taxable income projections for the current fiscal year (adjusted for any significant changes that have occurred or are expected to occur) may be used when applying the capital limit at an interim calendar quarter-end date rather then preparing a new projection each quarter.

(4) *Unrealized holding gains and losses on available-for-sale debt securities.* The deferred tax effects of any unrealized holding gains and losses on available-for-sale debt securities may be excluded from the determination of the amount of deferred tax assets that are dependent upon future taxable income and the calculation of the maximum allowable amount of such assets. If these deferred tax effects are excluded, this treatment must be followed consistently over time.

(5) *Intangible assets acquired in nontaxable purchase business combinations.* A deferred tax liability that is specifically related to an intangible asset (other than mortgage servicing rights and purchased credit card relationships) acquired in a nontaxable purchase business combination may be netted against this intangible asset. Only the net amount of the intangible asset must be deducted from Tier 1 capital. When a deferred tax liability is netted in this manner, the taxable temporary difference that gives rise to this deferred tax liability must be excluded from existing taxable temporary differences when determining the amount of deferred tax assets that are dependent upon future taxable income and calculating the maximum allowable amount of such assets.

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§ 325.6 Issuance of directives.

(a) *General.* A directive is a final order issued to a bank that fails to maintain capital at or above the minimum leverage capital requirement as set forth in §§ 325.3 and 325.4. A directive issued pursuant to this section, including a plan submitted under a directive, is enforceable in the same manner and to the same extent as a final cease-and-desist order issued under 12 U.S.C. 1818(b).

(b) *Issuance of directives.* If a bank is operating with less than the minimum leverage capital requirement established by this regulation, the Board of Directors, or its designee(s), may issue and serve upon any insured state nonmember bank a directive requiring the bank to restore its capital to the minimum leverage capital requirement within a specified time period. The directive may require the bank to submit to the appropriate FDIC regional director, or other specified official, for review and approval, a plan describing

the means and timing by which the bank shall achieve the minimum leverage capital requirement. After the FDIC has approved the plan, the bank may be required under the terms of the directive to adhere to and monitor compliance with the plan. The directive may be issued during the course of an examination of the bank, or at any other time that the FDIC deems appropriate, if the bank is found to be operating with less than the minimum leverage capital requirement.

(c) *Notice and opportunity to respond to issuance of a directive.* (1) If the FDIC makes an initial determination that a directive should be issued to a bank pursuant to paragraph (b) of this section, the FDIC, through the appropriate designated official(s), shall serve written notification upon the bank of its intent to issue a directive. The notice shall include the current Tier 1 leverage capital ratio, the basis upon which said ratio was calculated, the proposed capital injection, the proposed date for achieving the minimum leverage capital requirement and any other relevant information concerning the decision to issue a directive. When deemed appropriate, specific requirements of a proposed plan for meeting the minimum leverage capital requirement may be included in the notice.

(2) Within 14 days of receipt of notification, the bank may file with the appropriate designated FDIC official(s) a written response, explaining why the directive should not be issued, seeking modification of its terms, or other appropriate relief. The bank's response shall include any information, mitigating circumstances, documentation or other relevant evidence which supports its position, and may include a plan for attaining the minimum leverage capital requirement.

(3) After considering the bank's response, the appropriate designated FDIC official(s) shall serve upon the bank a written determination addressing the bank's response and setting forth the FDIC's findings and conclusions in support of any decision to issue or not to issue a directive. The directive may be issued as originally proposed or in modified form. The directive may order the bank to:

(i) Achieve the minimum leverage capital requirement established by this regulation by a certain date;

(ii) Submit for approval and adhere to a plan for achieving the minimum leverage capital requirement;

(iii) Take other action as is necessary to achieve the minimum leverage capital requirement; or

(iv) A combination of the above actions.

If a directive is to be issued, it may be served upon the bank along with the final determination.

(4) Any bank, upon a change in circumstances, may request the FDIC to reconsider the terms of a directive and may propose changes in the plan under which it is operating to meet the minimum leverage capital requirement. The directive and plan continue in effect while such request is pending before the FDIC.

(5) All papers filed with the FDIC must be postmarked or received by the appropriate designated FDIC official(s) within the prescribed time limit for filing.

(6) Failure by the bank to file a written response to notification of intent to issue a directive within the specified time period shall constitute consent to the issuance of such directive.

(d) *Enforcement of a directive.* (1) Whenever a bank fails to follow the directive or to submit or adhere to its capital adequacy plan, the FDIC may seek enforcement of the directive in the appropriate United States district court, pursuant to 12 U.S.C. 3907(b)(2)(B)(ii), in the same manner and to the same extent as if the directive were a final cease-and-desist order. In addition to enforcement of the directive, the FDIC may seek assessment of civil money penalties for violation of the directive against any bank, any officer, director, employee, agent, or other person participating in the conduct of the affairs of the bank, pursuant to 12 U.S.C. 3909(d).

(2) The directive may be issued separately, in conjunction with, or in addition to, any other enforcement mechanisms available to the FDIC, including cease-and-desist orders, orders of correction, the approval or denial of applications, or any other actions authorized by law. In addition to addressing a

bank's minimum leverage capital requirement, the capital directive may also address minimum risk-based capital requirements that are to be maintained and calculated in accordance with appendix A to this part.

[56 FR 10164, Mar. 11, 1991]

Subpart B—Prompt Corrective Action

SOURCE: 57 FR 44900, Sept. 29, 1992, unless otherwise noted.

§ 325.101 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.

(a) *Authority*. This subpart is issued by the FDIC pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act), as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose*. Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this subpart is to define, for FDIC-insured state-chartered nonmember banks, the capital measures and capital levels, and for insured branches of foreign banks, comparable asset-based measures and levels, that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This subpart also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope*. This subpart implements the provisions of section 38 of the FDI Act as they apply to FDIC-insured state-chartered nonmember banks and insured branches of foreign banks for which the FDIC is the appropriate Federal banking agency. Certain of these provisions also apply to officers, directors and employees of those insured institutions. In addition, certain provisions of this subpart apply to all insured depository institutions that are deemed critically undercapitalized.

(d) *Other supervisory authority*. Neither section 38 nor this subpart in any way limits the authority of the FDIC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this subpart may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories*. The assignment of a bank or insured branch under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the FDIC or otherwise required by law, no bank may state in any advertisement or promotional material its capital category under this subpart or that the FDIC or any other federal banking agency has assigned the bank to a particular capital category.

§ 325.102 Notice of capital category.

(a) *Effective date of determination of capital category*. A bank shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this subpart as of the date the bank is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category*. A bank shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition and Income (Call Report) is required to be filed with the FDIC;

(2) A final report of examination is delivered to the bank; or

(3) Written notice is provided by the FDIC to the bank of its capital category for purposes of section 38 of the FDI Act and this subpart or that the bank's capital category has changed as provided in § 325.103(d).

(c) *Adjustments to reported capital levels and capital category*—(1) *Notice of adjustment by bank*. A bank shall provide the appropriate FDIC regional director

with written notice that an adjustment to the bank's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the bank to be placed in a lower capital category from the category assigned to the bank for purposes of section 38 and this subpart on the basis of the bank's most recent Call Report or report of examination.

(2) *Determination by the FDIC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the FDIC shall determine whether to change the capital category of the bank and shall notify the bank of the FDIC's determination.

§ 325.103 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this subpart, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio; and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this subpart, a bank shall be deemed to be:

(1) *Well capitalized* if the bank:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the FDIC pursuant to section 8 of the FDI Act (12 U.S.C. 1818), the International Lending Supervision Act of 1983 (12 U.S.C. 3907), or section 38 of the FDI Act (12 U.S.C. 1831o), or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the bank:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the bank is rated composite 1 under the CAMEL rating system in the most recent examination of the bank and is not experiencing or anticipating significant growth; and

(iv) Does not meet the definition of a *well capitalized* bank.

(3) *Undercapitalized* if the bank:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii)(A) Except as provided in paragraph (b)(3)(iii)(B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent if the bank is rated composite 1 under the CAMEL rating system in the most recent examination of the bank and is not experiencing or anticipating significant growth.

(4) *Significantly undercapitalized* if the bank has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the insured depository institution has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Capital categories for insured branches of foreign banks.* For purposes of the provisions of section 38 and this subpart, a insured branch of a foreign bank shall be deemed to be:

(1) *Well capitalized* if the insured branch:

(i) Maintains the pledge of assets required under 12 CFR 346.19; and

(ii) Maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Has not received written notification from:

(A) The OCC to increase its capital equivalency deposit pursuant to 12 CFR 28.6(a), or to comply with asset maintenance requirements pursuant to 12 CFR 28.9; or

(B) The FDIC to pledge additional assets pursuant to 12 CFR 346.19 or to maintain a higher ratio of eligible assets pursuant to 12 CFR 346.20.

(2) *Adequately capitalized* if the insured branch:

(i) Maintains the pledge of assets required under 12 CFR 346.19; and

(ii) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(iii) Does not meet the definition of a *well capitalized* insured branch.

(3) *Undercapitalized* if the insured branch:

(i) Fails to maintain the pledge of assets required under 12 CFR 346.19; or

(ii) Fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(4) *Significantly undercapitalized* if it fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 104 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(5) *Critically undercapitalized* if the insured depository institution fails to maintain the eligible assets prescribed under 12 CFR 346.20 at 102 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(d) *Reclassifications based on supervisory criteria other than capital.* The FDIC may reclassify a well capitalized bank as adequately capitalized and may require an adequately capitalized bank or an undercapitalized bank to comply with certain mandatory or discretionary supervisory actions as if the bank were in the next lower capital category (except that the FDIC may not reclassify a significantly undercapitalized bank as critically undercapitalized) (each of these actions are hereinafter referred to generally as ''reclassifications'') in the following circumstances:

(1) *Unsafe or unsound condition.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 308.202(a) of this chapter, that the bank is in unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The FDIC has determined, after notice and opportunity for hearing pursuant to § 308.202(a) of this chapter, that, in the most recent examination of the bank, the bank received and has not corrected a less-than-satisfactory rating for any of the categories of asset quality, management, earnings, or liquidity.

§ 325.104 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* A bank shall file a written capital restoration plan with the appropriate FDIC regional director within 45 days of the date that the bank receives notice or is deemed to have notice that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the FDIC notifies the bank in writing that the plan is to be filed within a different period. An adequately capitalized bank that has been required pursuant to § 325.103(d) of this subpart to comply with supervisory actions as if the bank were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, a bank that has already submitted and is operating under a capital restoration plan approved under section 38 and this subpart is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 325.103 unless the FDIC notifies the bank that it must submit a new or revised capital plan. A bank that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the appropriate FDIC regional director within 45 days of receiving such notice, unless the FDIC notifies the bank in writing that the plan must be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the Call Report, unless the FDIC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A bank that is required to submit a capital restoration plan as a result of a reclassification of the bank pursuant to

§ 325.103(d) of this subpart shall include a description of the steps the bank will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the bank.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this subpart, the FDIC shall provide written notice to the bank of whether the plan has been approved. The FDIC may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the FDIC, the bank shall submit a revised capital restoration plan within the time specified by the FDIC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized bank (as defined in § 325.103(b) of this subpart) shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the bank has been approved by the FDIC.

(e) *Failure to submit capital restoration plan.* A bank that is undercapitalized (as defined in § 325.103(b) of this subpart) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(f) *Failure to implement capital restoration plan.* Any undercapitalized bank that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this subpart applicable to significantly undercapitalized institutions.

(g) *Amendment of capital restoration plan.* A bank that has filed an approved capital restoration plan may, after prior written notice to and approval by the FDIC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the bank shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) *Performance guarantee by companies that control a bank*—(1) *Limitation on liability*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this subpart for all companies that control a specific bank that is required to submit a capital restoration plan under this subpart shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the bank's total assets at the time the bank was notified or deemed to have notice that the bank was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the bank to the levels required for the bank to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the bank initially fails to comply with a capital restoration plan under this subpart.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this subpart shall expire after the FDIC notifies the bank that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same bank after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given bank shall be jointly and severally liable for the guarantee for such bank as required under section 38 and this subpart, and the FDIC may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a bank that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the bank shall, upon submission of the plan, be subject to the provisions of section 38 and this

subpart that are applicable to banks that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a bank to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the bank shall be subject to the provisions of section 38 and this subpart that are applicable to banks that have failed in a material respect to implement a capital restoration plan.

§ 325.105 Mandatory and discretionary supervisory actions under section 38.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all banks.* All banks are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized banks.* Immediately upon receiving notice or being deemed to have notice, as provided in § 325.102 of this subpart, that the bank is undercapitalized, significantly undercapitalized, or critically undercapitalized, the bank shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the FDIC monitor the condition of the bank (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this subpart (section 38(e)(2));

(iv) Restricting the growth of the bank's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized banks.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 325.102 of this subpart, that the bank is significantly undercapitalized, or critically undercapitalized, or that the bank is subject to the provisions applicable to institutions that are significantly undercapitalized because the bank failed to submit or implement in any material respect an acceptable capital restoration plan, the bank shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized institutions.* (i) In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 325.102 of this subpart, that the insured depository institution is critically undercapitalized, the institution is prohibited from doing any of the following without the FDIC's prior written approval:

(A) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action with respect to which the depository institution is required to provide notice to the appropriate Federal banking agency;

(B) Extending credit for any highly leveraged transaction;

(C) Amending the institution's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;

(D) Making any material change in accounting methods;

(E) Engaging in any covered transaction (as defined in section 23A(b) of the Federal Reserve Act (12 U.S.C. 371c(b));

(F) Paying excessive compensation or bonuses;

(G) Paying interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market areas; and

(H) Making any principal or interest payment on subordinated debt beginning 60 days after becoming critically

undercapitalized except that this restriction shall not apply, until July 15, 1996, with respect to any subordinated debt outstanding on July 15, 1991, and not extended or otherwise renegotiated after July 15, 1991.

(ii) In addition, the FDIC may further restrict the activities of any critically undercapitalized institution to carry out the purposes of section 38 of the FDI Act.

(5) *Exception for certain savings associations.* The restrictions in paragraph (a)(4) of this section shall not apply, before July 1, 1994, to any insured savings association if:

(i) The savings association had submitted a plan meeting the requirements of section 5(t)(6)(A)(ii) of the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)) prior to December 19, 1991;

(ii) The Director of OTS had accepted the plan prior to December 19, 1991; and

(iii) The savings association remains in compliance with the plan or is operating under a written agreement with the appropriate federal banking agency.

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the FDIC's discretion to take in connection with:

(1) An insured depository institution that is deemed to be undercapitalized, significantly undercapitalized, or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; or

(2) An officer or director of such institution, the FDIC shall follow the procedures for issuing directives under §§ 308.201 and 308.203 of this chapter, unless otherwise provided in section 38 or this subpart.

APPENDIX A TO PART 325—STATEMENT OF POLICY ON RISK-BASED CAPITAL

Capital adequacy is one of the critical factors that the FDIC is required to analyze when taking action on various types of applications and when conducting supervisory activities related to the safety and soundness of individual banks and the banking system. In view of this, the FDIC's Board of Directors has adopted part 325 of its regulations, which sets forth (1) minimum standards of capital adequacy for insured state nonmember banks and (2) standards for determining when an insured bank is in an unsafe or unsound condition by reason of the amount of its capital.

This capital maintenance regulation was designed to establish, in conjunction with other Federal bank regulatory agencies, uniform capital standards for all federally-regulated banking organizations, regardless of size. The uniform capital standards were based on ratios of capital to total assets. While those leverage ratios have served as a useful tool for assessing capital adequacy, the FDIC believes there is a need for a capital measure that is more explicitly and systematically sensitive to the risk profiles of individual banks. As a result, the FDIC's Board of Directors has adopted this Statement of Policy on Risk-Based Capital to supplement the part 325 regulation. This statement of policy does not replace or eliminate the existing part 325 capital-to-total assets leverage ratios. Once the risk-based capital framework is implemented, the FDIC will consider whether the part 325 definitions of capital for leverage purposes and the minimum leverage ratios should be amended.

The framework set forth in this statement of policy consists of (1) a *definition of capital* for risk-based capital purposes, (2) a system for calculating *risk-weighted assets* by assigning assets and off-balance sheet items to broad risk categories, and (3) a schedule, which includes transitional arrangements during a phase-in period, for achieving a *minimum supervisory ratio* of capital to risk weighted assets. A bank's risk-based capital ratio is calculated by dividing its qualifying total capital base (the numerator of the ratio) by its risk-weighted assets (the denominator).[1] Table I outlines the definition of capital and provides a general explanation of how the risk-based capital ratio is calculated, Table II summarizes the risk weights and risk categories, and Table III sets forth the credit conversation factors for off-balance sheet items. Additional explanations of the capital definitions, the risk-weighted asset calculations, and the minimum risk-based capital ratio guidelines are provided in Sections I, II and III of this statement of policy.

In addition, when certain banks that engage in trading activities calculate their risk-based capital ratio under this appendix A, they must also refer to appendix C of this part, which incorporates capital charges for certain market risks into the risk-based capital ratio. When calculating their risk-based capital ratio under this appendix A, such banks are required to refer to appendix C of

[1] Period-end amounts, rather than average balances, normally will be used when calculating risk-based capital ratios. However, on a case-by-case basis, ratios based on average balances may also be required if supervisory concerns render it appropriate.

this part for supplemental rules to determine qualifying and excess capital, calculate risk-weighted assets, calculate market risk equivalent assets and add them to risk-weighted assets, and calculate risk-based capital ratios as adjusted for market risk.

This statement of policy applies to all *FDIC-insured state-chartered banks* (excluding insured branches of foreign banks) that are *not* members of the Federal Reserve System, hereafter referred to as *state nonmember banks,* regardless of size, and to all circumstances in which the FDIC is required to evaluate the capital of a banking organization. Therefore, the risk-based capital framework set forth in this statement of policy will be used in the examination and supervisory process as well as in the analysis of applications that the FDIC is required to act upon.

The risk-based capital ratio focuses principally on broad categories of credit risk, however, the ratio does not take account of many other factors that can affect a bank's financial condition. These factors include overall interest rate risk exposure, liquidity, funding and market risks; the quality and level of earnings; investment, loan portfolio, and other concentrations of credit risk, certain risks arising from nontraditional activities; the quality of loans and investments; the effectiveness of loan and investment policies; and management's overall ability to monitor and control financial and operating risks, including the risk presented by concentrations of credit and nontraditional activities. In addition to evaluating capital ratios, an overall assessment of capital adequacy must take account of each of these other factors, including, in particular, the level and severity of problem and adversely classified assets as well as a bank's interest rate risk as measured by the bank's exposure to declines in the economic value of its capital due to changes in interest rates. For this reason, the final supervisory judgment on a bank's capital adequacy may differ significantly from the conclusions that might be drawn solely from the absolute level of the bank's risk-based capital ratio.

In light of these other considerations, banks generally are expected to operate above the minimum risk-based capital ratio. Banks contemplating significant expansion plans, as well as those institutions with high or inordinate levels of risk, should hold capital commensurate with the level and nature of the risks to which they are exposed.

I. Definition of Capital for the Risk-Based Capital Ratio

A bank's qualifying total capital base consists of two types of capital elements: *core capital elements* (Tier 1) and *supplementary capital elements* (Tier 2). To qualify as an element of Tier 1 or Tier 2 capital, a capital instrument should not contain or be subject to any conditions, covenants, terms, restrictions, or provisions that are inconsistent with safe and sound banking practices.

A. The Components of Qualifying Capital (see Table I)

1. *Core capital elements (Tier* 1) *consists of:*

—Common stockholders' equity capital (includes common stock and related surplus, undivided profits, disclosed capital reserves that represent a segregation of undivided profits, and foreign currency translation adjustments, less net unrealized holding losses on available-for-sale equity securities with readily determinable fair values);

—Noncumulative perpetual preferred stock,[2] including any related surplus; and

—Minority interests in the equity capital accounts of consolidated subsidiaries.

At least 50 percent of the qualifying total capital base should consist of Tier 1 capital. *Core (Tier 1) capital* is defined as the sum of core capital elements[3] minus all intangible assets other than mortgage servicing rights and purchased credit card relationships[4] and minus any disallowed deferred tax assets.

Although nonvoting common stock noncumulative perpetual preferred stock, and minority interests in the equity capital accounts of consolidated subsidiaries are normally included in Tier 1 capital, voting common stockholders' equity generally will be expected to be the dominant form of Tier 1 capital. Thus, banks should avoid undue reliance on nonvoting equity, preferred stock and minority interests.

Although minority interests in consolidated subsidiaries are generally included in regulatory capital, exceptions to this general rule will be made if the minority interests fail to provide meaningful capital support to the consolidated bank. Such a situation

[2] Preferred stock issues where the dividend is reset periodically based, in whole or in part, upon the bank's current credit standing, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to Tier 2 capital, regardless of whether the dividends are cumulative or noncumulative.

[3] In addition to the core capital elements, Tier 1 may also include certain supplementary capital elements during the transition period subject to certain limitations set forth in section III of this statement of policy.

[4] An exception is allowed for intangible assets that are explicitly approved by the FDIC as part of the bank's regulatory capital on a specific case basis. These intangibles will be included in capital for risk-based capital purposes under the terms and conditions that are specifically approved by the FDIC.

could arise if the minority interests are entitled to a preferred claim on essentially low risk assets of the subsidiary. Similarly, although intangible assets in the form of mortgage servicing rights and purchased credit card relationships are generally recognized for risk-based capital purposes, the deduction of part or all of the mortgage servicing rights and purchased credit card relationships may be required if the carrying amounts of these rights are excessive in relation to their market value or the level of the bank's capital accounts. Mortgage servicing rights and purchased credit card relationships that do not meet the conditions, limitations and restrictions described in 12 CFR 325.5(f) will not be recognized for risk-based capital purposes.

2. *Supplementary capital elements (Tier 2)* consist of:

—Allowances for loan and lease losses, up to a maximum of 1.25 percent of risk-weighted assets;

—Cumulative perpetual preferred stock, long-term preferred stock (original maturity of at least 20 years) and any related surplus;

—Perpetual preferred stock (and any related surplus) where the dividend is reset periodically based, in whole or part, on the bank's current credit standing, regardless of whether the dividends are cumulative or noncumulative;

—Hybrid capital instruments, including mandatory convertible debt securities; and

—Term subordinated debt and intermediate-term preferred stock (original average maturity of five years or more) and any related surplus.

The definition of supplementary capital does *not* include revaluation reserves or hidden reserves that represent unrealized appreciation on assets such as bank premises and equity securities. Although such reserves will not be explicitly recognized when calculating a bank's risk-based capital ratio, these reserves may be taken into account as additional factors when assessing a bank's overall capital adequacy.

The maximum amount of Tier 2 capital that may be recognized for risk-based capital purposes is limited to 100 percent of Tier 1 capital (after any deductions for disallowed intangibles). In addition, the combined amount of term subordinated debt and intermediate-term preferred stock that may be treated as part of Tier 2 capital for risk-based capital purposes is limited to 50 percent of Tier 1 capital. Amounts in excess of these limits may be issued but are not included in the calculation of the risk-based capital ratio.

(a) *Allowance for loan and lease losses.* Allowances for loan and lease losses are reserves that have been established through a charge against earnings to absorb future losses on loans or lease financing receivables. Allowances for loan and lease losses exclude *allocated transfer risk reserves,*[5] and reserves created against identified losses.

This risk-based capital framework provides a phasedown during the transition period of the extent to which the allowance for loan and lease losses may be included in an institution's capital base. By year-end 1990, the allowance for loan and lease losses, as an element of supplementary capital, may constitute no more than 1.5 percent of risk-weighted assets and, by year-end 1992, no more than 1.25 percent of risk-weighted assets.[6]

(b) *Preferred stock.* Perpetual preferred stock is defined as preferred stock that does not have a maturity date, that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. Long-term preferred stock includes limited-life preferred stock with an original maturity of 20 years or more, provided that the stock cannot be redeemed at the option of the holder prior to maturity, except with the prior approval of the FDIC.

Cumulative perpetual preferred stock and long-term preferred stock qualify for inclusion in supplementary capital provided that the instruments can absorb losses while the issuer operates as a going concern (a fundamental characteristic of equity capital) and provided the issuer has the option to defer payment of dividends on these instruments. Given these conditions, and the perpetual or long-term nature of the intruments, there is no limit on the amount of these preferred stock instruments that may be included with Tier 2 capital.

Noncumulative perpetual preferred stock where the dividend is reset periodically based, in whole or in part, on the bank's current credit standing, including auction rate, money market, or remarketable preferred stock, are also assigned to Tier 2 capital without limit, provided the above conditions are met.

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[5] Allocated transfer risk reserves are reserves that have been established in accordance with section 905(a) of the International Lending Supervision Act of 1983 against certain assets whose value has been found by the U.S. supervisory authorities to have been significantly impaired by protracted transfer risk problems.

[6] The amount of the allowance for loan and lease losses that may be included as a supplementary capital element is based on a percentage of gross risk-weighted assets. A bank may deduct reserves for loan and lease losses that are in excess of the amount permitted to be included in capital, as well as allocated transfer risk reserves, from gross risk-weighted assets when computing the denominator of the risk-based capital ratio.

(c) *Hybrid capital instruments.* Hybrid capital instruments include instruments that have certain characteristics of both debt and equity. In order to be included as supplementary capital elements, these instruments should meet the following criteria:

(1) The instrument should be unsecured, subordinated to the claims of depositors and general creditors, and fully paid-up.

(2) The instrument should not be redeemable at the option of the holder prior to maturity, except with the prior approval of the FDIC. This requirement implies that holders of such instruments may not accelerate the payment of principal except in the event of bankruptcy, insolvency, or reorganization.

(3) The instrument should be available to participate in losses while the issuer is operating as a going concern. (Term subordinated debt would not meet this requirement.) To satisfy this requirement, the instrument should convert to common or perpetual preferred stock in the event that the sum of the undivided profits and capital surplus accounts of the issuer results in a negative balance.

(4) The instrument should provide the option for the issuer to defer principal and interest payments if: (a) The issuer does not report a profit in the preceding annual period, defined as combined profits (i.e., net income) for the most recent four quarters, *and* (b) the issuer eliminates cash dividends on its common and preferred stock.

Mandatory convertible debt securities, which are subordinated debt instruments that require the issuer to convert such instruments into common or perpetual preferred stock by a date at or before the maturity of the debt instruments, will qualify as hybrid capital instruments provided the maturity of these instruments is 12 years or less and the instruments meet the criteria set forth below for ''term subordinated debt.'' There is no limit on the amount of hybrid capital instruments that may be included within Tier 2 capital.

(d) *Term subordinated debt and intermediate-term preferred stock.* The aggregate amount of term subordinated debt (excluding mandatory convertible debt securities) and intermediate-term preferred stock (including any related surplus) that may be treated as Tier 2 capital for risk-based capital purposes is limited to 50 percent of Tier 1 capital. Term subordinated debt and intermediate-term preferred stock should have an original average maturity of at least five years to qualify as supplementary capital and should not be redeemable at the option of the holder prior to maturity, except with the prior approval of the FDIC. For state nonmember banks, a *term subordinated debt* instrument is an obligation other than a deposit obligation that:

(1) Bears on its face, in boldface type, the following: This obligation is not a deposit and is not insured by the Federal Deposit Insurance Corporation;

(2)(i) Has a maturity of at least five years; or

(ii) In the case of an obligation or issue that provides for scheduled repayments of principal, has an average maturity of at least five years; provided that the Director of the Division of Supervision may permit the issuance of an obligation or issue with a shorter maturity or average maturity if the Director has determined that exigent circumstances require the issuance of such obligation or issue; provided further that the provisions of this paragraph I.A.2.(d)(2) shall not apply to mandatory convertible debt obligations or issues;

(3) States express that the obligation:

(i) Is subordinated and junior in right of payment to the issuing bank's obligations to its depositors and to the bank's other obligations to its general and secured creditors; and

(ii) Is ineligible as collateral for a loan by the issuing bank;

(4) Is unsecured;

(5) States expressly that the issuing bank may not retire any part of its obligation without the prior written consent of the FDIC or other primary federal regulator; and

(6) Includes, if the obligation is issued to a depository institution, a specific waiver of the right of offset by the lending depository institution.

Subordinated debt obligations issued prior to December 2, 1987 that satisfied the definition of the term ''subordinated note and debenture'' that was in effect prior to that date also will be deemed to be term subordinated debt for risk-based capital purposes. An optional redemption (''call'') provision in a subordinated debt instrument that is exercisable by the issuing bank in less than five years will not be deemed to constitute a maturity of less than five years, provided that the obligation otherwise has a stated contractual maturity of at least five years; the call is exercisable solely at the discretion or option of the issuing bank, and not at the discretion or option of the holder of the obligation; and the call is exercisable only with the express prior written consent of the FDIC under 12 U.S.C. 1828(i)(1) at the time early redemption or retirement is sought, and such consent has not been given in advance at the time of issuance of the obligation. Optional redemption provisions will be accorded similar treatment when determining the perpetual nature and/or maturity of preferred stock and other capital instruments.

Discount of limited-life supplementary capital instruments. As a limited-life capital instrument approaches maturity, the instrument begins to take on charcteristics of a short-

term obligation and becomes less like a component of capital. Therefore, for risk-based capital purposes, the outstanding amount of term subordinated debt and limited-life preferred stock eligible for inclusion in capital will be adjusted downward, or discounted, as the instruments approach maturity. Each limited-life capital instrument will be discounted by reducing the outstanding amount of the capital instrument eligible for inclusion as supplementary capital by a fifth of the original amount (less redemptions) each year during the instrument's last five years before maturity. Such instruments, therefore, will have no capital value when they have a remaining maturity of less than a year.

B. Deductions from Capital and Other Adjustments

Certain assets are deducted from a bank's capital base for the purpose of calculating the numerator of the risk-based capital ratio.[7] These assets include:

(1) All *intangible assets* other than mortgage servicing rights and purchased credit card relationships.[8] These disallowed intangibles are deducted from the core capital (Tier 1) elements.

(2) Investments in *unconsolidated* banking and finance subsidiaries.[9] This includes any equity or debt capital investments in banking or finance subsidaries if the subsidiaries are not consolidated for regulatory capital requirements.[10] Generally, these investments include equity and debt capital securities and any other instruments or commitments that are deemed to be capital of the subsidiary. These investments are deducted from the bank's total (Tier 1 plus Tier 2) capital base.

(3) Investments in *securities subsidiaries* established pursuant to 12 CFR 337.4. The FDIC may also consider deducting investments in other subsidiaries, either on a case-by-case basis or, as with securities subsidiaries, based on the general characteristics or functional nature of the subsidiaries.

(4) *Reciprocal holdings* of capital instruments of banks that represent intentional cross-holdings by the banks. These holdings are deducted from the bank's total capital base.

(5) *Deferred tax assets* in excess of the limit set forth in §325.5(g). These disallowed deferred tax assets are deducted from the core capital (Tier 1) elements.

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[7] Any assets deducted from capital when computing the numerator of the risk-based capital ratio will also be excluded from risk-weighted assets when computing the denominator of the ratio.

[8] In addition to mortgage servicing rights and purchased credit card relationships, certain other intangibles may be allowed if explicitly approved by the FDIC as part of the bank's regulatory capital on a specific case basis. In evaluating whether other types of intangibles should be recognized for regulatory capital purposes on a specific case basis, the FDIC will accord special attention to the general characteristics of the intangibles, including: (1) The separability of the intangible asset and the ability to sell it separate and apart from the bank or the bulk of the bank's assets, (2) the certainty that a readily identifiable stream of cash flows associated with the intangible asset can hold its value notwithstanding the future prospects of the bank, and (3) the existence of a market of sufficient depth to provide liquidity for the intangible asset.

[9] For risk-based capital purposes, these subsidiaries are generally defined as any company that is primarily engaged in banking or finance and in which the bank, either directly or indirectly, owns more than 50 percent of the outstanding voting stock but does not consolidate the company for regulatory capital purposes. In addition to investments in unconsolidated banking and finance subsidiaries, the FDIC may, on a case-by-case basis, deduct investments in associated companies or joint ventures, which are generally defined as any companies in which the bank, either directly or indirectly, owns 20 to 50 percent of the outstanding voting stock. Alternatively, the FDIC may, in certain cases, apply an appropriate risk-weighted capital charge against a bank's proportionate interest in the assets of associated companies and joint ventures. The definitions for subsidiaries, associated companies and joint ventures are contained in the instructions for the preparation of the Consolidated Reports of Condition and Income.

[10] Consolidation requirements for regulatory capital purposes generally follow the consolidation requirements set forth in the instructions for preparation of the consolidated Reports of Condition and Income. However, although investments in subsidiaries representing majority ownership in another Federally-insured depository institution are not consolidated for purposes of the consolidated Reports of Condition and Income that are filed by the parent bank, they are generally consolidated for purposes of determining FDIC regulatory capital requirements. Therefore, investments in these depository institution subsidiaries generally will not be deducted for risk-based capital purposes; rather, assets and liabilities of such subsidiaries will be consolidated with those of the parent bank when calculating the risk-based capital ratio. In addition, although securities subsidiaries established pursuant to 12 CFR 337.4 are consolidated for Report of Condition and Income purposes, they are not consolidated for regulatory capital purposes.

On a case-by-case basis, and in conjunction with supervisory examinations, other deductions from capital may also be required, including any adjustments deemed appropriate for assets classified as loss.

II. Procedures For Computing Risk-Weighted Assets

A. General Procedures

Under the risk-based capital framework, a bank's balance sheet assets and credit equivalent amounts of off-balance sheet items are assigned to one of four broad risk categories according to the obligor or, if relevent, the guarantor or the nature of the collateral. The aggregate dollar amount in each category is then multiplied by the risk weight assigned to that category. The resulting weighted values from each of the four risk categories are added together and this sum is the *risk-weighted assets* total that, as adjusted.[11] comprises the denominator of the risk-based capital ratio.

The risk-weighted amounts for all off-balance sheet items are determined by a two-step process. First, the notional principal, or face value, amount of each off-balance sheet item generally is multiplied by a credit conversion factor to arrive at a balance sheet *credit equivalent amount.* Second, the credit equivalent amount generally is assigned to the appropriate risk category, like any balance sheet asset, according to the obligor or, if relevant, the guarantor or the nature of the collateral.

B. Other Considerations

1. *Indirect Holdings of Assets.* Some of the assets on a bank's balance sheet may represent an indirect holding of a pool of assets; for example, *mutual funds.* An investment in shares of a mutual fund whose portfolio consists solely of various securities or money market instruments that, if held separately, would be assigned to different risk categories, generally is assigned to the risk category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with its stated investment objectives, but in no case to the zero percent risk category. If, in order to maintain a necessary degree of liquidity, a fund is permitted to hold an insignificant amount of its investments in short-term, highly liquid assets that are of superior credit quality but that do not qualify for a preferential risk weight, such assets may generally be disregarded in determining the risk category into which the bank's holding in the overall fund should be assigned. Regardless of the composition of the fund's assets, if the fund is allowed to engage in any activities that appear speculative in nature (for example, use of futures, forwards, or option contracts for purposes other than to reduce interest rate risk) or if the fund has any other characteristics that are inconsistent with the preferential risk-weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk category.

2. *Collateral.* In determining risk weights of various assets, the only forms of collateral that are formally recognized by the risk-based capital framework are cash on deposit in the lending bank; securities issued or guaranteed by the central governments of the OECD-based group of countries,[12] U.S. Government agencies, or U.S. Government-sponsored agencies; and securities issued or guaranteed by multilateral lending institutions or regional development banks. Claims fully secured by such collateral are assigned to the 20 percent risk category. The extent to which these securities are recognized as collateral for risk-based capital purposes is determined by their current market value. If a claim is partially secured, the portion of the claim that is not covered by the collateral is assigned to the risk category appropriate to the obligor or, if relevant, the guarantor.

[11] Any asset deducted from a bank's capital accounts when computing the numerator of the risk-based capital ratio will also be excluded from risk-weighted assets when calculating the denominator for the ratio.

[12] The OECD-based group of countries comprises all full members of the Organization for Economic Cooperation and Development (OECD) regardless of entry date, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow, but excludes any country that has rescheduled its external sovereign debt within the previous five years. As of November 1995, the OECD included the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States; and Saudi Arabia had concluded special lending arrangements with the IMF associated with the IMF's General Arrangements to Borrow. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

3. *Guarantees.* Guarantees of the OECD and non-OECD central governments, U.S. Government agencies, U.S. Government-sponsored agencies, state and local governments of the OECD-based group of countries, multilateral lending institutions and regional development banks, U.S. depository institutions and foreign banks are also recognized. If a claim is partially guaranteed, the portion of the claim that is not fully covered by the guarantee is assigned to the risk category appropriate to the obligor or, if relevant, the collateral.

4. *Maturity.* Maturity is generally not a factor in assigning items to risk categories with the exceptions of claims on non-OECD banks, commitments, and interest rate and foreign exchange rate related contracts. Except for commitments, short-term is defined as one year or less *remaining* maturity and long-term is defined as over one year *remaining* maturity. In the case of commitments, short-term is defined as one year or less *original* maturity and long-term is defined as over one year original maturity.[13]

5. *Mortgage-Backed Securities.* Mortgage-backed securities, including pass-throughs and collateralized mortgage obligations (but not stripped mortgage-backed securities) that are issued or guaranteed by a U.S. Government agency or a U.S. Government-sponsored agency, normally are assigned to the risk weight category appropriate to the issuer or guarantor. Generally, a privately-issued mortgage-backed security is treated as essentially an indirect holding of the underlying assets, and assigned to the same risk category as the underlying assets, in accordance with the provisions and criteria spelled out in detail in the accompanying footnote;[14] however, such privately-issued mortgage-backed securities may not be assigned to the zero percent risk category. Privately-issued mortgage-backed securities whose structures do not comply with the specified provisions set forth in the footnote are assigned to the 100 percent risk category. In addition, any class of a mortgage-backed security that can absorb more than its *pro rata* share of loss without the whole issue being in default (for example, a subordinated class or residual interest) will also be assigned to the 100 percent risk weight category. All stripped mortgage-backed securities, including interest-only strips (IOs), principal-only strips (POs), and similar instruments, are assigned to the 100 percent risk weight category, regardless of the issuer or guarantor.

6. *Small Business Loans and Leases on Personal Property Transferred with Recourse*—(a) Notwithstanding other provisions of this appendix A, a qualifying institution that has transferred small business loans and leases on personal property (small business obligations) with recourse shall include in risk-weighted assets only the amount of retained recourse, provided two conditions are met. First, the transaction must be treated as a sale under generally accepted accounting principles (GAAP) and, second, the qualifying institution must establish pursuant to GAAP a non-capital reserve sufficient to meet the institution's reasonably estimated liability under the recourse arrangement. Only loans and leases to businesses that meet the criteria for a small business concern established by the Small Business Administration under section 3(a) of the Small Business Act are eligible for this capital treatment.

(b) For purposes of this appendix A, a qualifying institution is a bank that is well capitalized. In addition, by order of the FDIC, a bank that is adequately capitalized may be deemed a qualifying institution. In determining whether a bank meets the qualifying institution criteria, the prompt corrective action well capitalized and adequately capitalized definitions set forth in §325.103 shall be used, except that the bank's capital ratios must be calculated *without regard* to the preferential capital treatment for transfers of small business obligations with recourse specified in section II.B.6.(a) of this appendix A. The total outstanding amount of recourse retained by a qualifying institution on transfers of small business obligations receiving the preferential capital treatment cannot exceed 15 percent of the institution's

[13] Through year-end 1992, remaining rather than original maturity may be used for determining term to maturity for commitments.

[14] A privately-issued mortgage-backed security may be treated as an indirect holding of the underlying assets provided that (1) the underlying assets are held by an independent trustee and the trustee has a first priority, perfected security interest in the underlying assets on behalf of the holders of the security, (2) either the holder of the security has an undivided *pro rata* ownership interest in the underlying mortgage assets or the trust or single purpose entity (or conduit) that issues the security has no liabilities unrelated to the issued securities, (3) the security is structured such that the cash flow from the underlying assets in all cases fully meets the cash flow requirements of the security without undue reliance on any reinvestment income, and (4) there is no material reinvestment risk associated with any funds awaiting distribution to the holders of the security. In addition, if the underlying assets of a mortgage-backed security are composed of more than one type of asset, the entire mortgage-backed security is generally assigned to the category appropriate to the highest risk-weighted asset underlying the issue.

total risk-based capital. By order, the FDIC may approve a higher limit.

(c) If a bank ceases to be a qualifying institution or exceeds the 15 percent of capital limit under section II.B.6.(b) of this appendix A, the preferential capital treatment will continue to apply to any transfers of small business obligations with recourse that were consummated during the time the bank was a qualifying institution and did not exceed such limit.

(d) The risk-based capital ratios of a bank shall be calculated *without regard* to the preferential capital treatment for transfers of small business obligations with recourse specified in paragraph (a) of this section for purposes of:

(i) Determining whether a bank is adequately capitalized, undercapitalized, significantly undercapitalized, or critically undercapitalized under the prompt corrective action capital category definitions specified in §325.103; and

(ii) Applying the prompt corrective action reclassification provisions specified in §325.103(d), regardless of the bank's capital level.

C. Risk Weights for Balance Sheet Assets (see Table II)

The risk-based capital framework contains four risk weight categories—0 percent, 20 percent, 50 percent and 100 percent. In general, if a particular item can be placed in more than one risk category, it is assigned to the category that has the lowest risk weight. An explanation of the components of each category follows:

Category 1—Zero Percent Risk Weight. This category includes cash (domestic and foreign) owned and held in all offices of the bank or in transit; balances due from Federal Reserve Banks and central banks in other OECD countries; the portions of local currency claims on or unconditionally guaranteed by non-OECD central governments to the extent that the bank has liabilities booked in that currency; and gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent it is offset by gold bullion liabilities.[15]

The zero percent risk category also includes direct claims[16] (including securities, loans, and leases) on, and the portions of claims that are unconditionally guaranteed by, OECD central governments[17] and U.S. Government agencies.[18] Federal Reserve Bank stock also is included in this category.

Category 2—20 Percent Risk Weight. This category includes short-term claims (including demand deposits) on, and portions of short-term claims that are guaranteed[19] by, U.S. depository institutions[20] and foreign

[15] All other bullion holdings are to be assigned to the 100 percent risk weight category.

[16] For purposes of determining the appropriate risk weights for this risk-based capital framework, the terms *claims* and *securities* refer to loans or other *debt* obligations of the entity on whom the claim is held. Investments in the form of stock or equity holdings in commercial or financial firms are generally assigned to the 100 percent risk category.

[17] A central government is defined to include departments and ministries, including the central bank, of the central government. The U.S. central bank includes the 12 Federal Reserve Banks. The definition of central government does not include state, provincial or local governments or commercial enterprises owned by the central government. In addition, it does not include local government entities or commercial enterprises whose obligations are guaranteed by the central government. OECD central governments are defined as central governments of the OECD-based group of countries. Non-OECD central governments are defined as central governments of countries that do not belong to the OECD-based group of countries.

[18] For risk-based capital purposes U.S. Government agency is defined as an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the U.S. Government. These agencies include the Government National Mortgage Association (GNMA), the Veterans Administration (VA), the Federal Housing Administration (FHA), the Farmers Home Administration (FHA), the Export-Import Bank (Exim Bank), the Overseas Private Investment Corporation (OPIC), the Commodity Credit Corporation (CCC), and the Small Business Administration (SBA). U.S. Government agencies generally do not directly issue securities to the public; however, a number of U.S. Government agencies, such as GNMA, guarantee securities that are publicly held.

[19] Claims guaranteed by U.S. depository institutions and foreign banks include risk participations in both bankers acceptances and standby letters of credit, as well as participations in commitments, that are *conveyed* to other U.S. depository institutions or foreign banks.

[20] U.S. depository institutions are defined to include branches (foreign and domestic) of federally-insured banks and depository institutions chartered and headquartered in the 50 states of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. The definition encompasses

banks;[21] portions of claims collateralized by cash held in a segregated deposit account of the lending bank; cash items in process of collection, both foreign and domestic; and long-term claims on, and portions of long-term claims guaranteed by, U.S. depository institutions and OECD banks.[22]

This category also includes claims on, or portions of claims guaranteed by, U.S. Government-*sponsored* agencies;[23] and portions of claims (including repurchase agreements) collateralized by securities issued or guaranteed by OECD central governments, U.S. Government agencies, or U.S. Government-sponsored agencies. Also included in the 20 percent risk category are portions of claims that are conditionally guaranteed by OECD central governments and U.S. Government agencies[24], as well as portions of local currency claims that are conditionally guaranteed by non-OECD central governments to the extent that the bank has liabilities booked in that currency.

General obligation claims on, or portions of claims guaranteed by, the full faith and credit of states or other political subdivisions of the United States or other countries of the OECD-based group are also assigned to this 20 percent risk category.[25] In addition, this category includes claims on the International Bank for Reconstruction and Development (World Bank), International Finance Corporation the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investment Bank, the European Bank for Reconstruction and Development, the Nordic Investment Bank, and other multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or contributing member, as well as portions of claims guaranteed by such organizations or collateralized by their securities.

Category 3—50 Percent Risk Weight. This category includes loans fully secured by first liens[26] on *one-to-four family residential properties,* provided that such loans have been approved in accordance with prudent underwriting standards, including standards relating to the loan amount as a percent of the appraised value of the property,[27] and provided that the loans are not past due 90 days

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banks, mutual or stock savings banks, savings or building and loan associations, cooperative banks, credit unions, international banking facilities of domestic depository institutions, and U.S.-chartered depository institutions owned by foreigners. However, this definition excludes branches and agencies of foreign banks located in the U.S. and bank holding companies.

[21] Foreign banks are distinguished as either OECD banks or non-OECD banks. OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries (other than the U.S.) that belong to the OECD-based group of countries. Non-OECD banks include banks and their branches (foreign and domestic) organized under the laws of countries that do not belong to the OECD-based group of countries. For risk-based capital purposes, a bank is defined as an institution that engages in the business of banking; is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations; receives deposits to a substantial extent in the regular course of business; and has the power to accept demand deposits.

[22] Long-term claims on, or guaranteed by, non-OECD banks and all claims on bank holding companies are assigned to the 100 percent risk weight category, as are holdings of bank-issued securities that qualify as capital of the issuing banks for risk-based capital purposes.

[23] For risk-based capital purposes, U.S. Government-sponsored agencies are defined as agencies originally established or chartered by the U.S. Government to serve public purposes specified by the U.S. Congress but whose debt obligations are *not explicitly* guaranteed by the full faith and credit of the U.S. Government. These agencies include the Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA), the Farm Credit System, the Federal Home Loan Bank System, and the Student Loan Marketing Association (SLMA). For risk-based capital purposes, claims on U.S. Government-sponsored agencies also include capital stock in a Federal Home Loan Bank that is held as a condition of membership in that Bank.

[24] For risk-based capital purposes, a conditional guarantee is deemed to exist if the validity of the guarantee by the OECD central government or the U.S. Government agency is dependent upon some affirmative action (e.g., servicing requirements on the part of the beneficiary of the guarantee). Portions of claims that are unconditionally guaranteed by OECD central governments or U.S. Government agencies are assigned to the zero percent risk category.

[25] Claims on, or guaranteed by, states or other political subdivisions of countries that do not belong to the OECD-based group of countries are to be placed in the 100 percent risk weight category.

[26] If a bank holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transactions will be treated as a single loan secured by a first lien.

[27] For risk-based capital purposes, the loan-to-value ratio generally is based upon the

Continued

or more or carried in nonaccrual status.[28] The types of loans that qualify as loans secured by one-to-four family residential properties are listed in the instructions for preparation of the Consolidated Reports of Condition and Income. These properties may be either owner-occupied or rented. In addition, for risk-based capital purposes, loans secured by one-to-four family residential properties include loans to builders with substantial project equity for the construction of one-to-four family residences that have been presold under firm contracts to purchasers who have obtained firm commitments for permanent qualifying mortgage loans and have made substantial earnest money deposits. Such loans to builders will be considered prudently underwritten only if the bank has obtained sufficient documentation that the buyer of the home intends to purchase the home (i.e., has a legally binding written sales contract) and has the ability to obtain a mortgage loan sufficient to purchase the home (i.e., has a firm written commitment for permanent financing of the home upon completion), provided the following criteria are met:

This category also includes loans fully secured by first liens on multifamily residential properties,[29] provided that:

(1) The loan amount does not exceed 80 percent of the value[30] of the property securing the loan as determined by the most current appraisal or evaluation, whichever may be appropriate (75 percent if the interest rate on the loan changes over the term of the loan);

(2) For the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent (115 percent if the interest rate on the loan changes over the term of the loan) or, in the case of a property owned by a cooperative housing corporation or nonprofit organization, the property generates sufficient cash flow to provide comparable protection to the bank;

(3) Amortization of principal and interest on the loan occurs over a period of not more than 30 years;

(4) The minimum original maturity for repayment of principal on the loan is not less than seven years;

(5) All principal and interest payments have been made on a timely basis in accordance with the terms of the loan for at least one year before the loan is placed in this category;[31]

(6) The loan is not 90 days or more past due or carried in nonaccrual status; and

(7) The loan has been made in accordance with prudent underwriting standards.

Also included in this category are privately-issued mortgage-backed securities provided that: (1) The structure of the security meets the criteria described above for ''Mortgage-Backed Securities;'' (2) if the security is backed by a pool of conventional mortgages on one-to-four family residential or multifamily residential properties, each underlying mortgage meets the criteria described in this section for inclusion in the 50 percent risk weight category at the time the pool is originated; (3) if the security is

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most current appraised value of the property. The appraisal should be performed in a manner consistent with the Federal banking agencies' real estate appraisal guidelines and with the bank's own appraisal guidelines.

[28] Real estate loans that do not meet all of the specified criteria or that are made for the purpose of property development are placed in the 100 percent risk category.

[29] The types of loans that qualify as loans secured by multifamily residential properties are listed in the instructions for preparation of the Consolidated Reports of Condition and Income. In addition, as provided in those instructions, a multifamily residential property loan that is sold subject to a pro rata loss sharing arrangement is treated by the selling bank as sold (and excluded from balance sheet assets) to the extent that the sales agreement provides for the purchaser of the loan to share in any loss incurred on the loan on a pro rata basis with the selling bank. In such a transaction, from the standpoint of the selling bank, the portion of the loan that is treated as sold is not subject to the risk-based capital standards. In connection with sales of multifamily residential property loans in which the purchaser of a loan shares in any loss incurred on the loan with the selling institution on other than a pro rata basis, these other loss sharing arrangements are taken into account for purposes of determining the extent to which such loans are treated by the selling bank as sold (and excluded from balance sheet assets) under the risk-based capital framework in the same manner as prescribed for reporting purposes in the instructions for preparation of the Consolidated Reports of Condition and Income.

[30] At the origination of a loan to purchase an existing property, the term ''value'' means the lesser of the actual acquisition cost or the estimate of value set forth in an appraisal or evaluation, whichever may be appropriate.

[31] In the case where the existing owner of a multifamily residential property refinances a loan on that property, all principal and interest payments on the loan being refinanced must have been made on a timely basis in accordance with the terms of that loan for at least the preceding year. The new loan must meet all of the other eligibility criteria in order to qualify for a 50 percent risk weight.

backed by privately-issued mortgage-backed securities, each underlying security qualifies for inclusion in the 50 percent risk category; and (4) if the security is backed by a pool of multifamily residential mortgages, principal or interest payments on the security are not 30 days or more past due.[32]

This category also includes *revenue* (non-general obligation) bonds or similar obligations, including loans and leases, that are obligations of states or political subdivisions of the United States or other OECD countries, but for which the government entity is committed to repay the debt with revenues from the specific projects financed, rather than from general tax funds (e.g., municipal revenue bonds). In addition, the credit equivalent amount of derivative contracts that do not qualify for a lower risk weight are assigned to the 50 percent risk category.

Category 4—100 Percent Risk Weight. All assets not included in the above risk categories are assigned to this category, which comprises standard risk assets. Long-term claims on, or guaranteed by, non-OECD banks, and all claims on non-OECD central governments that entail some degree of transfer risk are assigned to the 100 percent risk category.[33]

This category also includes all claims on foreign and domestic private sector obligors that are not assigned to lower risk weight categories, including: loans to nondepository financial institutions and bank holding companies; claims on commercial firms owned by the public sector; customer liabilities to the bank on acceptances outstanding involving standard risk claims;[34] investments in fixed assets, premises and other real estated owned; common and preferred stock of corporations, including stock acquired for debt previously contracted; commercial and consumer loans (except those loans assigned to lower risk categories due to recognized guarantees or collateral); real estate loans and mortgage-backed securities that do not meet the criteria for assignment to a lower risk weight (including any classes of mortgage-backed securities that can absorb more than their *pro rata* share of loss without the whole issue being in default, such as subordinated classes or residual interests); and all stripped mortgage-backed securities, including interest-only (IOs) and principal-only (POs) strips.

Also included in this category are industrial development bonds and similar obligations issued under the auspices of state or political subdivisions of the OECD-based group of countries for the benefit of a private party or enterprise where that party or enterprise, rather than the government entity, is obligated to pay the principal and interest, and all obligations of states or political subdivisions of countries that do not belong to the OECD-based group of countries.

Unless already deducted from capital for risk-based capital purposes, the following assets also are included in the 100 percent risk category: investments in unconsolidated subsidiaries, joint ventures or associated companies; instruments that qualify as capital issued by other banks; and mortgage servicing rights and other allowed intangibles.

D. Conversion Factors for Off-Balance Sheet Items (see Table III)

The face amount of an off-balance sheet item is generally multiplied by a *credit conversion factor* and the resulting *credit equivalent amount* is assigned to the appropriate risk category according to the obligor or, if relevant, the guarantor or the nature of the collateral.[35]

1. *Items With a 100 Percent Conversion Factor*. A 100 percent conversion factor applies to *direct credit substitutes*, which include *guarantees*, or equivalent instruments, backing *financial* claims, such as securities, loans or other financial obligations, or backing off-balance sheet items that require capital under the risk-based capital framework.

[32] Privately-issued mortgage-backed securities that do not meet these criteria or that do not qualify for a lower risk weight generally are assigned to the 100 percent risk weight category.

[33] Such assets include all non-local currency claims on non-OECD central governments and those portions of local currency claims on, or guaranteed by, non-OECD central governments that exceed the local currency liabilities held by the bank.

[34] Customer liabilities on acceptances outstanding involving non-standard risk claims, such as claims on U.S. depository institutions, are assigned to the risk category appropriate to the identity of the obligor or, if relevant, the nature of the collateral or guarantees backing the claim. Portions of acceptances conveyed as risk participations to U.S. depository institutions or foreign banks should be assigned to the 20 percent risk category that is appropriate for short-term claims guaranteed by U.S. depository institutions and foreign banks.

[35] The sufficiency of collateral and guarantees for off-balance-sheet items is determined by the market value of the collateral or the amount of the guarantee in relation to the face amount of the item, except for derivative contracts, for which this determination is generally made in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under section II.*B*. of this appendix A.

These direct credit substitutes include *financial standby letters of credit,* or other equivalent irrevocable undertakings or surety arrangements, that effectively guarantee repayment of financial obligations such as: commercial paper, tax-exempt securities, commercial or individual loans or other debt obligations, or standby or commercial letters of credit.

For risk-based capital purposes, financial standby letters of credit (100 percent conversion factor) are distinguished from loan commitments (normally a 50 percent conversion factor) in that financial standbys are irrevocable obligations of the bank to pay a third-party beneficiary when a customer (account party) *fails to repay* an outstanding loan or debt instrument. A loan commitment, on the other hand, involves an obligation (with or without a material adverse change clause) of the bank to provide funds to its customer *in the normal course* of business should the customer seek to draw down the commitment.

Therefore, the distinguishing characteristics of a financial standby letter of credit for risk-based capital purposes is the combination of irrevocability with the notion that funding is triggered by some failure to repay or perform on a financial obligation. Thus, any commitment (by whatever name) that involves an *irrevocable* obligation to make a payment to the customer or to a third party in the event the customer *fails to repay* an outstanding debt obligation will be treated, for risk-based capital purposes, as a financial standby letter of credit and assigned a 100 percent conversion factor. (Performance-related standby letters of credit are assigned a conversion factor of 50 percent.)

A bank that has conveyed *risk participation*[36] in a direct credit substitute to a third party should convert the full amount of the direct credit substitute at a 100 percent conversion factor without deducting the risk participations conveyed. However, portions of direct credit substitutes that have been conveyed as risk participations to U.S. depository institutions and OECD banks may then be assigned to the 20 percent risk category that is appropriate for claims guaranteed by U.S. depository institutions and OECD banks, rather than to the risk category appropriate to the account party obligor.[37] A bank acquiring a risk participation in a direct credit substitute or bankers acceptance should convert the participation at 100 percent and then assign the credit equivalent amount to the risk category that is appropriate to the account party obligor or, if relevant, the guarantor or the nature of the collateral.

In the case of direct credit substitutes that are structured in the form of a *syndication* as defined in the instructions for the preparation of the Consolidated Reports of Condition and Income (that is, where each bank is obligated only for its *pro rata* share of the risk and there is no recourse to the originating bank), each bank will only include its *pro rata* share of the direct credit substitute in its risk-based capital calculation.

Sale and repurchase agreements and *asset sales with recourse,* if not already included on the balance sheet, are also converted at 100 percent. For risk-based capital purposes, the definition of sales of assets with recourse, including the sale of one-to-four family residential mortgages, is consistent with the definition contained in the instructions for the preparation of the Consolidated Reports of Condition and Income. Accordingly, except as noted below, the entire amount of any assets transferred with recourse that are not already included on the balance sheet, including pools of one-to-four family residential mortgages, is to be converted at 100 percent and assigned to the risk weight category appropriate to the obligor or, if relevant, the guarantor or the nature of the collateral. The terms of a transfer of assets with recourse may contractually limit the amount of the bank's liability to an amount less than the effective risk-based capital requirement for the assets being transferred with recourse. If such a transaction (including one that, in accordance with the instructions for the preparation of the Consolidated Reports of Condition and Income, is reported as a financing, *i.e.,* the assets are not removed from the balance sheet) meets the criteria for sale treatment under generally accepted accounting principles, the amount of total capital required is equal to the maximum amount of loss possible under the recourse provision. If the transaction is also treated as a sale in accordance with the instructions for the preparation of the Consolidated Reports of Condition and Income, then the required amount of capital may be reduced by the balance of any associated noncapital liability account established pursuant to generally accepted accounting principles to cover estimated probable losses under the recourse provision. So-called ''loan strips'' (that is, short-term advances sold under long-term commitments without direct recourse) are defined in the instructions for the preparation of the Consolidated Reports of Condition and Income and for risk-based capital purposes as assets sold with recourse.

[36] That is, participations in which the originating bank remains liable to the beneficiary for the full amount of the direct credit substitute if the party that has acquired the participation fails to pay when the instrument is drawn upon.

[37] Risk participations with a remaining maturity of one year or less that are conveyed to non-OECD banks are also assigned to the 20 percent risk weight category.

In addition, a 100 percent conversion factor applies to forward agreements. Forward agreements are legally binding contractual obligations to purchase assets with drawdown which is certain at a specified future date. These obligations include forward purchases, forward deposits placed, and partly paid shares and securities, but do not include forward foreign exchange rate contracts or commitments to make residential mortgage loans.

Securities lent by a bank are treated in one of two ways, depending on whether the lender is exposed to risk of loss. If a bank, as agent for a customer, lends the customer's securities and is not obligated to indemnify the customer against loss, the securities lending transaction is excluded from the risk-based capital calculation. On the other hand, if a bank lends its own securities, or acting as agent lends the customer's securities and agrees to indemnify the customer against loss, the transaction is converted at 100 percent and assigned to the risk weight category appropriate to the obligor or, if applicable, to the collateral delivered to the lending bank or to the independent custodian acting on the lending bank's behalf.

2. *Items With a 50 Percent Conversion Factor.* Transaction-related contingencies are to be converted at 50 percent. Such contingencies include bid bonds, performance bonds, warranties, and *performance standby letters of credit* related to particular transactions, as well as acquisitions of risk participations in performance standby letters of credits. Performance standby letters of credit (performance bonds) are irrevocable obligations of the bank to pay a third-party beneficiary when a customer (account party) *fails to perform* on some contractual nonfinancial obligation. Thus, performance standby letters of credit represent obligations backing the performance of *nonfinancial* or *commercial* contracts or undertakings. To the extent permitted by law or regulation, performance standby letters of credit include arrangements backing, among other things, subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

The unused portion of *commitments* with an *original* maturity exceeding *one year*,[38] including underwriting commitments and commercial and consumer credit commitments, also are to be converted at 50 percent. Original maturity is defined as the length of time between the date the commitment is issued and the earliest date on which: (1) The bank can at its option, *unconditionally* (without cause) cancel the commitment,[39] and (2) the bank is scheduled to (and as a normal practice actually does) review the facility to determine whether or not it should be extended and, on at least an annual basis, continues to regularly review the facility. Facilities that are unconditionally cancelable (without cause) at any time by the bank are not deemed to be commitments, provided the bank makes a separate credit decision before each drawing under the facility.

Commitments, for risk-based capital purposes, are defined as any arrangements that obligate a bank to extend credit in the form of loans or lease financing receivables; to purchase loans, securities, or other assets; or to participate in loans and leases. Commitments also include overdraft facilities, revolving credit, home equity and mortgage lines of credit, and similar transactions. Normally, commitments involve a written contract or agreement and a commitment fee, or some other form of consideration. Commitments are included in risk-weighted assets regardless of whether they contain *material adverse change* clauses or other provisions that are intended to relieve the issuer of its funding obligation under certain conditions.

In the case of commitments structured as syndications where the bank is obligated only for its *pro rata* share, the risk-based capital framework includes only the bank's proportional share of such commitments. Thus, after a commitment has been converted at 50 percent, portions of commitments that have been conveyed to other U.S. depository institutions or OECD banks, but for which the originating bank retains the full obligation to the borrower if the participating bank fails to pay when the commitment is drawn upon, will be assigned to the 20 risk category. The acquisition of such a participation in a commitment would be converted at 50 percent and the credit equivalent amount would be assigned to the risk category that is appropriate for the account party obligor or, if relevant, to the nature of the collateral or guarantees.

Revolving underwriting facilities (RUFs), note issuance facilities (NIFs), and other similar arrangements also are converted at 50 percent. These are facilities under which a borrower can issue on a revolving basis short-term notes in its own name, but for which the underwriting banks have a legally binding commitment either to purchase any

[38] Remaining maturity may be used for determining the term to maturity for loan commitments through year-end 1992; thereafter, original maturity shall be used.

[39] In the case of home equity or mortgage lines of credit secured by liens on one-to-four family residential properties, a bank is deemed able to unconditionally cancel the commitment if, at its option, it can prohibit additional extensions of credit, reduce the credit line, and terminate the commitment to the full extent permitted by relevant Federal law.

notes the borrower is unable to sell by the rollover date or to advance funds to the borrower.

3. *Items With a 20 Percent Conversion Factor.* Short-term, self-liquidating, trade-related contingencies which arise from the movement of goods are converted at 20 percent. Such contingencies include *commercial letters of credit* and other documentary letters of credit collateralized by the underlying shipments.

4. *Items With a Zero Percent Conversion Factor.* These include unused portions of *commitments* with an *original maturity* of *one year or less,* or which are *unconditionally cancellable* at any time (provided a separate credit decision is made before each drawing under the facility). Unused portions of *retail credit card lines* and related plans are deemed to be short-term commitments if the bank, in accordance with applicable law, has the unconditional option to cancel the credit line at any time.

E. Derivative Contracts (Interest Rate, Exchange Rate, Commodity (including precious metal) and Equity Derivative Contracts)

1. Credit equivalent amounts are computed for each of the following off-balance-sheet derivative contracts:

(a) Interest Rate Contracts

(i) Single currency interest rate swaps.

(ii) Basis swaps.

(iii) Forward rate agreements.

(iv) Interest rate options purchased (including caps, collars, and floors purchased).

(v) Any other instrument linked to interest rates that gives rise to similar credit risks (including when-issued securities and forward deposits accepted).

(b) Exchange Rate Contracts

(i) Cross-currency interest rate swaps.

(ii) Forward foreign exchange contracts.

(iii) Currency options purchased.

(iv) Any other instrument linked to exchange rates that gives rise to similar credit risks.

(c) Commodity (including precious metal) or Equity Derivative Contracts

(i) Commodity- or equity-linked swaps.

(ii) Commodity- or equity-linked options purchased.

(iii) Forward commodity- or equity-linked contracts.

(iv) Any other instrument linked to commodities or equities that gives rise to similar credit risks.

2. Exchange rate contracts with an original maturity of 14 calendar days or less and derivative contracts traded on exchanges that require daily receipt and payment of cash variation margin may be excluded from the risk-based ratio calculation. Gold contracts are accorded the same treatment as exchange rate contracts except gold contracts with an original maturity of 14 calendar days or less are included in the risk-based calculation. Over-the-counter options purchased are included and treated in the same way as other derivative contracts.

3. *Credit Equivalent Amounts for Derivative Contracts.* (a) The credit equivalent amount of a derivative contract that is not subject to a qualifying bilateral netting contract in accordance with section II.*E*.5. of this appendix A is equal to the sum of:

(i) The current exposure (which is equal to the mark-to-market value,[40] if positive, and is sometimes referred to as the replacement cost) of the contract; and

(ii) An estimate of the potential future credit exposure.

(b) The current exposure is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current exposure is equal to that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero.

(c) The potential future credit exposure of a contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal amount of the contract by a credit conversion factor. Banks should, subject to examiner review, use the effective rather than the apparent or stated notional amount in this calculation. The credit conversion factors are:

CONVERSION FACTOR MATRIX

Remaining maturity	Interest rate	Exchange rate and gold	Equity	Precious metals, except gold	Other commodities
One year or less	0.0%	1.0%	6.0%	7.0%	10.0%
More than one year to five years	0.5%	5.0%	8.0%	7.0%	12.0%
More than five years	1.5%	7.5%	10.0%	8.0%	15.0%

(d) For contracts that are structured to settle outstanding exposure on specified dates and where the terms are reset such that the market value of the contract is zero

[40] Mark-to-market values are measured in dollars, regardless of the currency or currencies specified in the contract and should reflect changes in both underlying rates, prices and indices, and counterparty credit quality.

on these specified dates, the remaining maturity is equal to the time until the next reset date. For interest rate contracts with remaining maturities of more than one year and that meet these criteria, the conversion factor is subject to a minimum value of 0.5 percent.

(e) For contracts with multiple exchanges of principal, the conversion factors are to be multiplied by the number of remaining payments in the contract. Derivative contracts not explicitly covered by any of the columns of the conversion factor matrix are to be treated as ''other commodities.''

(f) No potential future exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices (so called floating/floating or basis swaps); the credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

4. *Risk Weights and Avoidance of Double Counting.* (a) Once the credit equivalent amount for a derivative contract, or a group of derivative contracts subject to a qualifying bilateral netting agreement, has been determined, that amount is assigned to the risk category appropriate to the counterparty, or, if relevant, the guarantor or the nature of any collateral. However, the maximum weight that will be applied to the credit equivalent amount of such contracts is 50 percent.

(b) In certain cases, credit exposures arising from the derivative contracts covered by these guidelines may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy and, perhaps, assigning inappropriate risk weights, counterparty credit exposures arising from the types of instruments covered by these guidelines may need to be excluded from balance sheet assets in calculating a bank's risk-based capital ratio.

(c) The FDIC notes that the conversion factors set forth in section II.*E*.3. of appendix A, which are based on observed volatilities of the particular types of instruments, are subject to review and modification in light of changing volatilities or market conditions.

(d) Examples of the calculation of credit equivalent amounts for these types of contracts are contained in Table IV of this appendix A.

5. *Netting.* (a) For purposes of this appendix A, netting refers to the offsetting of positive and negative mark-to-market values when determining a current exposure to be used in the calculation of a credit equivalent amount. Any legally enforceable form of bilateral netting (that is, netting with a single counterparty) of derivative contracts is recognized for purposes of calculating the credit equivalent amount provided that:

(i) The netting is accomplished under a written netting contract that creates a single legal obligation, covering all included individual contracts, with the effect that the bank would have a claim or obligation to receive or pay, respectively, only the net amount of the sum of the positive and negative mark-to-market values on included individual contracts in the event that a counterparty, or a counterparty to whom the contract has been validly assigned, fails to perform due to default, bankruptcy, liquidation, or similar circumstances;

(ii) The bank obtains a written and reasoned legal opinion(s) representing that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the bank's exposure to be such a net amount under:

(*1*) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities and, if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(*2*) The law that governs the individual contracts covered by the netting contract; and

(*3*) The law that governs the netting contract.

(iii) The bank establishes and maintains procedures to ensure that the legal characteristics of netting contracts are kept under review in the light of possible changes in relevant law; and

(iv) The bank maintains in its file documentation adequate to support the netting of derivative contracts, including a copy of the bilateral netting contract and necessary legal opinions.

(b) A contract containing a walkaway clause is not eligible for netting for purposes of calculating the credit equivalent amount.[41]

(c) By netting individual contracts for the purpose of calculating its credit equivalent amount, a bank represents that it has met the requirements of this appendix A and all the appropriate documents are in the bank's files and available for inspection by the FDIC. Upon determination by the FDIC that a bank's files are inadequate or that a netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs (ii)(1) through (3) of section

[41] For purposes of this section, a walkaway clause means a provision in a netting contract that permits a non-defaulting counterparty to make lower payments than it would make otherwise under the contract, or no payment at all, to a defaulter or to the estate of a defaulter, even if a defaulter or the estate of a defaulter is a net creditor under the contract.

II.E.5.(a) of this appendix A, underlying individual contracts may be treated as though they were not subject to the netting contract.

(d) The credit equivalent amount of derivative contracts that are subject to a qualifying bilateral netting contract is calculated by adding:

(i) The net current exposure of the netting contract; and

(ii) The sum of the estimates of potential future exposure for all individual contracts subject to the netting contract, adjusted to take into account the effects of the netting contract.[42]

(e) The net current exposure is the sum of all positive and negative mark-to-market values of the individual contracts subject to the netting contract. If the net sum of the mark-to-market values is positive, then the net current exposure is equal to that sum. If the net sum of the mark-to-market values is zero or negative, then the net current exposure is zero.

(f) The effects of the bilateral netting contract on the gross potential future exposure are recognized through application of a formula, resulting in an adjusted add-on amount (A_{net}). The formula, which employs the ratio of net current exposure to gross current exposure (NGR) is expressed as:

$$A_{net}=(0.4\times A_{gross})+0.6(NGR\times A_{gross})$$

The effect of this formula is that A_{net} is the weighted average of A_{gross}, and A_{gross} adjusted by the NGR.

(g) The NGR may be calculated in either one of two ways—referred to as the counterparty-by-counterparty approach and the aggregate approach.

(i) Under the counterparty-by-counterparty approach, the NGR is the ratio of the net current exposure of the netting contract to the gross current exposure of the netting contract. The gross current exposure is the sum of the current exposures of all individual contracts subject to the netting contract calculated in accordance with section II.E. of this appendix A.

(ii) Under the aggregate approach, the NGR is the ratio of the sum of all of the net current exposures for qualifying bilateral netting contracts to the sum of all of the gross current exposures for those netting contracts (each gross current exposure is calculated in the same manner as in section II.*E*.5.(g)(i) of this appendix A). Net negative mark-to-market values to individual counterparties cannot be used to offset net positive current exposures to other counterparties.

(iii) A bank must use consistently either the counterparty-by-counterparty approach or the aggregate approach to calculate the NGR. Regardless of the approach used, the NGR should be applied individually to each qualifying bilateral netting contract to determine the adjusted add-on for that netting contract.

III. Minimum Risk-Based Capital Ratio

A. Minimum Risk-Based Capital Ratio After Transition Period

Banks generally will be expected to meet a *minimum* ratio of qualifying total capital to risk-weighted assets of *8 percent*, of which at least 4 percentage points should be in the form of core capital (Tier 1). Any bank that does not meet the minimum risk-based capital ratio, or whose capital is otherwise considered inadequate, generally will be expected to develop and implement a capital plan for achieving an adequate level of capital, consistent with the provisions of this risk-based capital framework, the specific circumstances affecting the individual bank, and the requirements of any related agreements between the bank and the FDIC.

B. Transitional Arrangements

The transition period commences with the adoption of this statement of policy and ends on December 31, 1992. Initially, this risk-based capital framework does not establish a minimum level of capital. However, by year-end 1990, banks generally will be expected to meet a minimum total capital to risk-weighted assets ratio of 7.25 percent, at least one-half of which should be in the form of Tier 1 capital. For purposes of calculating this interim minimum ratio, the amount of the allowance for loan and lease losses that may be included as a supplementary capital element is limited to 1.5 percent of risk-weighted assets. In addition, up to 10 percent of a bank's Tier 1 capital (before any deduction for disallowed intangibles) may consist of supplementary capital elements. Thus, the 7.25 percent interim ratio implies a minimum ratio of Tier 1 capital to risk-weighted assets of approximately 3.6 percent (or one-half of 7.25) and a minimum ratio of core capital elements to risk-weighted assets of 3.25 percent (or nine-tenths of the Tier 1 capital ratio). By the end of 1992, a state nonmember bank's Tier 1 capital should consist solely of core capital elements.

During the transition period, banks should monitor their risk-based capital ratios and work toward achieving the interim and final risk-based capital ratios. Any bank that has risk-based capital ratios of less than 4 percent Tier 1 capital and 8 percent total capital should develop and implement a capital plan for achieving those minimum standards

[42] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

by December 31, 1992, and for achieving the interim minimum ratio of 7.25 percent by December 31, 1990. Banks that at present have a risk-based capital ratio in excess of 8 percent generally should not take any action that would cause the ratio to fall below 8 percent.

TABLE I—DEFINITION OF QUALIFYING CAPITAL

[NOTE: See footnotes at end of table.]

Components	Minimum Requirements and Limitations After Transition Period.
Core Capital (Tier 1)	Must equal or exceed 4% of risk-weighted assets.
Common stockholders' equity capital	No limit.[1]
Noncumulative perpetual preferred stock and any related surplus.	No limit.[1]
Minority interests in equity capital accounts of consolidated subsidiaries.	No limit.[1]
Less: All intangible assets other than mortgage servicing rights and purchased credit card relationships.[2]	([1])
Less: Certain deferred tax assers.[3]	
Supplementary Capital (Tier 2)	Total of Tier 2 is limited to 100% of Tier 1.[4]
Allowance for loan and lease losses	Limited to 1.25% of risk-weighted assets.[4]
Cumulative perpetual and long-term preferred stock (original maturity of 20 years or more), and any related surplus.	No limit within Tier 2; long-term preferred is amortized for capital purposes as it approaches maturity.
Auction rate and similar preferred stock (both cumulative and non-cumulative).	No limit within Tier 2.
Hybrid capital instruments (including mandatory convertible debt securities).	No limit within Tier 2.
Term subordinated debt and intermediate-term preferred stock (original weighted average maturity of 5 years or more).	Term subordinated debt and intermediate-term preferred stock are limited to 50% of Tier 1[4] and amortized for capital purposes as they approach maturity.
Deductions (from the sum of Tier 1 plus Tier 2).	
Investments in banking and finance subsidiaries that are not consolidated for regulatory capital purposes.	
Intentional, reciprocal cross-holdings of capital securities issued by banks.	
Other deductions (such as investments in other subsidiaries or in joint ventures) as determined by supervisory authority.	On case-by-case basis or as matter of policy after formal consideration of relevant issues.
Total Capital (Tier 1 + Tier 2 − Deductions).	Must equal or exceed 8% of risk-weighted assets.

[1] No express limits are placed on the amounts of nonvoting common, noncumulative perpetual preferred stock and minority interests that may be recognized as part of Tier 1 capital. However, voting common stockholders' equity capital generally will be expected to be the dominant form of Tier 1 capital and banks should avoid undue reliance on other Tier 1 capital elements.

[2] The amounts of mortgage servicing rights and purchased credit card relationships that can be recognized for purposes of calculating Tier 1 capital are subject to the limitations set forth in § 325.5(f) of the FDIC's regulations. All deductions are for capital purposes only; deductions would not affect accounting treatment.

[3] Deferred tax assets are subject to the capital limitations set forth in § 325.5(g).

[4] Amounts in excess of limitations are permitted but do not qualify as capital.

Calculation of the Risk-Based Capital Ratio

When calculating the risk-based capital ratio under the framework set forth in this statement of policy, qualifying total capital (the numerator) is divided by risk-weighted assets (the denominator). The process of determining the numerator for the ratio is summarized in Table I. The calculation of the denominator is based on the risk weights and conversion factors that are summarized in Tables II and III.

When determining the amount of risk-weighted assets, balance sheet assets are assigned an appropriate risk weight (see Table II) and off-balance sheet items are first converted to a credit equivalent amount (see Table III) and then assigned to one of the risk weight categories set forth in Table II.

The balance sheet assets and the credit equivalent amount of off-balance sheet items are then multiplied by the appropriate risk weight percentages and the sum of these risk-weighted amounts is the gross risk-weighted asset figure used in determining the denominator of the risk-based capital ratio. Any items deducted from capital when computing the amount of qualifying capital may also be excluded from risk-weighted assets when calculating the denominator for the risk-based capital ratio.

TABLE II.—SUMMARY OF RISK WEIGHTS AND RISK CATEGORIES

Category 1—Zero Percent Risk Weight

(1) Cash (domestic and foreign).

(2) Balances due from Federal Reserve Banks and central banks in other OECD countries.

(3) Direct claims on, and portions of claims unconditionally guaranteed by, the U.S.

Treasury, U.S. Government agencies,[1] or central governments in other OECD countries.

(4) Portions of local currency claims on, or unconditionally guaranteed by, non-OECD central governments (including non-OECD central banks), to the extent the bank has liabilities booked in that currency.

(5) Gold bullion held in the bank's own vaults or in another bank's vaults on an allocated basis, to the extent that it is offset by gold bullion liabilities

(6) Federal Reserve Bank stock.

Category 2—20 Percent Risk Weight

(1) Cash items in the process of collection.

(2) All claims (long- and short-term) on, and portions of claims (long- and short-term) guaranteed by, U.S. depository institutions and OECD banks.

(3) Short-term (remaining maturity of one year or less) claims on, and portions of short-term claims guaranteed by, non-OECD banks.

(4) Portions of loans and other claims conditionally guaranteed by the U.S. Treasury, U.S. Government agencies,[1] or central governments in other OECD countries and portions of local currency claims conditionally guaranteed by non-OECD central governments to the extent that the bank has liabilities booked in that currency.

(5) Securities and other claims on, and portions of claims guaranteed by, U.S. Government-*sponsored* agencies.[2]

(6) Portions of loans and other claims (including repurchase agreements) collateralized[3] by securities issued or guaranteed by the U.S. Treasury, U.S. Government agencies, U.S. Government-sponsored agencies or central governments in other OECD countries.

(7) Portions of loans and other claims collateralized[3] by cash on deposit in the lending bank.

(8) General obligation claims on, and portions of claims guaranteed by, the full faith and credit of states or other political subdivisions of OECD countries, including U.S. state and local governments.

(9) Claims on, and portions of claims guaranteed by, official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or a contributing member.

(10) Portions of claims collateralized[3] by securities issued by official multilateral lending institutions or regional development institutions in which the U.S. Government is a shareholder or contributing member.

(11) Privately-issued mortgage-backed securities representing indirect ownership of U.S. Government agency or U.S. Government-sponsored agency securities.

(12) Investments in shares of mutual funds whose portfolios are permitted to hold only assets that qualify for the zero or 20 percent risk categories.

Category 3—50 Percent Risk Weight

(1) Loans fully secured by first liens on one-to-four family residential properties (including certain presold residential construction loans), provided that the loans were approved in accordance with prudent underwriting standards and are not past due 90 days or more or carried in nonaccrual status.

(2) Loans fully secured by first liens on multifamily residential properties that have been prudently underwritten and meet specified requirements with respect to loan-to-value ratio, level of annual net operating income to required debt service, maximum amortization period, minimum original maturity, and demonstrated timely repayment performance.

(3) Certain privately-issued mortgage-backed securities representing indirect ownership of a pool of residential loans that meet the criteria for a 50 percent risk weight.

(4) Revenue bonds or similar obligations, including loans and leases, that are obligations of U.S. state or political subdivisions of the United States or other OECD countries but for which the government entity is committed to repay the debt only out of revenues from the specific projects financed.

(5) Credit equivalent amounts of interest rate and foreign exchange rate related contracts, except for those assigned to a lower risk category.

Category 4—100 Percent Risk Weight

(1) All other claims on private obligors.

(2) Claims on, or guaranteed by, non-OECD banks with a remaining maturity exceeding one year.

(3) Claims on non-OECD central governments that are not included in item 4 of Category 1 or item 3 of Category 2, and all claims on non-OECD state and local governments.

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[1] For the purpose of calculating the risk-based capital ratio, a U.S. Government agency is defined as an instrumentality of the U.S. Government whose obligations are fully and explicitly guaranteed as to the timely repayment of principal and interest by the full faith and credit of the U.S. Government.

[2] For the purpose of calculating the risk-based capital ratio, a U.S. Government-*sponsored* agency is defined as an agency originally established or chartered to serve public purposes specified by the U.S. Congress but whose obligations are not *explicitly* guaranteed by the full faith and credit of the U.S. Government.

[3] Degree of collateralization is determined by current market value.

(4) Obligations issued by U.S. state or local governments or other OECD local governments (including industrial development authorities and similar entities) that are repayable solely by a private party or enterprise.

(5) Premises, plant, and equipment; other fixed assets; and other real estate owned.

(6) Investments in any unconsolidated subsidiaries, joint ventures, or associated companies—if not deducted from capital.

(7) Instruments issued by other banking organizations that qualify as capital.

(8) Claims on commercial firms owned by the U.S. Government or foreign governments.

(9) All other assets, including any intangible assets that are not deducted from capital, and the credit equivalent amounts[4] of off-balance sheet items not assigned to a lower risk category.

TABLE III.—CREDIT CONVERSION FACTORS FOR OFF-BALANCE SHEET ITEMS

100 Percent Conversion Factor

(1) Direct credit substitutes, including general guarantees of indebtedness and guarantee-type instruments, such as standby letters of credit that serve as financial guarantees for, or support the repayment of, loans, securities or commercial letters of credit.

(2) Acquisitions of risk participations in bankers acceptances and in such direct credit substitutes and financial standby letters of credit.

(3) Sale and repurchase agreements and asset sales with recourse, if not already included on the balance sheet.

(4) Forward agreements representing contractual obligations to purchase assets, including financing facilities, with drawdown *certain* at a specified future date.

(5) Securities lent, if the lending bank is exposed to risk of loss.

50 Percent Conversion Factor

(1) Transaction-related contingencies, including bid bonds, performance bonds, warranties, and performance standby letters of credit backing the nonfinancial performance of other parties.

(2) Unused portions of commitments with an original maturity[1] exceeding one year, including underwriting commitments and commercial credit lines.

(3) Revolving underwriting facilities (RUFs), note issuance facilities (NIFs) and other similar arrangements.

20 Percent Conversion Factor

(1) Short-term, self-liquidating, trade-related contingencies, including commercial letters of credit.

Zero Percent Conversion Factor

(1) Unused portions of commitments with an original maturity[1] of one year or less.

(2) Unused portions of commitments (regardless of maturity) which are unconditionally cancelable at any time, provided a separate credit decision is made before each drawing.

Credit Conversion for Interest Rate and Foreign Exchange Rate Related Contracts

The total replacement cost of contracts (obtained by summing the positive mark-to-market values of contracts) is added to a measure of future potential increases in credit exposure. This future potential credit exposure measure is calculated by multiplying the total notional value of contracts by one of the following credit conversion factors, as appropriate:

CONVERSION FACTOR MATRIX

Remaining maturity	Interest rate	Exchange rate and gold	Equity	Precious metals, except gold	Other commodities
One year or less	0.0%	1.0%	6.0%	7.0%	10.0%
More than one year to five years	0.5%	5.0%	8.0%	7.0%	12.0%
More than five years	1.5%	7.5%	10.0%	8.0%	15.0%

No potential exposure is calculated for single currency interest rate contracts on which payments are made based on two floating rate indices (floating/floating or basis swaps); the credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values. In the event a netting contract covers transactions that are normally not included in the risk-based ratio calculation—for example, exchange rate contracts with an original maturity of

[4] For each off-balance sheet item, a conversion factor (see Table III) must be applied to determine the *credit equivalent amount* prior to assigning the off-balance sheet item to a risk weight category.

[1] Remaining maturity may be used until year-end 1990.

fourteen calendar days or less or instruments traded on exchanges that require daily payment of variation margin—an institution may elect to consistently either include or exclude all mark-to-market values of such transactions when determining a net current exposure. Multiple contracts with the same counterparty may be netted for risk-based capital purposes pursuant to section II.E.5. of this appendix.

TABLE IV.—CALCULATION OF CREDIT EQUIVALENT AMOUNTS FOR DERIVATIVE CONTRACTS

Potential exposure	+	Current exposure	=	Credit equivalent amount		Credit equivalent amount
Type of contract (remaining maturity)	Notional principal (dollars)	Conversion factor	Potential exposure (dollars)	Mark-to market value	Current exposure (dollars)	
(1) 120-Day Forward Foreign Exchange	5,000,000	.01	50,000	100,000	100,000	150,000
(2) 4-Year Forward Foreign Exchange ..	6,000,000	.05	300,000	−120,000	0	300,000
(3) 3-Year Single-Currency Fixed/Floating Interest Rate Swap	10,000,000	.005	50,000	200,000	200,000	250,000
(4) 6-Month Oil Swap	10,000,000	.10	1,000,000	−250,000	0	1,000,000
(5) 7-Year Cross-Currency Floating/Floating Interest Rate Swap	20,000,000	.075	1,500,000	−1,500,000	0	1,500,000
Total	.....	.....	2,900,000	.....	300,000	3,200,000

(1) If contracts (1) through (5) above are subject to a qualifying bilateral netting contract, then the following applies:

	Potential future exposure (from above)		Net current exposure*		Credit equivalent amount
(1)	50,000				
(2)	300,000				
(3)	50,000				
(4)	1,000,000				
(5)	1,500,000				
Total	2,900,000	+	0	=	2,900,000

*The total of the mark-to-market values from above is −1,370,000. Since this is a negative amount, the net current exposure is zero.

(2) To recognize the effects of netting on potential future exposure, the following formula applies:

$A_{net}=(0.4\times A_{gross})+0.6(NGR\times A_{gross})$

(3) In the above example:

NGR=0=(0/300,000)

$A_{net}=(0.4\times 2,900,000)+0.6(0\times 2,900,000)$

$A_{net}=1,160,000$

Credit Equivalent Amount: 1,160,000+0=1,160,000

(4) If the net current exposure was a positive amount, for example, $200,000, the credit equivalent amount would be calculated as follows:

NGR=.67=(200,000/300,000)

$A_{net}=(0.4\times 2,900,000)+0.6(.67\times 2,900,000)$

$A_{net}=2,325,800$

Credit Equivalent Amount: 2,325,800+200,000=2,525,800

[54 FR 11509, Mar. 21, 1989, as amended at 55 FR 53147, Dec. 27, 1990; 56 FR 10165, Mar. 11, 1991; 58 FR 6369, Jan. 28, 1993; 58 FR 8219, Feb. 12, 1993; 58 FR 12151, Mar. 3, 1993; 58 FR 60103, Nov. 15, 1993; 59 FR 3784, Jan. 27, 1994; 59 FR 64564, Dec. 15, 1994; 59 FR 66660, 66661, 66666, Dec. 28, 1994; 60 FR 8188, Feb. 13, 1995; 60 FR 15861, Mar. 28, 1995; 60 FR 39232, Aug. 1, 1995; 60 FR 39493, Aug. 2, 1995; 60 FR 45609, Aug. 31, 1995; 60 FR 46183, 46184, Sept. 5, 1995; 60 FR 66045, Dec. 20, 1995; 61 FR 47375, Sept. 6, 1996]

APPENDIX B TO PART 325—STATEMENT OF POLICY ON CAPITAL ADEQUACY

Part 325 of the Federal Deposit Insurance Corporation rules and regulations (12 CFR part 325) sets forth minimum leverage capital requirements for fundamentally sound, well-managed banks having no material or significant financial weaknesses. It also defines capital and sets forth sanctions which

will be used against banks which are in violation of the part 325 regulation. This statement of policy on capital adequacy provides some interpretational and definitional guidance as to how this part 325 regulation will be administered and enforced by the FDIC. This statement of policy also addresses certain aspects of the FDIC's minimum risk-based capital guidelines that are set forth in appendix A to part 325. This statement of policy does not address the prompt corrective action provisions mandated by the Federal Deposit Insurance Corporation Improvement Act of 1991. However, section 38 of the Federal Deposit Insurance Act and subpart B of part 325 provide guidance on the prompt corrective action provisions, which generally apply to institutions with inadequate levels of capital.

I. Enforcement of Minimum Capital Requirements

Section 325.3(b)(1) specifies that FDIC-supervised, state-chartered nonmember commercial and savings banks (or other insured depository institutions making applications to the FDIC that require the FDIC to consider the adequacy of the institutions' capital structure) must maintain a minimum leverage ratio of Tier 1 (or core) capital to total assets of at least 3 percent; however, this minimum only applies to the most highly-rated banks (i.e., those with a composite CAMEL rating of 1 under the Uniform Financial Institutions Rating System established by the Federal Financial Institutions Examination Council) that are not anticipating or experiencing any significant growth. All other state nonmember banks would need to meet a minimum leverage ratio that is at least 100 to 200 basis points above this minimum. That is, in accordance with §325.3(b)(2), an absolute minimum leverage ratio of not less than 4 percent must be maintained by those banks that are not highly-rated or that are anticipating or experiencing significant growth.

In addition to the minimum leverage capital standards, section III of appendix A to part 325 indicates that state nonmember banks generally are expected to maintain a minimum risk-based capital ratio of qualifying total capital to risk-weighted assets of 8 percent by December 31, 1992 (and at least 7.25 percent by December 31, 1990), with at least one-half of that total capital amount consisting of Tier 1 capital.

State nonmember banks (hereinafter referred to as ''banks'') operating with leverage capital ratios below the minimums set forth in part 325 will be deemed to have inadequate capital and will be in violation of the part 325 regulation. Furthermore, banks operating with risk-based capital ratios below the minimums set forth in appendix A to part 325 generally will be deemed to have inadequate capital. Banks failing to meet the minimum leverage and/or risk-based capital ratios normally can expect to have any application submitted to the FDIC denied (if such application requires the FDIC to evaluate the adequacy of the institution's capital structure) and also can expect to be subject to the use of capital directives or other formal enforcement action by the FDIC to increase capital.

Capital adequacy in banks which have capital ratios at or above the minimums will be assessed and enforced based on the following factors (these same criteria will apply to any insured depository institutions making applications to the FDIC and to any other circumstances in which the FDIC is requested or required to evaluate the adequacy of a depository institution's capital structure):

A. Banks Which Are Fundamentally Sound and Well-Managed

The minimum leverage capital ratios set forth in §325.3(b)(2) and the minimum risk-based capital ratios set forth in section III of appendix A to part 325 generally will be viewed as the minimum acceptable capital standards for banks whose overall financial condition is fundamentally sound, which are well-managed and which have no material or significant financial weaknesses. While the FDIC will make this determination in each bank based upon its own condition and specific circumstances, this definition will generally apply to those banks evidencing a level of risk which is no greater than that normally associated with a Composite rating of 1 or 2 under the Uniform Financial Institutions Rating System. Banks meeting this definition which are in compliance with the minimum leverage and risk-based capital ratio standards will not generally be required by the FDIC to raise new capital from external sources.

The FDIC does, however, encourage such banks to maintain capital well above the minimums, particularly those institutions that are anticipating or experiencing significant growth, and will carefully evaluate their earnings and growth trends, dividend policies, capital planning procedures and other factors important to the continuous maintenance of adequate capital. Adverse trends or deficiencies in these areas will be subject to criticism at regular examinations and may be an important factor in the FDIC's action on applications submitted by such banks. In addition, the FDIC's consideration of capital adequacy in banks making applications to the FDIC will also fully examine the expected impact of those applications on the bank's ability to maintain its capital adequacy. In all cases, banks should maintain capital commensurate with the

level and nature of risks, including the volume and severity of adversely classified assets, to which they are exposed.

B. All Other Banks

Banks not meeting the definition set forth in I.A. of this appendix, that is, banks evidencing a level of risk which is at least as great as that normally associated with a Composite rating of 3, 4, or 5 under the Uniform Financial Institutions Rating System, will be required to maintain capital higher than the minimum regulatory requirement and at a level deemed appropriate in relation to the degree of risk within the institution. These higher capital levels will normally be addressed through memorandums of understanding between the FDIC and the bank or, in cases of more pronounced risk, through the use of formal enforcement actions under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

C. Capital Requirements of Primary Regulator

Notwithstanding I.A. and B. of this appendix, all banks (or other depository institutions making applications to the FDIC that require the FDIC to consider the adequacy of the institutions' capital structure) will be expected to meet any capital requirements established by their primary state or federal regulator which exceed the minimum capital requirement set forth in the FDIC's part 325 regulation. In addition, the FDIC will, when establishing capital requirements higher than the minimum set forth in the regulation, consult with an institution's primary state or federal regulator.

II. CAPITAL PLANS

Section 325.4(b) specifies that any bank which has less than its minimum leverage capital requirement is deemed to be engaging in an unsafe or unsound banking practice unless it has submitted, and is in compliance with, a plan approved by the FDIC to increase its Tier 1 leverage capital ratio to such level as the FDIC deems appropriate.

As required under §325.104(a)(1) of this part, a bank must file a written capital restoration plan with the appropriate FDIC regional director within 45 days of the date that the bank receives notice or is deemed to have notice that the bank is undercapitalized, significantly undercapitalized or critically undercapitalized, unless the FDIC notifies the bank in writing that the plan is to be filed within a different period. The amount of time allowed to achieve the minimum leverage capital requirement will be evaluated by the FDIC on a case-by-case basis and will depend on a number of factors, including the viability of the bank and whether it is fundamentally sound and well-managed.

Banks evidencing more than normal levels of risk will normally have their minimum capital requirements established in a formal or informal enforcement proceeding. The time frames for meeting these requirements will be set forth in such actions and will generally require some immediate action on the bank's part to meet its minimum capital requirement. The reasonableness of capital plans submitted by depository institutions in connection with applications as provided for in §325.3(d)(2) will be determined in conjunction with the FDIC's consideration of the application.

III. WRITTEN AGREEMENTS

Section 325.4(c) provides that any insured depository institution with a Tier 1 capital to total assets (leverage) ratio of less than 2 percent must enter into and be in compliance with a written agreement with the FDIC (or with its primary federal regulator with FDIC as a party to the agreement) to increase its Tier 1 leverage capital ratio to such level as the FDIC deems appropriate or may be subject to a section 8(a) termination of insurance action by the FDIC. Except in the very rarest of circumstances, the FDIC will require that such agreements contemplate immediate efforts by the depository institution to acquire the required capital.

A bank which has issued net worth certificates to the FDIC or received approval from the FDIC to defer agricultural loan losses will be considered to be in compliance with this written agreement requirement for so long as it is in compliance with the FDIC requirements set forth in the net worth certificate program and/or agricultural loan loss deferral program, provided that both its board and the FDIC agree that the net worth certificate or agricultural loan loss deferral agreements they enter into or have entered into are written agreements as defined in the part 325 regulation. In addition, a savings association with qualifying supervisory goodwill that is being recognized as Tier 1 capital by the association's primary federal regulator will be allowed to recognize this intangible asset for purposes of calculating core capital under part 325.

The guidance in this section III is not intended to preclude the FDIC from taking section 8(a) or other enforcement action against any institution, regardless of its capital level, if the specific circumstances deem such action to be appropriate.

IV. CAPITAL COMPONENTS

Section 325.2 sets forth the definition of Tier 1 capital for the leverage standard as well as the definitions for the various instruments and accounts which are included therein. Although nonvoting common stock, noncumulative perpetual preferred stock,

and minority interests in consolidated subsidiaries are normally included in Tier 1 capital, voting common stockholders' equity generally will be expected to be the dominant form of Tier 1 capital. Thus, banks should avoid undue reliance on nonvoting equity, preferred stock and minority interests. The following provides some additional guidance with respect to some of the items that affect the calculation of Tier 1 capital.

A. Intangible Assets

The FDIC permits state nonmember banks to record intangible assets on their books and to report the value of such assets in the Consolidated Reports of Condition and Income (''Call Report''). As noted in the instructions for preparation of the Consolidated Reports of Condition and Income (published by the Federal Financial Institutions Examination Council), intangible assets may arise from business combinations accounted for under the purchase method in accordance with Accounting Principles Board Opinion No. 16, as amended, and acquisitions of portions or segments of another institution's business, such as branch offices, mortgage servicing portfolios, and credit card portfolios.

Intangible assets created from such transactions may be booked in accordance with generally accepted accounting principles with one exception. For the purpose of reporting such assets on Call Reports, banks reporting to the FDIC shall amortize such assets over their estimated useful lives or a period not in excess of 15 years, whichever is shorter.

Notwithstanding the authority to report all intangible assets in the Consolidated Reports of Condition and Income, §325(t) of the regulation specifies that mortgage servicing rights and purchased credit card relationships are the only intangible assets which will be allowed as Tier 1 capital.[1] The portion of equity capital represented by other types of intangible assets will be deducted from equity capital and assets in the computation of a bank's Tier 1 capital. Certain of these intangible assets may, however, be recognized for regulatory capital purposes if explicitly approved by the Director of the Division of Supervision as part of the bank's regulatory capital on a specific case basis. These intangibles will be included in regulatory capital under the terms and conditions that are specifically approved by the FDIC.[2]

In certain instances banks may have investments in unconsolidated subsidiaries or joint ventures that have large volumes of intangible assets. In such instances the bank's consolidated statements will reflect an investment in a tangible asset even though such investment will, in fact, be represented by a large volume of intangible assets. In any such situation where this is material, the bank's investment in the unconsolidated subsidiary will be divided into a tangible and an intangible portion based on the percentage of intangible assets to total assets in the subsidiary. The intangible portion of the investment will be treated as if it were an intangible asset on the bank's books in the calculation of Tier 1 capital. However, intangible assets in the form of mortgage servicing rights and purchased credit card relationships, including servicing intangibles held by mortgage banking subsidiaries, are subject to the specific criteria set forth in §325.5(f).

B. Perpetual Preferred Stock

Perpetual preferred stock is defined as preferred stock that does not have a maturity date, that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. Also, pursuant to section 18(i)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1828(i)(1)), a state nonmember bank cannot, without the prior consent of the FDIC, reduce the amount or retire any part of its perferred stock. (This prior consent is also required for the reduction or retirement of

[1] Although intangible assets in the form of mortgage servicing rights and purchased credit card relationships are generally recognized for regulatory capital purposes, the — deduction of part or all of the mortgage servicing rights and purchased credit card relationships may be required if the carrying amounts of these rights are excessive in relation to their market value or the level of the bank's capital accounts. In this regard, mortgage servicing rights and purchased credit card relationships will be recognized for regulatory capital purposes only to the extent the rights meet the conditions, limitations and restrictions described in §325.5(f).

[2] This specific approval must be received in accordance with §325.5(b). In evaluating whether other types of intangibles should be recognized for regulatory capital purposes, the FDIC will accord special attention to the general characteristics of the intangibles, including: (1) The separability of the intangible asset and the ability to sell it separate and apart from the bank or the bulk of the bank's assets, (2) the certainty that a readily identifiable stream of cash flows associated with the intangible asset can hold its value notwithstanding the future prospects of the bank, and (3) the existence of a market of sufficient depth to provide liquidity for the intangible asset. However, pursuant to section 18(n) of the Federal Deposit Insurance Act (12 U.S.C. 1828(n)), specific approval cannot be given for an unidentifiable intangible asset, such as goodwill, if acquired after April 12, 1989.

any part of a state nonmember bank's common stock or capital notes and debentures.)

Noncumulative perpetual preferred stock is generally included in Tier 1 capital. Nonetheless, it is possible for banks to issue preferred stock with a dividend rate which escalates to such a high rate that the terms become so onerous as to effectively force the bank to call the issue (for example, an issue with a low initial rate that is scheduled to escalate to much higher rates in subsequent periods). Preferred stock issues with such onerous terms have much the same characteristics as limited life preferred stock in that the bank would be effectively forced to redeem the issue to avoid performance of the onerous terms. Such instruments may be disallowed as Tier 1 capital and, for risk-based capital purposes, would be included in Tier 2 capital only to the extent that the instruments fall within the limitations applicable to intermediate-term preferred stock. Banks which are contemplating issues bearing terms which may be so characterized are encouraged to submit them to the appropriate FDIC regional office for review prior to issuance. Nothing herein shall prohibit banks from issuing floating rate preferred stock issues where the rate is constant in relation to some outside market or index rate. However, noncumulative floating rate instruments where the rate paid is based in some part on the current credit standing of the bank, and all cumulative preferred stock instruments, are excluded from Tier 1 capital. These instruments are included in Tier 2 capital for risk-based capital purposes in accordance with the limitations set forth in appendix A to part 325.

The FDIC will also require that issues of perpetual preferred stock be consistent with safe and sound banking practices. Issues which would unduly enrich insiders or which contain dividend rates or other terms which are inconsistent with safe and sound banking practices will likely be the subject of appropriate supervisory response from the FDIC. Banks contemplating preferred stock issues which may pose safety and soundness concerns are encouraged to submit such issues to the appropriate FDIC regional office for review prior to sale. Pursuant to §325.5(e), capital instruments that contain or that are subject to any conditions, covenants, terms, restrictions or provisions that are inconsistent with safe and sound banking practices will not qualify as capital under part 325.

C. Other Instruments or Transactions Which Fail to Provide Capital Support

Section 325.5(b) specifies that any capital component or balance sheet entry or account which has characteristics or terms that diminish its contribution to an insured depository institution's ability to absorb losses shall be deducted from capital. An example involves certain types of minority interests in consolidated subsidiaries. Minority interests in consolidated subsidiaries have been included in capital based on the fact that they provide capital support to the risk in the consolidated subsidiaries. Certain transactions have been structured where a bank forms a subsidiary by transferring essentially risk-free or low-risk assets to the subsidiary in exchange for common stock of the subsidiary. The subsidiary then sells preferred stock to third parties.

The preferred stock becomes a minority interest in a consolidated subsidiary but, in effect, represents an essentially risk-free or low-risk investment for the preferred stockholders. This type of minority interest fails to provide any meaningful capital support to the consolidated entity inasmuch as it has a preferred claim on the essentially risk-free or low-risk assets of the subsidiary. In addition, certain minority interests are not substantially equivalent to permanent equity in that the interests must be paid off on specified future dates, or at the option of the holders of the minority interests, or contain other provisions or features that limit the ability of the minority interests to effectively absorb losses. Capital instruments or transactions of this nature which fail to absorb losses or provide meaningful capital support will be deducted from Tier 1 capital.

D. Mandatory Convertible Debt

Mandatory convertible debt securities are subordinated debt instruments that require the issuer to convert such instruments into common or perpetual preferred stock by a date at or before the maturity of the debt instruments. The maturity of these instruments must be 12 years or less and the instruments must also meet the other criteria set forth in appendix A to part 325. Mandatory convertible debt is excluded from Tier 1 capital but, for risk-based capital purposes, is included in Tier 2 capital as a ''hybrid capital instrument.''

So-called ''equity commitment notes,'' which merely require a bank to sell common or perpetual preferred stock during the life of the subordinated debt obligation, are specifically excluded from the definition of mandatory convertible debt securities and are only included in Tier 2 capital under the risk-based capital framework to the extent that they satisfy the requirements and limitations for ''term subordinated debt'' set forth in appendix A to part 325.

V. Analysis of Consolidated Companies

In determining a bank's compliance with its minimum capital requirements the FDIC will, with two exceptions, generally utilize the bank's consolidated statements as defined in the instructions for the preparation

of Consolidated Reports of Condition and Income.

The first exception relates to securities subsidiaries of state nonmember banks which are subject to §337.4 of the FDIC's rules and regulations (12 CFR 337.4). Any subsidiary subject to this section must be a bona fide subsidiary which is adequately capitalized. In addition, §337.4(b)(3) requires that any insured state nonmember bank's investment in such a subsidiary shall not be counted towards the bank's capital. In those instances where the securities subsidiary is consolidated in the bank's Consolidated Report of Condition it will be necessary, for the purpose of calculating the bank's Tier 1 capital, to adjust the Consolidated Report of Condition in such a manner as to reflect the bank's investment in the securities subsidiary on the equity method. In this case, and in those cases where the securities subsidiary has not been consolidated, the investment in the subsidiary will then be deducted from the bank's capital and assets prior to calculation of the bank's Tier 1 capital ratio. (Where deemed appropriate, the FDIC may also consider deducting investments in other subsidiaries, either on a case-by-case basis or, as with securities subsidiaries, based on the general characteristics or functional nature of the subsidiaries.)

The second exception relates to the treatment of subsidiaries of insured banks that are domestic depository institutions such as commercial banks, savings banks, or savings associations. These subsidiaries are not consolidated on a line-by-line basis with the insured bank parent in the bank parent's Consolidated Reports of Condition and Income. Rather, the instructions for these reports provide that bank investments in such depository institution subsidiaries are to be reported on an unconsolidated basis in accordance with the equity method. Since the FDIC believes that the minimum capital requirements should apply to a bank's depository activities in their entirety, regardless of the form that the organization's corporate structure takes, it will be necessary, for the purpose of calculating the bank's Tier 1 leverage and total risk-based capital ratios, to adjust a bank parent's Consolidated Report of Condition to consolidate its domestic depository institution subsidiaries on a line-by-line basis. The financial statements of the subsidiary that are used for this consolidation must be prepared in the same manner as the Consolidated Report of Condition.

The FDIC will, in determining the capital adequacy of a bank which is a member of a bank holding company or chain banking group, consider the degree of leverage and risks undertaken by the parent company or other affiliates. Where the level of risk in a holding company system is no more than normal and the consolidated company is adequately capitalized at all appropriate levels, the FDIC generally will not require additional capital in subsidiary banks under its supervision over and above that which would be required for the subsidiary bank on its own merit. In cases where a holding company or other affiliated banks (or other companies) evidence more than a normal degree of risk (either by virtue of the quality of their assets, the nature of the activities conducted, or other factors) or where the affiliated organizations are inadequately capitalized, the FDIC will consider the potential impact of the additional risk or excess leverage upon an individual bank to determine if such factors will likely result in excessive requirements for dividends, management fees, or other support to the holding company or affiliated organizations which would be detrimental to the bank. Where the excessive risk or leverage in such organizations is determined to be potentially detrimental to the bank's condition or its ability to maintain adequate capital, the FDIC may initiate appropriate supervisory action to limit the bank's ability to support its weaker affiliates and/or require higher than minimum capital ratios in the bank.

VI. Applicability of Part 325 to Savings Associations

Section 325.3(c) indicates that, where the FDIC is required to evaluate the adequacy of any depository institution's (including any savings association's) capital structure in conjunction with an application filed by the institution, the FDIC will not approve the application if the depository institution does not meet the minimum leverage capital requirement set forth in §325.3(b).

Also, §325.4(b) states that, under certain conditions specified in section 8(t) of the Federal Deposit Insurance Act, the FDIC may take section 8(b)(1) and/or 8(c) enforcement action against a savings association that is deemed to be engaged in an unsafe or unsound practice on account of its inadequate capital structure. Section 325.4(c) further specifies that any insured depository institution with a Tier 1 leverage ratio (as defined in part 325) of less than 2 percent is deemed to be operating in an unsafe or unsound condition pursuant to section 8(a) of the Federal Deposit Insurance Act.

In addition, the Office of Thrift Supervision (OTS), as the primary federal regulator of savings associations, has established minimum core capital leverage, tangible capital and risk-based capital requirements for savings associations (12 CFR part 567). In this regard, certain differences exist between the methods used by the OTS to calculate a savings association's capital and the methods set forth by the FDIC in part 325. These differences include, among others, the core capital treatment for investments in subsidiaries and for certain intangible assets.

In determining whether a savings association's application should be approved pursuant to §325.3(c), or whether an unsafe or unsound practice or condition exists pursuant to §§325.4(b) and 325.4(c), the FDIC will consider the extent of the savings association's capital as determined in accordance with part 325. However, the FDIC will also consider the extent to which a savings association is in compliance with (a) the minimum capital requirements set forth by the OTS, (b) any related capital plans for meeting the minimum capital requirements approved by the OTS, and/or (c) any other criteria deemed by the FDIC as appropriate based on the association's specific circumstances.

[56 FR 10166, Mar. 11, 1991, as amended at 58 FR 6369, Jan. 28, 1993; 58 FR 8219, Feb. 12, 1993; 58 FR 60103, Nov. 15, 1993; 60 FR 39232, Aug. 1, 1995]

APPENDIX C TO PART 325—RISK-BASED CAPITAL FOR STATE NON-MEMBER BANKS; MARKET RISK

Section 1. Purpose, Applicability, Scope, and Effective Date

(a) *Purpose.* The purpose of this appendix is to ensure that banks with significant exposure to market risk maintain adequate capital to support that exposure.[1] This appendix supplements and adjusts the risk-based capital ratio calculations under appendix A of this part with respect to those banks.

(b) *Applicability.* (1) This appendix applies to any insured state nonmember bank whose trading activity[2] (on a worldwide consolidated basis) equals:

(i) 10 percent or more of total assets;[3] or

(ii) $1 billion or more.

(2) The FDIC may additionally apply this appendix to any insured state nonmember bank if the FDIC deems it necessary or appropriate for safe and sound banking practices.

(3) The FDIC may exclude an insured state nonmember bank otherwise meeting the criteria of paragraph (b)(1) of this section from coverage under this appendix if it determines the bank meets such criteria as a consequence of accounting, operational, or similar considerations, and the FDIC deems it consistent with safe and sound banking practices.

(c) *Scope.* The capital requirements of this appendix support market risk associated with a bank's covered positions.

(d) *Effective date.* This appendix is effective as of January 1, 1997. Compliance is not mandatory until January 1, 1998. Subject to supervisory approval, a bank may opt to comply with this appendix as early as January 1, 1997.[4]

Section 2. Definitions

For purposes of this appendix, the following definitions apply:

(a) *Covered positions* means all positions in a bank's trading account, and all foreign exchange[5] and commodity positions, whether or not in the trading account.[6] Positions include on-balance-sheet assets and liabilities and off-balance-sheet items. Securities subject to repurchase and lending agreements are included as if they are still owned by the lender.

(b) *Market risk* means the risk of loss resulting from movements in market prices. Market risk consists of general market risk and specific risk components.

(1) *General market risk* means changes in the market value of covered positions resulting from broad market movements, such as changes in the general level of interest rates, equity prices, foreign exchange rates, or commodity prices.

(2) *Specific risk* means changes in the market value of specific positions due to factors other than broad market movements and includes such risk as the credit risk of an instrument's issuer.

(c) *Tier 1* and *Tier 2 capital* are defined in appendix A of this part.

(d) *Tier 3 capital* is subordinated debt that is unsecured; is fully paid up; has an original maturity of at least two years; is not redeemable before maturity without prior approval by the FDIC; includes a lock-in clause precluding payment of either interest or principal (even at maturity) if the payment would cause the issuing bank's risk-based capital ratio to fall or remain below the minimum required under appendix A of this part; and does not contain and is not covered by

[1] This appendix is based on a framework developed jointly by supervisory authorities from the countries represented on the Basle Committee on Banking Supervision and endorsed by the Group of Ten Central Bank Governors. The framework is described in a Basle Committee paper entitled ''Amendment to the Capital Accord to Incorporate Market Risk,'' January 1996.

[2] Trading activity means the gross sum of trading assets and liabilities as reported in the bank's most recent quarterly Consolidated Report of Condition and Income (Call Report).

[3] Total assets means quarter-end total assets as reported in the bank's most recent Call Report.

[4] A bank that voluntarily complies with the final rule prior to January 1, 1998, must comply with all of its provisions.

[5] Subject to FDIC review, a bank may exclude structural positions in foreign currencies from its covered positions.

[6] The term trading account is defined in the instructions to the Call Report.

any covenants, terms, or restrictions that are inconsistent with safe and sound banking practices.

(e) *Value-at-risk (VAR)* means the estimate of the maximum amount that the value of covered positions could decline during a fixed holding period within a stated confidence level, measured in accordance with section 4 of this appendix.

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations.

(a) *Risk-based capital ratio denominator.* A bank subject to this appendix shall calculate its risk-based capital ratio denominator as follows:

(1) *Adjusted risk-weighted assets.* Calculate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amounts of all covered positions (except foreign exchange positions outside the trading account and over-the-counter derivative positions).[7]

(2) *Measure for market risk.* Calculate the measure for market risk, which equals the sum of the VAR-based capital charge, the specific risk add-on (if any), and the capital charge for de minimis exposures (if any).

(i) *VAR-based capital charge.* The VAR-based capital charge equals the higher of:

(A) The previous day's VAR measure; or

(B) The average of the daily VAR measures for each of the preceding 60 business days multiplied by three, except as provided in section 4(e) of this appendix;

(ii) *Specific risk add-on.* The specific risk add-on is calculated in accordance with section 5 of this appendix; and

(iii) *Capital charge for de minimis exposure.* The capital charge for de minimis exposure is calculated in accordance with section 4(a) of this appendix.

(3) *Market risk equivalent assets.* Calculate market risk equivalent assets by multiplying the measure for market risk (as calculated in paragraph (a)(2) of this section) by 12.5.

(4) *Denominator calculation.* Add market risk equivalent assets (as calculated in paragraph (a)(3) of this section) to adjusted risk-weighted assets (as calculated in paragraph (a)(1) of this section). The resulting sum is the bank's risk-based capital ratio denominator.

(b) *Risk-based capital ratio numerator.* A bank subject to this appendix shall calculate its risk-based capital ratio numerator by allocating capital as follows:

(1) *Credit risk allocation.* Allocate Tier 1 and Tier 2 capital equal to 8.0 percent of adjusted risk-weighted assets (as calculated in paragraph (a)(1) of this section).[8]

(2) *Market risk allocation.* Allocate Tier 1, Tier 2, and Tier 3 capital equal to the measure for market risk as calculated in paragraph (a)(2) of this section. The sum of Tier 2 and Tier 3 capital allocated for market risk must not exceed 250 percent of Tier 1 capital allocated for market risk. (This requirement means that Tier 1 capital allocated in this paragraph (b)(2) must equal at least 28.6 percent of the measure for market risk.)

(3) *Restrictions.* (i) The sum of Tier 2 capital (both allocated and excess) and Tier 3 capital (allocated in paragraph (b)(2) of this section) may not exceed 100 percent of Tier 1 capital (both allocated and excess).[9]

(ii) Term subordinated debt (and intermediate-term preferred stock and related surplus) included in Tier 2 capital (both allocated and excess) may not exceed 50 percent of Tier 1 capital (both allocated and excess).

(4) *Numerator calculation.* Add Tier 1 capital (both allocated and excess), Tier 2 capital (both allocated and excess), and Tier 3 capital (allocated under paragraph (b)(2) of this section). The resulting sum is the bank's risk-based capital ratio numerator.

Section 4. Internal Models

(a) *General.* For risk-based capital purposes, a bank subject to this appendix must use its internal model to measure its daily VAR, in accordance with the requirements of this section.[10] The FDIC may permit a bank to use alternative techniques to measure the market risk of de minimis exposures so long

[7] Foreign exchange positions outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in adjusted risk weighted assets as determined in appendix A of this part.

[8] A bank may not allocate Tier 3 capital to support credit risk (as calculated under appendix A of this part).

[9] Excess Tier 1 capital means Tier 1 capital that has not been allocated in paragraphs (b)(1) and (b)(2) of this section. Excess Tier 2 capital means Tier 2 capital that has not been allocated in paragraph (b)(1) and (b)(2) of this section, subject to the restrictions in paragraph (b)(3) of this section.

[10] A bank's internal model may use any generally accepted measurement techniques, such as variance-covariance models, historical simulations, or Monte Carlo simulations. However, the level of sophistication and accuracy of a bank's internal model must be commensurate with the nature and size of its covered positions. A bank that modifies its existing modeling procedures to comply with the requirements of this appendix for risk-based capital purposes should, nonetheless, continue to use the internal model it considers most appropriate in evaluating risks for other purposes.

as the techniques adequately measure associated market risk.

(b) *Qualitative requirements.* A bank subject to this appendix must have a risk management system that meets the following minimum qualitative requirements:

(1) The bank must have a risk control unit that reports directly to senior management and is independent from business trading units.

(2) The bank's internal risk measurement model must be integrated into the daily management process.

(3) The bank's policies and procedures must identify, and the bank must conduct, appropriate stress tests and backtests.[11] The bank's policies and procedures must identify the procedures to follow in response to the results of such tests.

(4) The bank must conduct independent reviews of its risk measurement and risk management systems at least annually.

(c) *Market risk factors.* The bank's internal model must use risk factors sufficient to measure the market risk inherent in all covered positions. The risk factors must address interest rate risk,[12] equity price risk, foreign exchange rate risk, and commodity price risk.

(d) *Quantitative requirements.* For regulatory capital purposes, VAR measures must meet the following quantitative requirements:

(1) The VAR measures must be calculated on a daily basis using a 99 percent, one-tailed confidence level with a price shock equivalent to a ten-business day movement in rates and prices. In order to calculate VAR measures based on a ten-day price shock, the bank may either calculate ten-day figures directly or convert VAR figures based on holding periods other than ten days to the equivalent of a ten-day holding period (for instance, by multiplying a one-day VAR measure by the square root of ten).

(2) The VAR measures must be based on an historical observation period (or effective observation period for a bank using a weighting scheme or other similar method) of at least one year. The bank must update data sets at least once every three months or more frequently as market conditions warrant.

(3) The VAR measures must include the risks arising from the non-linear price characteristics of options positions and the sensitivity of the market value of the positions to changes in the volatility of the underlying rates or prices. A bank with a large or complex options portfolio must measure the volatility of options positions by different maturities.

(4) The VAR measures may incorporate empirical correlations within and across risk categories, provided that the bank's process for measuring correlations is sound. In the event that the VAR measures do not incorporate empirical correlations across risk categories, then the bank must add the separate VAR measures for the four major risk categories to determine its aggregate VAR measure.

(e) *Backtesting.* (1) Beginning one year after a bank starts to comply with this appendix, a bank must conduct backtesting by comparing each of its most recent 250 business days' actual net trading profit or loss[13] with the corresponding daily VAR measures generated for internal risk measurement purposes and calibrated to a one-day holding period and a 99 percent, one-tailed confidence level.

(2) Once each quarter, the bank must identify the number of exceptions, that is, the number of business days for which the magnitude of the actual daily net trading loss, if any, exceeds the corresponding daily VAR measure.

(3) A bank must use the multiplication factor indicated in Table 1 of this appendix in determining its capital charge for market risk under section 3(a)(2)(i)(B) of this appendix until it obtains the next quarter's backtesting results, unless the FDIC determines that a different adjustment or other action is appropriate.

TABLE 1.—MULTIPLICATION FACTOR BASED ON RESULTS OF BACKTESTING

Number of exceptions	Multiplication factor
4 or fewer	3.00
5	3.40
6	3.50
7	3.65
8	3.75
9	3.85
10 or more	4.00

[11] Stress tests provide information about the impact of adverse market events on a bank's covered positions. Backtests provide information about the accuracy of an internal model by comparing a bank's daily VAR measures to its corresponding daily trading profits and losses.

[12] For material exposures in the major currencies and markets, modeling techniques must capture spread risk and must incorporate enough segments of the yield curve—at least six—to capture differences in volatility and less than perfect correlation of rates along the yield curve.

[13] Actual net trading profits and losses typically include such things as realized and unrealized gains and losses on portfolio positions as well as fee income and commissions associated with trading activities.

Section 5. Specific Risk

(a) *Specific risk add-on.* For purposes of section 3(a)(2)(ii) of this appendix, a bank's specific risk add-on equals the standard specific risk capital charge calculated under paragraph (c) of this section. If, however, a bank can demonstrate to the FDIC that its internal model measures the specific risk of covered debt and/or equity positions and that those measures are included in the VAR-based capital charge in section 3(a)(2)(i) of this appendix, then the bank may reduce or eliminate its specific risk add-on under this section. The determination as to whether a model incorporates specific risk must be made separately for covered debt and equity positions.

(1) If a model includes the specific risk of covered debt positions but not covered equity positions (or vice versa), then the bank can reduce its specific risk charge for the included positions under paragraph (b) of this section. The specific risk charge for the positions not included equals the standard specific risk capital charge under paragraph (c) of this section.

(2) If a model addresses the specific risk of both covered debt and equity positions, then the bank can reduce its specific risk charge for both covered debt and equity positions under paragraph (b) of this section. In this case, the comparison described in paragraph (b) of this section must be based on the total VAR-based figure for the specific risk of debt and equity positions, taking into account any correlations that are built into the model.

(b) *VAR-based specific risk capital charge.* In all cases where a bank measures specific risk in its internal model, the total capital charge for specific risk (i.e., the VAR-based specific risk capital charge plus the specific risk add-on) must equal at least 50 percent of the standard specific risk capital charge (this amount is the minimum specific risk charge).

(1) If the portion of a bank's VAR measure that is attributable to specific risk (multiplied by the bank's multiplication factor if required in section 3(a)(2) of this appendix) is greater than or equal to the minimum specific risk charge, then the bank has no specific risk add-on and its capital charge for specific risk is the portion included in the VAR measure.

(2) If the portion of a bank's VAR measure that is attributable to specific risk (multiplied by the bank's multiplication factor if required in section 3(a)(2) of this appendix) is less than the minimum specific risk charge, then the bank's specific risk add-on is the difference between the minimum specific risk charge and the specific risk portion of the VAR measure (multiplied by the bank's multiplication factor if required in section 3(a)(2) of this appendix).

(c) *Standard specific risk capital charge.* The standard specific risk capital charge equals the sum of the components for covered debt and equity positions as follows:

(1) *Covered debt positions.* (i) For purposes of this section 5, covered debt positions means fixed-rate or floating-rate debt instruments located in the trading account and instruments located in the trading account with values that react primarily to changes in interest rates, including certain non-convertible preferred stock, convertible bonds, and instruments subject to repurchase and lending agreements. Also included are derivatives (including written and purchased options) for which the underlying instrument is a covered debt instrument that is subject to a non-zero specific risk capital charge.

(A) For covered debt positions that are derivatives, a bank must risk-weight (as described in paragraph (c)(1)(iii) of this section) the market value of the effective notional amount of the underlying debt instrument or index portfolio. Swaps must be included as the notional position in the underlying debt instrument or index portfolio, with a receiving side treated as a long position and a paying side treated as a short position; and

(B) For covered debt positions that are options, whether long or short, a bank must risk-weight (as described in paragraph (c)(1)(iii) of this section) the market value of the effective notional amount of the underlying debt instrument or index multiplied by the option's delta.

(ii) A bank may net long and short covered debt positions (including derivatives) in identical debt issues or indices.

(iii) A bank must multiply the absolute value of the current market value of each net long or short covered debt position by the appropriate specific risk weighting factor indicated in Table 2 of this appendix. The specific risk capital charge component for covered debt positions is the sum of the weighted values.

TABLE 2.—SPECIFIC RISK WEIGHTING FACTORS FOR COVERED DEBT POSITIONS

Category	Remaining maturity (contractual)	Weighting factor (in percent)
Government	N/A	0.00
Qualifying	6 months or less	0.25
	Over 6 months to 24 months.	1.00
	Over 24 months	1.60
Other	N/A	8.00

(A) The *government* category includes all debt instruments of central governments of

OECD-based countries[14] including bonds, Treasury bills, and other short-term instruments, as well as local currency instruments of non-OECD central governments to the extent the bank has liabilities booked in that currency.

(B) The *qualifying* category includes debt instruments of U.S. government-sponsored agencies, general obligation debt instruments issued by states and other political subdivisions of OECD-based countries, multilateral development banks, and debt instruments issued by U.S. depository institutions or OECD-banks that do not qualify as capital of the issuing institution.[15] This category also includes other debt instruments, including corporate debt and revenue instruments issued by states and other political subdivisions of OECD countries, that are:

(*1*) Rated investment-grade by at least two nationally recognized credit rating services;

(*2*) Rated investment-grade by one nationally recognized credit rating agency and not rated less than investment-grade by any other credit rating agency; or

(*3*) Unrated, but deemed to be of comparable investment quality by the reporting bank and the issuer has instruments listed on a recognized stock exchange, subject to review by the FDIC.

(C) The *other* category includes debt instruments that are not included in the government or qualifying categories.

(2) *Covered equity positions.* (i) For purposes of this section 5, covered equity positions means equity instruments located in the trading account and instruments located in the trading account with values that react primarily to changes in equity prices, including voting or non-voting common stock, certain convertible bonds, and commitments to buy or sell equity instruments. Also included are derivatives (including written and purchased options) for which the underlying is a covered equity position.

(A) For covered equity positions that are derivatives, a bank must risk weight (as described in paragraph (c)(2)(iii) of this section) the market value of the effective notional amount of the underlying equity instrument or equity portfolio. Swaps must be included as the notional position in the underlying equity instrument or index portfolio, with a receiving side treated as a long position and a paying side treated as a short position; and

(B) For covered equity positions that are options, whether long or short, a bank must risk weight (as described in paragraph (c)(2)(iii) of this section) the market value of the effective notional amount of the underlying equity instrument or index multiplied by the option's delta.

(ii) A bank may net long and short covered equity positions (including derivatives) in identical equity issues or equity indices in the same market.[16]

(iii)(A) A bank must multiply the absolute value of the current market value of each net long or short covered equity position by a risk weighting factor of 8.0 percent, or by 4.0 percent if the equity is held in a portfolio that is both liquid and well-diversified.[17] For covered equity positions that are index contracts comprising a well-diversified portfolio of equity instruments, the net long or short position is multiplied by a risk weighting factor of 2.0 percent.

(B) For covered equity positions from the following futures-related arbitrage strategies, a bank may apply a 2.0 percent risk weighting factor to one side (long or short) of each position with the opposite side exempt from charge, subject to review by the FDIC:

(*1*) Long and short positions in exactly the same index at different dates or in different market centers; or

(*2*) Long and short positions in index contracts at the same date in different but similar indices.

(C) For futures contracts on broadly-based indices that are matched by offsetting positions in a basket of stocks comprising the index, a bank may apply a 2.0 percent risk weighting factor to the futures and stock basket positions (long and short), provided that such trades are deliberately entered into and separately controlled, and that the basket of stocks comprises at least 90 percent of the capitalization of the index.

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[14] Organization for Economic Cooperation and Development (OECD)-based countries is defined in appendix A of this part.

[15] U.S. government-sponsored agencies, multilateral development banks, and OECD banks are defined in appendix A of this part.

[16] A bank may also net positions in depository receipts against an opposite position in the underlying equity or identical equity in different markets, provided that the bank includes the costs of conversion.

[17] A portfolio is liquid and well-diversified if: (1) it is characterized by a limited sensitivity to price changes of any single equity issue or closely related group of equity issues held in the portfolio; (2) the volatility of the portfolio's value is not dominated by the volatility of any individual equity issue or by equity issues from any single industry or economic sector; (3) it contains a large number of individual equity positions, with no single position representing a substantial portion of the portfolio's total market value; and (4) it consists mainly of issues traded on organized exchanges or in well-established over-the-counter markets.

(iv) The specific risk capital charge component for covered equity positions is the sum of the weighted values.

[61 FR 47376, Sept. 6, 1996]

PART 326—MINIMUM SECURITY DEVICES AND PROCEDURES AND BANK SECRECY ACT[1] COMPLIANCE

Subpart A—Minimum Security Procedures

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Subpart B—Procedures for Monitoring Bank Secrecy Act Complianace

326.8 Bank Secrecy Act compliance.

AUTHORITY: 12 U.S.C. 1813, 1815, 1817, 1818, 1819 [Tenth], 1881–1883; 31 U.S.C. 5311–5324.

Subpart A—Minimum Security Procedures

SOURCE: 56 FR 13581, Apr. 3, 1991, unless otherwise noted.

§326.0 Authority, purpose, and scope.

(a) This part is issued by the Federal Deposit Insurance Corporation (''FDIC'') pursuant to section 3 of the Bank Protection Act of 1968 (12 U.S.C. 1882). It applies to insured state banks that are not members of the Federal Reserve System. It requires each bank to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in identifying and apprehending persons who commit such acts.

(b) It is the responsibility of the bank's board of directors to comply with this part and ensure that a written security program for the bank's main office and branches is developed and implemented.

(Approved by the Office of Management and Budget under control number 3064–0095)

[1] In its original form, subchapter II of chapter 53 of title 31 U.S.C., was part of Pub. L. 91–508 which requires recordkeeping for and reporting of currency transactions by banks and others and is commonly known as the *Bank Secrecy Act*.

§326.1 Definitions.

For the purposes of this part—

(a) The term *insured nonmember bank* means any bank, including a foreign bank having a branch the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act, which is not a member of the Federal Reserve System. The term does not include any institution chartered or licensed by the Comptroller of the Currency, any District bank, or any savings association.

(b) The term *banking office* includes any branch of an insured nonmember bank, and, in the case of an insured state nonmember bank, it includes the main office of that bank.

(c) The term *branch* for a bank chartered under the laws of any state of the United States includes any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States, District of Columbia, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Northern Mariana Islands or the Virgin Islands at which deposits are received or checks paid or money lent. In the case of a foreign bank, as defined in 12 CFR 346.1(a), the term *branch* has the meaning given in 12 CFR 346.1(d).

§326.2 Designation of security officer.

Upon the issuance of federal deposit insurance, the board of directors of each insured nonmember bank[2] shall designate a security officer who shall have the authority, subject to the approval of the board of directors, to develop, within a reasonable time, but no later than 180 days, and to administer a written security program for each banking office.

§326.3 Security program.

(a) *Contents of security program.* The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable

[2] The term *board of directors* includes the managing official of an insured branch of a foreign bank for purposes of 12 CFR 326.0–326.4.

securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the bank and that will preserve evidence that may aid in their identification and prosecution; such procedures may include, but are not limited to:

(i) Retaining a record of any robbery, burglary, or larceny committed against the bank;

(ii) Maintaining a camera that records activity in the banking office; and

(iii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a robbery, burglary or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) *Security devices.* Each insured nonmember bank shall have, at a minimum, the following security devices:

(1) A means of protecting cash or other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the banking office;

(3) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary;

(4) Tamper-resistant locks on exterior doors and exterior windows that may be opened; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency or other valuables exposed to robbery, burglary, and larceny;

(iii) The distance of the banking office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the banking office; and

(vi) The physical characteristics of the structure of the banking office and its surroundings.

§ 326.4 Reports.

The security officer for each insured nonmember bank shall report at least annually to the bank's board of directors on the implementation, administration, and effectiveness of the security program.

Subpart B—Procedures for Monitoring Bank Secrecy Act Compliance

§ 326.8 Bank Secrecy Act compliance.

(a) *Purpose.* This subpart is issued to assure that all insured nonmember banks[3] establish and maintain procedures reasonably designed to assure and monitor their compliance with the requirements of subchapter II of chapter 53 of title 31 U.S.C., and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR part 103.

(b) *Compliance procedures.* On or before April 27, 1987, each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31 U.S.C., and the implementing regulations promulgated thereunder by the Department of Treasury at 31 CFR part 103. The compliance program shall be reduced to writing, approved by the board of directors and noted in the minutes.

(c) *Contents of compliance program.* The compliance program shall, at a minimum:

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by bank personnel or by an outside party;

(3) Designate an individual or individuals responsible for coordinating

[3] In regard to foreign banks, the programs and procedures required by § 326.8 need be instituted only at an *insured branch* as defined in 12 CFR 346.1(g) which is a *State branch* as defined in 12 CFR 346.1(f).

and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

(Approved by the Office of Management and Budget under control number 3064–0087)

[52 FR 2860, Jan. 27, 1987, as amended at 53 FR 17917, May 19, 1988]

PART 327—ASSESSMENTS

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APPENDIX A TO SUBPART C OF PART 327—GUIDELINES FOR EXEMPTION OF WEAK INSTITUTIONS

AUTHORITY: 12 U.S.C. 1441, 1441b, 1813, 1815, 1817–1819; Deposit Insurance Funds Act of 1996, Pub. L. 104–208, 110 Stat. 3009 *et seq.*

SOURCE: 54 FR 51374, Dec. 15, 1989, unless otherwise noted.

Subpart A—In General

§327.1 Purpose and scope.

(a) *Scope.* This part 327 applies to any insured depository institution, including any insured branch of a foreign bank.

(b) *Purpose.* (1) Except as specified in paragraph (b)(2) of this section, this part 327 sets forth the rules for:

(i) The time and manner of filing certified statements by insured depository institutions;

(ii) The time and manner of payment of the semiannual assessments by such institutions; and

(iii) The payment of assessments by depository institutions whose insured status has terminated.

(2) Deductions from the assessment base of an insured branch of a foreign bank are stated in part 346 of this chapter.

§327.2 Certified statements.

(a) *Required.* Each insured depository institution shall file a certified statement during each semiannual period.

(b) *Time of filing.* Certified statements for any semiannual period must be filed no later than the second-quarterly payment date specified in §327.3(d)(2). Certified statements postmarked on or before such date are deemed to be timely filed.

(c) *Form.* The Corporation will provide to each insured depository institution a certified statement form showing the amount and computation of the institution's semiannual assessment. The president of the insured depository institution, or such other officer as the institution's board of directors or trustees may designate, shall review the information shown on the form.

(d) *Certification*—(1) *Form accepted.* If such officer agrees that to the best of his or her knowledge and belief the information shown on the certified statement form is true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued thereunder, the officer shall so certify.

(2) *Form amended*—(i) *In general.* If such officer determines that to the best of his or her knowledge and belief the information shown on the certified statement form is not true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued thereunder, the officer shall make such amendments to the information as he or she believes

necessary. The officer shall certify that to the best of his or her knowledge and belief the information shown on the form, as so amended, is true, correct and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued thereunder.

(ii) *Request for revision.* The certification and filing of an amended form under paragraph (d)(2) of this section does not constitute a request for revision by the Corporation of the information shown on the form. Any such request to the Corporation for revision of the information shown on the form shall be submitted separately from the certified statement and in accordance with the provisions of § 327.3(h).

(iii) *Rate multiplier.* The rate multiplier shown on the certified statement form shall be amended only if it is inconsistent with the assessment risk classification assigned to the institution in writing by the Corporation for the current semiannual period pursuant to § 327.4(a). Agreement with the rate multiplier shall not be deemed to constitute agreement with the assessment risk classification assigned.

[59 FR 67160, Dec. 29, 1994]

§ 327.3 Payment of semiannual assessments.

(a) *Required*—(1) *In general.* Except as provided in paragraph (b) of this section, each insured depository institution shall pay to the Corporation, in two quarterly payments, a semiannual assessment determined in accordance with this part 327.

(2) *Notice of designated deposit account.* For the purpose of making such payments, each insured depository institution shall designate a deposit account for direct debit by the Corporation. No later than 30 days prior to the next payment date specified in paragraphs (c)(2) and (d)(2) of this section, each institution shall provide written notice to the Corporation of the account designated, including all information and authorizations needed by the Corporation for direct debit of the account. After the initial notice of the designated account, no further notice is required unless the institution designates a different account for assessment debit by the Corporation, in which case the requirements of the preceding sentence apply.

(b) *Newly insured institutions.* A newly insured institution shall not be required to pay an assessment for the semiannual period during which it becomes an insured institution. For the semiannual period following the period during which it becomes an insured institution, it shall pay its full semiannual assessment at the time and in the manner provided for in paragraph (d) of this section, in an amount that is the product of its assessment base for the prior semiannual period, as provided for in § 327.5(c), multiplied by one-half of the annual assessment rate corresponding to the assessment risk classification assigned to the institution pursuant to § 327.4(a). For the purpose of making such payment, the institution shall provide to the Corporation no later than the payment date specified in paragraph (d)(2) of this section the notice required by paragraph (a)(2) of this section.

(c) *First-quarterly payment*—(1) *Invoice.* Except in the case of invoices for the first quarterly payment for the first semiannual period of 1997, no later than 30 days prior to the payment date specified in paragraph (c)(2) of this section, the Corporation will provide to each insured depository institution an invoice showing the amount of the assessment payment due from the institution for the first quarter of the upcoming semiannual period, and the computation of that amount. Subject to paragraph (g) of this section and to subpart B of this part, the invoiced amount shall be the product of the following: The assessment base of the institution for the preceding September 30 (for the semiannual period beginning January 1) or March 31 (for the semiannual period beginning July 1) computed in accordance with § 327.5; multiplied by one-quarter of the annual assessment rate corresponding to the assessment risk classification assigned to the institution pursuant to § 327.4(a).

(2) *Payment date and manner.* Except as provided in paragraphs (c)(3) and (j) of this section, the Corporation will cause the amount stated in the applicable invoice to be directly debited on the appropriate regular payment date from the deposit account designated by

the insured depository institution for that purpose, as follows:

(i) In the case of the first quarterly payment for a semiannual period that begins on January 1, the regular payment date is January 2; and

(ii) In the case of the first quarterly payment for a semiannual period that begins on July 1, the regular payment date is the preceding June 30.

(3) *Alternate payment date*—(i) *Election.* An insured depository institution may elect to pay the first quarterly payment for a semiannual period that begins on January 1 of a current year on the alternate payment date. The alternate payment date is December 30 of the prior year.

(ii) *Certification.* (A) In order to elect the alternate payment date with respect to a current semiannual period, an institution must so certify in writing in advance. In order for the election to be effective with respect to the current semiannual period, the Corporation must receive the certification no later than the prior November 1.

(B) The certification shall be made on a pre-printed form provided by the Corporation. The form shall be signed by the institution's chief financial officer or such other officer as the institution's board of directors may designate for that purpose. The form shall be sent to the attention of the Chief of the Assessment Operations Section of the Corporation's Division of Finance. An institution may obtain the form from the Corporation's Division of Finance.

(C) The election of the alternate payment date shall be effective with respect to the semiannual period specified in the certification and thereafter, until terminated.

(iii) *Termination.* (A) An insured depository institution may terminate its election of the alternate payment date, and thereby revert to the regular payment date, by so certifying in writing to the Corporation in advance. In order for the termination to be effective for a current semiannual period, the Corporation must receive the termination certification no later than the prior November 1.

(B) The termination certification shall be made on a pre-printed form provided by the Corporation. The form shall be signed by the institution's chief financial officer or such other officer as the institution's board of directors may designate for that purpose. The form shall be sent to the attention of the Chief of the Assessment Operations Section of the Corporation's Division of Finance. An institution may obtain the form from the Corporation's Division of Finance.

(C) The termination shall be permanent, except that an institution that has terminated an election may make a new election under paragraph (c)(3)(i) of this section.

(iv) *Manner of payment.* Except as provided in paragraph (j) of this section, if an insured depository institution elects the alternate payment date, the Corporation will cause the amount stated in the applicable invoice to be directly debited on the alternate payment date from the deposit account designated by the insured depository institution for that purpose.

(d) *Second-quarterly payment*—(1) *Invoice.* No later than 30 days prior to the payment date specified in paragraph (d)(2) of this section, the Corporation will provide to each insured depository institution an invoice showing the amount of the assessment payment due from the institution for the second quarter of that semiannual period, and the computation of that amount. Subject to paragraph (g) of this section and to subpart B of this part, the invoiced amount shall be the product of the following: The assessment base of the institution for the preceding December 31 (for the semiannual period beginning January 1) or June 30 (for the semiannual period beginning July 1) computed in accordance with § 327.5; multiplied by one-quarter of the annual assessment rate corresponding to the assessment risk classification assigned to the institution pursuant to § 327.4(a).

(2) Except as provided in paragraph (j) of this section, the Corporation will cause the amount stated in the applicable invoice to be directly debited on the appropriate regular payment date from the deposit account designated by the insured depository institution for that purpose, as follows:

(i) In the case of the second quarterly payment for a semiannual period that begins on January 1, the regular payment date is March 30; and

(ii) In the case of the second quarterly payment for a semiannual period that begins on July 1, the regular payment date is September 30.

(e) *Necessary action, sufficient funding by institution.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit assessments from the insured depository institution's designated deposit account. Each insured depository institution shall, prior to each payment date indicated in paragraphs (c)(2), (c)(3)(i), and (d)(2) of this section, ensure that funds in an amount at least equal to the invoiced amount (or twice the invoiced amount if the insured depository institution has elected the doubled-payment option pursuant to paragraph (j) of this section) are available in the designated account for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the assessment.

(f) *Business days.* If a payment date specified in paragraph (c)(2)(i) falls on a date that is not a business day, the applicable date shall be the following business day. If a payment date specified in paragraph (c)(1), (c)(2)(ii), (c)(3)(i), or (d)(2) of this section falls on a date that is not a business day, the applicable date shall be the previous business day.

(g) *Payment adjustments in succeeding quarters.* The quarterly assessment invoices provided by the Corporation may reflect adjustments, initiated by the Corporation or an institution, resulting from such factors as amendments to prior quarterly reports of condition, retroactive revision of the institution's assessment risk classification, and revision of the Corporation's assessment computations for prior quarters.

(h) *Request for revision of computation of quarterly assessment payment*—(1) *In general.* An institution may submit a request for revision of the computation of the institution's quarterly assessment payment as shown on the quarterly invoice. Such revision may be requested in the following circumstances:

(i) The institution disagrees with the computation of the assessment base as stated on the invoice;

(ii) The institution determines that the rate multiplier applied by the Corporation is inconsistent with the assessment risk classification assigned to the institution in writing by the Corporation for the semiannual period for which the payment is due; or

(iii) The institution believes that the invoice does not fully or accurately reflect adjustments provided for in paragraph (g) of this section.

(2) *Inapplicability.* This paragraph (h) is not applicable to requests for review of an institution's assessment risk classification, which are covered by § 327.4(d).

(3) *Requirements.* Any such request for revision must be submitted within 60 days of the date of the quarterly assessment invoice for which revision is requested, except that requests for revision resulting from detection by the institution of an error or omission for which the institution files an amendment to its quarterly report of condition must be submitted within 60 days of the filing date of the amendment to the quarterly report of condition. The request for revision shall be submitted to the Chief of the Assessment Operations Section and shall provide documentation sufficient to support the revision sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the Corporation's request for additional information. Any institution submitting a timely request for revision will receive written response from the Corporations's Chief Financial Officer (or his or her designee) within 60 days of receipt by the Corporation of the request for revision or, if additional information has been requested by the Corporation, within 60 days of receipt of the additional information. Whenever feasible, the response will notify the institution of the determination of the Chief Financial Officer (or designee) as to whether the requested revision is warranted. In all instances in which a timely request for revision is submitted, the Chief Financial Officer

(or designee) will make a determination on the request as promptly as possible and notify the institution in writing of the determination.

(i) *Assessment notice not received.* Any institution that has not received an assessment invoice for any quarterly payment by the fifteenth day of the month in which the quarterly payment is due shall promptly notify the Corporation. Failure to provide prompt notice to the Corporation shall not affect the institution's obligation to make full and timely assessment payment. Unless otherwise directed by the Corporation, the institution shall preliminarily pay the amount shown on its assessment invoice for the preceding quarter, subject to subsequent correction.

(j) *Doubled-payment option*—(1) *Election.* In the case of a quarterly payment to be made on March 30, on June 30, on September 30, or on the alternate payment date, an insured depository institution may elect to pay twice the amount of such quarterly payment.

(2) *Certification.* (i) In order to elect the doubled-payment option with respect to a selected payment date, an institution must so certify in writing to the Corporation in advance. In order for the election to be effective, the Corporation must receive the certification by the following dates: in the case of a quarterly payment to be made on March 30, June 30, or September 30, the Corporation must receive the certification no later than the prior February 1, May 1, or August 1, respectively; in the case of a quarterly payment to be made on the alternate payment date, the Corporation must receive the certification by the prior November 1.

(ii) The certification shall be made on a pre-printed form provided by the Corporation. The form shall be signed by the institution's chief financial officer or such other officer as the institution's board of directors may designate for that purpose. The form shall be sent to the attention of the Chief of the Assessment Operations Section of the Corporation's Division of Finance. An institution may obtain the form from the Corporation's Division of Finance.

(iii) The election shall be effective with respect to the selected quarterly payment for the year specified in the certification and with respect to subsequent quarterly payments made on the selected payment date in subsequent years, until the election is terminated.

(3) *Termination.* (i) An insured depository institution may terminate its election of the doubled-payment option for a selected payment date by so certifying in writing to the Corporation in advance. In order for the termination to be effective, the Corporation must receive the termination certification by the following dates: In the case of a quarterly payment to be made on March 30, June 30, or September 30, the Corporation must receive the termination certification no later than the prior February 1, May 1, or August 1, respectively; in the case of a quarterly payment to be made on the alternate payment date, the Corporation must receive the termination certification by the prior November 1.

(ii) The termination certification shall be made on a pre-printed form provided by the Corporation. The form shall be signed by the institution's chief financial officer or such other officer as the institution's board of directors may designate for that purpose. The form shall be sent to the attention of the Chief of the Assessment Operations Section of the Corporation's Division of Finance. An institution may obtain the form from the Corporation's Division of Finance.

(iii) The termination shall be permanent, except that an institution that has terminated its election of the doubled-payment option for a selected payment date may make a new election.

(4) *Manner of payment.* If an insured depository institution elects the doubled-payment option for a selected payment date, the Corporation will cause an amount equal to twice the amount stated in the applicable invoice to be directly debited on the selected payment date from the deposit account designated by the insured depository institution for that purpose.

[59 FR 67161, Dec. 29, 1994, as amended at 60 FR 50407, Sept. 29, 1995; 61 FR 67696, Dec. 24, 1996]

§327.4 Annual assessment rate.

(a) *Assessment risk classification.* For the purpose of determining the annual assessment rate for insured depository

institutions under § 327.9, each insured depository institution will be assigned an ''assessment risk classification''. Notice of the assessment risk classification applicable to a particular semiannual period will be provided to the institution with the first-quarterly invoice provided pursuant to § 327.3(c)(1). Each institution's assessment risk classification, which will be composed of a group and a subgroup assignment, will be based on the following capital and supervisory factors:

(1) *Capital factors.* Institutions will be assigned to one of the following three capital groups on the basis of data reported in the institution's Report of Income and Condition, Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report containing the necessary capital data, for the report date that is closest to the last day of the seventh month preceding the current semiannual period.

(i) *Well capitalized.* For assessment risk classification purposes, the short-form designation for this group is ''1''.

(A) Except as provided in paragraph (a)(1)(i)(B) of this section, this group consists of institutions satisfying each of the following capital ratio standards: Total risk-based ratio, 10.0 percent or greater; Tier 1 risk-based ratio, 6.0 percent or greater; and Tier 1 leverage ratio, 5.0 or greater. New insured depository institutions coming into existence after the report date specified in paragraph (a)(1) of this section will be included in this group for the first semiannual period for which they are required to pay assessments. For the purpose of computing the ratios referred to in this paragraph (a)(1)(i)(A) for the second semiannual period of 1997, each such ratio shall be computed for an institution as if the institution had retained the funds that the institution disbursed in payment of the special assessment prescribed by § 329.41(a).

(B) For purposes of assessment risk classification, an insured branch of a foreign bank will be deemed to be ''well capitalized'' if the insured branch:

(*1*) Maintains the pledge of assets required under 12 CFR 346.19; and

(*2*) Maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (a)(1) of this section.

(ii) *Adequately capitalized.* For assessment risk classification purposes, the short-form designation for this group is ''2''.

(A) Except as provided in paragraph (a)(1)(ii)(B) of this section, this group consists of institutions that do not satisfy the standards of ''well capitalized'' under this paragraph but which satisfy each of the following capital ratio standards: Total risk-based ratio, 8.0 percent or greater; Tier 1 risk-based ratio, 4.0 percent or greater; and Tier 1 leverage ratio, 4.0 percent or greater. For the purpose of computing the ratios referred to in this paragraph (a)(1)(ii)(A) for the second semiannual period of 1997, each such ratio shall be computed for an institution as if the institution had retained the funds that the institution disbursed in payment of the special assessment prescribed by § 327.41(a).

(B) For purposes of assessment risk classification, an insured branch of a foreign bank will be deemed to be ''adequately capitalized'' if the insured branch:

(*1*) Maintains the pledge of assets required under 12 CFR 346.19;

(*2*) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (a)(1) of this section; and

(*3*) Does not meet the definition of a well capitalized insured branch of a foreign bank.

(iii) *Undercapitalized.* For assessment risk classification purposes, the short-form designation for this group is ''3''. This group consists of institutions that do not qualify as either ''well capitalized'' or ''adequately capitalized'' under paragraphs (a)(1) (i) and (ii) of this section.

(2) *Supervisory risk factors.* Within its capital group, each institution will be assigned to one of three subgroups

based on the Corporation's consideration of supervisory evaluations provided by the institution's primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be relevant to the institution's financial condition and the risk posed to the BIF or SAIF. Authority to set dates applicable to the determination of supervisory subgroup assignments is delegated to the Corporation's Director of the Division of Supervision (or his or her designee). The three supervisory subgroups are:

(i) *Subgroup ''A''.* This subgroup consists of financially sound institutions with only a few minor weaknesses;

(ii) *Subgroup ''B''.* This subgroup consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the BIF or SAIF; and

(iii) *Subgroup ''C''.* This subgroup consists of institutions that pose a substantial probability of loss to the BIF or SAIF unless effective corrective action is taken.

(b) *Payment of assessment at rate assigned.* Institutions shall make timely payment of assessments based on the assessment risk classification assigned in the notice provided to the institution pursuant to paragraph (a) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (d) of this section. An institution for which the assessment risk classification cannot be determined prior to an invoice date specified in § 327.3(c)(1) or (d)(1) shall preliminarily pay on that invoice at the assessment rate applicable to the classification designated ''2A'' in the appropriate rate schedule set forth in § 327.9. If such institution is subsequently assigned for that semiannual period an assessment risk classification other than that designated as ''2A'', or if the classification assigned to an institution in the notice is subsequently changed, any excess assessment paid by the institution will be credited by the Corporation, with interest, and any additional assessment owed shall be paid by the institution, with interest, in the next quarterly assessment payment after such subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

(c) *Classification for certain types of institutions.* The annual assessment rate applicable to institutions that are bridge banks under 12 U.S.C. 1821(n) and to institutions for which the Corporation has been appointed or serves as conservator shall in all cases be the rate applicable to the classification designated as ''2A'' in the appropriate assessment schedule prescribed pursuant to § 327.9.

(d) *Requests for review.* An institution may submit a written request for review of its assessment risk classification. Any such request must be submitted within 30 days of the date of the assessment risk classification notice provided by the Corporation pursuant to paragraph (a) of this section. The request shall be submitted to the Corporation's Director of the Division of Supervision in Washington, DC, and shall include documentation sufficient to support the reclassification sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for the additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the Director of the Division of Supervision (or his or her designee) shall promptly notify the institution in writing of the FDIC's determination of whether reclassification is warranted. Notice of the procedures applicable to reviews will be included with the assessment risk classification notice to be provided pursuant to paragraph (a) of this section.

(e) *Disclosure restrictions.* The supervisory subgroup to which an institution is assigned by the Corporation pursuant to paragraph (a) of this section is deemed to be exempt information within the scope of § 309.5(c)(8) of

this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(f) *Limited use of assessment risk classification.* The assignment of a particular assessment risk classification to a depository institution under this part 327 is for purposes of implementing and operating a risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material the assessment risk classification assigned to it pursuant to this part.

(g) *Lifeline accounts.* Notwithstanding any other provision of this part 327, the portion of an institution's assessment base that is attributable to deposits in lifeline accounts pursuant to the Bank Enterprise Act, 12 U.S.C. 1834, will be assessed at such rate as may be established by the Corporation pursuant to 12 U.S.C. 1834 and section 7(b)(2)(H) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(b)(2)(H).

[59 FR 67162, Dec. 29, 1994, as amended at 61 FR 67696, Dec. 24, 1996]

§ 327.5 Assessment base.

(a) *Computation of assessment base.* Except as provided in paragraph (c) of this section, the assessment base of an insured depository institution for any date on which the institution is required to file a quarterly report of condition shall be computed by:

(1) Adding—

(i) All demand deposits—

(A) That the institution reported as such in the quarterly report of condition for that date;

(B) That belong to subsidiaries of the institution and were eliminated in consolidation;

(C) That are held in any insured branches of the institution that are located in the territories and possessions of the United States;

(D) That represent any uninvested trust funds required to be separately stated in the quarterly report for that date;

(E) That represent any unposted credits to demand deposits, as determined in accordance with the provisions of paragraph (b)(1) of this section; and

(ii) All time and savings deposits, together with all interest accrued and unpaid thereon—

(A) That the institution reported as such in the quarterly report of condition for that date;

(B) That belong to subsidiaries of the institution and were eliminated in consolidation;

(C) That are held in any insured branches of the institution that are located in the territories and possessions of the United States;

(D) That represent any unposted credits to time and savings deposits, as determined in accordance with the provisions of paragraph (b)(1) of this section; then

(2) Subtracting, in the case of any institution that maintains such records as will readily permit verification of the correctness of its assessment base—

(i) Any unposted debits;

(ii) Any pass-through reserve balances;

(iii) 16⅔ percent of the amount computed by subtracting, from the amount specified in paragraph (a)(1)(i) of this section, the sum of:

(A) Unposted debits allocated to demand deposits pursuant to the provisions of paragraph (b)(2) of this section; plus

(B) Pass-through reserve balances representing demand deposits;

(iv) 1 percent of the amount computed by subtracting, from the amount specified in paragraph (a)(1)(ii) of this section, the sum of:

(A) Unposted debits allocated to time and savings deposits pursuant to the provisions of paragraph (b)(2) of this section; plus

(B) Pass-through reserve balances representing time and savings deposits;

(v) Liabilities arising from a depository institution investment contract that are not treated as insured deposits under section 11(a)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(8)).

(b) *Methods of reporting unposted credits and unposted debits*—(1) *Unposted credits.* Each insured depository institution shall report unposted credits in quarterly reports of condition for addition to the assessment base in the following manner:

(i) If the institution's records show the total actual amount of unposted credits segregated into demand deposits and time and savings deposits, the institution must report the segregated amounts for addition to demand deposits and time and savings deposits, respectively.

(ii) If the institution's records show the total actual amount of unposted credits but do not segregate the amount as stated in paragraph (b)(1)(i) of this section, the institution must report the total actual amount of the unposted credits for addition to time and savings deposits.

(2) *Unposted debits.* Unposted debits may be reported in the same manner as stated in paragraph (b)(1) of this section for deduction from the assessment base, except that unsegregated amounts may be reported for deduction only from demand deposits.

(c) *Newly insured institutions.* In the case of a newly insured institution, the assessment base for the last date for which insured depository institutions are required to file quarterly reports of condition within the semiannual period in which the newly insured institution became an insured institution shall be deemed to be its assessment base for that semiannual period. If the institution has not filed such a report by the due date for such reports from insured depository institutions, it shall promptly provide to the Corporation such information as the Corporation may require to prepare the certified statement form for the institution for the current semiannual period.

[59 FR 67163, Dec. 29, 1994]

§327.6 Terminating transfers; other terminations of insurance.

(a) *Terminating transfer*—(1) *Assessment base computation.* If a terminating transfer occurs at any time in the second half of a semiannual period, each surviving institution's assessment base (as computed pursuant to §327.5) for the first half of that semiannual period shall be increased by an amount equal to such institution's pro rata share of the terminating institution's assessment base for such first half.

(2) *Pro rata share.* For purposes of paragraph (a)(1) of this section, the phrase *pro rata share* means a fraction the numerator of which is the deposits assumed by the surviving institution from the terminating institution during the second half of the semiannual period during which the terminating transfer occurs, and the denominator of which is the total deposits of the terminating institution as required to be reported in the quarterly report of condition for the first half of that semiannual period.

(3) *Other assessment-base adjustments.* The Corporation may in its discretion make such adjustments to the assessment base of an institution participating in a terminating transfer, or in a related transaction, as may be necessary properly to reflect the likely amount of the loss presented by the institution to its insurance fund.

(4) *Limitation on aggregate adjustments.* The total amount by which the Corporation may increase the assessment bases of surviving or other institutions under this paragraph (a) shall not exceed, in the aggregate, the terminating institution's assessment base as reported in its quarterly report of condition for the first half of the semiannual period during which the terminating transfer occurs.

(b) *Other terminations.* When the insured status of an institution is terminated, and the deposit liabilities of such institution are not assumed by another insured depository institution—

(1) *Payment of assessments; certified statements.* The terminating depository institution shall continue to file certified statements and pay assessments for the period its deposits are insured. Such terminating institution shall not be required to file further certified statements or to pay further assessments after the depository institution has paid in full its deposit liabilities and the assessment to the Corporation required to be paid for the semiannual period in which its deposit liabilities are paid in full, and after it, under applicable law, has ceased to have authority to transact a banking business and to have existence, except for the purpose of, and to the extent permitted by law for, winding up its affairs.

(2) *Payment of deposits; certification to Corporation.* When the deposit liabilities of the depository institution have

been paid in full, the depository institution shall certify to the Corporation that the deposit liabilities have been paid in full and give the date of the final payment. When the depository institution has unclaimed deposits, the certification shall further state the amount of the unclaimed deposits and the disposition made of the funds to be held to meet the claims. For assessment purposes, the following will be considered as payment of the unclaimed deposits:

(i) The transfer of cash funds in an amount sufficient to pay the unclaimed and unpaid deposits to the public official authorized by law to receive the same; or

(ii) If no law provides for the transfer of funds to a public official, the transfer of cash funds or compensatory assets to an insured depository institution in an amount sufficient to pay the unclaimed and unpaid deposits in consideration for the assumption of the deposit obligations by the insured depository institution.

(3) *Notice to depositors.* (i) The terminating depository institution shall give sufficient advance notice of the intended transfer to the owners of the unclaimed deposits to enable the depositors to obtain their deposits prior to the transfer. The notice shall be mailed to each depositor and shall be published in a local newspaper of general circulation. The notice shall advise the depositors of the liquidation of the depository institution, request them to call for and accept payment of their deposits, and state the disposition to be made of their deposits if they fail to promptly claim the deposits.

(ii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(i) of this section, a certified copy of the public official's receipt issued for the funds shall be furnished to the Corporation.

(iii) If the unclaimed and unpaid deposits are disposed of as provided in paragraph (b)(2)(ii) of this section, an affidavit of the publication and of the mailing of the notice to the depositors, together with a copy of the notice and a certified copy of the contract of assumption, shall be furnished to the Corporation.

(4) *Notice to Corporation.* The terminating depository institution shall advise the Corporation of the date on which the authority or right of the depository institution to do a banking business has terminated and the method whereby the termination has been effected (*i.e.*, whether the termination has been effected by the surrender of the charter, the cancellation of its authority or license to do a banking business by the supervisory authority, or otherwise).

(c) *Resumption of insured status before insurance of deposits ceases.* If a depository institution whose insured status has been terminated is permitted by the Corporation to continue or resume its status as an insured depository institution before the insurance of its deposits has ceased, the institution will be deemed, for assessment purposes, to continue as an insured depository institution and must thereafter furnish certified statements and pay assessments as though its insured status had not been terminated. The procedure for applying for the continuance or resumption of insured status is set forth in § 303.5 of this chapter.

[54 FR 51374, Dec. 15, 1989, as amended at 59 FR 67164, Dec. 29, 1994; 61 FR 64983, Dec. 10, 1996]

§ 327.7 Payment of interest on assessment underpayments and overpayments.

(a) *Payment of interest*—(1) *Payment by institutions.* Each insured depository institution shall pay interest to the Corporation on any underpayment of the institution's assessment.

(2) *Payment by Corporation.* (i) The Corporation will pay interest on any overpayment by the institution of its assessment.

(ii) When an institution elects the alternate payment date pursuant to § 327.3(c)(3), or otherwise pays an amount due on a regular payment date before that date, the payment of the invoiced amount prior to the regular payment date shall not be regarded as an overpayment of an assessment.

(iii) When an institution elects the doubled-payment option pursuant to § 327.3(j), the payment of any amount in excess of the invoiced amount shall not

be regarded as an overpayment of an assessment.

(3) *Accrual of interest.* (i) Interest on an amount owed to or by the Corporation for the underpayment or overpayment of an assessment shall accrue interest at the relevant interest rate.

(ii) Interest on an amount specified in paragraph (a)(3)(i) of this section shall begin to accrue on the day following the regular payment date, as provided for in §327.3(c)(2) and (d)(2), for the amount so overpaid or underpaid, provided, however, that interest shall not begin to accrue on any overpayment until the day following the date such overpayment was received by the Corporation. Interest shall continue to accrue through the date on which the overpayment or underpayment (together with any interest thereon) is discharged.

(iii) The relevant interest rate shall be redetermined for each quarterly assessment interval. A quarterly assessment interval begins on the day following a regular payment date, as specified in §327.3(c)(2) and (d)(2), and ends on the immediately following regular payment date.

(b) *Rates after the first payment date in 1996.* (1) On and after January 3, 1996, the relevant interest rate for a quarterly assessment interval that includes the month of January, April, July, and October, respectively, is the coupon equivalent yield of the average discount rate set on the 3-month Treasury bill at the last auction held by the United States Treasury Department during the preceding December, March, June, and September, respectively.

(2) The relevant interest rate for a quarterly assessment interval will apply to any amounts overpaid or underpaid on the payment date (whether regular or alternate) immediately prior to the beginning of the quarterly assessment interval. The relevant interest rate will also apply to any amounts owed for previous overpayments or underpayments (including any interest thereon) that remain outstanding, after any adjustments to such overpayments or underpayments have been made thereon, at the end of the regular payment date immediately prior to the beginning of the quarterly assessment interval.

(c) *Rates prior to the first payment date in 1996.* Through January 3, 1996:

(1) The interest rate will be the United States Treasury Department's current value of funds rate which is issued under the Treasury Fiscal Requirements Manual (TFRM rate) and published in the FEDERAL REGISTER;

(2) The interest will be calculated based on the rate issued under the TFRM for each applicable period and compounded annually;

(3) For the initial year, the rate will be applied to the gross amount of the underpayment or overpayment; and

(4) For each additional year or portion thereof, the rate will be applied to the net amount of the underpayment or overpayment after that amount has been reduced by the assessment credit, if any, for the year.

[54 FR 51374, Dec. 15, 1989, as amended at 57 FR 45286, Oct. 1, 1992; 58 FR 3069, Jan. 7, 1993; 59 FR 67164, Dec. 29, 1994; 60 FR 50409, Sept. 29, 1995]

§327.8 Definitions.

(a) *Unposted credits and debits*—(1) *Unposted credit.* The term *unposted credit* means any deposit received in any office of a depository institution for deposit in any other office of the depository institution located in any State of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Northern Marianas Islands, or the Virgin Islands, except those which have been:

(i) Included in the total deposits in the quarterly report of condition; or

(ii) Offset in the quarterly report of condition by an equal amount of cash items in the institution's possession drawn on itself (on the same type of deposits as those offset) and not charged against deposit liabilities at the close of business on the date of the quarterly report of condition.

(2) *Unposted debit.* The term *unposted debit* means a cash item in the reporting institution's possession that is drawn on the institution and immediately chargeable, but not yet charged, against the institution's deposit liabilities at the close of business on the date of the quarterly report of condition. The following items are excluded:

(i) Cash items drawn on other depository institutions,

(ii) Overdrafts and nonsufficient fund (NSF) items,

(iii) Cash items returned unpaid to the last endorser for any reason, and

(iv) Drafts and warrants that are *payable at* or *payable through* the reporting institution for which there is no written authorization on file at the institution or State statute allowing the institution at its discretion to charge the items against the deposit accounts of the drawees.

(3) *Exclusion.* The above terms *unposted credit* and *unposted debit* do not include items which have been reflected in deposit accounts on the general ledger and in the quarterly report of condition, even though they have not been credited or debited to individual deposit accounts.

(b) *Deposits*—(1) *Deposit.* The term *deposit* has the meaning specified in section 3(*1*) of the Federal Deposit Insurance Act. In particular, the term *deposit* includes any liability—without regard for whether the liability is a liability of an insured bank or of an insured savings association—that is of a kind which, had the liability been a liability of an insured bank immediately prior to the effective date of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, would have constituted a deposit in such bank within the meaning of section 3(*1*) of the Federal Deposit Insurance Act as such section 3(*1*) was then in effect.

(2) *Demand deposits.* The term *demand deposits* refers to deposits specified in § 329.1(b) of this chapter, except that any reference to *bank* in such section shall be deemed to refer to *depository institution*.

(3) *Time and savings deposits.* The term *time and savings deposits* refers to any deposits other than demand deposits.

(4) *Exception.* (i) Deposits accumulated for the payment of personal loans, which represent actual loan payments received by the depository institution from borrowers and accumulated by the depository institution in hypothecated deposit accounts for payment of the loans at maturity, shall not be reported as deposits on the quarterly report of condition. The deposit amounts covered by the exception are to be deducted from the loan amounts for which these deposits have been accumulated and assigned or pledged to effectuate payment.

(ii) Time and savings deposits that are pledged as collateral to secure loans are not *deposits accumulated for the payment of personal loans* and are to be reported in the same manner as if they were not securing a loan.

(c) *Quarterly report of condition.* The term *quarterly report of condition* means a report required to be filed pursuant to section 7(a)(3) of the Federal Deposit Insurance Act.

(d) *Semiannual period*—(1) *In general.* The term *semiannual period* means a period beginning on January 1 of any calendar year and ending on June 30 of the same year, or a period beginning on July 1 of any calendar year and ending on December 31 of the same year.

(2) *Current semiannual period.* The term *current semiannual period* means, with respect to a certified statement or an assessment, the semiannual period within which such certified statement is required to be filed or for which such assessment is required to be paid.

(3) *Prior semiannual period.* The term *prior semiannual period* means, with respect to a certified statement or an assessment, the semiannual period immediately prior to the current semiannual period.

(e) *Newly insured institution.* The term *newly insured institution* means an institution that became an insured depository institution during the semiannual period immediately prior to the period for which the certified statement is required: *Provided,* That the term *newly insured institution* does not include any institution that became an insured depository institution as a result of the operation of section 4(a)(2) of the Federal Deposit Insurance Act.

(f) *BIF member.* The term *BIF member* means a depository institution that is a member of the Bank Insurance Fund.

(g) *SAIF member.* The term *SAIF member* means a depository institution that is a member of the Savings Association Insurance Fund.

(h) As used in § 327.6(a), the following terms are given the following meanings:

(1) *Surviving institution.* The term *surviving institution* means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(2) *Terminating institution.* The term *terminating institution* means an insured depository institution some or all of the deposits of which are assumed by another insured depository institution in a terminating transfer.

(3) *Terminating transfer.* The term *terminating transfer* means the assumption by one insured depository institution of another insured depository institution's liability for deposits, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, when the terminating institution goes out of business or transfers all or substantially all its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments by or at the end of the semiannual period during which such assumption of liability for deposits occurs. The term *terminating transfer* does not refer to the assumption of liability for deposits from the estate of a failed institution, or to a transaction in which the FDIC contributes its own resources in order to induce a surviving institution to assume liabilities of a terminating institution.

(i) [Reserved]

(j) *Primary fund.* The *primary fund* of an insured depository institution is the insurance fund of which the institution is a member.

(k) *Secondary fund.* The *secondary fund* of an insured depository institution is the insurance fund that is not the primary fund of the institution.

[54 FR 51374, Dec. 15, 1989, as amended at 59 FR 67164, Dec. 29, 1994; 60 FR 42741, Aug. 16, 1995; 61 FR 64983, Dec. 10, 1996; 61 FR 67696, Dec. 24, 1996]

§ 327.9 Assessment schedules.

(a) *Base assessment schedules*—(1) *In general.* Subject to § 327.4(c) and subpart B of this part, the base annual assessment rate for an insured depository institution shall be the rate prescribed in the appropriate base assessment schedule set forth in paragraph (a)(2) of this section applicable to the assessment risk classification assigned by the Corporation under § 327.4(a) to that institution. Each base assessment schedule utilizes the group and subgroup designations specified in § 327.4(a). An institution shall pay assessments at the rate specified in the appropriate base assessment schedule except as provided in paragraph (b) of this section.

(2) *Assessment schedules*—(i) *Base rates for BIF members.* The following base assessment schedule applies with respect to assessments paid to the BIF by BIF members and by other institutions that are required to make payments to the BIF pursuant to subpart B of this part:

BIF BASE ASSESSMENT SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	4	7	21
2	7	14	28
3	14	28	31

(ii) *Base rates for SAIF members.* The following base assessment schedule applies with respect to assessments paid to the SAIF by SAIF members and by other institutions that are required to make payments to the SAIF pursuant to subpart B of this part:

SAIF BASE ASSESSMENT SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	4	7	21
2	7	14	28
3	14	28	31

(b) *Adjusted assessment schedules*—(1) *In general.* Institutions shall pay semiannual assessments at the rates specified in this paragraph (b) whenever such rates have been prescribed by the Board.

(2) *Adjusted rates for BIF members.* (i) The Board has adjusted the BIF Base Assessment Schedule by reducing each rate therein by 4 basis points for the second semiannual period of 1996 and for the first semiannual period of 1997 by resolution of the Board of Directors of the Corporation. Accordingly, the following adjusted assessment schedule applies to BIF members for those two semiannual periods:

BIF ADJUSTED ASSESSMENT SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	0	3	17
2	3	10	24
3	10	24	27

(ii) The rates set forth in paragraph (b)(2)(i) of this section shall terminate at the end of the first semiannual period of 1997.

(3) *SAIF members*—(i) *General reduction.* Except as provided in paragraph (b)(3)(ii) of this section, the Board has adjusted the SAIF Base Assessment Schedule as of October 1, 1996, by reducing the rates therein by 4 basis points. The adjusted rates are presented to the left in each risk classification category in the schedule shown in paragraph (b)(3)(iii) of this section.

(ii) *Interim assessment schedule for SAIF-member savings associations.* From October 1, 1996, through December 31, 1996, savings associations that are members of the SAIF shall pay assessments according to the schedule in effect for such institutions on September 30, 1996, except that each rate in the schedule other than the rate for institutions in assessment risk classification 3C shall be reduced by 5 basis points (0.05 percent), and the rate for institutions in assessment risk classification 3C shall be reduced by 4 basis points (0.04 percent). No rate prescribed under this paragraph (b)(3)(ii) shall be applied for the purpose of § 327.32(a)(2)(i). The rates specified by this paragraph (b)(3)(ii) are presented to the right in each risk classification category in the schedule shown in paragraph (b)(3)(iii) of this section.

(iii) *Adjusted rates for SAIF members.* The following schedule sets forth to the left in each risk classification category the adjusted rate schedule that applies to SAIF members generally on and after October 1, 1996, in accordance with paragraph (b)(3)(i) of this section, and also sets forth to the right in each risk classification category the rates that apply to savings associations that are members of the SAIF from October 1, 1996, through December 31, 1996, in accordance with paragraph (b)(3)(ii) of this section:

SAIF ADJUSTED ASSESSMENT SCHEDULE

Capital group	Supervisory subgroup					
	A		B		C	
1	0	18	3	21	17	24
2	3	21	10	24	24	25
3	10	24	24	25	27	27

(c) *Rate adjustments; procedures*—(1) *Semiannual adjustments.* The Board may increase or decrease the BIF Base Assessment Schedule set forth in paragraph (a)(2)(i) of this section or the SAIF Base Assessment Schedule set forth in paragraph (a)(2)(ii) of this section up to a maximum increase of 5 basis points or a fraction thereof or a maximum decrease of 5 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary to maintain the reserve ratio of an insurance fund at the designated reserve ratio for that fund. Any such adjustment shall apply uniformly to each rate in the base assessment schedule. In no case may such adjustments result in an assessment rate that is mathematically less than zero or in a rate schedule for an insurance fund that, at any time, is more than 5 basis points above or below the base assessment schedule for that fund, nor may any one such adjustment constitute an increase or decrease of more than 5 basis points. The adjustment for any semiannual period for a fund shall be determined by:

(i) The amount of assessment revenue necessary to maintain the reserve ratio at the designated reserve ratio; and

(ii) The assessment schedule that would generate the amount of revenue in paragraph (c)(1)(i) of this section considering the risk profile of the institutions required to pay assessments to the fund.

(2) *Amount of revenue.* In determining the amount of assessment revenue in paragraph (c)(1)(i) of this section, the Board shall take into consideration the following:

(i) Expected operating expenses of the insurance fund;

(ii) Case resolution expenditures and income of the insurance fund;

(iii) The effect of assessments on the earnings and capital of the institutions

paying assessments to the insurance fund; and

(iv) Any other factors the Board may deem appropriate.

(3) *Adjustment procedure.* Any adjustment adopted by the Board pursuant to this paragraph (c) will be adopted by rulemaking. Nevertheless, because the Corporation is generally required by statute to set assessment rates as necessary (and only to the extent necessary) to maintain or attain the target designated reserve ratio, and because the Corporation must do so in the face of constantly changing conditions, and because the purpose of the adjustment procedure is to permit the Corporation to act expeditiously and frequently to maintain or attain the designated reserve ratio in an environment of constant change, but within set parameters not exceeding 5 basis points, without the delays associated with full notice-and-comment rulemaking, the Corporation has determined that it is ordinarily impracticable, unnecessary and not in the public interest to follow the procedure for notice and public comment in such a rulemaking, and that accordingly notice and public procedure thereon are not required as provided in 5 U.S.C. 553(b). For the same reasons, the Corporation has determined that the requirement of a 30-day delayed effective date is not required under 5 U.S.C. 553(d). Any adjustment adopted by the Board pursuant to a rulemaking specified in this paragraph (c) will be reflected in an adjusted assessment schedule set forth in paragraph (b)(2) or (b)(3) of this section, as appropriate.

(4) *Announcement.* Except with respect to assessments for the first semiannual period of 1997, the Board shall announce the semiannual assessment schedule and the amount and basis for any adjustment thereto not later than 15 days before the invoice date specified in §327.3(c) for the first quarter of the semiannual period for which the adjustment shall be effective.

(d) *Refunds or credits of certain assessments.* If the amount paid by an institution for the regular semiannual assessment for the second semiannual period of 1996 exceeds, as a result of the reduction in the rate schedule for a portion of that semiannual period, the amount due from the institution for that semiannual period, the Corporation will refund or credit any such excess payment and will provide interest on the excess payment in accordance with the provisions of §327.7. Notwithstanding §327.7(a)(3)(ii), such interest will accrue beginning as of October 1, 1996.

[61 FR 67696, Dec. 24, 1996]

§327.10 Interpretive rule: section 7(b)(2)(A)(v).

This interpretive rule explains certain phrases used in section 7(b)(2)(A)(v) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(b)(2)(A)(v).

(a) An institution classified in supervisory subgroup B or C pursuant to §327.4(a)(2) exhibits ''financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory'' within the meaning of such section 7(b)(2)(A)(v).

(b) An institution classified in capital group 2 or 3 pursuant to §327.4(a)(1) is ''not well capitalized'' within the meaning of such section 7(b)(2)(A)(v).

[61 FR 67698, Dec. 24, 1996]

Subpart B—Insured Depository Institutions Participating in Section 5(d)(3) Transactions

§327.31 Scope.

(a) *Affected institutions.* This subpart B applies to any insured depository institution that:

(1) Is either a BIF or SAIF member; and

(2) Is the assuming, surviving, or resulting institution in a transaction undertaken pursuant to section 5(d)(3) of the Federal Deposit Insurance Act.

(b) *Duration.* This subpart B shall cease to apply to an insured depository institution if:

(1) On or after August 9, 1994, the Corporation approves an application by an insured depository institution to treat the transaction described in paragraph (a) of this section as a conversion transaction; and

(2) The insured depository institution pays the amount of any exit and entrance fee assessed by the Corporation with respect to such transaction.

[57 FR 45286, Oct. 1, 1992, as amended at 59 FR 67165, Dec. 29, 1994]

§ 327.32 Computation and payment of assessment.

(a) *Rate of assessment*—(1) *BIF and SAIF member rates.* (i) Except as provided in paragraph (a)(2) of this section, and consistent with the provisions of § 327.4, the assessment to be paid by an institution that is subject to this subpart B shall be computed at the rate applicable to institutions that are members of the primary fund of such institution. (ii) Such applicable rate shall be applied to the institution's assessment base less that portion of the assessment base which is equal to the institution's adjusted attributable deposit amount.

(2) *Rate applicable to the adjusted attributable deposit amount.* Notwithstanding paragraph (a)(1)(i) of this section, that portion of the assessment base of any acquiring, assuming, or resulting institution which is equal to the adjusted attributable deposit amount of such institution shall:

(i) Be subject to assessment at the assessment rate applicable to members of the secondary fund of such institution pursuant to subpart A of this part; and

(ii) Not be taken into account in computing the amount of any assessment to be allocated to the primary fund of such institution.

(3) *Adjusted attributable deposit amount.* An insured depository institution's ''adjusted attributable deposit amount'' for any semiannual period is equal to the sum of:

(i) The amount of any deposits acquired by the institution in connection with the transaction (as determined at the time of such transaction) described in § 327.31(a), but subject to the adjustment specified in paragraph (c) of this section;

(ii) The total of the amounts determined under paragraph (a)(3)(iii) of this section for semiannual periods preceding the semiannual period for which the determination is being made under this section; and

(iii) The amount by which the sum of the amounts described in paragraphs (a)(3)(i) and (a)(3)(ii) of this section would have increased during the preceding semiannual period (other than any semiannual period beginning before the date of such transaction) if such increase occurred at a rate equal to the annual rate of growth of deposits of the acquiring, assuming, or resulting depository institution minus the amount of any deposits acquired through the acquisition, in whole or in part, of another insured depository institution.

(4) *Deposits acquired by the institution.* As used in paragraph (a)(3)(i) of this section, the term ''deposits acquired by the institution'' means all deposits that are held in the institution acquired by such institution on the date of such transaction; provided, that if on or before June 30, 1997, the Corporation has been appointed or serves as conservator or receiver for the acquired institution, such term:

(i) Does not include any deposit held in the acquired institution on the date of such transaction which the acquired institution has obtained, directly or indirectly, by or through any deposit broker;

(ii) Does not include that part of any remaining deposit held in the acquired institution on the date of such transaction that is in excess of $80,000; and

(iii) Is limited to 80 per centum of the remaining portion of the aggregate of the deposits specified in paragraph (a)(4)(ii) of this section.

(5) *Deposit broker.* As used in paragraph (a)(4) of this section, the term ''deposit broker'' has the meaning specified in section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f).

(b) *Procedures for computation and payment.* An insured depository institution subject to this subpart B shall follow the payment procedure that is set forth in subpart A of this part.

(c) *Reduction of deposits acquired by certain institutions.* In the case of a transaction occurring on or before March 31, 1995, the amount determined under paragraph (a)(3)(i) of this section shall be reduced by 20 percent for the purpose of computing the adjusted attributable deposit amount for any

semiannual period beginning after December 31, 1996, of a BIF member bank that, as of June 30, 1995:

(1) Had an adjusted attributable deposit amount the value of which was less than 50 percent of the amount of its total deposits; or

(2)(i) Had an adjusted attributable deposit amount the value of which was less than 75 percent of the value of its total deposits;

(ii) Had total deposits greater than $5,000,000,000; and

(iii) Was owned or controlled by a bank holding company that owned or controlled insured depository institutions having an aggregate amount of deposits insured or treated as insured by the BIF greater than the aggregate amount of deposits insured or treated as insured by the SAIF.

[59 FR 67165, Dec. 29, 1994, as amended at 61 FR 53839, Oct. 16, 1996; 61 FR 64983, Dec. 10, 1996]

§327.33 "Acquired" deposits.

This section interprets the phrase ''deposits acquired by the institution'' as used in §327.32(a)(3)(i).

(a) *In general*—(1) *Secondary-fund deposits.* The phrase ''deposits acquired by the institution'' refers to deposits that are insured by the secondary fund of the acquiring institution, and does not include deposits that are insured by the acquiring institution's primary fund.

(2) *Nominal dollar amount.* Except as provided in paragraph (b) of this section, an acquiring institution is deemed to acquire the entire nominal dollar amount of any deposits that the transferring institution holds on the date of the transaction and transfers to the acquiring institution.

(b) *Conduit deposits*—(1) *Defined.* As used in this paragraph (b), the term ''conduit deposits'' refers to deposits that an acquiring institution has assumed from another institution (original transferor) in the course of a transaction described in §327.31(a), and that are treated as insured by the secondary fund of the acquiring institution, but which the acquiring institution has been explicitly and specifically ordered by the Corporation, or by the appropriate federal banking agency for the institution, or by the Department of Justice to commit to re-transfer to another insured depository institution (re-transferee institution) as a condition of approval of the transaction. The commitment must be enforceable, and the divestiture must be required to occur and must occur within 6 months after the date of the initial transaction.

(2) *Treatment with respect to acquiring institution.* Conduit deposits are not considered to be acquired by the acquiring institution within the meaning of §327.32(a)(3)(i) for the purpose of computing the acquiring institution's adjusted attributable deposit amount for a current semiannual period that begins after the end of the semiannual period following the semiannual period in which the acquiring institution re-transfers the deposits.

(3) *Treatment with respect to re-transferee institution.* Conduit deposits are treated as insured by the same insurance fund after having been acquired by the re-transferee institution as when held by the original transferor.

[61 FR 64983, Dec. 10, 1996]

§327.34 Application of AADAs.

This section interprets the meaning of the phrase ''an insured depository institution's 'adjusted attributable deposit amount' for any semiannual period'' as used in the introductory text of §327.32(a)(3).

(a) *In general.* The phrase ''for any semiannual period'' refers to the current semiannual period: that is, the period for which the assessment is due, and for which an institution's adjusted attributable deposit amount (AADA) is computed.

(b) *Quarterly components of AADAs.* An AADA for a current semiannual period consists of 2 quarterly AADA components. The first quarterly AADA component for the current period is determined with respect to the first quarter of the prior semiannual period, and the second quarterly AADA component for the current period is determined with respect to the second quarter of the prior period.

(c) *Application of AADAs.* The value of an AADA that is to be applied to a quarterly assessment base in accordance with §327.32(a)(2) is the value of

the quarterly AADA component for the corresponding quarter.

(d) *Initial AADAs.* If an AADA for a current semiannual period has been generated in a transaction that has occurred in the second calendar quarter of the prior semiannual period, the first quarterly AADA component for the current period is deemed to have a value of zero.

(e) *Transition rule.* Paragraphs (b), (c) and (d) of this section shall apply to any AADA for any semiannual period beginning on or after July 1, 1997.

[61 FR 64984, Dec. 10, 1996]

§ 327.35 Grandfathered AADA elements.

This section explains the meaning of the phrase ''total of the amounts determined under paragraph (a)(3)(iii)'' in § 327.32(a)(3)(ii). The phrase ''total of the amounts determined under paragraph (a)(3)(iii)'' refers to the aggregate of the increments of growth determined in accordance with § 327.32(a)(3)(iii). Each such increment is deemed to be computed in accordance with the contemporaneous provisions and interpretations of such section. Accordingly, any increment of growth that is computed with respect to a semiannual period has the value appropriate to the proper calculation of the institution's assessment for the semiannual period immediately following such semiannual period.

[61 FR 64984, Dec. 10, 1996]

§ 327.36 Growth computation.

This section interprets various phrases used in the computation of growth as prescribed in § 327.32(a)(3)(iii).

(a) *Annual rate.* The annual rate of growth of deposits refers to the rate, which may be expressed as an annual percentage rate, of growth of an institution's deposits over any relevant interval. A relevant interval may be less than a year.

(b) *Growth; increase; increases.* Except as provided in paragraph (c) of this section, references to ''growth'', ''increase'', and ''increases'' may generally include negative values as well as positive ones.

(c) *Growth of deposits.* ''Growth of deposits'' does not include any decrease in an institution's deposits representing deposits transferred to another insured depository institution, if the transfer occurs on or after July 1, 1996.

(d) *Quarterly determination of growth.* For the purpose of computing assessments for semiannual periods beginning on July 1, 1997, and thereafter, the rate of growth of deposits for a semiannual period, and the amount by which the sum of the amounts specified in § 327.32(a)(3)(i) and (ii) would have grown during a semiannual period, is to be determined by computing such rate of growth and such sum of amounts for each calendar quarter within the semiannual period.

[61 FR 64984, Dec. 10, 1996]

§ 327.37 Attribution of transferred deposits.

This section explains the attribution of deposits to the BIF and the SAIF when one insured depository institution (acquiring institution) acquires deposits from another insured depository institution (transferring institution). For the purpose of determining whether the assumption of deposits (assumption transaction) constitutes a transaction undertaken pursuant to section 5(d)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1815(d)(3)), and for the purpose of computing the adjusted attributable deposit amounts, if any, of the acquiring and the transferring institutions after the transaction:

(a) *Transferring institution*—(1) *Transfer of primary-fund deposits.* To the extent that the aggregate volume of deposits that is transferred by a transferring institution in a transaction, or in a related series of transactions, does not exceed the volume of deposits that is insured by its primary fund (primary-fund deposits) immediately prior to the transaction (or, in the case of a related series of transactions, immediately prior to the initial transaction in the series), the transferred deposits shall be deemed to be insured by the institution's primary fund. The primary institution's volume of primary-fund deposits shall be reduced by the aggregate amount so transferred.

(2) *Transfer of secondary-fund deposits.* To the extent that the aggregate volume of deposits that is transferred by the transferring institution in a transaction, or in a related series of transactions, exceeds the volume of deposits that is insured by its primary fund immediately prior to the transaction (or, in the case of a related series of transactions, immediately prior to the initial transaction in the series), the following volume of the deposits so transferred shall be deemed to be insured by the institution's secondary fund (secondary-fund deposits): the aggregate amount of the transferred deposits minus that portion thereof that is equal to the institution's primary-fund deposits. The transferring institution's volume of secondary-fund deposits shall be reduced by the volume of the secondary-fund deposits so transferred.

(b) *Acquiring institution.* The deposits shall be deemed, upon assumption by the acquiring institution, to be insured by the same fund or funds in the same amount or amounts as the deposits were so insured immediately prior to the transaction.

[61 FR 64984, Dec. 10, 1996]

Subpart C—Special Assessment

SOURCE: 61 FR 53839, Oct. 16, 1996, unless otherwise noted.

§327.41 Special assessment imposed.

(a) *Payment required.* Except as provided in §§327.43 and 327.44, each insured depository institution shall pay a special assessment on the SAIF-assessable deposits that the institution held on March 31, 1995, in accordance with the provisions of this subpart C.

(b) *Rate.* Except as provided in §327.44, the rate for the special assessment shall be 0.657 percentum, subject to such adjustments as the Corporation may deem necessary to cause the Savings Association Fund reserve ratio to achieve the designated reserve ratio for the SAIF on October 1, 1996.

(c) *Due date.* The special assessment shall be due on October 1, 1996.

(d) *Payment date.* Except as provided in §327.44, each institution shall pay the special assessment to the Corporation on November 27, 1996. Each institution shall make the payment in the manner and according to the procedures set forth in paragraph (e) of this section.

(e) *Procedures*—(1) *Preliminary and final invoices; requests for correction of amount due.* The Corporation will issue a preliminary invoice to each institution showing the amount expected to be due from the institution and the computation of that amount. An institution may request the Corporation to revise the amount due; any such request must be made in writing on or before November 1, 1996. The Corporation will issue a final invoice to each insured depository institution no later than 14 days prior to the date specified in paragraph (d) of this section, showing the amount due from the institution and the computation of that amount.

(2) *Funding of designated accounts.* Each insured depository institution shall take all actions necessary to allow the Corporation to debit the invoiced amount from the deposit account designated by the institution pursuant to §327.3(a)(2). Each insured depository institution shall, prior to the date specified in paragraph (d) of this section, ensure that funds in an amount at least equal to the invoiced amount are available in the designated account on that date for direct debit by the Corporation. Failure to take any such action or to provide such funding of the account shall be deemed to constitute nonpayment of the amount due.

(3) *Manner of payment.* The Corporation will cause the invoiced amount to be directly debited on the date specified in paragraph (d) of this section from the deposit account designated by the insured depository institution pursuant to §327.3(a)(2).

(f) *Deposit of proceeds.* The proceeds of the special assessment, and of the assessments paid pursuant to §327.44, shall be deposited in the SAIF.

§327.42 Assessment base.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, an institution's special assessment shall be computed with reference to the institution's SAIF assessment base on March 31, 1995.

(b) *''Converted'' institutions.* In the case of each of the following SAIF members, the volume of SAIF-insured deposits used to determine the institution's SAIF assessment base on March 31, 1995, shall be reduced by 20 percent:

(1) A federal savings association:

(i) That had deposits subject to assessment by the SAIF which did not exceed $4,000,000,000, as of March 31, 1995; and

(ii) That had been, or is a successor by merger, acquisition, or otherwise to an institution that had been, a state savings bank, the deposits of which were insured by the Corporation prior to August 9, 1989, which institution converted to a federal savings association pursuant to section 5(*i*) of the Home Owners' Loan Act, 12 USC 1464(*i*), prior to January 1, 1985;

(2) A SAIF-member state depository institution that had been a state savings bank prior to October 15, 1982, and was a federal savings association on August 9, 1989;

(3) An insured bank that:

(i) Was established de novo in order to acquire the deposits of a savings association in default or in danger of default;

(ii) Did not open for business before acquiring the deposits of such savings association; and

(iii) Was a SAIF member as of the date of enactment of the Deposit Insurance Funds Act of 1996; and

(4) An insured bank that:

(i) Resulted from a savings association before December 19, 1991, in accordance with section 5(d)(2)(G) of the FDI Act; and

(ii) Had an increase in its capital in conjunction with the conversion in an amount equal to more than 75 percent of the capital of the institution on the day before the date of the conversion.

(c) *Oakar banks.* The special assessment shall be computed with reference to that portion of an institution's SAIF assessment base for March 31, 1995, which is equal to 80 percent of the institution's adjusted attributable deposit amount for that date, if the institution is a BIF member that, as of June 30, 1995:

(1) Had an adjusted attributable deposit amount that was less than 50 percent of its total domestic deposits; or

(2)(i) Had an adjusted attributable deposit amount equal to less than 75 percent of its total assessable deposits;

(ii) Had total assessable deposits greater than $5,000,000,000; and

(iii) Was owned or controlled by a bank holding company that owned or controlled insured depository institutions having an aggregate amount of deposits insured or treated as insured by the BIF greater than the aggregate amount of deposits insured or treated as insured by the SAIF.

§ 327.43 Exemptions from the special assessment.

(a) *Mandatory exemptions.* The following institutions are exempt from the special assessment:

(1) An institution that was in existence on October 1, 1995, and held no SAIF-assessable deposits prior to January 1, 1993. For this purpose, an institution shall be deemed to have held SAIF-assessable deposits prior to January 1, 1993, if:

(i) The institution directly held SAIF-assessable insured deposits prior to that date; or

(ii) The institution succeeded to, acquired, purchased, or otherwise held any SAIF-assessable deposits as of September 30, 1996, that were SAIF-assessable deposits prior to January 1, 1993;

(2) A federal savings bank that:

(i) Was established de novo in April 1994 in order to acquire the deposits of a savings association which was in default or in danger of default; and

(ii) Received minority interim capital assistance from the Resolution Trust Corporation under section 21A(w) of the Federal Home Loan Bank Act in connection with the acquisition of any such savings association; and

(3) A savings association, the deposits of which are insured by the SAIF, that:

(i) Prior to January 1, 1987, was chartered as a federal savings bank insured by the Federal Savings and Loan Insurance Corporation for the purpose of acquiring all or substantially all of the assets and assuming all or substantially all of the deposit liabilities of a national bank in a transaction consummated after July 1, 1986; and

(ii) As of the date of that transaction, had assets of less than $150,000,000.

(b) *Weak institutions.* If an institution meets any criterion for designation as ''weak'' under the guidelines set forth in appendix A of this subpart, the institution shall generally be exempt from the special assessment, unless the exemption would not materially reduce risk to the SAIF. Authority to determine whether an institution meets any such criterion, authority to issue orders exempting ''weak'' institutions, authority to determine whether the risk to the SAIF would not be materially reduced if an institution qualifying for exemption as a ''weak'' institution were nevertheless allowed to pay the special assessment, and authority to determine whether an institution rated 4 or 5 by its appropriate federal banking agency would present a substantial risk of loss to the SAIF unless the institution were exempt from the special assessment, are delegated to the Director of the Division of Supervision.

(c) *Semiannual assessments payable to the SAIF*—(1) *Special rate schedule.* Except as provided in paragraph (c)(2) of this section, an institution that is exempt from the special assessment pursuant to paragraph (a) or (b) of this section shall pay regular semiannual assessments to the SAIF from the first semiannual period of 1996 through the second semiannual period of 1999 according to the schedule of rates specified in §327.9(d)(1) as in effect for SAIF members on June 30, 1995.

(2) *Termination of special rate schedule.* An institution that makes a pro-rata payment of the special assessment shall cease to be subject to paragraph (c)(1) of this section. The pro-rata payment must be equal to the following product: 16.7 percent of the amount the institution would have owed for the special assessment, multiplied by the number of full semiannual periods remaining between the date of the payment and December 31, 1999.

§327.44 Hardship exception.

(a) *Applicability.* This section applies to an insured depository institution if:

(1) The institution, or a depository institution holding company that controls the institution, is subject to terms or covenants in any debt obligation or preferred stock outstanding on September 13, 1995; and

(2) The Corporation has determined that payment of the special assessment in accordance with the provisions of §327.41 would pose a significant risk of causing the depository institution or its depository institution holding company to default on or to violate any term or covenant specified in paragraph (a)(1) of this section.

(b) *Election.* An insured depository institution may elect, with the prior approval of the Corporation, to pay the special assessment prescribed by the Deposit Insurance Funds Act of 1996 in two installments in accordance with the provisions of this section. In deciding whether to grant or withhold approval, the Corporation will consider the entire circumstances of the proposed election, including but not limited to the election's effects on the institution, on the SAIF, and on the public interest.

(c) *Procedures*—(1) *Initial assessment*—(i) *Date.* An institution that makes the election specified in paragraph (b) of this section shall pay the initial installment of the special assessment to the Corporation on November 27, 1996.

(ii) *Amount.* The initial installment shall be equal to 50 percent of the amount that the institution would otherwise be required to pay on November 27, 1996, in accordance with §327.41.

(iii) *Payment procedures.* The procedures set forth in §327.41(e) shall apply to the payment of the initial installment.

(2) *Second installment*—(i) *Date.* An institution that makes the election specified in paragraph (b) of this section shall pay a second installment to the Corporation on the regular payment date for the second quarterly payment for the first semiannual period of 1997.

(ii) *Amount.* The second installment shall be an amount computed as follows: the SAIF assessment base of the institution on December 31, 1996, multiplied by the rate specified in §327.41(b), multiplied by 51 percent.

(iii) *Payment procedures.* The procedures set forth in §327.41(e) shall apply to the payment of the second installment, except that any reference to the

date specified in § 327.41(d) shall be deemed to be a reference to the date specified in paragraph (c)(2)(i) of this section, and that any reference to November 1, 1996, shall be deemed to be a reference to February 1, 1997.

(3) *Supplemental assessment*—(i) *Date.* An institution that makes the election specified in paragraph (b) of this section shall pay a supplemental assessment to the Corporation at the same time as the second installment.

(ii) *Amount.* The supplemental assessment shall be an amount computed as follows: the institution's SAIF assessment base for December 31, 1996, shall be subtracted from the institution's SAIF assessment base for March 31, 1995; if the result is greater than zero, the result shall be multiplied by 95 percent; and the product thereof shall be multiplied by one-half the rate for the special assessment.

(iii) *Payment procedures.* The procedures set forth in § 327.41(e) shall apply to the payment of the supplemental assessment, except that any reference to the date specified in § 327.41(d) shall be deemed to be a reference to the date specified in paragraph (c)(2)(i) of this section, and that any reference to November 1, 1996, shall be deemed to be a reference to February 1, 1997.

§ 327.45 Definitions.

For the purpose of this subpart C:

(a) *BIF; SAIF*—(1) *BIF.* The term ''BIF'' refers to the Bank Insurance Fund.

(2) *SAIF.* The term ''SAIF'' refers to the Savings Association Insurance Fund.

(b) *SAIF-assessable deposits.* The term ''SAIF-assessable deposits'' means all deposits that are subject to assessment by the Corporation for deposit in the SAIF, and, in the case of a BIF member, includes that portion of the deposits of the BIF member that is equal to the BIF member's adjusted attributable deposit amount.

(c) *Deposits held on March 31, 1995.* A deposit is deemed to have been held on March 31, 1995, by an institution if either:

(1) The institution held the deposit on that date; or

(2)(i) The deposit was held by another institution (''transferring institution'') on that date;

(ii) The institution assumed the deposit from the transferring institution after that date, either directly or indirectly; and

(iii) The transferring institution is not an insured depository institution on the payment date specified in § 327.41(d).

(d) *SAIF assessment base.* The term ''SAIF assessment base'' for any date means that portion of an institution's assessment base for that date that is subject to assessment by the Corporation for deposit in the SAIF.

APPENDIX A TO SUBPART C OF PART 327—GUIDELINES FOR EXEMPTION OF WEAK INSTITUTIONS

(a) The Board of Directors of the Corporation has adopted criteria for identifying institutions that are regarded as ''weak'' within the meaning of section 2702(f) of the Deposit Insurance Funds Act of 1996. The Board has determined that granting exemptions to institutions that meet the criteria would generally reduce the risk to the SAIF.

(b) The criteria apply only to institutions that are members of the Savings Association Insurance Fund (SAIF) or that hold deposits that are treated as insured by the SAIF pursuant to section 5(d)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1815(d)(3).

(c) The criteria are as follows:

(1) *Guideline #1: Capital group 3 institutions.* An institution is regarded as ''weak'' if, in the judgment of the Corporation, the institution meets the standards for assignment to capital group 3 (''undercapitalized'') pursuant to § 327.4(a)(1)(iii).

(2) *Guideline #2: Potential capital group 3 institutions.* An institution is regarded as ''weak'' if, in the judgment of the Corporation, the institution would satisfy the criteria set forth in Guideline #1 if the institution were to pay the special assessment imposed under § 327.41(a).

(3) *Guideline #3: Institutions rated 4 or 5.* If an institution has a composite rating of 4 or 5 by its primary supervisor, the institution may request the Corporation to consider whether it would be appropriate to exempt the institution from the special assessment. Such an institution is regarded as ''weak'' if the institution would, after having paid the assessment, present a significant risk of loss to the SAIF for the purpose of section 2(f) of the Funds Act.

PART 328—ADVERTISEMENT OF MEMBERSHIP

Sec.
328.0 Scope.
328.1 Official signs.
328.2 Mandatory requirements with regard to the official sign and its display by banks.
328.3 Mandatory requirements with regard to the official advertising statement and manner of use by banks.
328.4 Mandatory requirements with regard to the display of the official savings association sign by insured savings associations.

AUTHORITY: 12 U.S.C. 1819; 12 U.S.C. 1828(a), as amended by sec. 221, Pub. L. 101–73, 103 Stat. 183.

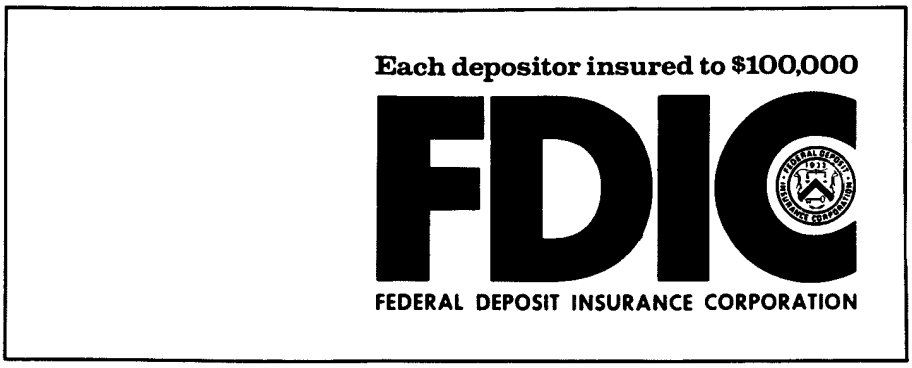
§328.0 Scope.

The regulation contained in this part describes the official signs of the FDIC and prescribes their use by insured depository institutions. It also prescribes the official advertising statement insured banks must include in their advertisements. Insured banks which maintain offices that are not insured in foreign countries are not required to include the advertising statement in advertisements published in foreign countries. For purposes of this part 328, the term *insured bank* includes a foreign bank having an insured branch.

[54 FR 33670, Aug. 16, 1989]

§328.1 Official signs.

(a) *Official bank sign.* The official sign referred to in this paragraph (*bank sign*) shall be 7″ by 3″ in size and of the following design:



The *symbol* of the Corporation shall be that portion of the official bank sign represented by the letters and the Corporation seal contained upon the official bank sign.

(b) *Official savings association sign.* The official sign referred to in this paragraph (*savings association sign*) shall be 5⅛″ in diameter and of the following design:

[54 FR 33670, Aug. 16, 1989, as amended at 57 FR 45977, Oct. 6, 1992]

§ 328.2 Mandatory requirements with regard to the official sign and its display by banks.

(a) *Insured banks to display official sign.* Each insured bank shall continuously display an official bank sign or an official savings association sign at each station or window where insured deposits are usually and normally received in its principal place of business and in all its branches, except on automatic service facilities including automated teller machines, cash dispensing machines, point-of-sale terminals, and other electronic facilities where deposits are received. However, no bank becoming an insured bank shall be required to display such an official sign until twenty-one (21) days after its first day of operation as an insured bank. An official sign may be displayed by an insured bank prior to the date display is required. Additional bank signs or savings association signs may be displayed in other locations within an insured bank in other sizes, colors, or materials. An insured bank may display an official sign at a remote service facility, provided that if there are any noninsured institutions which share in the remote service facility, any insured bank which displays the official bank sign must clearly show that the sign refers only to a designated insured bank or banks.

(b) *Obtaining official signs.* (1) Any insured bank may procure official bank signs with black letters on a gold background or official savings association signs with black letters, stars, and eagle, on a gold background, from the Corporation for official use at no charge. The Corporation shall furnish to banks an order blank for use in procuring the official signs. Any bank which promptly, after the receipt of the order blank, fills it in, executes it, and properly directs and forwards it to the Federal Deposit Insurance Corporation, Washington, DC 20429, shall not be deemed to have violated this regulation on account of not displaying an official sign, or signs, unless the bank shall omit to display such official sign or signs after receipt thereof.

(2) Official signs or signs reflecting variations in size, colors, or materials may be procured by insured banks from commercial suppliers.

(c) *Receipt of deposits at same teller's station or window as noninsured bank or institution.* An insured bank is forbidden to receive deposits at any teller's station or window except a remote service facility as defined in § 303.0(b)(18) of this chapter, where any noninsured insitution receives deposits or similar liabilities.

(d) *Required changes in official sign.* The Corporation may require any insured bank, upon at least 30 days' written notice, to change the wording of its official signs in a manner deemed necessary for the protection of depositors or others.

[54 FR 33670, Aug. 16, 1989, as amended at 57 FR 45977, Oct. 6, 1992]

§ 328.3 Mandatory requirements with regard to the official advertising statement and manner of use by banks.

(a) *Insured banks to include official advertising statement in all advertisements except as provided in paragraph (c) of this section.* Each insured bank shall include

the official advertising statement, prescribed in paragraph (b) of this section, in all of its advertisements except as provided in paragraph (c) of this section.

(1) An insured bank is not required to include the official advertising statement in its advertisements until thirty (30) days after its first day of operation as an insured bank.

(2) In cases where the Board of Directors of the Federal Deposit Insurance Corporation shall find the application to be meritorious, that there has been no neglect or willful violation in the observance of the section and that undue hardship will result by reason of its requirements, the Board of Directors may grant a temporary exemption from its provision to a particular bank upon its written application setting forth the facts. For the procedure to be followed in making such application see § 303.8 of this chapter.

(3) In cases where advertising copy not including the official advertising statement is on hand on the date the requirements of this section become operative, the insured bank may cause the official advertising statement to be included by use of a rubber stamp or otherwise.

(4) When a foreign bank has both insured and noninsured U.S. branches, the bank must identify which branches are insured and which branches are not insured in all of its advertisements requiring the use of the official advertising statement.

(b) *Official advertising statement.* The official advertising statement shall be in substance as follows: ''Member of the Federal Deposit Insurance Corporation''. The word ''the'' or the words ''of the'' may be omitted. The words ''This bank is a'' or the words ''This institution is a'' or the name of the insured bank followed by the words ''is a'' may be added before the word ''member''. The short title ''Member of FDIC'' or ''Member FDIC'' or a reproduction of the ''symbol'' may be used by insured banks at their option as the official advertising statement. The official advertising statement shall be of such size and print to be clearly legible. Where it is desired to use the ''symbol'' of the Corporation as the official advertising statement, and the ''symbol'' must be reduced to such proportions that the small lines of type and the Corporation seal therein are indistinct and illegible, the Corporation seal in the letter C and the two lines of small type may be blocked out or dropped.

(c) *Types of advertisements which do not require the official advertising statement.* The following is an enumeration of the types of advertisements which need not include the official advertising statement:

(1) Statements of condition and reports of condition of an insured bank which are required to be published by State or Federal law;

(2) Bank supplies such as stationery (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, deposit passbooks, certificates of deposit, etc.;

(3) Signs or plates in the banking office or attached to the building or buildings in which the banking offices are located;

(4) Listings in directories;

(5) Advertisements not setting forth the name of the insured bank;

(6) Display advertisements in bank directory, provided the name of the bank is listed on any page in the directory with a symbol or other descriptive matter indicating it is a member of the Federal Deposit Insurance Corporation;

(7) Joint or group advertisements of banking services where the names of insured banks and noninsured banks or institutions are listed and form a part of such advertisements;

(8) Advertisements by radio which do not exceed thirty (30) seconds in time;

(9) Advertisements by television, other than display advertisements, which do not exceed thirty (30) seconds in time;

(10) Advertisements which are of the type or character making it impractical to include thereon the official advertising statement including, but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains;

(11) Advertisements which contain a statement to the effect that the bank is a member of the Federal Deposit Insurance Corporation, or that the bank is insured by the Federal Deposit Insurance Corporation, or that its deposits or depositors are insured by the

Federal Deposit Insurance Corporation to the maximum of $100,000 for each depositor;

(12) Advertisements relating to the making of loans by the bank or loan services;

(13) Advertisements relating to safekeeping box business or services;

(14) Advertisements relating to trust business or trust department services;

(15) Advertisements relating to real estate business or services;

(16) Advertisements relating to armored car services;

(17) Advertisements relating to service charges or analysis charges;

(18) Advertisements relating to securities business or securities department services;

(19) Advertisements relating to travel department business, including traveler's checks on which the bank issuing or causing to be issued the advertisement is not primarily liable;

(20) Advertisements relating to savings bank life insurance.

(d) *Outstanding billboard advertisements.* Where an insured bank has billboard advertisements outstanding which are required to include the official advertising statement and has direct control of such advertisements either by possession or under the terms of a contract, it shall, as soon as it can consistent with its contractual obligations, cause the official advertising statement to be included therein.

(e) *Official advertising statement in non-English language.* The non-English equivalent of the official advertising statement may be used in any advertisement: *Provided,* That the translation has had the prior written approval of the Corporation.

(Sec. 3(m), 9, 64 Stat. 881; 12 U.S.C. 1813(m), 1819)

[32 FR 10189, July 11, 1967, as amended at 45 FR 23645, Apr. 8, 1980; 46 FR 37876, July 23, 1981. Redesignated and amended at 54 FR 33670, Aug. 16, 1989]

§ 328.4 Mandatory requirements with regard to the display of the official savings association sign by insured savings associations.

(a) *Insured savings associations to display official savings association sign.* Each insured savings association shall continuously display an official savings association sign at each station or window where insured deposits are usually and normally received in its principal place of business and at all of its branches, except on automatic service facilities including automated teller machines, cash dispensing machines, point-of-sale terminals, and other electronic facilities where deposits are received. However, no savings association becoming an insured savings association as a result of the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 or otherwise, shall be required to display an official savings association sign until twenty-one (21) days after its first day of operation as an insured savings association. The official savings association sign may be displayed by any insured savings association prior to the date display is required. Additional savings association signs in other sizes, colors, or materials, may be displayed in other locations within an insured savings association. An insured savings association may display the official savings association sign at a remote service facility, provided that if there are any noninsured institutions which share in the remote service facility, any insured savings association which displays the sign must clearly show that the official savings association sign refers only to a designated insured savings association or associations.

(b) *Obtaining official savings association signs.* (1) Any insured savings association may procure official savings association signs with black letters, stars, and eagle, on a gold background from the Corporation for official use at no charge. The Corporation shall furnish to savings associations an order blank for use in procuring the official savings association sign. Any savings association which promptly, after the receipt of the order blank, fills it in, executes it, and properly directs and forwards it to the Federal Deposit Insurance Corporation, Washington, DC 20429, shall not be deemed to have violated this regulation on account of not displaying an official savings association sign, or signs, unless the savings association shall omit to display such official sign or signs after receipt thereof.

(2) Official savings association signs or signs reflecting variations in size, colors, or materials may be procured by insured savings associations from commercial suppliers.

(c) *Receipt of deposits at same teller's station or window as noninsured institution.* An insured savings association is forbidden to receive deposits at any teller's station or window except a remote service facility as defined in §303.0(b)(18) of this chapter, where any noninsured institution receives deposits or similar liabilities.

(d) *Required changes in official sign.* The Corporation may require any insured savings association upon at least 30 days' written notice, to change the wording of its official signs in a manner deemed necessary for the protection of depositors or others.

(e) *Display of official bank sign by insured savings association prohibited.* An insured savings association shall not display the bank sign at its principal place of business or at any of its branches.

[54 FR 33672, Aug. 16, 1989, as amended at 57 FR 45977, Oct. 6, 1992]

PART 329—INTEREST ON DEPOSITS

Sec.
329.0 Scope.
329.1 Definitions.
329.2 Payment of interest.
329.101 Transfers not included within the six transfers allowed for nondemand deposits pursuant to §329.1(b)(3).
329.102 Deposits described in §329.1(b)(3).
329.103 Premiums.
329.104 Ten-day grace period.

AUTHORITY: 12 U.S.C. 1819, 1828(g) and 1832(a).

SOURCE: 51 FR 10808, Mar. 31, 1986, unless otherwise noted.

§329.0 Scope.

This part applies to any deposit which is payable by a bank within the States of the United States or the District of Columbia, or which is directly or indirectly accessible by check, draft, or order payable within the States of the United States or the District of Columbia, which check, draft or order is drawn on an account maintained at a bank office located within the States of the United States or the District of Columbia. An *international banking facility time deposit,* as defined by the Board of Governors of the Federal Reserve System in §204.8(a)(2) of this title, is not a *deposit* within the meaning of this part.

§329.1 Definitions.

(a) The term *bank* includes:

(1) Any State bank, as defined in section 3(a) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(a), the deposits in which are insured by the Corporation, and which is not a member of the Federal Reserve System;

(2) Any State branch of a foreign bank, the deposit obligations in which branch are insured by the Corporation; and

(3) Any noninsured bank in a State if the total amount of time and savings deposits held in all such banks in the State, plus the total amount of deposits, shares, and withdrawable accounts held in all building and loan, savings and loan, and homestead associations (including cooperative banks) in the State which are not members of a Federal home loan bank, is more than 20 per centum of the total amount of such deposits, shares, and withdrawable accounts held in all banks and building and loan, savings and loan, and homestead associations (including cooperative banks) in the State.

(b) The term *demand deposit* includes:

(1) Any deposit that has a maturity or required-notice period of less than seven days;

(2) Any deposit regarding which the bank does not reserve the right to require at least seven days' written notice prior to withdrawal or transfer of any funds from the account; or

(3) Any other deposit from which, under the terms of the deposit contract, the depositor is authorized to make, during any month or statement cycle of at least four weeks, more than six transfers by means of a preauthorized or automatic transfer or telephonic (including data transmission) agreement, order or instruction, which transfers are made to another account of the depositor at the same bank, to the bank itself, or to a third party:

Provided, That any deposit specified in this paragraph (b)(3) will be deemed to be a *demand deposit* if more than

three of the six authorized transfers are authorized to be made by check, draft, debit card or similar order made by the depositor;

And provided further, That no deposit specified in this paragraph (3) will be deemed to be a *demand deposit* if the entire beneficial interest of the deposit is held by a depositor identified in paragraph (2) of section 2(a) of Pub. L. 93–100 (12 U.S.C. 1832(a)(2)).[1]

(c) The term *interest* means any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit. A bank's absorption of expenses incident to providing a normal banking function or its forbearance from charging a fee in connection with such a service is not considered a payment of interest.

[51 FR 10808, Mar. 31, 1986, as amended at 53 FR 47523, Nov. 23, 1988]

§ 329.2 Payment of interest.

No bank shall, directly or indirectly, by any device whatsoever, pay interest on any demand deposit.

§ 329.101 Transfers not included within the six transfers allowed for nondemand deposits pursuant to § 329.1(b)(3).

This interpretive rule describes certain transfers that are not included as any of the six transfers allowed pursuant to § 329.1(b)(3).

(a) Transfers from a deposit described in § 329.1(b)(3) that are made to the bank are not deemed to be included within the six transfers permitted for a nondemand deposit by that paragraph (3) when the transfers are made for the purpose of repaying loans and associated expenses at the bank (as originator or servicer). This exemption does not apply to transfers to the bank that are made for the purpose of repaying loans that are made by the bank to the depositor's demand account for the purpose of covering overdrafts.

(b) Transfers from a deposit described in § 329.1(b)(3) that are made to another account of the same depositor at the bank are not deemed to be included within the six transfers permitted for a nondemand deposit by that paragraph (3) when the transfers are made by mail, messenger, automated teller machine or in person.

(c) Withdrawals from a deposit described in § 329.1(b)(3) are not deemed to be included within the six transfers permitted for a nondemand deposit by that paragraph (3) when the withdrawals are made by mail, messenger, telephone (via check mailed to the depositor), automated teller machine, or in person.

§ 329.102 Deposits described in § 329.1(b)(3).

This interpretive rule explains the second proviso of § 329.1(b)(3).

(a) No deposit described in § 329.1(b)(3) that is held by an organization that is not organized for profit and that is described in paragraphs 501(c) (3) through (13) and (19) and section 528 of the Internal Revenue Code of 1954 (26 U.S.C. 501(c) (3) through (13) and (19), and 528) is deemed to be a demand deposit. Actual Internal Revenue Service documentation of the organization's tax-exempt status is not required; it is merely an aid in making the determination.

(b) No deposit described in § 329.1(b)(3) that is held by a depositor identified in section 2(a)(2) of Pub. L. 93–100 (12 U.S.C. 1832(a)(2))—whether the deposit is used for business purposes or otherwise—is deemed to be a demand deposit.

(c) No deposit described in § 329.1(b)(3) that represents funds held in a fiduciary capacity (whether the fiduciary

[1] Paragraph (1) of 12 U.S.C. 1832(a) authorizes banks to let certain depositors make withdrawals from interest-bearing deposits by negotiable or transferable instruments for the purpose of making transfers to third parties—*i.e.*, to hold deposits commonly called *NOW accounts*.

Paragraph (2) of 12 U.S.C. 1832(a) provides: ''Paragraph (1) shall apply only with respect to deposits or accounts which consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religous, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit, and with respect to deposits of public funds by an officer, employee, or agent of the United States, any State, county, municipality, or political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, any territory or possession of the United States, or any political subdivision thereof.

is a natural person or otherwise) is deemed to be a demand deposit if all the beneficiaries of the account are natural persons.

§329.103 Premiums.

This interpretive rule describes certain payments that are not deemed to be *interest* as defined in §329.1(c).

(a) Premiums, whether in the form of merchandise, credit, or cash, given by a bank to the holder of a deposit will not be regarded as *interest* as defined in §329.1(c) if:

(1) The premium is given to the depositor only at the time of the opening of a new account or an addition to, or renewal of, an existing account;

(2) No more than two premiums per deposit are given in any twelve-month interval; and (3) the value of the premium (in the case of merchandise, the total cost to the bank, including shipping, warehousing, packaging, and handling costs) does not exceed $10 for a deposit of less than $5,000 or $20 for a deposit of $5,000 or more.

(b) The costs of premiums may not be averaged.

(c) A bank may not solicit funds for deposit on the basis that the bank will divide the funds into several accounts for the purpose of enabling the bank to pay the depositor more than two premiums within a twelve-month interval on the solicited funds.

(d) The bank must retain sufficient information for examiners to determine that the requirements of this section have been satisfied.

§329.104 Ten-day grace period.

This interpretive rule provides for 10-day grace periods during which interest may be paid on a deposit without violating §329.2.

(a) During the ten calendar days following the maturity of a time deposit, the bank may continue to pay interest on the matured deposit at the contract rate of the deposit, or at any lesser rate, if the deposit contract provides for such post-maturity interest. The payment of such post-maturity interest will not be regarded as the payment of interest on a demand deposit.

(b) If a time deposit is renewed within ten calendar days after maturity, the renewed deposit may be dated back to the maturity date of the matured deposit and may draw interest from that date. The payment of such additional interest will not be regarded as the payment of interest on a demand deposit.

(c) If a time or savings deposit is renewed within ten days after expiration of the period of notice given with respect to its repayment, the renewed deposit may draw interest from the date such notice period expired. The payment of such additional interest will not be regarded as the payment of interest on a demand deposit.

PART 330—DEPOSIT INSURANCE COVERAGE

Sec.

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AUTHORITY: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818(q), 1819[Tenth], 1820(f), 1821(a), 1822(c).

SOURCE: 55 FR 20122, May 15, 1990, unless otherwise noted.

§330.1 Definitions.

For the purposes of this part:

(a) *Act* means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(b) *Default* has the same meaning as provided under section 3(x) of the Act (12 U.S.C. 1813(x)).

(c) *Deposit* has the same meaning as provided under section 3(l) of the Act (12 U.S.C. 1813(l)).

(d) *Deposit account records* means account ledgers, signature cards, certificates of deposit, passbooks, corporate

resolutions authorizing accounts in the possession of the insured depository institution and other books and records of the insured depository institution, including records maintained by computer, which relate to the insured depository institution's deposit taking function, but does not mean account statements, deposit slips, items deposited or cancelled checks.

(e) *FDIC* means the Federal Deposit Insurance Corporation.

(f) *Insured deposit* has the same meaning as that provided under subsection 3(m)(1) of the Act (12 U.S.C. 1813(m)(1)).

(g) *Insured depository institution* is any depository institution whose deposits are insured pursuant to the Act, including a foreign bank having an insured branch.

(h) *Insured branch* means a branch of a foreign bank any deposits in which are insured in accordance with the provisions of the Act.

(i) *Natural person* means a human being.

(j) *Trust funds* means funds held by an insured depository institution as trustee pursuant to any irrevocable trust established pursuant to any statute or written trust agreement.

(k) *Trust estate* means the determinable and beneficial interest of a beneficiary or principal in trust funds but does not include the beneficial interest of an heir or devisee in a decedent's estate.

[55 FR 20122, May 15, 1990, as amended at 58 FR 29963, May 25, 1993]

§ 330.2 Authority and purpose.

Section 311 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, 105 Stat. 2236, amended sections 3, 7 and 11 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1813, 1817 and 1821, which govern the amount of deposit insurance provided by the FDIC. Section 311 of FDICIA deleted the provision in section 3 of the Federal Deposit Insurance Act which authorized the FDIC to clarify and define, by regulation, the extent of deposit insurance coverage resulting from subsections 3(m)(1), 3(p), 7(i) and 11(a) of the FDI Act, 12 U.S.C. 1813(m)(1), 1813(p), 1817(i) and 1821(a) and to define the terms used in those sections. However, FDICIA did not change the FDIC's authority, in section 9 [Tenth] of the FDI Act, to prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of the FDI Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency). Moreover, in section 302(d) of FDICIA, Congress added a new subsection to section 10 of the FDI Act which provides that except to the extent that authority under the FDI Act is conferred on any of the Federal banking agencies other than the Corporation, the Corporation may prescribe regulations to carry out the FDI Act and by regulation define terms as necessary to carry out the FDI Act. The purpose of the regulations in this part is to clarify the rules and define the terms employed in affording deposit insurance coverage under the Act and provide rules for the recognition of deposit ownership in various circumstances.

[58 FR 29963, May 25, 1993]

§ 330.3 General principles.

(a) *Ownership rights and capacities.* The insurance coverage provided by the Act and the regulations in this part is based upon the ownership rights and capacities in which deposit accounts are maintained at insured depository institutions. All deposits in an insured depository institution which are maintained in the same right and capacity (by or for the benefit of a particular depositor or depositors) shall be added together and insured in accordance with the regulations in this part. Deposits maintained in different rights and capacities, as recognized under this part, shall be insured separately from each other.

(b) *Deposits maintained in separate insured depository institutions or in separate branches of the same insured depository institution.* Any deposit accounts maintained by a depositor at one insured depository institution are insured separately from, and without regard to, any deposit accounts that the same depositor maintains at any other

separately chartered and insured depository institution, even if two or more separately chartered and insured depository institutions are affiliated through common ownership. The deposit accounts of a depositor maintained in the same right and capacity at different branches or offices of the same insured depository institution are not separately insured; rather they shall be added together and insured in accordance with the regulations in this part.

(c) *Deposits maintained by foreigners and deposits denominated in foreign currency.* The availability of deposit insurance is not limited to citizens and residents of the United States. Any person or entity that maintains deposits in an insured depository institution is entitled to the deposit insurance provided by the Act and the provisions of this part. In addition, deposits denominated in a foreign currency shall be insured in accordance with the provisions of this part. Deposit insurance for such deposits shall be determined and paid in the amount of United States dollars that is equivalent in value to the amount of the deposit denominated in the foreign currency as of close of business on the date of default of the insured depository institution. The exchange rates to be used for such conversions are the 12 PM rates (the *noon buying rates for cable transfers*) quoted for major currencies by the Federal Reserve Bank of New York on the date of default of the insured depository institution, unless the deposit agreement specifies that some other widely recognized exchange rates are to be used for all purposes under that agreement, in which case, the rates so specified shall be used for such conversions.

(d) *Deposits in insured branches of foreign banks.* Deposits in an insured branch of a foreign bank which are payable by contract in the United States shall be insured in accordance with the provisions of this part, except that any deposits to the credit of the foreign bank, or any office, branch, agency or any wholly owned subsidiary of the foreign bank, shall not be insured. All deposits held by a depositor in the same right and capacity in more than one insured branch of the same foreign bank shall be added together for the purpose of determining the amount of deposit insurance.

(e) *Deposits payable solely outside of the United States.* Any obligation of an insured depository institution which is payable solely at an office of such institution located outside the States of the United States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, is not a deposit for the purposes of this part.

(f) *International banking facility deposits.* An ''international banking facility time deposit,'' as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR 204.8(a)(2)), or in any successor regulation, is not a deposit for the purposes of this part.

(g) *Continuation of separate deposit insurance after merger of insured depository institutions.* Whenever the liabilities of one or more insured depository institutions for deposits shall have been assumed by another insured depository institution, whether by merger, consolidation, other statutory assumption, or contract:

(1) The insured status of the institutions whose liabilities have been so assumed terminates on the date of receipt by the FDIC of satisfactory evidence of such assumption, and

(2) The separate insurance of deposits so assumed continues for six months from the date such assumption takes effect or, in the case of a time deposit, the earliest maturity date after the six-month period.

In the case of time deposits which mature within six months of the date such deposits are assumed and which are renewed at the same dollar amount (either with or without accrued interest having been added to the principal amount) and for the same term as the original deposit, the separate insurance is applicable to the renewed deposits until the first maturity date after the six-month period. Time deposits that mature within six months of the deposit assumption and that are renewed on any other basis, or that are not renewed and thereby become demand deposits, are separately insured only until the end of the six-month period.

(h) *Application of state or local law to deposit insurance determinations.* In general, deposit insurance is for the benefit of the owner or owners of funds on deposit. However, while ownership under state law of deposited funds is a necessary condition for deposit insurance, ownership under state law is not sufficient for, or decisive in, determining deposit insurance coverage. Deposit insurance coverage is also a function of the deposit account records of the insured depository institution, of recordkeeping requirements, and of other provisions of this part, which, in the interest of uniform national rules for deposit insurance coverage, are controlling for purposes of determining deposit insurance coverage.

(i) *Determination of the amount of a deposit*—(1) *General rule.* The amount of a deposit is the balance of principal and interest unconditionally credited to the deposit account as of the date of default of the insured depository institution, plus the ascertainable amount of interest to that date, accrued at the contract rate (or the anticipated or announced interest or dividend rate), which the insured depository institution in default would have paid if the deposit had matured on that date and the insured depository institution had not failed. In the absence of any such announced or anticipated interest or dividend rate, the rate for this purpose shall be whatever rate was paid in the immediately preceding payment period.

(2) *Discounted certificates of deposit.* The amount of a certificate of deposit sold by an insured depository institution at a discount from its face value is its original purchase price plus the amount of accrued earnings calculated by compounding interest annually at the rate necessary to increase the original purchase price to the maturity value over the life of the certificate.

(3) *Waiver of minimum requirements.* In the case of a deposit with a fixed payment date, fixed or minimum term, or a qualifying or notice period that has not expired as of such date, interest thereon to the date of closing shall be computed according to the terms of the deposit contract as if interest had been credited and as if the deposit could have been withdrawn on such date without any penalty or reduction in the rate of earnings.

§ 330.4 Recognition of deposit ownership and recordkeeping requirements.

(a) *Recognition of deposit ownership*—(1) *Evidence of deposit ownership.* In determining the amount of insurance available to each depositor, the FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution. If the FDIC, in its sole discretion, determines that the deposit account records of the insured depository institution are clear and unambiguous, those records shall be considered binding on the depositor, and no other records shall be considered, as to the manner in which the funds are owned. If the deposit account records are ambiguous or unclear as to the manner in which the funds are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned. Notwithstanding the foregoing, if the FDIC has reason to believe that the insured depository institution's deposit account records misrepresent the actual ownership of deposited funds and such misrepresentation would increase deposit insurance coverage, the FDIC may consider all available evidence and pay claims for insured deposits on the basis of the actual rather than the misrepresented ownership.

(2) *Recognition of deposit ownership in custodial accounts.* In the case of custodial deposits, the interest of each beneficial owner may be determined on a fractional or percentage basis. This may be accomplished in any manner which indicates that where the funds of an owner are commingled with other funds held in a custodial capacity and a portion thereof is placed on deposit in one or more insured depository institutions without allocation, the owner's insured interest in such a deposit in any one insured depository institution would represent, at any given time, the same fractional share as his or her share of the total commingled funds.

(b) *Recordkeeping requirements*—(1) *Disclosure of fiduciary relationships.* The deposit account records of an insured depository institution must expressly disclose, by way of specific references, the existence of any fiduciary relationship including, but not limited to, relationships involving a trustee, agent, nominee, guardian, executor or custodian, pursuant to which funds in an account are deposited and on which a claim for insurance coverage is based. No claim for insurance coverage based on a fiduciary relationship will be recognized if no fiduciary relationship is evident from the deposit account records of the insured depository institution.

(2) *Details of fiduciary relationships.* If the deposit account records of an insured depository institution disclose the existence of a relationship which might provide a basis for additional insurance, the details of the relationship and the interests of other parties in the account must be ascertainable either from the deposit account records of the insured depository institution or from records maintained, in good faith and in the regular course of business, by the depositor or by some person or entity that has undertaken to maintain such records for the depositor.

(3) *Multi-tiered fiduciary relationships.* In deposit accounts where there are multiple levels of fiduciary relationships, there are two alternative methods of satisfying paragraphs (b)(1) and (b)(2) of this section so as to obtain insurance coverage for the interests of the true beneficial owners of a deposit account.

(i) One method is to: (A) Expressly indicate, on the deposit account records of the insured depository institution, the existence of each and every level of fiduciary relationships; and

(B) Disclose, at each level, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting.

(ii) An alternative method is to: (A) Expressly indicate, on the deposit account records of the insured depository institution, that the depositor is acting in a fiduciary capacity on behalf of certain persons or entities who may, in turn, be acting in a fiduciary capacity for others;

(B) Disclose the existence of additional levels of fiduciary relationships in records, maintained in good faith and in the regular course of business, by parties at subsequent levels; and

(C) Disclose, at each of the levels, the name(s) and interest(s) of the person(s) on whose behalf the party at that level is acting.

No person or entity in the chain of parties will be permitted to claim that they are acting in a fiduciary capacity for others unless the possible existence of such a relationship is revealed at some previous level in the chain.

(4) *Exceptions to recordkeeping requirements*—(i) *Deposits evidenced by negotiable instruments.* If any deposit obligation of an insured depository institution is evidenced by a negotiable certificate of deposit, negotiable draft, negotiable cashier's or officer's check, negotiable certified check, negotiable traveler's check, letter of credit or other negotiable instrument, the FDIC will recognize the owner of such deposit obligation for all purposes of claim for insured deposits to the same extent as if his or her name and interest were disclosed on the records of the insured depository institution;

Provided, That the instrument was in fact negotiated to such owner prior to the date of default of the insured depository institution. The owner must provide affirmative proof of such negotiation, in a form satisfactory to the FDIC, to substantiate his or her claim. Receipt of a negotiable instrument directly from the insured depository institution in default shall, in no event, be considered a negotiation of said instrument for purposes of this provision.

(ii) *Deposit obligations for payment of items forwarded for collection by depository institution acting as agent.* Where an insured depository institution in default has become obligated for the payment of items forwarded for collection by a depository institution acting solely as agent, the FDIC will recognize the holders of such items for all purposes of claim for insured deposits to the same extent as if their name(s) and interest(s) were disclosed as depositors on the deposit account records of the insured depository institution, when such claim for insured deposits, if otherwise payable, has been established by

the execution and delivery of prescribed forms. The FDIC will recognize such depository institution forwarding such items for the holders thereof as agent for such holders for the purpose of making an assignment to the FDIC of their rights against the insured depository institution in default and for the purpose of receiving payment on their behalf.

§ 330.5 Single ownership accounts.

(a) *Individual accounts.* Funds owned by a natural person and deposited in one or more deposit accounts in his or her own name shall be added together and insured up to $100,000 in the aggregate. If more than one natural person has the right to withdraw funds from an individual account (excluding persons who have the right to withdraw by virtue of a Power of Attorney) the account shall be treated as a joint ownership account and shall be insured in accordance with the provisions of § 330.7 of this part, unless the deposit account records clearly indicate, to the satisfaction of the FDIC, that the funds are owned by one individual and that other signatories on the account are merely authorized to withdraw funds on behalf of the owner.

(b) *Sole proprietorship accounts.* (1) Funds owned by a business which is a sole proprietorship and deposited in one or more deposit accounts in the name of the business, shall be treated as the individual account(s) of the person who is the sole proprietor, added to any other individual accounts of that person, and insured up to $100,000 in the aggregate.

(2) The term *sole proprietorship* means a form of business in which one person owns all the assets of the business, in contrast to a partnership or corporation.

(c) *Single-name accounts containing community property funds.* Community property funds deposited into one or more deposit accounts in the name of one member of a husband-wife community shall be treated as the individual account(s) of the named member, added to any other individual accounts of that person, and insured up to $100,000 in the aggregate.

(d) *Accounts of a decedent and accounts held by executors or administrators of a decedent's estate.* Funds held in the name of a decedent or in the name of the executor, administrator, or other personal representative of his or her estate and deposited into one or more deposit accounts shall be added together and insured up to $100,000 in the aggregate. Such deposit insurance shall be separate from any insurance coverage provided for the individual deposit accounts of the executor, administrator, other personal representative or the beneficiaries of the estate.

§ 330.6 Accounts held by an agent, nominee, guardian, custodian or conservator.

(a) *Agency or nominee accounts.* Funds owned by a principal or principals and deposited into one or more deposit accounts in the name of an agent, custodian or nominee shall be insured to the same extent as if deposited in the name of the principal(s). When such funds are deposited by an insured depository institution acting as a trustee of an irrevocable trust, the insurance coverage shall be governed by the provisions of § 330.10 of this part.

(b) *Guardian, custodian or conservator accounts.* Funds held by a guardian, custodian, or conservator for the benefit of his or her ward, or for the benefit of a minor under the Uniform Gifts to Minors Act, and deposited into one or more accounts in the name of the guardian, custodian or conservator shall, for purposes of this part, be deemed to be agency or nominee accounts and shall be insured in accordance with paragraph (a) of this section.

(c) *Accounts held by fiduciaries on behalf of two or more persons.* Funds held by an agent, nominee, guardian, custodian, conservator or loan servicer, on behalf of two or more persons jointly, shall be treated as a joint ownership account and shall be insured in accordance with the provisions of § 330.7 of this part.

(d) *Mortgage servicing accounts.* Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of principal and interest, shall be added together and insured in the amount of up to $100,000 for the interest of each owner

(mortgagee, investor or security holder) in such accounts. Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of taxes and insurance premiums shall be added together and insured in the amount of up to $100,000 for the ownership interest of each mortgagor in such accounts.

(e) *Custodial accounts for American Indians.* Paragraph (a) of this section shall not apply to any interest an individual American Indian may have in funds deposited by the Bureau of Indian Affairs of the United States Department of the Interior (the *BIA*) on behalf of that person pursuant to 25 U.S.C. 162(a), or by any other disbursing agent of the United States on behalf of that person pursuant to similar authority, in an insured depository institution. The interest of each American Indian in all such accounts maintained at the same insured depository institution shall be added together and insured, up to $100,000, separately from any other accounts maintained by that person in the same insured depository institution.

(f) *Annuity Contract Accounts.* Funds held by an insurance company or other corporation in a deposit account for the sole purpose of funding life insurance or annuity contracts and any benefits incidental to such contracts, shall be insured in the amount of up to $100,000 per annuitant, provided that, pursuant to a state statute:

(1) The corporation establishes a separate account for such funds; and

(2) The account cannot be charged with the liabilities arising out of any other business of the corporation; and

(3) The account cannot be invaded by other creditors of the corporation in the event that the corporation becomes insolvent and its assets are liquidated.

Such insurance coverage shall be separate from the insurance provided for any other accounts maintained in a different right and capacity by the corporation or the annuitants at the same insured depository institution.

[55 FR 20122, May 15, 1990, as amended at 60 FR 7709, Feb. 9, 1995]

§330.7 Joint ownership accounts.

(a) *Separate insurance coverage.* Qualifying joint accounts, whether owned as joint tenants with right of survivorship, as tenants in common or as tenants by the entirety, shall be insured separately from any individually owned (single ownership) deposit accounts maintained by the co-owners. Qualifying joint accounts in the names of both husband and wife which are comprised of community property funds shall be added together and insured up to $100,000, separately from any funds deposited into accounts bearing their individual names.

(b) *Determination of insurance coverage.* All qualifying joint accounts owned by the same combination of individuals shall first be added together and insured up to $100,000 in the aggregate. The interests of each co-owner in all qualifying joint accounts, whether owned by the same or different combinations of persons, shall then be added together and the total shall be insured up to $100,000.

(c) *Qualifying joint accounts.* (1) A joint deposit account shall be deemed to be a qualifying joint account, for purposes of this section, only if:

(i) All co-owners of the funds in the account are natural persons; and

(ii) Each co-owner has personally signed a deposit account signature card; and

(iii) Each co-owner possesses withdrawal rights on the same basis.

(2) The requirement of paragraph (c)(1)(ii) of this section shall not apply to certificates of deposit, to any deposit obligation evidenced by a negotiable instrument, or to any account maintained by an agent, nominee, guardian, custodian or conservator on behalf of two or more persons.

(3) All deposit accounts that satisfy the criteria in paragraph (c)(1) of this section, and those accounts that come within the exception provided for in paragraph (c)(2) of this section, shall be deemed to be jointly owned provided that, in accordance with the provisions of §330.4(a) of this part, the FDIC determines that the deposit account records of the insured depository institution are clear and unambiguous as to the ownership of the accounts. If the deposit account records are ambiguous or

unclear as to the manner in which the deposit accounts are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned. The signatures of two or more persons on the deposit account signature card or the names of two or more persons on a certificate of deposit or other deposit instrument shall be conclusive evidence that the account is a joint account unless the deposit records as a whole are ambiguous and some other evidence indicates, to the satisfaction of the FDIC, that there is a contrary ownership capacity.

(d) *Nonqualifying joint accounts.* A deposit account held in two or more names which is not a qualifying joint account, for purposes of this section, shall be treated as being owned by each named owner, as an individual, corporation, partnership, or unincorporated association, as the case may be, and the actual ownership interest of each individual or entity in such account shall be added to any other single ownership accounts of such individual or other accounts of such entity, and shall be insured in accordance with the provisions of this part governing the insurance of such accounts.

(e) *Determination of interests.* (1) The interests of the co-owners of qualifying joint accounts, held as tenants in common, shall be deemed equal, unless otherwise stated in the insured depository institution's deposit account records.

(2) The rule set forth in paragraph (e)(1) of this section shall apply regardless of whether the conjunction ''and'' or ''or'' is used in the title of a joint deposit account, even when both terms are used, such as in the case of a joint deposit account with three or more co-owners.

[55 FR 20122, May 15, 1990, as amended at 60 FR 7710, Feb. 9, 1995]

§ 330.8 Revocable trust accounts.

(a) *General rule.* Funds owned by an individual and deposited into any account commonly referred to as a tentative or ''Totten'' trust account, ''payable-on-death'' account, revocable trust account, or similar account evidencing an intention that upon the death of the owner, the funds shall belong to such owner's spouse, or to one or more children or grandchildren of the owner, shall be insured in the amount of up to $100,000 in the aggregate as to each such named beneficiary, separately from any other accounts of the owner or the beneficiaries. Such intention must be manifested in the title of the account using commonly accepted terms such as, but not limited to, ''in trust for,'' ''as trustee for,'' ''payable-on-death to,'' or any acronym therefor, and the beneficiaries of the account must be specifically named in the deposit account records of the insured depository institution. The settlor of a revocable trust account shall be presumed to own the funds deposited into the account.

(b) *Interests of nonqualifying beneficiaries.* If a named beneficiary of such an account is not a spouse, child, or grandchild of one or more owners, the funds corresponding to that beneficiary, who is not within the qualifying degree of kinship, shall be treated as individually owned (single ownership) accounts of such owner(s), aggregated with any other single ownership accounts of such owners, and insured up to $100,000 per owner.

(c) *Joint revocable trust accounts.* Where an account described in paragraph (a) of this section is established by more than one owner and held for the benefit of others, some or all of whom are within the qualifying degree of kinship, the respective interests of each owner (which shall be deemed equal unless otherwise stated in the insured depository institution's deposit account records) held for the benefit of each qualifying beneficiary shall be separately insured up to $100,000. However, where a husband and a wife establish a revocable trust account naming themselves as the sole beneficiaries, such account shall not be insured according to the provisions of this section but shall instead be insured in accordance with the provisions of § 330.7 of this part.

(d) *Definition of children* and *grandchildren.* For the purpose of establishing the qualifying degree of kinship set forth in paragraph (a) of this section, the term *children* includes any natural-born, adopted and step-children of the

owner and the term *grandchildren* includes natural-born, adopted, or stepchildren of any of the owner's children.

§330.9 Accounts of a corporation, partnership or unincorporated association.

(a) *Corporate accounts.* (1) The deposit accounts of a corporation engaged in any independent activity shall be added together and insured up to $100,000 in the aggregate. If a corporation has divisions or units which are not separately incorporated, the deposit accounts of those divisions or units shall be added to any other deposit accounts of the corporation. If a corporation maintains deposit accounts in a representative or fiduciary capacity, such accounts shall not be treated as the deposit accounts of the corporation but shall be treated as fiduciary accounts and insured in accordance with the provisions of §330.6 of this part.

(2) Notwithstanding any other provision of this part, any trust or other business arrangement which has filed or is required to file a registration statement with the Securities and Exchange Commission pursuant to section 8 of the Investment Company Act of 1940 or that would be required so to register but for the fact it is not created under the laws of the United States or a state or but for sections 2(b), 3(c)(1), or 6(a)(1) of that act shall be deemed to be a corporation for purposes of determining deposit insurance coverage.

(b) *Partnership accounts.* The deposit accounts of a partnership engaged in any independent activity shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be separate from any insurance provided for individually owned (single ownership) accounts maintained by the individual partners. A partnership shall be deemed to exist, for purposes of this paragraph, any time there is an association of two or more persons or entities formed to carry on, as co-owners, an unincorporated business for profit.

(c) *Unincorporated association accounts.* The deposit accounts of an unincorporated association engaged in any independent activity shall be added together and insured up to $100,000 in the aggregate, separately from the accounts of the person(s) or entity(ies) comprising the unincorporated association. An unincorporated association shall be deemed to exist, for purposes of this paragraph, whenever there is an association of two or more persons formed for some religious, educational, charitable, social or other noncommercial purpose.

(d) *Definition of independent activity.* A corporation, partnership or unincorporated association shall be deemed to be engaged in an *independent activity,* for purposes of this section, if the entity is operated primarily for some purpose other than to increase deposit insurance. The deposit accounts of an entity which is not engaged in an independent activity shall be deemed to be owned by the person or persons owning the corporation or comprising the partnership or unincorporated association, and, for deposit insurance purposes, the interest of each person in such a deposit account shall be added to any other deposit accounts individually owned by that person and insured up to $100,000 in the aggregate.

§330.10 Accounts held by a depository institution as the trustee of an irrevocable trust.

(a) *Separate insurance coverage.* Trust funds held by an insured depository institution in its capacity as trustee of an irrevocable trust, whether held in its trust department, held or deposited in any other department of the fiduciary institution, or deposited by the fiduciary institution in another insured depository institution, shall be insured up to $100,000 of each owner or beneficiary represented. This insurance shall be separate from, and in addition to, the insurance provided for any other deposits of the owners or the beneficiaries.

(b) *Determination of interests.* The insurance for funds held by an insured depository institution in its capacity as trustee of an irrevocable trust shall be determined in accordance with the following rules:

(1) *Allocated funds of a trust estate.* If trust funds of a particular trust estate are allocated by the fiduciary and deposited, the insurance with respect to

such trust estate shall be determined by ascertaining the amount of its funds allocated, deposited and remaining to the credit of the claimant as fiduciary at the insured depository institution in default.

(2) *Interest of a trust estate in unallocated trust funds.* If funds of a particular trust estate are commingled with funds of other trust estates and deposited by the fiduciary institution in one or more insured depository institutions to the credit of the depository institution as fiduciary, without allocation of specific amounts from a particular trust estate to an account in such institution(s), the percentage interest of that trust estate in the unallocated deposits in any institution in default is the same as that trust estate's percentage interest in the entire commingled investment pool.

(c) *Limitation on applicability.* This section shall not apply to deposits of trust funds belonging to a trust which is classified as a corporation under § 330.9(b) of this part.

[55 FR 20122, May 15, 1990, as amended at 58 FR 29963, May 25, 1993; 60 FR 7710, Feb. 9, 1995]

§ 330.11 Irrevocable trust accounts.

(a) *General rule.* Funds representing the non-contingent trust interest(s) of a beneficiary deposited into one or more deposit accounts established pursuant to one or more irrevocable trust agreements created by the same settlor(s) (grantor(s)) shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be separate from the coverage provided for other accounts maintained by the settlor(s), trustee(s) or beneficiary(ies) of the irrevocable trust(s) at the same insured depository institution. Each trust interest in any irrevocable trust established by two or more settlors shall be deemed to be derived from each settlor pro rata to his or her contribution to the trust.

(b) *Treatment of contingent trust interests.* In the case of any trust in which certain trust interests do not qualify as non-contingent trust interests, the funds representing those interests shall be added together and insured up to $100,000 in the aggregate. Such insurance coverage shall be in addition to the coverage provided for the funds representing non-contingent trust interests which are insured pursuant to paragraph (a) of this section.

(c) *Definitions of trust interest* and *non-contingent trust interest.* For the purposes of this section:

(1) The term *trust interest* means the interest of a beneficiary in an irrevocable express trust (other than an employee benefit plan) created either by written trust instrument or by statute, but does not include any interest retained by the settlor.

(2) The term *non-contingent trust interest* means a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

(d) *Commingled accounts of bankruptcy trustees.* Whenever a bankruptcy trustee appointed under Title 11 of the *United States Code* commingles the funds of various bankruptcy estates in the same account at an insured depository institution, the funds of each Title 11 bankruptcy estate will be added together and insured for up to $100,000, separately from the funds of any other such estate.

[55 FR 20122, May 15, 1990, as amended at 60 FR 7710, Feb. 9, 1995]

§ 330.12 Retirement and other employee benefit plan accounts.

(a) *''Pass-through'' insurance.* Except as provided in paragraph (b) of this section, any deposits of an employee benefit plan or of any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457) in an insured depository institution shall be insured on a ''pass-through'' basis, in the amount of up to $100,000 for the non-contingent interest of each plan participant, provided that the FDIC's recordkeeping requirements, as outlined in § 330.4, are satisfied.

(b) *Exception.* ''Pass-through'' insurance shall not be provided pursuant to

paragraph (a) of this section with respect to any deposit accepted by an insured depository institution which, at the time the deposit is accepted, may not accept brokered deposits pursuant to section 29 of the Act unless, at the time the deposit is accepted:

(1) The institution meets each applicable capital standard; and

(2) The depositor receives a written statement from the institution indicating that such deposits are eligible for insurance coverage on a ''pass-through'' basis.

(c) *Aggregation—(1) Multiple plans.* Funds representing the non-contingent interests of a beneficiary in an employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986, which are deposited in one or more deposit accounts shall be aggregated with any other deposited funds representing such interests of the same beneficiary in other employee benefit plans, or eligible deferred compensation plans described in section 457 of the Internal Revenue Code of 1986, established by the same employer or employee organization.

(2) *Certain retirement accounts.* (i) Deposits in an insured depository institution made in connection with the following types of retirement plans shall be aggregated and insured in the amount of up to $100,000 per participant:

(A) Any individual retirement account described in section 408(a) of the Internal Revenue Code of 1986 (26 U.S.C. 408(a));

(B) Any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986; and

(C) Any individual account plan defined in section 3(34) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002) and any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d)), to the extent that participants and beneficiaries under such plans have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plans.

(ii) The provisions of this paragraph (c) shall not apply with respect to the deposits of any employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986, which is not entitled to ''pass-through'' insurance pursuant to paragraph (b) of this section. Such deposits shall be aggregated and insured in the amount of $100,000 per-plan.

(d) *Determination of interests*—(1) *Definded contribution plans.* The value of an employee's non-contingent interest in a defined contribution plan shall be deemed to be the employee's account balance as of the date of default of the insured depository institution, regardless of whether said amount was derived, in whole or in part, from contributions of the employee and/or the employer to the account.

(2) *Defined benefit plans.* The value of an employee's non-contingent interest in a defined benefit plan shall be deemed to be the present value of the employee's interest in the plan, evaluated in accordance with the method of calculation ordinarily used under such plan, as of the date of default of the insured depository institution.

(3) *Amounts taken into account.* For the purposes of applying the rule under paragraph (c)(2) of this section, only the present vested and ascertainable interests of each participant in an employee benefit plan or ''457 Plan,'' excluding any remainder interest created by, or as a result of, the plan, shall be taken into account in determining the amount of deposit insurance accorded to the deposits of the plan.

(e) *Treatment of contingent interests.* In the event that employee' interests in an employees benefit plan are not capable of evaluation in accordance with the rules contained in this section, or an account established for any such plan includes amounts for future participants in the plan, payment by the FDIC with respect to all such interests shall not exceed $100,000 in the aggregate.

(f) *Overfunded pension plan deposits.* Any portion(s) of an employee benefit plan's deposits which are not attributable to the interests of the beneficiaries under the plan shall be deemed attributable to the overfunded portion of the plan's assets and shall be aggregated and insured up to $100,000, separately from any other deposits.

(g) *Definitions of ''depositor'', ''employee benefit plan'', ''employee organizations'' and ''non-contingent interest''.* Except as otherwise indicated in this section, for purposes of this section:

(1) The term *depositor* means the person(s) administering or managing an employee benefit plan.

(2) The term *employee benefit plan* has the same meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002) and includes any plan described in section 401(d) of the Internal Revenue Code of 1986.

(3) The term *employee organization* means any labor union, organization, employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan.

(4) The term *non-contingent interest* means an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables as may be published by the Internal Revenue Service.

(h) *Disclosure of capital status*—(1) *Disclosure upon request.* An insured depository institution shall, upon request, provide a clear and conspicuous written notice to any depositor of employee benefit plan funds of the institution's leverage ratio, Tier 1 risk-based capital ratio, total risk-based capital ratio and prompt corrective action (PCA) capital category, as defined in the regulations of the institution's primary federal regulator, and whether, in the depository institution's judgment, employee benefit plan deposits made with the institution, at the time the information is requested, would be eligible for ''pass-through'' insurance coverage under paragraphs (a) and (b) of this section. Such notice shall be provided within five business days after receipt of the request for disclosure.

(2) *Disclosure upon opening of an account.* (i) An insured depository institution shall, upon the opening of any account comprised of employee benefit plan funds, provide a clear and conspicuous written notice to the depositor consisting of: an accurate explanation of the requirements for pass-through deposit insurance coverage provided in paragraphs (a) and (b) of this section; the institution's PCA capital category; and a determination of whether or not, in the depository institution's judgment, the funds being deposited are eligible for ''pass-through'' insurance coverage.

(ii) An insured depository institution shall provide the notice required in paragraph (h)(2)(i) of this section to depositors who have employee benefit plan deposits with the insured depository institution on July 1, 1995 that, at the time such deposits were placed with the insured depository institution, were not eligible for pass-through insurance coverage under paragraphs (a) and (b) of this section. The notice shall be provided to the applicable depositors within ten business days after July 1, 1995.

(3) *Disclosure when ''pass-through'' coverage is no longer available.* Whenever new, rolled-over or renewed employee benefit plan deposits placed with an insured depository institution would no longer be eligible for ''pass-through'' insurance coverage, the institution shall provide a clear and conspicuous written notice to all existing depositors of employee benefit plan funds of its new PCA capital category, if applicable, and that new, rolled-over or renewed deposits of employee benefit plan funds made after the applicable date shall not be eligible for ''pass-through'' insurance coverage under paragraphs (a) and (b) of this section. Such written notice shall be provided within 10 business days after the institution receives notice or is deemed to have notice that it is no longer permitted to accept brokered deposits under section 29 of the Act and the institution no longer meets the requirements in paragraph (b) of this section.

(4) *Definition of ''employee benefit plan''.* For purposes of this paragraph,

the term *employee benefit plan* has the same meaning as provided under paragraph (g)(2) of this section but also includes any eligible deferred compensation plans described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457).

[58 FR 29964, May 25, 1993; 58 FR 40688, July 29, 1993; 60 FR 7710, Feb. 9, 1995]

§330.13 Bank investment contracts.

(a) *General rule.* Any liability arising under any insured depository institution investment contract between any insured depository institution and any employee benefit plan which expressly permits benefit-responsive withdrawals or transfers shall not be treated as an ''insured deposit'' and thus shall not be entitled to deposit insurance.

(b) *Definitions.* For purposes of paragraph (a) of this section:

(1) *Benefit-responsive withdrawals or transfers* means any withdrawal or transfer of funds (consisting of any portion of the principal and any interest credited at a rate guaranteed by the insured depository institution investment contract) during the period in which any guaranteed rate is in effect, without substantial penalty or adjustment, to pay benefits provided by the employee benefit plan or to permit a plan participant or beneficiary to redirect the investment of his or her account balance. This term excludes penalty-free withdrawals from employee benefit plan deposits which are based on penalty-free withdrawals of funds from an employee benefit plan that are permitted or required pursuant to the Employee Retirement Income Security Act of 1974 or the Internal Revenue Code.

(2) *Employee benefit plan:* (i) Has the meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002); and

(ii) Includes any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d)); and

(iii) Excludes any deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457).

(3) *Substantial penalty or adjustment* means, in the case of a deposit having an original term which exceeds one year, all interest earned on the amount withdrawn from the date of deposit or for six months, whichever is less; or, in the case of a deposit having an original term of one year or less, all interest earned on the amount withdrawn from the date of deposit or three months, whichever is less.

[58 FR 29964, May 25, 1993]

§330.14 Public unit accounts.

(a) *Extent of insurance coverage*—(1) *Accounts of the United States.* Each official custodian of funds of the United States lawfully depositing such funds in an insured depository institution shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

(2) *Accounts of a state, county, municipality or political subdivision.* Each official custodian of funds of any state of the United States, or any county, municipality, or political subdivision thereof, lawfully depositing such funds in an insured depository institution in the state comprising the public unit or wherein the public unit is located (including any insured depository institution having a branch in said state) shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

In addition, each such official custodian depositing such funds in an insured depository institution outside of the state comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(3) *Accounts of the District of Columbia.* Each official custodian of funds of the District of Columbia lawfully depositing such funds in an insured depository institution in the District of Columbia (including an insured depository institution having a branch in the District of Columbia) shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

In addition, each such official custodian depositing such funds in an insured depository institution outside of the District of Columbia shall be insured in the amount of up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(4) *Accounts of the Commonwealth of Puerto Rico and other government possessions and territories.* Each official custodian of funds of the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, Guam, or The Commonwealth of the Northern Mariana Islands, or of any county, municipality, or political subdivision thereof lawfully depositing such funds in an insured depository institution in Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, Guam, or The Commonwealth of the Northern Mariana Islands, respectively, shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

In addition, each such official custodian depositing such funds in an insured depository institution outside of the commonwealth, possession or territory comprising the public unit or wherein the public unit is located, shall be insured in the amount of up to $100,000 in the aggregate for all deposits, regardless of whether they are time, savings or demand deposits.

(5) *Accounts of an Indian tribe.* Each official custodian of funds of an Indian tribe (as defined in 25 U.S.C. 1452(c)), including an agency thereof having official custody of tribal funds, lawfully depositing the same in an insured depository institution shall be separately insured in the amount of:

(i) Up to $100,000 in the aggregate for all time and savings deposits; and

(ii) Up to $100,000 in the aggregate for all demand deposits.

(b) *Rules relating to the official custodian*—(1) *Qualifications for an official custodian.* In order to qualify as an *official custodian* for the purposes of paragraph (a) of this section, such custodian must have plenary authority, including control, over funds owned by the public unit which the custodian is appointed or elected to serve. Control of public funds includes possession, as well as the authority to establish accounts for such funds in insured depository institutions and to make deposits, withdrawals, and disbursements of such funds.

(2) *Official custodian of the funds of more than one public unit.* For the purposes of paragraph (a) of this section, if the same person is an official custodian of the funds of more than one public unit, he or she shall be separately insured with respect to the funds held by him or her for each such public unit, but shall not be separately insured by virtue of holding different offices in such public unit or, except as provided in paragraph (c) of this section, holding such funds for different purposes.

(3) *Split of authority or control over public unit funds.* If the exercise of authority or control over the funds of a public unit requires action by, or the consent of, two or more officers, employees, or agents of such public unit, then they will be treated as one *official custodian* for the purposes of this section.

(c) *Public bond issues.* Where an officer, agent or employee of a public unit has custody of certain funds which by law or under a bond indenture are required to be set aside to discharge a debt owed to the holders of notes or bonds issued by the public unit, any deposit of such funds in an insured depository institution shall be deemed to be a deposit by a trustee of trust funds of which the noteholders or bondholders are pro rata beneficiaries, and the beneficial interest of each noteholder or bondholder in the deposit shall be separately insured up to $100,000.

(d) *Definition of political subdivision.* The term *political subdivision* includes drainage, irrigation, navigation, improvement, levee, sanitary, school or power districts, and bridge or port authorities and other special districts created by state statute or compacts between the states. It also includes any subdivision of a public unit mentioned in paragraphs (a)(2), (a)(3) and (a)(4) of

this section or any principal department of such public unit:

(1) The creation of which subdivision or department has been expressly authorized by the law of such public unit;

(2) To which some functions of government have been delegated by such law; and

(3) Which is empowered to exercise exclusive control over funds for its exclusive use.

§330.15 Notice to depositors.

(a) Each insured depository institution shall send, no later than October 10, 1993 (except as provided in paragraph (b) of this section), a notice to each of its depositors or, at the option of the institution, to all depositors having deposit accounts which could potentially be affected by the rules in this part which are effective December 19, 1993, a notice containing the following language:

In December 1993, some of the FDIC's deposit insurance rules will change. The rule changes will primarily affect the total amount of coverage which is provided for IRA, self-directed Keogh plan accounts, self-directed defined contribution plan accounts, ''457 Plan'' accounts and accounts where an insured institution is acting in a fiduciary capacity. If you do not have these types of accounts, those rule changes will not affect you. For further information contact [insert ''your branch office'' or some other contact point for the institution].

(b) The language of this notice may not be materially altered in any way. The required notice may be included on account statements, included as a separate enclosure with account statements or it may be sent to all depositors/accountholders in a separate mailing. With respect to any depositor/accountholder who maintains a time deposit and would not otherwise receive a regular monthly or quarterly account statement prior to October 10, 1993, the required notice may be sent to said depositor/accountholder at any time prior to the later of:

(1) 60 days prior to the first maturity date of that time deposit; or

(2) October 10, 1993.

[58 FR 29965, May 25, 1993]

§330.16 Effective dates.

(a) *Delayed effective dates.* Sections 330.1(j), 330.10(a), 330.12(c), 330.12(d)(3) and 330.13 shall become effective on December 19, 1993.

(b) *Time deposits.* Except with respect to the provisions in §330.12 (a) and (b), any time deposits made before December 19, 1991 that do not mature until after December 19, 1993, shall be subject to the rules as they existed on the date the deposits were made. Any time deposits made after December 19, 1991 but before December 19, 1993, shall be subject to the rules as they existed on the date the deposits were made. Any rollover or renewal of such time deposits prior to December 19, 1993 shall subject those deposits to the rules in effect on the date of such rollover or renewal. With respect to time deposits which mature only after a prescribed notice period, the provisions of this part shall be effective on the earliest possible maturity date after June 24, 1993 assuming (solely for purposes of this section) that notice had been given on that date.

[58 FR 29965, May 25, 1993]

PARTS 331—332—[RESERVED]

PART 333—EXTENSION OF CORPORATE POWERS

REGULATIONS

Sec.
333.1 Classification of general character of business.
333.2 Change in general character of business.
333.4 Conversions from mutual to stock form.

INTERPRETATIONS

333.101 Prior consent not required.

AUTHORITY: 12 U.S.C. 1816, 1818, 1819 (''Seventh'', ''Eighth'' and ''Tenth''), 1828, 1828(m), 1831p–1(c).

REGULATIONS

§ 333.1 Classification of general character of business.

State nonmember insured banks are divided into five categories for the purpose of classifying their general character or type of business,[2] viz: commercial banks, banks and trust companies, savings banks (including mutual and stock), industrial banks, and cash depositories.

[15 FR 8644, Dec. 6, 1950]

§ 333.2 Change in general character of business.

No State nonmember insured bank (except a District bank) or branch thereof shall hereafter cause or permit any change to be made in the general character or type of business exercised by it after the effective date of this part without the prior written consent of the Corporation.

[15 FR 8644, Dec. 6, 1950]

§ 333.4 Conversions from mutual to stock form.

(a) *Scope.* This section applies to the conversion of insured mutual state savings banks to the stock form of ownership. It supplements the procedural and other requirements for such conversions in § 303.15 of this chapter. This section also applies, to the extent appropriate, to the reorganization of insured mutual state savings banks to the mutual holding company form of ownership. As determined by the Board of Directors of the FDIC on a case-by-case basis, the requirements of paragraphs (d), (e), and (f) of this section do not apply to mutual-to-stock conversions of insured mutual state savings banks whose capital category under § 325.103 of this chapter is ''undercapitalized'', ''significantly undercapitalized'' or ''critically undercapitalized''. The Board of Directors of the FDIC may grant a waiver in writing from any requirement of this section for good cause shown.

(b) *Conflicts with state law.* In the event that an insured mutual state savings bank that proposes to convert to the stock form of ownership finds that compliance with any provision of this section would be inconsistent or in conflict with applicable state law, the bank may file a written request for waiver of compliance with such provision by the FDIC. In making such request, the bank shall demonstrate that the requested waiver, if granted, would not result in any effects that would be detrimental to the safety and soundness of the bank, entail a breach of fiduciary duty on part of the bank's management or otherwise be detrimental or inequitable to the bank, its depositors, any other insured depository institution(s), the federal deposit insurance funds or to the public interest.

(c) *Definition of Eligible Depositor.* For purposes of this section, *eligible depositors* are depositors holding qualifying deposits at the bank as of a date designated in the bank's plan of conversion that is not less than one year prior to the date of adoption of the plan of conversion by the converting bank's board of directors/trustees.

(d) *Requirements.* In addition to other requirements that may be imposed by the applicable state statutes and regulations and other federal statutes and regulations, including § 303.15 of this chapter, an insured mutual state savings bank shall not convert to the stock form of ownership unless the following requirements are satisfied:

(1) Eligible depositors shall have higher subscription rights than employee stock ownership plans;

(2) The proposed conversion shall be approved by a vote of at least a majority of the bank's depositors and, as reasonably determined by the bank's directors or trustees, other stakeholders of the bank who are entitled to vote on the conversion, unless the applicable state law requires a higher percentage, in which case the higher percentage shall be used. Voting may be in person or by proxy;

(3) Management shall not use proxies executed outside the context of the proposed conversion to satisfy the voting requirement imposed in the previous paragraph; and

(4) In addition to the materials to be submitted to the FDIC pursuant to § 303.15(c) of this chapter, the bank must submit to the FDIC:

[2] A bank's business may include two or more of the general classifications.

(i) A full appraisal report on the value of the converting bank and the pricing of the stock to be sold in the conversion. The report must be prepared by an independent appraiser and must include a complete and detailed description of the elements that make up an appraisal report, justification for the methodology employed and sufficient support for the conclusions reached therein, including a full discussion of the applicability of each peer group member and documented analytical evidence supporting any variance (above or below) the institution proposing to convert may have from the peer group statistics and a complete analysis of the institution's *pro forma* earnings which should include its full potential once the institution fully deploys its new capital pursuant to its business plan; and

(ii) A business plan which must include, in part, a detailed discussion of how the capital acquired in the conversion will be used, expected earnings resulting from the plan and a justification for any proposed stock repurchases.

(e) *Restriction on repurchase of stock.* An insured mutual state savings bank that has converted from the mutual to stock form of ownership may not repurchase its capital stock within one year following the date of its conversion to stock form, except that stock repurchases of no greater than 5% of the bank's outstanding capital stock may be repurchased during this one-year period where compelling and valid business reasons are established, to the satisfaction of the FDIC. Any stock repurchases shall be subject to the requirements of section 18(i)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1828(i)(1)).

(f) *Stock benefit plan limitations.* The FDIC will presume that a stock option plan or management or employee stock benefit plan that does not conform with the applicable percentage limitations of the regulations issued by the Office of Thrift Supervision constitutes excessive insider benefits and thereby evidences a breach of the board of directors' or trustees' fiduciary responsibility. In addition, no converted insured mutual state savings bank shall, for one year from the date of the conversion, implement a stock option plan or management or employee stock benefit plan, other than a tax-qualified employee stock ownership plan, unless each of the following requirements is met:

(1) Each of the plans was fully disclosed in the proxy solicitation and conversion stock offering materials;

(2) All such plans are approved by a majority of the bank's stockholders, or in the case of a recently formed holding company, its stockholders, prior to implementation at a duly called meeting of shareholders, either annual or special, to be held no sooner than six months after the completion of the conversion;

(3) In the case of a savings bank subsidiary of a mutual holding company, all such plans are approved by a majority of stockholders other than its parent mutual holding company prior to implementation at a duly called meeting of shareholders, either annual or special, to be held no sooner than six months following the stock issuance;

(4) For stock option plans, stock options are granted at no lower than the market price at which the stock is trading at the time of grant; and

(5) For management or employee stock benefit plans, no conversion stock is used to fund the plans.

[59 FR 61246, Nov. 30, 1994]

INTERPRETATIONS

§ 333.101 Prior consent not required.

(a) The extension by any State nonmember insured bank of its business to include personal, character or installment loans, or the extension by an industrial bank of its business to include the business of a commercial bank, is not a change in the general character or type of business requiring the prior written consent of the Corporation.

(b) An insured State nonmember bank, not exercising trust powers may act as trustee or custodian of Individual Retirement Accounts established pursuant to the Employee Retirement Income Security Act of 1974 and Self-Employed Retirement Plans established pursaunt to the Self-Employed Individuals Retirement Act of 1962 without the prior written consent of the Corporation provided:

(1) The bank's duties as trustee or custodian are essentially custodial or ministerial in nature, (2) the bank is required to invest the funds from such plans only (i) in its own time or savings deposits, or (ii) in any other assets at the direction of the customer provided the bank does not excercise any investment discretion or provided any investment advice with respect to such account assets, and (3) the bank's acceptance of such accounts without trust powers is not contrary to State law.

[41 FR 2375, Jan. 16, 1976, as amended at 50 FR 10754, Mar. 18, 1985]

PART 334—[RESERVED]

PART 335—SECURITIES OF NONMEMBER INSURED BANKS

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AUTHORITY: Sec. 12(i), Securities Exchange Act of 1934, as amended (15 U.S.C. 78*l*(i)).

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EFFECTIVE DATE NOTE: In part 335, the requirement that bank financial statements be

audited by independent public accountants becoming effective for periods ending after December 15, 1990 was published at 54 FR 53574, Dec. 29, 1989. See the List of CFR Sections Affected in the Finding Aids section of this volume for amendments to the various sections of this part.

Subpart A—General Provisions

§ 335.101 Scope of part.

This part is issued by the Federal Deposit Insurance Corporation (the *FDIC*) under section 12(i) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78) (the *Act*) and applies to all securities of an insured bank (including a foreign bank having an insured branch) (*foreign bank*) which is neither a member of the Federal Reserve System nor a District bank (*bank*) that are subject to the registration requirements of section 12(b) or section 12(g) of the Act. The Office of Management and Budget has reviewed and approved the recordkeeping and reporting required by this part (OMB Control No. 3064–0030).

[46 FR 25208, May 5, 1981, as amended at 46 FR 61642, Dec. 18, 1981; 54 FR 53574, Dec. 29, 1989]

§ 335.102 Definitions.

For the purposes of this part, including all forms and instructions promulgated for use in connection herewith, unless the context otherwise requires:

(a) The terms *exchange, director, person, security* and *equity security* have the meanings given them in section 3(a) of the Act.

(b) *Accountants report.* The term *accountant's report,* when used in regard to financial statements, means a document in which an independent public or certified public accountant indicates the scope of the audit (or examination) which he has made and sets forth his opinion regarding the financial statements taken as a whole, or an assertion to the effect that an overall opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefor shall be stated.

(c) The term *affiliate* (whether referred to as an *affiliate* of, or a person *affiliated* with, a specified person) means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(d) The term *amount,* when used with respect to securities, means the principal amount if relating to evidences of indebtedness, the number of shares if relating to shares, and the number of units if relating to any other kind of security.

(e) The term *associate,* when used to indicate a relationship with any person, means:

(1) Any corporation or organization (other than the bank or a subsidiary of the bank) of which such person is an officer or partner or is, directly or indirectly, either alone or together with one or more members of his immediate family, the beneficial owner of 10 percent or more of any class of equity securities,

(2) Any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as a trustee or in a similar fiduciary capacity, and

(3) Any relative or spouse of such person or any relative of such spouse, who has the same home as such person or who is a director or officer of the bank or any of its parents or subsidiaries.

(f) *Audit (or examination).* The term *audit* (or *examination*), when used in regard to financial statements, means an examination of the statements by an accountant in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon.

(g) The terms *beneficial ownership, beneficially owned,* and the like, when used with respect to the reporting of ownership of the bank's equity securities in any statement or report required by this part, shall include, in addition to direct and indirect beneficial ownership by the reporting person, ownership of such securities:

(1) By the spouse (except where legally separated) and minor children of such reporting person, and

(2) By any other relative of the reporting person who has the same home as such person.

(h) *Call Report.* The term *Call Report* means the Consolidated Reports of Condition and Income for insured

banks (FFIEC forms 031, 032, 033 and 034).

(i) *Certified.* The term *certified,* when used in regard to financial statements, means examined and reported upon with an opinion expressed by an independent public or certified public accountant.

(j) The term *charter* includes articles of incorporation, declarations of trust, articles of association or partnership, or any similar instrument, as amended, effecting (either with or without filing with any governmental agency) the organization or creation of an incorporated or unincorporated person.

(k) The term *control* (including the terms *controlling, controlled by,* and *under common control with*) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(l) [Reserved]

(m) *Employee benefit plan.* For purposes of §§ 335.203 and 335.214, the term *employee benefit plan* means any purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan solely for employees, directors, trustees or officers, and the term *exempt employee benefit plan securities* means:

(1) Securities of the bank held by an employee benefit plan, as defined in this paragraph (m), where such plan is established by the bank or

(2) If notice regarding the current solicitation has been given pursuant to § 335.214 (a)(1)(ii)(C) or if notice regarding the current request for a list of names, addresses and securities positions of beneficial owners has been given pursuant to § 335.214(b)(3), securities of the bank held by an employee benefit plan, as defined in this paragraph (m), where such plan is established by an affiliate of the bank.

(n) *Entity that exercises fiduciary powers.* The term *entity that exercises fiduicary powers* means any entity that holds securities in nominee name or otherwise on behalf of a beneficial owner but does not include a clearing agency registered pursuant to section 17A of the Act or a broker or a dealer.

(o) The term *equity capital accounts* means capital stock, surplus, undivided profits, and reserve for contingencies and other capital reserves.

(p) The term *50-percent-owned person,* in relation to a specified person, means a person approximately 50 percent of whose outstanding voting securities is owned by the specified person either directly, or indirectly through one or more intermediaries.

(q) The term *fiscal year* means the annual accounting period or, if no closing date has been adopted, the calendar year ending on December 31.

(r)(1) For the purpose of determining whether the registration requirements of section 12(g)(1) of the Act are applicable, securities shall be deemed to be *held of record* by each person who is identified the owner of such securities on records of security holders maintained by or on behalf of the bank, subject to the following:

(i) In any case where the records of security holders have not been maintained in accordance with accepted practice, any additional person who would be identified as such an owner on such records if they had been maintained in accordance with accepted practices shall be included as a holder of record.

(ii) Securities identified as held of record by a corporation, a partnership, a trust whether or not the trustees are named, or other organization shall be included as so held by one person.

(iii) Securities identified as held of record by one or more persons as trustees, executors, guardians, custodians, or in other fiduciary capacities with respect to a single trust, estate, or account shall be included as held of record by one person.

(iv) Securities held by two or more persons as co-owners shall be included as held by one person.

(v) Each outstanding unregistered or bearer certificate shall be included as held of record by a separate person, except to the extent that the bank can establish that, if such securities were registered, they would be held of record, under the provisions of this paragraph, by a lesser number of persons.

(vi) Securities registered in substantially similar names, where the bank

has reason to believe because of the address or other indications that such names represent the same person, may be included as held of record by one person.

(2) Notwithstanding paragraph (r)(1) of this section: (i) Securities held subject to a voting trust, deposit agreement, or similar arrangement shall be included as held of record by the record holders of the voting trust certificates, certificates of deposit, receipts, or similar evidences of interest in such securities; *Provided, however,* That the bank may rely in good faith on such information as is received in response to its request from a nonaffiliated issuer of the certificates or interests.

(ii) If the bank knows or has reason to know that the form of holding securities of record is used principally to circumvent the provisions of section 12(g)(1) of the Act, the beneficial owners of such securities shall be deemed to be record owners thereof.

(s) The term *immediate family* includes a person's father, mother, spouse, brothers, sisters, sons and daughters, stepparents and stepchildren, and lineal ascendents and descendents. For the purpose of determining whether any of the foregoing relationships exist, a legally adopted child shall be considered a child by blood.

(t) The term *information statement* means the statement required by § 335.201(b), whether or not contained in a single document.

(u) *Last fiscal year.* The term *last fiscal year* of the bank means the last fiscal year of the bank ending prior to the date of the meeting for which proxies are to be solicited or an information statement is required to be distributed or, if the solicitation or information statement involves written authorizations or consents in lieu of a meeting, the earliest date they may be used to effect corporate action.

(v) The term *listed* means admitted to full trading privileges upon application by the bank and includes securities for which authority to add to the list on official notice of issuance has been granted.

(w) The term *majority-owned subsidiary* means a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors is owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries.

(x) The term *material,* when used to qualify a requirement for furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed.

(y) The term *officer* or *principal officer* or *executive officer* means Chairman of the Board of Directors, Vice Chairman of the Board, Chairman of the Executive Committee, President, Vice President (except as indicated in the next sentence), Cashier, Treasurer, Secretary, Comptroller, and any other person who participates in major policy-making functions of the bank. In some banks (particularly banks with officers bearing titles such as Executive Vice President, Senior Vice President, or First Vice President as well as a number of *Vice Presidents*), some or all *Vice Presidents* do not participate in major policy-making functions, and such persons are not officers for the purpose of this part.

(z) The term *option* means any option, warrant, or right other than those issued to security holders on a pro rata basis.

(aa) The term *parent* of a specified person is a person controlling such person directly, or indirectly through one or more intermediaries.

(bb) The term *plan* includes all plans, contracts, authorizations, or arrangements, whether or not set forth in any formal document.

(cc) The term *predecessor* means a person the major portion of the business and assets of which another person acquired in a single succession or in a series of related successions.

(dd) The terms *previously filed* and *previously reported* mean previously filed with, or reported in, a registration statement under section 12, a report under section 13, or a definitive proxy statement or similar statement under section 14 of the Act, which statement or report has been filed with the FDIC provided that information contained in any such document shall be deemed to have been previously filed

with or reported to an exchange only if such document is filed with such exchange.

(ee) The term *principal underwriter* means an underwriter in privity of contract with the issuer of the securities as to which he is underwriter.

(ff) The term *promoter* includes: (1) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the bank;

(2) Any person who, in connection with the founding and organizing of the bank, directly or indirectly receives in consideration of services or property or both services and property ten percent or more of any class of securities of the bank or ten percent or more of the proceeds from the sale of any class of such securities. A person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not, however, be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the bank.

(gg) The term *proxy* includes every proxy, consent, or authorization within the meaning of section 14(a) of the Act. The consent or authorization may take the form of failure to object or to dissent.

(hh) The term *proxy statement* means the statement required by § 335.201(a), whether or not contained in a single document.

(ii) *Qualified stock option, restricted stock option, and employee stock purchase plan.* The terms *qualified stock option, restricted stock option,* and *employee stock purchase plan* have the meanings given them in sections 422 through 424 of the Internal Revenue Code of 1986, as amended. For the purposes of this regulation, an option which meets all of the conditions of section 424(b) of the Internal Revenue Code of 1986 as amended, other than the date of issuance, shall be deemed to be a *restricted stock option.*

(jj) *Record date.* The term *record date* means the date as of which the record holders of securities entitled to vote at a meeting or by written consent or authorization shall be determined.

(kk) *Record holder.* For purposes of §§ 335.203 and 335.214 the term *record holder* means any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to section 17A of the Act.

(ll) *Respondent bank.* For purposes of §§ 335.203 and 335.214, the term *respondent bank* means any bank, association or other entity that exercises fiduciary powers which holds securities on behalf of beneficial owners and deposits such securities for safekeeping with another bank, association or other entity that exercises fiduciary powers.

(mm) The term *share* means a share of stock in a corporation or unit of interest in an unincorporated person.

(nn) The term *significant subsidiary* means: (1) A subsidiary or

(2) A subsidiary and its subsidaries which meet any of the conditions described below based on

(i) The most recent annual financial statements, including consolidated financial statements, of such subsidiary which would be required to be filed if such subsidiary were required to file and

(ii) The most recent annual consolidated financial statements of the bank being filed:

(A) The parent's and its other subsidiaries' investments in and advances to, or their proportionate share (based on their equity interests) of the total assets (after intercompany eliminations) of, the subsidiary exceed five percent of the total assets of the parent and its consolidated subsidiaries.

(B) The parent's and its other subsidiaries' proportionate share (based on their equity interests) of the gross operating revenues (after intercompany eliminations) of the subsidiary exceeds five percent of the gross operating revenues of the parent and its consolidated subsidiaries.

(C) The parent's and its other subsidiaries' equity in the income before income taxes and extraordinary items of the subsidiary exceeds five percent of such income of the parent and its consolidated subsidiaries, provided that if such income of the parent and its consolidated subsidiaries is at least

five percent lower than the average of such income for the last five fiscal years such average income may be substituted in the determination.

(D) The investments in the subsidiary by its parent plus the parent's proportion of the investments in such subsidiary by the parent's other subsidiaries, if any, exceed 5 percent of the equity capital accounts of the bank. *Investments* refers to the amount carried on the books of the parent and other subsidiaries or the amount equivalent to the parent's proportionate share in the equity capital accounts of the subsidiary, whichever is greater.

(oo) The term *Small Business Issuer* shall be defined in the same manner as currently defined in 17 CFR 240.12b–2.

(pp) The terms *solicit* and *solicitation* mean:

(1) Any request for a proxy whether or not accompanied by or included in a form of proxy;

(2) Any request to execute or not to execute, or to revoke, a proxy; or

(3) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy. The terms do not apply, however, to:

(i) The furnishing of a form of proxy to a security holder upon the unsolicited request of such security holder;

(ii) The performance by the bank of acts required by § 335.210;

(iii) The performance by any person of ministerial acts on behalf of a person soliciting a proxy; or

(iv) A communication by a security holder who does not otherwise engage in a proxy solicitation (other than a solicitation exempt under § 335.202) stating how the security holder intends to vote and the reasons therefore, provided that the communication:

(A) Is made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, or newspaper, magazine or other bona fide publication disseminated on a regular basis;

(B) Is directed to persons to whom the security holder owes a fiduciary duty in connection with the voting of securities of a bank held by the security holder; or

(C) Is made in response to unsolicited requests for additional information with respect to a prior communication by the security holder made pursuant to this paragraph (oo)(3)(iv).

(qq) The term *subsidiary* means:

(1) Any corporation, business trust, association, or similar organization of which the bank, either directly or through one or more intermediaries, (i) owns beneficially a majority of the voting securities, (ii) holds a majority of the voting securities as trustee for the benefit of the holders of a class of stock of the bank, pro rata, or (iii) has the power to elect a majority of the directors, trustees, or other persons exercising similar functions except where such power (A) exists by reason of ownership or control of voting securities by the bank in a fiduciary capacity, or (B) was obtained in the course of securing or collecting a debt previously contracted in good faith; or

(2) Any affiliate controlled by such person directly, or indirectly through one or more intermediaries.

(rr) The term *succession* means the direct acquisition of the shares or assets comprising a going business, whether by merger, consolidation, purchase, or other direct transfer. The term does not include the acquisition of control of a business unless followed by the direct acquisition of its shares or assets. The terms *succeed* and *successor* have meanings correlative to the foregoing.

(ss) *Verified*. The term *verified* when used in regard to financial statements, has the same meaning as *certified*.

(tt) The term *voting securities* means the sum of all rights, other than as affected by the events of default, to vote for election of directors and/or the sum of all interests in an unincorporated person.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53574, Dec. 29, 1989; 57 FR 58136, Dec. 9, 1992; 59 FR 67168, Dec. 29, 1994]

§ 335.103 Liability for forward-looking statements.

(a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of a bank, or by an outside reviewer retained by the bank, shall be deemed not to be a

fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.

(b) This section applies to (1) a forward-looking statement (as defined in paragraph (c) of this section) made in an annual report to shareholders meeting the requirements of § 335.203 or in a document filed with the FDIC under the Act, (2) a statement reaffirming the forward-looking statement referred to in paragraph (b)(1) of this section subsequent to the date the document was filed or the annual report was made publicly available, (3) a forward-looking statement made prior to the date the document was filed or the date the annual report was made publicly available if such forward-looking statement is reaffirmed in a filed document or annual report made publicly available within a reasonable time after the making of such forward-looking statement, or (4) information relating to the effects of changing prices on the business enterprise presented voluntarily or pursuant to any *Management's discussion and analysis of financial condition and results of operations*, or any other supplementary financial information, and disclosed in a document filed with the FDIC, or in an annual report to shareholders meeting the requirements of § 335.203.

(c) For the purpose of this section the term *forward-looking statement* shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations; or

(4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraph (c) (1), (2), or (c)(3) of this section.

(d) For the purpose of this section the term *fraudulent statement* shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Act or the regulations issued thereunder.

(e) Notwithstanding any of the provisions of paragraphs (a) through (d) this shall apply only to forward-looking statements made by or on behalf of a bank if, at the time such statements are made or reaffirmed, the bank is subject to the reporting requirements of the Act and has filed its most recent annual report on Form F–2.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55555, Dec. 14, 1983]

Subpart B—Shareholder Meetings

§ 335.201 Requirement of statement.

(a) *Proxy statements.* No solicitation of a proxy (See 12 CFR 335.102(gg) and (pp)) with respect to a security of a bank registered under section 12 of the Act shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information required by Form F–5.

(b) *Information statements.* If any bank having such a security outstanding fails to solicit proxies from the holders of any such security in a manner requiring the furnishing of a proxy statement, the bank shall transmit to all holders of record of such security a statement containing the information required by Form F-5A. The ''information statement'' required by the preceding sentence shall be transmitted:

(1) At least 20 calendar days prior to any annual or other meeting of the holders of such security at which the holders are entitled to vote or.

(2) In the case of corporate action taken with the written authorization or consent of security holders, at least 20 days prior to the earliest date on

which the corporate action may be taken.

The ''information statement'' shall be transmitted to every security holder of the class that is entitled to vote or give an authorization or consent in regard to any matter to be acted upon and from whom a proxy, authorization or consent is not solicited on behalf of the bank pursuant to section 14(a) of the Act: *Provided, however,* that in the case of a class of securities in unregistered or bearer form, such statements need be transmitted only to those security holders whose names are known to the bank.

(c) *Statements.* A proxy statement or an information statement where required by this paragraph is hereinafter sometimes referred to as a ''Statement''.

(d) The provisions of paragraph (a) of this section shall not apply to a communication made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, newspaper, magazine or other bona fide publication disseminated on a regular basis, provided that:

(1) No form of proxy, consent or authorization or means to execute the same is provided to a security holder in connection with the communication; and

(2) At the time the communication is made, a definitive proxy statement is on file with the FDIC pursuant to § 335.204(c).

[46 FR 25208, May 5, 1981, as amended at 54 FR 53575, Dec. 29, 1989; 59 FR 67168, Dec. 29, 1994]

§ 335.202 Exceptions.

The requirements of this subpart (except §§ 335.204(l), 335.206, and 335.210) shall not apply to the following:

(a) Any solicitation made otherwise than on behalf of the the bank where the total number of persons solicited is not more than 10.

(b) Any solicitation by a person in respect to securities carried in his name or in the name of his nominee (otherwise than as voting trustee) or held in his custody, if such person:

(1) Receives no commission or remuneration for such solicitation, directly or indirectly, other than reimbursement of reasonable expenses;

(2) Furnishes promptly to the person solicited a copy of all soliciting material with respect to the same subject matter or meeting received from all persons who will furnish copies thereof for such purpose and who will, if requested, defray the reasonable expenses to be incurred in forwarding such material; and

(3) In addition, does no more than: (i) Impartially instruct the person solicited to forward a proxy to the person, if any, to whom the person solicited desires to give a proxy, or (ii) impartially request from the person solicited instructions as to the authority to be conferred by the proxy and state that a proxy will be given if no instructions are received by a certain date.

(c) Any solicitation by a person with respect to securities of which he is the beneficial owner.

(d) Any solicitation through the medium of a newspaper advertisement that informs security holders of a source from which they may obtain copies of a proxy statement, form of proxy, and any other soliciting material and does no more than (1) name the bank; (2) state the reason for the advertisement; and (3) identify the proposal or proposals to be acted upon by security holders.

(e) The furnishing of proxy voting advice by any person (the ''advisor'') to any other person with whom the advisor has a business relationship, if:

(1) The advisor renders financial advice in the ordinary course of his business;

(2) The advisor discloses to the recipient of the advice any significant relationship with the bank or any of its affiliates, or a shareholder proponent of the matter on which advice is given, as well as any material interest of the advisor in such matter;

(3) The advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice and other persons who receive similar advice under this subsection; and

(4) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of § 335.220.

(f) Any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization. *Provided, however,* that the exemption set forth in this paragraph shall not apply to:

(1) The bank or an affiliate or associate of the bank (other than an officer or director or any person serving in a similar capacity);

(2) An officer or director of the bank or any person serving in a similar capacity engaging in a solicitation financed directly or indirectly by the bank;

(3) An officer, director, affiliate or associate of a person that is ineligible to rely on the exemption set forth in this paragraph (other than persons specified in paragraph (b)(1)(i) of this section), or any person serving in a similar capacity;

(4) Any nominee for whose election as a director proxies are solicited;

(5) Any person soliciting in opposition to a merger, recapitalization, reorganization, sale of assets or other extraordinary transaction recommended or approved by the board of directors of the bank who is proposing or intends to propose an alternative transaction to which such person or one of its affiliates is a party;

(6) Any person who is required to report beneficial ownership of the bank's equity securities on a Form F–11 [§ 335.407], unless such person has filed a Form F–11 and has not disclosed pursuant to Item 4 thereto an intent, or reserved the right, to engage in a control transaction, or any contested solicitation for the election of directors;

(7) Any person who receives compensation from an ineligible person directly related to the solicitation of proxies, other than pursuant to § 335.203(c);

(8) Any person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person's employment with the bank; and

(9) Any person acting on behalf of any of the foregoing in paragraphs (f)(1) through (8) of this section.

[46 FR 25208, May 5, 1981, as amended at 59 FR 67168, Dec. 29, 1994]

§ 335.203 Annual report to security holders to accompany statements.

(a) Any statement furnished on behalf of the bank that relates to an annual meeting (or special meeting in lieu of annual meeting) of security holders at which directors are to be elected shall be accompanied or preceded by an annual report to such security holders.

Note to Small Business Issuers: A ''small business issuer'', as defined under 17 CFR 240.12b–2 has the option of providing financial and other item disclosure in conformance with Regulation S–B of the Securities and Exchange Commission (17 CFR Part 228) in lieu of the disclosure requirements set forth by paragraphs (a)(1) and (a)(3) through (a)(8) of this section. If there is no comparable disclosure requirement in Regulation S–B, a small business issuer need not provide the information requested. The definition of ''small business issuer'', generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

(1) The report shall include, for the bank and its subsidiaries, consolidated balance sheets as of the end of each of the two most recent fiscal years, and statements of income, changes in capital accounts and changes in financial position and/or cash flows for each of the three most recent fiscal years, prepared and audited in substantial compliance with subpart F of this part. Any financial statement schedules (except schedule VI) or exhibits or separate financial statements which may otherwise be required in filings with the FDIC may be omitted.

NOTE: If the financial statements for a year prior to the most recently completed

fiscal year have been examined by a predecessor accountant, the separate report of the predecessor accountant may be omitted in the report to security holders provided the bank has obtained from the predecessor accountant a reissued report covering the prior period presented and the successor accountant clearly indicates in the scope paragraph of his report (a) that the financial statements of the prior period were examined by other accountants, (b) the date of their report, (c) the type of opinion expressed by the predecessor accountant, and (d) the substantive reasons therefor, if it was other than unqualified. It should be noted, however, that the separate report of any predecessor accountant may be required in filings with the FDIC. If, for instance, the financial statements in the annual report to security holders are incorporated by reference in a Form F–2, the separate report of a predecessor accountant shall be filed in part II or in part IV as a financial statement schedule.

(2) Financial statements and notes thereto shall be presented in roman type at least as large and as legible as 10-point modern type. If necessary for convenient presentation, the financial statements may be in roman type as large and as legible as 8-point modern type. All type shall be leaded at least 2 points.

(3) The report shall contain the information required by §335.622(f)—Disagreements on accounting and financial disclosure matters, and §335.622(g)—Disclosure of selected quarterly financial data in notes to the financial statements, unless such situation did not exist or the bank is otherwise exempt from making such disclosures.

(4)(i) The report shall contain Selected Financial Data in accordance with the provisions of item 6 of the Form F–2 (§335.312).

(ii) The report shall contain Management's Discussion and Analysis of the bank's financial condition and results of operations in accordance with the provisions of item 7 of the Form F–2 (§335.312). Item 7 deals with results of operations.

(5) The report shall contain a brief description of the business done by the bank and its subsidiaries during the most recent year which will, in the opinion of management, indicate the general nature and scope of the business of the bank and its subsidiaries. The report shall contain information as comprehensive as that required by Schedule III of Format F–9E.

(6) The report shall contain information as comprehensive as that required by item 1(c) of Form F–2 regarding the bank's lines of business.

(7) The report shall identify each of the bank's directors and officers, and shall indicate the principal occupation or employment of each such person and the name and principal business of any organization by which such person is so employed. See the definition of ''officers'' at §335.102(y).

(8) The report shall contain the market price of the bank's common stock and related security holder matters in accordance with the provisions of item 5 of Form F–2 (§335.312).

(9) The bank's proxy statement, or the report, shall contain an undertaking in bold face or otherwise reasonably prominent type to provide without charge to each person solicited, on the written request of any such person, a copy of the bank's annual report on Form F–2, including the financial statements and the schedules thereto required to be filed with the FDIC under §335.310 for the bank's most recent fiscal year, and shall indicate the name and address of the person to whom such a written request is to be directed. In the discretion of management, a bank need not undertake to furnish without charge copies of all exhibits to its Form F–2, provided that the copy of the annual report on Form F–2 furnished without charge to requesting security holders is accompanied by a list briefly describing all the exhibits not contained therein and indicating that the bank will furnish any exhibit upon the payment of a specified reasonable fee which fee shall be limited to the issuer's reasonable expenses in furnishing the exhibit. If the bank's annual report to security holders complies with all of the disclosure requirements of Form F–2 and is filed with the FDIC in satisfaction of its Form F–2 filing requirements, the bank need not furnish a separate Form F–2 to security holders who receive a copy of such annual report.

NOTE: Pursuant to the undertaking required by paragraph (a)(9) of this section, a bank shall furnish a copy of its annual report on Form F-2 (§355.312) to a beneficial

owner of its securities upon receipt of a written request from such person. Each request must set forth a good faith representation that, as of the record date for the solicitation requiring the furnishing of the annual report to security holders pursuant to paragraph (a) of this section, the person making the request was a beneficial owner of securities entitled to vote.

(10) Subject to the foregoing requirements, the report may be in a form deemed suitable by management and the information required by paragraphs (a) (4) through (9) of this section may be presented in an appendix or other separate section of the report, provided that the attention of security holders is called to such presentation.

Instruction. Banks are encouraged to utilize tables, schedules, charts, and graphic illustrations to present financial information in an understandable manner. Any presentation of financial information must be consistent with the data in the financial statements contained in the report and, if appropriate, should refer to relevant portions of the financial statements and notes thereto.

(11) This § 335.203 shall not apply, however, to solicitations made on behalf of the bank before the financial statements are available if solicitation is being made at the time in opposition to the bank and if the bank's statement includes an undertaking in boldface type to furnish such annual report to all persons being solicited at least 20 calendar days before the date of the meeting or, if the solicitation refers to a written consent or authorization in lieu of a meeting, at least 20 calendar days prior to the earliest date on which it may be used to effect corporation action.

(b) Three copies of each annual report sent to security holders under this section shall be sent to the FDIC not later than: (1) The date on which such report is first sent or given to security holders or (2) the date on which preliminary copies of the bank's statement are filed with the FDIC under § 335.204 whichever date is later.

NOTE: To assist the staff, managements of banks are requested to indicate in a letter transmitting to the FDIC copies of their annual reports to security holders or in a separate letter at or about the time the annual report is furnished to the FDIC, whether the financial statements in the report reflect a change from the preceding year in any accounting principles or practices or in the method of applying any such principles or practices.

Such annual report is not deemed to be ''soliciting material'' or to be ''filed'' with the FDIC or otherwise subject to this subpart or the liabilities of section 18 of the Act, except to the extent that the bank specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement by reference.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55555, Dec. 14, 1983; 54 FR 53575, Dec. 29, 1989; 57 FR 58136, Dec. 9, 1992; 59 FR 67169, Dec. 29, 1994]

§ 335.204 Material required to be filed.

(a) Three preliminary copies of each statement, form of proxy, and other item of soliciting material to be furnished to security holders concurrently therewith, shall be filed with the FDIC by the bank or any other person making a solicitation subject to this subpart at least ten calendar days (or 15 calendar days in the case of other than routine meetings, as defined below) prior to the date such item is first sent or given to any security holders, or such shorter period prior to that date as may be authorized. For the purposes of this paragraph, a routine meeting means a meeting with respect to which no one is soliciting proxies subject to this subpart other than on behalf of the bank and at which the bank intends to present no matters other than the election of directors, election of inspectors of election, and other recurring matters. In the absence of actual knowledge to the contrary, bank may assume that no other such solicitation of the bank's security holders is being made. In cases of annual meetings, one additional preliminary copy of the Statement, the form of proxy, and any other soliciting material, marked to show changes from the material sent or given to security holders with respect to the preceding annual meeting, shall be filed with the FDIC. If the changes are material, the bank shall file with the FDIC any explanatory comments which may be of assistance in the expeditious processing of the Statement.

Note 1: The filing of revised material does not recommence the ten day time period unless the revised material contains material

revisions or material new proposal(s) that constitute a fundamental change in the proxy material.

Note 2: The officials responsible for the preparation of the preliminary material should make every effort to verify the accuracy and completeness of the information required by the applicable rules. The preliminary material should be filed with the FDIC at the earliest practicable date.

(b) Three preliminary copies of any additional soliciting material, relating to the same meeting or subject matter, furnished to security holders subsequent to the proxy statement shall be filed with the FDIC at least two days (exclusive of Saturdays, Sundays, and Federal holidays) prior to the date copies of such material are first sent or given to security holders, or such shorter period prior to such date as may be authorized upon a showing of good cause therefor.

(c) Three copies of each statement, form of proxy, and other item of soliciting material, in the form in which such material is furnished to security holders, shall be filed with, or mailed for filing to, the FDIC not later than the date such material is first sent or given to any security holders. Three copies of such material shall at the same time be filed with, or mailed for filing to, each exchange upon which any security of the bank is listed.

NOTE: The Definitive Statement filed with the FDIC should be accompanied by a letter indicating any material changes which have been made therein, other than those made in response to the staff's comments, and should also be accompanied by a marked copy of the Definitive Statement indicating all changes made therein.

(d) If the solicitation is to be made in whole or in part by personal solicitation, three copies of all written instructions, or other material that discusses or reviews, or comments upon the merits of, any matter to be acted upon and is furnished to the individuals making the actual solicitation for their use directly or indirectly in connection with the solicitation shall be filed with the FDIC by the person on whose behalf the solicitation is made at least five days prior to the date copies of such material are first sent or given to the individuals, or such shorter period prior to that date as may be authorized upon a showing of good cause therefor.

(e) All preliminary material filed pursuant to paragraph (a) or (b) of this section shall be accompanied by a statement of the date on which definitive copies therefor filed pursuant to paragraph (c) of this section are intended to be released to security holders. All definitive material filed pursuant to paragraph (c) of this section shall be accompanied by a statement of the date on which copies of such material have been released to security holders, or, if not released, the date on which copies thereof are intended to be released. All material filed pursuant to paragraph (d) of this section shall be accompanied by a statement of the date on which copies thereof are intended to be released to the individual who will make the actual solicitation.

(f)(1) All copies of preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be clearly marked ''Preliminary Copies'', and shall be deemed immediately available for public inspection unless confidential treatment is obtained pursuant to paragraph (f)(2) of this section.

(2) If action is to be taken with respect to any matter specified in Item 12 of Form F–5, all copies of the preliminary proxy statement and form of proxy filed pursuant to paragraph (a) of this section shall be for the information of the FDIC only and shall not be deemed available for public inspection until filed with the FDIC in definitive form, provided that:

(i) The proxy statement does not relate to a matter or proposal subject to § 335.409; and

(ii) The filed material is marked ''Confidential, For Use of the FDIC Only''. In any and all cases, such material may be disclosed to any department or agency of the United States Government and to the Congress, and the FDIC may make such inquiries or investigation in regard to the material as may be necessary for an adequate review thereof by the FDIC.

(g) Copies of replies to inquiries from security holders requesting further information and copies of communications that do no more than request

that forms of proxy theretofore solicited be signed, dated, and returned need not be filed under this section.

(h) Notwithstanding the provisions of §335.204 (a) and (b), §335.205(b) and §335.220(c), copies of soliciting material in the form of speeches, press releases, and radio or television scripts may, but need not, be filed with the FDIC prior to use or publication. Definitive copies, however, shall be filed with or mailed for filing to the FDIC as required by §335.204(c) not later than the date such material is used or published. The provisions of §335.204 (a) and (b), §335.205(b) and §335.220(c) shall apply, however, to any reprints or reproductions of all or any part of such material.

(i) Where any statement, form of proxy, or other material filed pursuant to this section is revised, two of the copies of such amendment or revised material filed under §335.204(c) shall be marked to indicate clearly the changes. If the amendment or revision alters the text of the material, the changes in such text shall be indicated by means of underscoring or in some other appropriate manner.

(j) The date that proxy material is ''filed'' with the FDIC for purposes of paragraphs (a), (b), and (d) of this section, is the date of receipt by the FDIC not the date of mailing to the FDIC. In computing the advance filing period for preliminary copies of proxy soliciting material referred to in such paragraphs, the filing date of the preliminary material is to be counted as the first day of the period and definitive material should not be planned to be mailed or distributed to security holders until after the expiration of such period. Where additional time is required for final printing after receipt of comments, the preliminary proxy material should be filed as early as possible prior to the intended mailing date.

(k) Where preliminary copies of material are filed with the FDIC under this section the printing of definitive copies for distribution to security holders should be deferred until the comments of the FDIC's staff have been received and considered.

(l) Solicitations subject to §335.202(f). (1) Any person who:

(i) Engages in a solicitation pursuant to §335.202(f); and

(ii) At the commencement of that solicitation owns beneficially securities of the class which is the subject of the solicitation with a market value of over §5 million, shall furnish or mail to the FDIC, not later than three days after the date the written solicitation is first sent or given to any security holder, three copies of a statement containing the information specified in the Notice of Exempt Solicitation (Form F–6A, §335.222) which statement shall attach as an exhibit all written soliciting materials. Three copies of an amendment to such statement shall be furnished or mailed to the FDIC, in connection with dissemination of any additional communications, not later than three days after the date the additional material is first sent or given to any security holder. Three copies of the Notice of Exempt Proxy Solicitation and amendments thereto shall, at the same time the materials are furnished or mailed to the FDIC, be furnished or mailed to each national securities exchange upon which any class of securities of the bank is listed and registered.

(2) Notwithstanding paragraph (l)(1) of this section, no such submission need be made with respect to oral solicitations (other than with respect to scripts used in connection with such oral solicitations), speeches delivered in a public forum, press releases, published or broadcast opinions, statements, and advertisements appearing in a broadcast media, or a newspaper, magazine or other bona fide publication disseminated on a regular basis.

[46 FR 25208, May 5, 1981, as amended 54 FR 53575, Dec. 29, 1989; 59 FR 67169, Dec. 29, 1994]

§335.205 Solicitation prior to furnishing required proxy statement.

(a) Notwithstanding the provisions of §335.201, a solicitation (other than one subject to §335.220) may be made prior to furnishing security holders a written proxy statement containing the information specified in Form F–5 with respect to such solicitation if:

(1) The solicitation is made in opposition to a prior solicitation or an invitation for tenders or other publicized activity which, if successful, could reasonably have the effect of defeating the action proposed to be taken at the meeting;

(2) No form of proxy is furnished to security holders prior to the time the written proxy statement required by § 335.201 is furnished to security holders: *Provided, however,* That this paragraph shall not apply where a proxy statement then meeting the requirements of Form F–5 has been furnished to security holders by or on behalf of the person making the solicitation;

(3) The identity of the participants in the solicitation (as defined in Instruction 3 to Item 3 of Form F–5 (§ 335.212)) and a description of their interests direct or indirect, by security holdings or otherwise, are set forth in each communication published, sent or given to security holders in connection with the solicitation; and

(4) A written proxy statement meeting the requirements of this regulation is sent or given to security holders solicited pursuant to this section at the earliest practicable date.

(b) Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishing of the written proxy statement required by § 335.201 shall be filed with the FDIC in preliminary form at least five business days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period as the FDIC may authorize upon a showing of good cause therefor.

[46 FR 25208, May 5, 1981, as amended at 59 FR 67169, Dec. 29, 1994]

§ 335.206 False or misleading statements.

(a) No solicitation or communication subject to this subpart B shall be made by means of any statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading. Depending upon particular circumstances, the following may be misleading within the meaning of this section: Predictions as to specific future market values, material that directly or indirectly impugns character, integrity, or personal reputation, or directly or indirectly makes charges concerning improper, illegal, or immoral conduct or associations, without factual foundation; failure to so identify a statement, form of proxy, and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter; claims made prior to a meeting regarding the results of a solicitation.

(b) The fact that a proxy statement, form of proxy, or other soliciting material has been filed with or reviewed by the FDIC or its staff shall not be deemed a finding by the FDIC that such material is accurate or complete or not false or misleading, or that the FDIC has passed upon the merits of or approved any statement therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983; 54 FR 53576, Dec. 29, 1989]

§ 335.207 Requirements as to proxy.

(a) The form of proxy:

(1) Shall indicate in bold-face type whether or not the proxy is solicited on behalf of the bank's board of directors or, if provided other than by a majority of the board of directors, shall indicate in bold face type the identity of the persons on whose behalf the solicitation is made;

(2) Shall provide a specifically designated blank space for dating the proxy; and

(3) Shall identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the bank or by security holders. No

reference need be made, however, to matters as to which discretionary authority is conferred under paragraph (c) of this section.

(b)(1) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office. A proxy may confer discretionary authority with respect to matters as to which a choice is not so specified by the security holder if the form of proxy states in bold-faced type how the shares represented by the proxy are intended to be voted in each such case.

(2) A form of proxy which provides for the election of directors shall set forth the names of persons nominated for election as directors. Such form of proxy shall clearly provide any of the following means for security holders to withhold authority to vote for each nominee:

(i) A box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld; or

(ii) An instruction in bold-face type which indicates that the security holder may withhold authority to vote for any nominee by lining through or otherwise striking out the name of any nominee; or

(iii) Designated blank spaces in which the shareholder may enter the names of nominees with respect to whom the shareholder chooses to withhold authority to vote; or

(iv) Any other similar means, provided that clear instructions are furnished indicating how the shareholder may withhold authority to vote for any nominee.

The form of proxy also may provide a means for the security holder to grant authority to vote for the nominees set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for the group of nominees. Any form of proxy which is executed by the security holder in such manner as not to withhold authority to vote for the election of any nominee shall be deemed to grant authority, provided that the form of proxy so states in bold-face type.

Instructions. 1. Section 335.207(b)(2) does not apply in the case of a merger, consolidation or other plan if the election of directors is an integral part of the plan.

2. If applicable state law gives legal effect to votes cast against a nominee, then in lieu of, or in addition to, providing a means for security holders to withhold authority to vote, the bank should provide a similar means for security holders to vote against each nominee.

(c) A proxy may confer discretionary authority to vote with respect to any of the following matters:

(1) Matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting, if a specific statement to that effect is made in the proxy statement or form of proxy;

(2) Approval of the minutes of the prior meeting if such approval does not amount to ratification of the action taken at that meeting;

(3) The election of any person to any office for which a bona fide nominee is named in the proxy statement and nominee is subsequently unable to serve or for good cause refuses to serve;

(4) Any proposal omitted from the proxy statement and form of proxy under § 335.206 or § 335.211; and

(5) Matters incident to the conduct of the meeting.

(d)(1) No proxy shall confer authority:

(i) To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement;

(ii) To vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders;

(iii) To vote with respect to more than one meeting (and any adjournment thereof) or more than one consent solicitation; or

(iv) To consent to or authorize any action other than the action proposed to be taken in the proxy statement or matters referred to in paragraph (c) of this section.

(2) A person shall not be deemed to be a bona fide nominee and he shall not be

named as such unless he has consented to being named in the proxy statement and to serve if elected. *Provided, however,* that nothing in this section shall prevent any person soliciting in support of nominees who, if elected, would constitute a minority of the board of directors, from seeking authority to vote for nominees named in the bank's proxy statement, so long as the soliciting party:

(i) Seeks authority to vote in the aggregate for the number of director positions then subject to election;

(ii) Represents that it will vote for all the bank nominees, other than those bank nominees specified by the soliciting party;

(iii) Provides the security holder an opportunity to withhold authority with respect to any other bank nominee by writing the name of that nominee on the form of proxy; and

(iv) States on the form of proxy and in the proxy statement that there is no assurance that the bank's nominees will serve if elected with any of the soliciting party's nominees.

(e) The proxy statement or form of proxy shall provide, subject to reasonable specified conditions, that the shares represented by the proxy will be voted and that where the person solicited specifies by means of a ballot provided under paragraph (b) of this section a choice with respect to any matters to be acted upon, the shares will be voted in accordance with the specifications so made.

(f) No person conducting a solicitation subject to this subpart B shall deliver a form of proxy, consent or authorization to any security holder unless the security holder concurrently receives, or has previously received, a definitive proxy statement that has been filed with, or mailed for filing to, the FDIC pursuant to § 335.204(c).

[46 FR 25208, May 5, 1981, as amended at 54 FR 53576, Dec. 29, 1989; 59 FR 67169, Dec. 29, 1994]

§ 335.208 Prohibition of certain solicitations.

No person making a solicitation that is subject to this subpart B shall solicit:

(a) Any undated or postdated proxy; or

(b) Any proxy that provides that it shall be deemed to be dated as of any date subsequent to the date on which it is signed by the security holder.

§ 335.209 Presentation of information in statement.

(a) The information included in the Statement shall be clearly presented and the statements made shall be divided into groups according to subject matter and the various groups of statements shall be preceded by appropriate headings. The order of items in the form need not be followed. Where practicable and appropriate, the information shall be presented in tabular form. All amounts shall be stated in figures. Information required by more than one applicable item need not be repeated. No statement need be made in response to any item that is inapplicable.

(b) Any information required to be included in the Statement as to terms of securities or other subject matter that from a standpoint of practical necessity must be determined in the future may be stated in terms of present knowledge and intention. To the extent practicable, the authority to be conferred concerning each such matter shall be confined within limits reasonably related to the need for discretionary authority. Subject to the foregoing, information that is not known to the persons on whose behalf the solicitation is to be made and is not reasonably within the power of such persons to ascertain or procure may be omitted, if a brief statement of the circumstances rendering such information unavailable is made.

(c) There may be omitted from a proxy statement any information contained in any other proxy soliciting material that has been furnished to each person solicited in connection with the same meeting or subject matter if a clear reference is made to the particular document containing the information.

(d) All printed Statements shall be set in roman type at least as large as 10-point modern type except that to the extent necessary for convenient presentation financial statements and other statistical or tabular matter may be set in roman type at least as large

as 8-point modern type. All type shall be leaded at least 2 points.

(e) All proxy statements shall disclose on the first page thereof the complete mailing address, including zip code, of the principal executive offices of the bank and the approximate date on which the proxy statement and form of proxy are first sent or given to security holders. If action is to be taken by written consent, state the date by which consents are to be submitted if state law requires that such a date be specified or if the person soliciting intends to set a date.

(f) All proxy statements shall disclose, under an appropriate caption, the date by which proposals of security holders intended to be presented at the next annual meeting must be received by the bank for inclusion in the bank's proxy statement and form of proxy relating to that meeting, such date to be calculated in accordance with the provisions of § 335.211(a)(3)(i). If the date of the next annual meeting is subsequently advanced by more than 30 calendar days or delayed by more than 90 calendar days from the date of the annual meeting to which the proxy statement relates, the bank shall, in a timely manner, inform security holders of such change, and the date by which proposals of security holders must be received, by any means reasonably calculated to so inform them.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53576, Dec. 29, 1989]

§ 335.210 Obligations of banks to provide a list of, or mail soliciting material to, security holders.

(a) If the bank has made or intends to make a proxy solicitation in connection with a security holder meeting, upon the written request by any record or beneficial holder of securities of the class entitled to vote at the meeting to provide a list of security holders or to mail the requesting security holder's materials, regardless of whether the request references this section, the bank shall:

(1) Deliver to the requesting security holder within five business days after receipt of the request:

(i) Notification as to whether the bank has elected to mail the security holder's soliciting materials or provide a security holder list if the election under paragraph (b) of this section is to be made by the bank;

(ii) A statement of the approximate number of record holders and beneficial holders, separated by type of holder and class, owning securities in the same class or classes as holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the bank's or its transfer agent's security holder data systems; and

(iii) The estimated cost of mailing a proxy statement, form of proxy or other communication to such holders, including to the extent known or reasonably available, the estimated costs of any bank, broker, and similar person through whom the bank has solicited or intends to solicit beneficial owners in connection with the security holder meeting or action;

(2) Perform the acts set forth in either paragraphs (a)(2)(i) or (a)(2)(ii) of this section, at the bank's or requesting security holder's option, as specified in paragraph (b) of this section:

(i) Mail copies of any proxy statement, form of proxy or other soliciting material furnished by the security holder to the record holders, including banks, brokers, and similar entities, designated by the security holder. A sufficient number of copies must be mailed to the banks, brokers and similar entities for distribution to all beneficial owners designated by the security holder. The bank shall mail the security holder material with reasonable promptness after tender of the material to be mailed, envelopes or other containers therefor, postage or payment for postage and other reasonable expenses of effecting such mailing. The bank shall not be responsible for the content of the material; or

(ii) Deliver the following information to the requesting security holder within five business days of receipt of the request: A reasonably current list of the names, addresses and security positions of the record holders, including banks, brokers and similar entities, holding securities in the same class or classes as holders which have been or are to be solicited on management's

behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the bank's or its transfer agent's security holder data systems; the most recent list of names, addresses and security positions of beneficial owners as specified in § 335.214(b), in the possession, or which subsequently comes into the possession, of the bank. All security holder list information shall be in the form requested by the security holder to the extent that such form is available to the bank without undue burden or expense. The bank shall furnish the security holder with updated record holder information on a daily basis or, if not available on a daily basis, at the shortest reasonable intervals, *provided, however,* the bank need not provide beneficial or record holder information more current than the record date for the meeting or action.

(b) If the bank is soliciting or intends to solicit with respect to a proposal that is subject to § 335.409, the requesting security holder shall have the option set forth in paragraph (a)(2) of this section. With respect to all other requests pursuant to this section, the bank shall have the option to either mail the security holder's material or furnish the security holder list as set forth in paragraph (a)(2) of this section.

(c) At the time of a list request, the security holder making the request shall:

(1) If holding the bank's securities through a nominee, provide the bank with a statement by the nominee or other independent third party, or a copy of a current filing made with the FDIC and furnished to the bank, confirming such holder's beneficial ownership; and

(2) Provide the bank with an affidavit, declaration, affirmation or other similar document provided for under applicable state law identifying the proposal or other corporate action that will be the subject of the security holder's solicitation or communication and attesting that:

(i) The security holder will not use the list information for any purpose other than to solicit security holders with respect to the same meeting or action by consent or authorization for which the bank is soliciting or intends to solicit or to communicate with security holders with respect to a solicitation commenced by the bank; and

(ii) The security holder will not disclose such information to any person other than a beneficial owner for whom the request was made and an employee or agent to the extent necessary to effectuate the communication or solicitation.

(d) The security holder shall not use the information furnished by the bank pursuant to paragraph (a)(2)(ii) of this section for any purpose other than to solicit security holders with respect to the same meeting for which the bank is soliciting or intends to solicit or to communicate with security holders with respect to a solicitation commenced by the bank; or disclose such information to any person other than an employee, agent, or beneficial owner for whom a request was made to the extent necessary to effectuate the communication or solicitation. The security holder shall return the information provided pursuant to paragraph (a)(2)(ii) of this section and shall not retain any copies thereof or of any information derived from such information after the termination of the solicitation.

(e) The security holder shall reimburse the reasonable expenses incurred by the bank in performing the acts requested pursuant to paragraph (a) of this section.

[59 FR 67170, Dec. 29, 1994]

§ 335.211 Proposals of security holders.

(a) If any security holder of the bank notifies the bank of his intention to present a proposal for action at a forthcoming meeting of the bank's security holders, the bank shall set forth the proposal in its proxy statement or information statement. If management issues a proxy statement, it shall identify the proposal in its form of proxy and provide means by which security holders can make the specification required by § 335.207(b). If the bank issues an information statement under § 335.201(b), it shall identify the proposal and indicate the disposition it proposes to make at the meeting. The bank however, need not include a proposal in its information statement if such proposal is submitted less than 60

days in advance of a day corresponding to the date of mailing a proxy statement or information statement in connection with the last annual meeting of security holders. Notwithstanding the foregoing, the banks shall not be required to include the proposal in its proxy statement or form of proxy unless the security holder (hereinafter, the ''proponent'') has complied with the requirements of this paragraph and paragraphs (b) and (c) of this section:

(1) *Eligibility*. At the time he submits the proposal, the proponent shall be a record or beneficial owner of a security entitled to be voted at the meeting on his proposal, and he shall continue to own security through the date on which the meeting is held. If the the bank requests documentary support for a proponent's claim that he is a beneficial owner of a voting security of the bank, the proponent shall furnish appropriate documentation within 10 business days after receiving the request. In the event the bank includes the proponent's proposal in its proxy soliciting materials for the meeting and the proponent fails to comply with the requirement that he continuously be a voting security holder through the meeting date, the bank shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

(2) *Notice*. The proponent shall notify the management in writing of his intention to appear personally at the meeting to present his proposal for action. The proponent shall furnish the requisite notice at the time he submits the proposal, except that if he was unaware of the notice requirement at that time he shall comply with it within 10 business days after being informed of it by the bank. If the proponent, after furnishing in good faith the notice required by this provision, subsequently determines that he will be unable to appear personally at the meeting, he shall arrange to have another security holder of the bank present his proposal on his behalf at the meeting. In the event the proponent or his proxy fails, without good cause, to present the proposal for action at the meeting, the bank shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting, held in the following two calendar years.

(3) *Timeliness*. The proponent shall submit his proposal sufficiently far in advance of the meeting so that it is received by the bank within the following time periods:

(i) *Annual meetings*. A proposal to be presented at an annual meeting shall be received by the bank at the bank's principal executive offices not less than 90 days in advance of a date corresponding to the date of the bank's proxy statement released to security holders in connection with the previous year's annual meeting of security holders, except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting a proposal shall be received by the management a reasonable time before the solicitation is made.

(ii) *Other meetings*. A proposal to be presented at any meeting other than an annual meeting shall be received a reasonable time before the solicitation is made.

NOTE: In order to curtail controversy as to the date on which a proposal was received by the management, it is suggested that proponents submit their proposals by Certified Mail-Return Receipt Requested.

(4) *Number and length of proposals*. The proponent may submit a maximum of two proposals of not more than 300 words each for inclusion in the management's proxy materials for a meeting of security holders. If the proponent fails to comply with either of these requirements, or if he fails to comply with the 200-word limit on supporting statements mentioned in paragraph (b) of this section, he shall be provided the opportunity by the bank to reduce, within 10 business days, the items submitted by him to the limits required by this section.

(b) If the bank opposes any proposal received from a proponent, it shall also, at the request of the proponent, include in its proxy statement a statement of the proponent of not more

than 200 words in support of the proposal, which statement shall not include the name and address of the proponent. The statement and request of the proponent shall be furnished to the bank at the time that the proposal is furnished, and the bank shall not be responsible for such statement. The proxy statement shall also include either the name and address of the proponent or a statement that such information will be furnished by the bank or by the FDIC to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the proponent are omitted from the proxy statement, they shall be furnished to the FDIC at the time of filing the management's preliminary proxy material under § 335.204.

(c) The bank may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal is, under applicable law, not a proper subject for action by security holders;

NOTE: A proposal that may be improper under applicable law when framed as a mandate or directive may be proper when framed as a recommendation or request.

(2) If the proposal would, if implemented, require the bank to violate any State law or Federal law of the United States, or any law of any foreign jurisdiction, to which the bank is subject;

(3) If the proposal or the supporting statement is contrary to any of the FDIC's proxy rules and regulations, including § 335.206 which prohibits false or misleading statements in proxy soliciting materials;

(4) If the proposal relates to the enforcement of a personal claim or the redress of a personal grievance against the bank, or any other person;

(5) If the proposal deals with a matter that is not significantly related to the bank's business;

(6) If the proposal deals with a matter that is beyond the bank's power to effectuate;

(7) If the proposal deals with a matter relating to the conduct of the ordinary business operations of the bank;

(8) If the proposal relates to an election to office;

(9) If the proposal is counter to a proposal to be submitted by the management at the meeting;

(10) If the proposal has been rendered moot;

(11) If the proposal is substantially duplicative of a proposal previously submitted to the bank by another proponent, which proposal will be included in the bank's proxy materials for the meeting;

(12) If substantially the same proposal has previously been submitted to security holders in the bank's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding 5 calendar years, it may be omitted from the bank's proxy materials relating to any meeting of security holders held within 3 calendar years after the latest such previous submission:

Provided, That: (i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; and

(13) If the proposal relates to specific amounts of cash or stock dividends.

(d) Whenever the bank asserts, for any reason, that a proposal and any statement in support thereof received from a proponent may properly be omitted from its proxy statement and form of proxy, it shall file with the FDIC not later than 50 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed under § 335.204, or such shorter period prior to such date as the FDIC or its staff may permit, three copies of the following items:

(1) The proposal;

(2) Any statement in support thereof as received from the proponent;

(3) A statement of the reasons why the bank deems omission to be proper in the particular case; and

(4) Where such reasons are based on matters of law, a supporting opinion of counsel. The bank shall at the same time, if it has not already done so, notify the proponent of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of reasons why the bank deems the omission of the proposal to be proper and a copy of the supporting opinion of counsel.

(e) If the bank intends to include in the proxy statement a statement in opposition to a proposal received from a proponent, it shall—not later than ten calendar days prior to the date the preliminary copies of the proxy statement and form of proxy are filed under § 335.204, or, in the event that the proposal must be revised to be includable, not later than five calendar days after receipt by the bank of the revised proposal—promptly forward to the proponent a copy of the statement in opposition to the proposal. In the event the proponent believes that the statement in opposition contains materially false or misleading statements within the meaning of § 335.206 and the proponent wishes to bring this matter to the attention of the FDIC, the proponent should promptly provide the staff with a letter setting forth the reasons for this view and at the same time promptly provide the bank with a copy of such letter.

§ 335.212 Form for proxy statement (Form F–5).

FORM F–5—Proxy Statement

GENERAL INSTRUCTIONS

Each proxy statement shall, to the extent applicable, include the information called for under each of the items below. In the preparation of the statement, particular attention should be given to the definitions in § 335.102.

This form is not to be used as a blank form to be filled in nor is it intended to prescribe a form for presentation of material in the statement. Its purpose is solely to prescribe the information required to be set forth in the statement; any additional information that the bank or the soliciting persons deem appropriate may be included.

Except as otherwise specifically provided, where any item calls for information for a specified period in regard to directors, officers or other persons holding specified positions or relationships, the information shall be given in regard to any person who held any of the specified positions or relationships at any time during the period. However, information need not be included for any portion of the period during which such person did not hold any such position or relationship provided a statement to that effect is made.

Note to Small Business Issuers: a ''small business issuer'', as defined under 17 CFR 240.12b–2 has the option of providing financial and other item disclosure in conformance with Regulation S–B of the Securities and Exchange Commission (17 CFR Part 228) in lieu of the disclosure requirements set forth in this section by Item 4, paragraph (b)(1)(xi); Item 5, paragraph (d); Item 6, paragraphs (a) through (d): Item 7, paragraphs (a) and (c); Item 8, paragraph (c); Item 10, paragraph (b); Item 12, paragraphs (a)(3)(vi), (a)(5), (a)(6), (a)(7), (b)(1) through (b)(8), (c)(1) through (c)(4), and (e); and Item 13. If there is no comparable disclosure requirement in Regulation S–B, a small business issuer need not provide the information requested. The definition of ''small business issuer'', generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

INFORMATION REQUIRED IN STATEMENT

Item 1—Revocability of Proxy.

State whether the person giving the proxy has the power to revoke it. If the right of revocation before the proxy is exercised, is limited or is subject to compliance with any formal procedure, briefly describe such limitation or procedure.

Item 2—Dissenters' Rights of Appraisal.

Outline briefly the rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights. Where such rights may be exercised only within a limited time after the date of the adoption of a proposal, the filing of a charter amendment or other similar act, state whether the person solicited will be notified of such date.

Instruction. Indicate whether a security holder's failure to vote against a proposal will constitute a waiver of his appraisal or similar rights and whether a vote against a proposal will be deemed to satisfy any notice requirements under State law with respect to appraisal rights. If the State law is unclear, state what position will be taken in regard to those matters.

Item 3—Persons Making the Solicitation.

(a) Solicitations not subject to § 335.220.

(1) If the solicitation is made by the bank, so state. Give the name of any director of the bank who has informed the bank in writing that he intends to oppose any action intended to be taken by the bank and indicate the action which he intends to oppose.

(2) If the solicitation is made otherwise than by the bank, so state and give the names of the participants in the solicitation, as defined in paragraphs (a)(iii), (iv), (v) and (vi) of Instruction 3 to this item.

(3) If the solicitation is to be made otherwise than by the use of the mails, describe the methods to be employed. If the solicitation is to be made by specially engaged employees or paid solicitors, state: (i) The material features of any contract or arrangement for such solicitation and identify the parties, and (ii) the cost or anticipated cost thereof.

(4) State the names of the persons by whom the cost of solicitation has been or will be borne, directly or indirectly.

(b) Solicitations subject to § 335.220.

(1) State by whom the solicitation is made and describe the methods employed and to be employed.

(2) If regular employees of the bank or any other participants in a solicitation have been or are to be employed to solicit security holders, describe the class or classes of employees to be so employed, and the manner and nature of their employment for such purpose.

(3) If specially engaged employees, representatives, or other persons have been or are to be employed to solicit security holders, state: (i) The material features of any contract or arrangement for such solicitation and identify the parties, (ii) the cost or anticipated cost thereof, and (iii) the approximate number of such employees or employees of any other person (naming such other person) who will solicit security holders.

(4) State the total amount estimated to be spent and the total expenditures to date for, in furtherance of, or in connection with the solicitation of security holders.

(5) State by whom the cost of the solicitation will be borne. If such cost is to be borne initially by any person other than the bank, state whether reimbursement will be sought from the bank, and if so, whether the question of such reimbursement will be submitted to a vote of security holders.

(6) If any such solicitation is terminated pursuant to a settlement between the bank and any other participant in such solicitation, describe the terms of such settlement, including the cost or anticipated cost thereof to the bank.

Instructions. 1. With respect to solicitations subject to § 335.220, costs and expenditures within the meaning of this item 3 shall include fees for attorneys, accountants, public relations or financial advisers, solicitors, advertising, printing, transportation, litigation and other costs incidental to the solicitation, except that the bank may exclude the amount of such costs represented by the amount normally expended for a solicitation for an election of directors in the absence of a contest, and costs represented by salaries and wages of regular employees and officers, provided a statement to that effect is included in the proxy statement.

2. The information required under paragraph (6) of item 3(b) should be included in any amended or revised proxy statement or other soliciting materials relating to the same meeting or subject matter furnished to security holders by the bank subsequent to the date of settlement.

3. For purposes of this Item 3 and Item 4 of this Form F–5:

(a) The terms *participant* and *participant in a solicitation* include the following:

(i) The bank;

(ii) Any director of the bank, and any nominee for whose election as a director proxies are solicited;

(iii) Any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly takes the initiative, or engages, in organizing, directing, or arranging for the financing of any such committee or group;

(iv) Any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than $500 and who are not otherwise participants;

(v) Any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the bank by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant; and

(vi) Any person who solicits proxies.

(b) The terms *participant* and *participant in a solicitation* do not include:

(i) Any person or organization retained or employed by a participant to solicit security holders and whose activities are limited to the duties required to be performed in the course of such employment;

(ii) Any person who merely transmits proxy soliciting material or performs other ministerial or clerical duties;

(iii) Any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the

duties required to be performed in the course of such employment;

(iv) Any person regularly employed as an officer or employee of the bank or any of its subsidiaries who is not otherwise a participant; or

(v) Any officer or director of, or any person regularly employed by, any other participant, if such officer, director or employee is not otherwise a participant.

Item 4—Interest of Certain Persons in Matters To Be Acted Upon.

(a) Solicitations not subject to § 335.220. Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each of the following persons in any matter to be acted upon, other than elections to office:

(1) If the solicitation is made on behalf of the bank each person who has been a director or officer of the bank at any time since the beginning of the last fiscal year.

(2) If the solicitation is made otherwise than on behalf of the bank, each participant in the solicitation, as defined in paragraphs (a)(iii), (iv), (v), and (vi) of Instruction 3 to Item 3 of this Form F–5.

(3) Each nominee for election as a director of the bank.

(4) Each associate of the foregoing persons.

Instruction. Except in the case of a solicitation subject to subpart B made in opposition to another solicitation subject to subpart B, this subitem (a) shall not apply to any interest arising from the ownership of securities of the bank where the security holder receives no extra or special benefit not shared on a pro rata basis by all other holders of the same class.

(b) Solicitations subject to § 335.220.

(1) Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each participant as defined in paragraphs (a)(ii), (iii), (iv), (v) and (vi) of Instruction 3 to Item 3 of this Form F–5, in any matter to be acted upon at the meeting, and include with respect to each participant the following information, or a fair and accurate summary thereof:

(i) Name and business address of the participant.

(ii) The participant's present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is carried on.

(iii) State whether or not, during the past ten years, the participant has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case. A negative answer need not be included in the proxy statement or other soliciting material.

(iv) State the amount of each class of securities of the bank which the participant owns beneficially, directly or indirectly.

(v) State the amount of each class of securities of the bank which the participant owns of record but not beneficially.

(vi) State with respect to all securities of the bank purchased or sold within the past two years, the dates on which they were purchased or sold and the amount purchased or sold on each such date.

(vii) If any part of the purchase price or market value of any of the shares specified in paragraph (b)(1)(vi) of this item is represented by funds borrowed or otherwise obtained for the purpose of acquiring or holding such securities, so state and indicate the amount of the indebtedness as of the latest practicable date. If such funds were borrowed or obtained otherwise than pursuant to a margin account or bank loan in the regular course of business of a bank, broker or dealer, briefly describe the transaction, and state the names of the parties.

(viii) State whether or not the participant is, or was within the past year, a party to any contract, arrangements or understandings with any person with respect to any securities of the bank, including, but not limited to joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profit, division of losses or profits, or the giving or withholding of proxies. If so, name the parties to such contracts, arrangements or understandings and give the details thereof.

(ix) State the amount of securities of the bank owned beneficially, directly or indirectly, by each of the participant's associates and the name and address of each such associate.

(x) State the amount of each class of securities of any parent or subsidiary of the bank which the participant owns beneficially, directly or indirectly.

(xi) Furnish for the participant and associates of the participant the information required by § 335.212, Item 7(c).

(xii) State whether or not the participant or any associates of the participant have any arrangement or understanding with any person—

(A) With respect to any future employment by the bank or its affiliates; or

(B) With respect to any future transactions to which the bank or any of its affiliates will or may be a party. If so, describe such arrangement or understanding and state the names of the parties thereto.

(2) With respect to any person, other than a director or executive officer of the bank acting solely in that capacity, who is a party to an arrangement or understanding pursuant to which a nominee for election as director is proposed to be elected, describe any

substantial interest, direct or indirect, by security holdings or otherwise, that such person has in any matter to be acted upon at the meeting, and furnish the information called for by paragraphs (b)(1) (xi) and (xii) of this item.

Instruction: For purposes of this Item 4, beneficial ownership shall be determined in accordance with § 335.403.

Item 5—Voting Securities and Principal Holders Thereof.

(a) As to each class of voting securities of the bank entitled to be voted at the meeting (or by written consents or authorizations if no meeting is held) state the number of shares outstanding and the number of votes to which each class is entitled.

(b) Give the date as of which the record of security holders entitled to vote at the meeting will be determined. If the right to vote is not limited to security holders of record on that date, indicate the conditions under which other security holders may be entitled to vote.

(c) If action is to be taken with respect to the election of directors and if the persons solicited have cumulative voting rights: (1) Make a statement that they have these rights, (2) briefly describe these rights, (3) state briefly the conditions precedent to their exercise, and (4) if discretionary authority to cumulate votes is solicited, so indicate.

(d)(1) Furnish the following information, as of the most recent practicable date, substantially in the tabular form indicated, with respect to any person (including any ''group'' as that term is used in section 13(d)(3) of the Act) who is known to the bank to be the beneficial owner of more than five percent of any class of the bank's voting securities. The address given in column (2) may be a business, mailing or residence address. Show in column (3) the total number of shares beneficially owned and in column (4) the percentage of class so owned. Of the number of shares shown in column (3), indicate by footnote or otherwise the amount known to be shares with respect to which such listed beneficial owner has the right to acquire beneficial ownership as specified in § 335.403(d)(1).

(1)	(2)	(3)	(4)
Title of class	Name and address of beneficial owner	Amount and nature of beneficial ownership	Percent of class

(2) *Security ownership of management.* Furnish the following information, as of the most recent practicable date, in substantially the tabular form indicated, as to each class of equity securities of the bank or any of its parents or subsidiaries other than directors' qualifying shares, beneficially owned by all directors and nominees, naming them, each of the named executive officers as defined in 17 CFR 229.402(a)(3), and directors and executive officers of the bank as a group, without naming them. Show in column (3) the total number of shares beneficially owned and in column (4) the percent of class so owned. Of the number of shares shown in column (3), indicate, by footnote or otherwise, the amount of shares with respect to which such persons have a right to acquire beneficial ownership as specified in § 335.403(d)(1).

(1)	(2)	(3)	(4)
Title of class	Name of beneficial owner	Amount and nature of beneficial ownership	Percent of class

(e) If, to the knowledge of the persons on whose behalf the solicitation is made, a change in control of the bank has occurred since the beginning of its last fiscal year, state the name of the person(s) who acquired such control, the amount and the source of the consideration used by such person or persons; the basis of the control, the date and a description of the transaction(s) which resulted in the change of control and the percentage of voting securities of the bank now beneficially owned directly or indirectly by the person(s) who acquired control; and the identity of the person(s) from whom control was assumed. If the source or any part of the

consideration used is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act, the identity of the bank shall be omitted provided a request for confidentiality has been made under section 13(d)(1)(B) of the Act by the person(s) who acquired control. In lieu thereof, the material shall indicate that the identity of the bank has been so omitted and filed separately with the FDIC.

Instructions. 1. State the terms of any loans or pledges obtained by the new control group for the purpose of acquiring control, and the names of the lenders or pledgees.

2. Any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters shall be described.

(f) Describe any arrangements, known to the bank including any pledge by any person of securities of the bank or any of its parents, the operation of which may at a subsequent date result in a change in control of the bank.

Instructions to Item 5. 1. The percentages are to be calculated on the basis of the amount of outstanding securities, excluding securities held by or for the account of the bank or its subsidiaries, plus securities deemed outstanding pursuant to § 335.403(d)(1). For purposes of paragraph (2), if the percentage of shares beneficially owned by any director or nominee, or by all directors and officers of the bank as a group does not exceed one percent of the class so owned, the bank may, in lieu of furnishing a precise percentage, indicate this fact by means of an asterisk and explanatory footnote or other similar means.

2. For the purpose of this Item, beneficial ownership shall be determined in accordance with § 335.403. Include such additional subcolumns or other appropriate explanation of column (3) necessary to reflect amounts as to which the beneficial owner has (A) sole voting power, (B) shared voting power, (C) sole investment power, or (D) shared investment power.

3. The bank shall be deemed to know the contents of any statements filed with the FDIC pursuant to section 13(d) or 13(g) of the Exchange Act. When applicable, a bank may rely upon information set forth in the statements unless the bank knows or has reason to believe that such information is not complete or accurate or that a statement or amendment should have been filed and was not.

4. For purposes of furnishing information pursuant to paragraph (d)(1), the bank may indicate the source and date of such information.

5. Where more than one beneficial owner is known to be listed for the same securities, appropriate disclosure should be made to avoid confusion. For purposes of paragraph (2), in computing the aggregate number of shares owned by directors and officers of the bank as a group, the same shares shall not be counted more than once.

6. Paragraph (f) of this Item does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the bank.

7. Where the holder(s) of voting securities reported pursuant to paragraph (1) hold more than five percent of any class of voting securities of the bank pursuant to any voting trust or similar agreement, state the title of such securities, the amount held or to be held pursuant to the trust or agreement (if not clear from the table) and the duration of the agreement. Give the names and addresses of the voting trustees and outline briefly their voting rights and other powers under the trust or agreement.

Item 6—Directors and Principal Officers.

If action is to be taken with respect to election of directors, furnish the following information, in tabular form to the extent practicable, with respect to each person nominated for election as a director and each person whose term of office will continue after the meeting. However, if the solicitation is made on behalf of persons other than the bank the information required need to be furnished only as to nominees of the persons making the solicitation.

(a) *Identification of directors.* List the names and ages of all directors of the bank, and all persons nominated or chosen to become directors; indicate all positions and offices with the bank held by each such person; state the term of office as director and any period(s) during which the person has served as such; briefly describe any arrangement or understanding between the person and any other person or persons (naming such person(s)) pursuant to which the person was or is to be selected as a director or nominee.

Instructions. 1. Do not include arrangements or understandings with directors or officers of the bank acting solely in their capacities as such.

2. No nominee or person chosen to become a director or who has not consented to act as one should be named in response to this item. In this regard, see § 335.207.

3. No information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

4. In connection with action to be taken concerning the election of directors, if fewer nominees are named than the number fixed by or under the governing instruments, state the reasons for this procedure and that the proxies cannot be voted for a greater number of persons than the number of nominees named.

(b) *Family relationships.* State the nature of any family relationship between any director, principal officer, or person nominated or chosen by the bank to become a director or principal officer.

Instruction. The term *family relationship* means any relationship by blood, marriage, or adoption, not more remote than first cousin.

(c) *Business experience.* (1) Give a brief account of the business experience during the past five years of each director or person nominated or chosen to become a director; including the person's principal occupations and employment during that period and the name and principal business of any corporation or other organization in which such occupations and employment were carried on.

(2) *Directorships.* Indicate any other directorships held by each director or person nominated or chosen to become a director in any company with a class of securities registered under section 12 of the Act.

(d) *Involvement in certain legal proceedings.* Describe any of the following events which occurred during the past five years and which are material to an evaluation of the ability or integrity of any director or person nominated to become a director of the bank:

(1) A petition under the Bankruptcy Act or any State insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of the person, or any partnership in which the person was a general partner at or within two years before the time of filing, or any corporation or business association of which the person was a principal officer at or within two years before the time of the filing;

(2) The person was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) The person was the subject of any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction permanently or temporarily enjoining the person from, or otherwise limiting the following activities:

(i) Acting as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with such activity;

(ii) Engaging in any type of business practice; or

(iii) Engaging in any type of activity in connection with the purchase or sale of any security or in connection with any violation of Federal or State securities laws;

(4) The person was the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, of any Federal or State authority barring, suspending or otherwise limiting for more than 60 days the right of the person to engage in any activity described in paragraph (d)(3) of this item, or to be associated with persons engaged in any such activity;

(5) The person was found by a court of competent jurisdiction in a civil action or by a government authority to have violated any Federal or State securities law, and the judgment in the civil action or finding by the government authority has not been subsequently reversed, suspended, or vacated.

Instructions. 1. For purposes of computing the five-year period referred to in this paragraph, the date of a reportable event shall be deemed the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees have lapsed. With respect to bankruptcy petitions, the computation date shall be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final.

2. If any event specified in this paragraph (d) has occurred and information in regard thereto is omitted on the ground that it is not material, the bank may furnish to the FDIC, at the time preliminary materials are filed under § 335.204 as supplemental information and not as part of the proxy statement materials to which the omission relates, a description of the event and a statement of the reasons for the omission of information in regard thereto.

3. The bank is permitted to explain any mitigating circumstances associated with events reported pursuant to this paragraph.

4. No information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

(e) *Certain business relationships.* Describe any of the following relationships regarding directors or nominees for director that exist, or have existed during the bank's last fiscal year, indicating the identity of the entity with which the bank has such a relationship, the name of the nominee or director affiliated with such entity and the nature of such nominee's or director's affiliation, the relationship between such entity and the bank and the amount of the business done between the bank and the entity during the bank's last full fiscal year or proposed to be done during the bank's current fiscal year:

(1) If the nominee or director is, or during the last fiscal year has been a principal officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of a ten percent equity interest in, any business or professional entity that has made during the bank's last full fiscal year, or proposes to make during the bank's current fiscal year, payments to the bank or its subsidiaries for property or services in excess of five percent of (i) the bank's consolidated

gross revenues for its last full fiscal year, or (ii) the other entity's consolidated gross revenues for its last full fiscal year;

(2) If the nominee or director is, or during the last fiscal year has been, a principal officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of a ten percent equity interest in, any business or professional entity to which the bank or its subsidiaries has made during the bank's last full fiscal year, or proposes to make during the bank's current fiscal year, payments for property or services in excess of five percent of (i) the bank's consolidated gross revenues for its last full fiscal year, or (ii) the other entity's consolidated gross revenues for its last full fiscal year;

(3) If the nominee or director is, or during the last fiscal year has been, a principal officer of, or owns, or during the last fiscal year has owned, of record or beneficially in excess of a ten percent equity interest in, any business or professional entity to which the bank or its subsidiaries was indebted at the end of the bank's last full fiscal year in an aggregate amount in excess of five percent of the bank's total consolidated assets at the end of such fiscal year;

(4) If the nominee or director is, or during the last fiscal year has been, a member of, or of counsel to, a law firm that the bank has retained during the last fiscal year or proposes to retain during the current fiscal year; *Provided, however,* that the dollar amount of fees paid to a law firm by the bank need not be disclosed if such amount does not exceed five percent of the law firm's gross revenues for that firm's last full fiscal year;

(5) If the nominee or director is, or during the last fiscal year has been, a partner or principal officer of any investment banking firm that has performed services for the bank, other than as a participating underwriter in a syndicate, during the last fiscal year or that the bank proposes to have perform services during the current year; *Provided, however,* that the dollar amount of compensation received by an investment banking firm need not be disclosed if such amount does not exceed five percent of the investment banking firm's consolidated gross revenues for that firm's last full fiscal year; or

(6) Any other relationships that the bank is aware of between the nominee or director and the bank that are substantially similar in nature and scope to those relationships listed in paragraph (b) (1) through (5).

Instructions to Paragraph (e) of Item 6

1. In order to determine whether payments or indebtedness exceed five percent of the consolidated gross revenues of any entity, other than the bank, it is appropriate to rely on information provided by the nominee or director.

2. In calculating payments for property and services the following may be excluded:

A. Payments where the rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

B. Payments that arise solely from the ownership of securities of the bank and no extra or special benefit not shared on a pro rata basis by all holders of the class of securities is received; or

C. Payments made or received by subsidiaries other than significant subsidiaries as defined in § 335.102(nn), provided that all such subsidiaries making or receiving payments, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in § 335.102(nn).

3. In calculating indebtedness the following may be excluded:

A. Debt securities that have been publicly offered, admitted to trading on a national securities exchange, or quoted on the automated quotation system of a registered securities association;

B. Amounts due for purchases subject to the usual trade terms; or

C. Indebtedness incurred by subsidiaries other than significant subsidiaries as defined in § 335.102(nn), provided that all such subsidiaries incurring indebtedness, when considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as defined in § 335.102(nn).

4. No information called for by paragraph (e) need be given respecting any director who is no longer a director at the time of filing the registration statement or report containing such disclosure. If such information is being presented in a proxy or information statement, no information need be given respecting any director whose term of office as a director will not continue after the meeting to which the statement relates.

NOTE: In the FDIC's view, where significant business or personal relationships exist between the director or nominee and the bank or its management, including, but not limited to, those as to which disclosure would be required pursuant to this item 6(e), characterization of a director or nominee by any ''label'' connoting a lack of relationship to the bank and its management may be materially misleading.

(f) *Committees.* (1) State whether or not the bank has standing audit, nominating and compensation committees of the board of directors, or committees performing similar functions. If the bank has such committees, however designated, identify each committee member, state the number of committee meetings held by each committee during the

last fiscal year and describe briefly the functions performed by such committees.

(2) If the bank has a nominating or similar committee, state whether the committee will consider nominees recommended by shareholders and, if so, describe the procedures to be followed by shareholders in submitting such recommendations.

(g) *Director attendance.* State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of: (1) The total number of meetings of the board of directors (held during the period for which he has been a director) and (2) the total number of meetings held by all committees of the board on which he served (during the periods that he served).

(h) *Director resignations.* If a director has resigned or declined to stand for re-election to the board of directors since the date of the last annual meeting of shareholders because of a disagreement with the bank on any matter relating to the bank's operations, policies or practices, and if the director has furnished the bank with a letter describing such disagreement and requesting that the matter be disclosed, the bank shall state the date of resignation or declination to stand for re-election and summarize the director's description of the disagreement.

If the bank believes that the description provided by the director is incorrect or incomplete, it may include a brief statement presenting its views of the disagreement.

Item 7—Compensation and Other Transactions With Management and Others.

Furnish the information called for by this item if action is to be taken with respect to: (i) The election of directors, (ii) any bonus, profit sharing or other compensation plan, contract or arrangement in which any director, nominee for election as a director, or officer of the bank will participate, (iii) any pension or retirement plan in which any such person will participate, or (iv) the granting or extension to any such person of any options, warrants or rights to purchase any securities, other than warrants or rights issued to security holders, as such, on a pro rata basis. However, if the solicitation is made on behalf of persons other than the management, the information required need be furnished only as to nominees for election as directors and as to their associates.

(a) *Compensation of directors and executive officers.* Furnish the information required by the applicable and currently effective SEC regulations contained in Item 8 of SEC Schedule 14A (17 CFR 240.14a-101, Item 8).

(b) *Indebtedness of management.* (1) State as to each of the following specified persons (''specified persons''), who was indebted to the bank at any time since the beginning of its last fiscal year:

(i) The largest aggregate amount of indebtedness (in dollar amounts, and as a percentage of total equity capital accounts at the time), including extensions of credit or overdrafts, endorsements and guarantees outstanding at any time during that period;

(ii) The amount thereof outstanding as of the latest practicable date;

(iii) The nature of the indebtedness and of the transaction in which it was incurred; and

(iv) The rate of interest paid or charged:

(A) Each director or principal officer of the bank;

(B) Each nominee for election as a director;

(C) Each security holder who is known to the bank to own of record or beneficially more than five percent of any class of the bank's voting securities (''principal security holder''); and

(D) Each associate of any such director, principal officer, nominee or principal security holder.

Instructions. 1. Include the name of each person whose indebtedness is described and the nature of the relationship by reason of which the information is required to be given.

2. Generally, no information need be given under this item 7(f) unless any of the following are present:

(a) The extension(s) of credit were not made on substantially the same terms, including interest rates, collateral and repayment terms as those prevailing at the time for comparable transactions with other than the specified persons.

(b) The extension(s) of credit were not made in the ordinary course of business.

(c) The extension(s) of credit have involved or presently involve more than a normal risk of collectibility or other unfavorable features including the restructuring of an extension of credit, or a delinquency as to payment of interest or principal.

(d) The aggregate amount of extensions of credit outstanding at any time from the beginning of the last fiscal year to date to a person specified in (A), (B), and (C) of this paragraph (f)(1) together with the person's associates, exceeded 10% of the equity capital accounts of the bank at the time or $5 million, whichever is less.

NOTE: For purposes of this instruction 2(d) only: (1) The information called for by paragraphs (f)(1)(iii) and (iv) of this item 7 need not be furnished; (2) A principal security holder shall mean each security holder known to the bank to own of record or beneficially more than ten (10) percent of any class of the bank's voting securities; and (3) The name of any associate need not be furnished.

(2) If aggregate extensions of credit to the specified persons as a group exceeded 20 percent of the equity capital accounts of the bank at any time since the beginning of the last fiscal year:

(i) The aggregate amount of such extensions of credit shall be disclosed, and

(ii) A statement shall be included, to the extent applicable, that the bank has had and expects to have in the future, banking transactions in the ordinary course of its business with directors, officers, principal stockholders, and their associates, on substantially the same terms, including interest rates and collateral on loans, as those prevailing at the same time for comparable transactions with others and did not involve more than the normal risk of collectibility or present other unfavorable features.

(3) If any indebtedness required to be described arose under section 16(b) of the Act and had not been discharged by payment, state the amount of any profit realized, that such profit will inure to the benefit of the bank and whether suit will be brought or other steps taken to recover such profit. If in the opinion of counsel a question reasonably exists as to the recoverability of such profit, it will suffice to state all facts necessary to describe the transaction, including the prices and number of shares involved.

(c) *Transactions with management.* Describe briefly any transactions since the beginning of the bank's last fiscal year or any presently proposed transactions, to which the bank was or is to be a party, in which any of the following persons had or is to have a direct or indirect material interest, naming such person and stating his relationship to the bank, the nature of his interest in the transaction and, where practicable, the amount of such interest:

(1) Any director or principal officer of the bank;

(2) Any nominee for election as a director;

(3) Any security holder who is known to the bank to own of record or beneficially more than five percent of any class of the bank's voting securities; and

(4) Any associate of any of the foregoing persons.

Instructions. 1. No information need be given in response to this item 7(g) as to any compensation or other transaction reported in response to item 7(a), (b), (c), (d), (e) or (f), or as to any transaction with respect to which information may be omitted under General Instructions to Paragraphs (a) through (e) of item 7.

2. No information need be given in answer to this item 7(g) as to any transaction where:

(a) The rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

(b) The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;

(c) The amount involved in the transaction or series of similar transactions, including all periodic installments in the case of any lease or other agreement providing for periodic payments or installments, does not exceed $60,000; or

(d) The interest of the specified person arises solely from the ownership of securities of the bank and the specified person receives no extra or special benefit not shared on a pro rata basis by all holders of securities of the class.

3. It should be noted that this item calls for disclosure of indirect, as well as direct, material interests in transactions. A person who has a position or relationship with a firm, corporation, or other entity, which engages in a transaction with the bank or its subsidiaries may have an indirect interest in such transaction by reason of such position or relationship. However, a person shall be deemed not to have a material indirect interest in a transaction within the meaning of this item 7(g) where:

(a) The interest arises only: (i) From such person's position as a director of another corporation or organization (other than a partnership) which is a party to the transaction, or (ii) from the direct or indirect ownership by such person and all other persons specified in paragraphs (1) through (4) above, in the aggregate, of less than a 10 percent equity interest in another person (other than a partnership) which is a party to the transaction, or (iii) from both such position and ownership;

(b) The interest arises only from such person's position as a limited partner in a partnership in which he and all other persons specified in (1) through (4) above had an interest of less than 10 percent; or

(c) The interest of such person arises solely from the holding of an equity interest (including a limited partnership interest, but excluding a general partnership interest), or a creditor interest in another person which is a party to the transaction with the bank or any of its subsidiaries and the transaction is not material to such other person.

4. The amount of the interest of any specified person shall be computed without regard to the amount of the profit or loss involved in the transaction. Where it is not practicable to state the approximate amount of the interest, the approximate amount involved in the transaction shall be indicated.

5. In describing any transaction involving the purchase or sale of assets by or to the bank or any of its subsidiaries, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and,

if acquired by the seller within two years prior to the transaction, the cost thereof to the seller. Indicate the principle followed in determining the bank's purchase or sale price and the name of the persons making such determination.

6. Include the name of each person whose interest in any transaction is described and the nature of the relationship by reason of which such interest is required to be described. Where it is not practicable to state the approximate amount of the interest, the approximate amount involved in the transactions shall be indicated.

7. Information shall be furnished in answer to this item with respect to transactions not excluded above which involve remuneration from the bank or its subsidiaries, directly or indirectly, to any of the specified persons for services in any capacity unless the interest of such persons arises solely from the ownership individually and in the aggregate of less than 10 percent of any class of equity securities of another corporation furnishing the services to the bank.

8. The foregoing instructions specify certain transactions and interests as to which information may be omitted in answering this item. There may be situations where, although the foregoing instructions do not expressly authorize nondisclosure, the interest of a specified person in the particular transaction or series of transactions is not a material interest. In that case, information regarding such interest and transaction is not required to be disclosed in response to this item. The materiality of any interest or transaction is to be determined on the basis of the significance of the information to investors in light of all of the circumstances of the particular case. The importance of the interest to the person having the interest, the relationship of the parties to the transaction to each other and the amount involved in the transaction are among the factors to be considered in determining the significance of the information to investors.

(d) *Legal proceedings.* Briefly describe any material legal proceeding to which any director, any nominee for election as a director, principal officer of the bank, any owner of record or beneficially of more than five (5) percent of any class of voting securities of the bank, or any associate of any such director, nominee, officer or security holder is a party adverse to the bank.

Item 8—Relationship With Independent Public Accountants.

If the solicitation is made on behalf of management of the bank and relates to a meeting of security holders at which directors are to be elected, auditors are to be selected or approved, or financial statements are included pursuant to item 13, furnish the following information describing the bank's relationship with its independent public accountants:

(a) The name of the principal accountant selected or being recommended to shareholders for election, approval or ratification for the current year. If no accountant has been selected or recommended, so state and briefly describe the reasons therefor.

(b) The name of the principal accountant for the fiscal year most recently completed if different from the accountant selected or recommended for the current year or if no accountant has yet been selected or recommended for the current year.

(c) If a change or changes in accountants have taken place since the date of the proxy statement for the most recent annual meeting of shareholders, and if in connection with such change(s) a disagreement between the accountant and bank has been reported on Form F–3 or in the accountant's letter filed as an exhibit thereto, the disagreement shall be described. Prior to submitting the preliminary proxy material to the FDIC which contains or amends such description, the bank shall furnish the description of the disagreement to any accountant with whom a disagreement has been reported. If that accountant believes that the description of the disagreement is incorrect or incomplete, he may include a brief statement, ordinarily expected not to exceed 200 words, in the proxy statement presenting his view of the disagreement. This statement shall be submitted to the bank within 10 business days of the date the accountant received the bank's description.

(d) The proxy statement shall indicate whether or not representatives of the principal accountants for the current year and for the most recently completed fiscal year are expected to be present at the stockholders' meeting with the opportunity to make a statement if they desire to do so and whether or not such representatives are expected to be available to respond to appropriate questions.

(e) If any change in accountants has taken place since the date of the proxy statement for the most recent annual meeting of shareholders, state whether such change was recommended or approved by

(1) Any audit or similar committee of the board of directors, if the bank has such a committee; or

(2) The board of directors, if the bank has no such committee.

Item 9—Compensation Plans.

If action is to be taken with respect to any plan pursuant to which cash or noncash compensation may be paid or distributed, furnish the following information:

(a) *Plans subject to security holder action.*

(1) Describe briefly the material features of the plan being acted upon, identify each

class of persons who will be eligible to participate therein, indicate the approximate number of persons in each such class, and state the basis of such participation.

(2)(i) In the tabular format specified below, disclose the benefits or amounts that will be received by or allocated to each of the following under the plan being acted upon, if such benefits or amounts are determinable:

NEW PLAN BENEFITS

PLAN NAME

Name and position	Dollar value ($)	No. of units
CEO		
A		
B		
C		
D		
Executive Group		
Non-Executive Director Group		
Non-Executive Officer Employee Group		

Instruction to New Plan Benefits Table

Additional columns should be added for each plan with respect to which security holder action is to be taken.

(ii) The table required by paragraph (a)(2)(i) of this item shall provide information as to the following persons:

(A) Each person (stating name and position) specified in 17 CFR 229.402(a)(3);

(B) All current executive officers as a group;

(C) All current directors who are not executive officers as a group; and

(D) All employees, including all current officers who are not executive officers, as a group.

(iii) If the benefits or amounts specified in paragraph (a)(2)(i) of this item are not determinable, state the benefits or amounts which would have been received by or allocated to each of the following for the last completed fiscal year if the plan had been in effect, if such benefits or amounts may be determined, in the table specified in paragraph (a)(2)(i) of this item:

(A) Each person (stating name and position) specified in 17 CFR 229.402(a)(3);

(B) All current executive officers as a group;

(C) All current directors who are not executive officers as a group; and

(D) All employees, including all current officers who are not executive officers, as a group.

(3) If the plan to be acted upon can be amended, otherwise than by a vote of security holders, to increase the cost thereof to the bank or to alter the allocation of the benefits as between the persons and groups specified in paragraph (a)(2) of this item, state the nature of the amendments which can be so made.

(b) *Additional information regarding specified plans subject to security holder action.*

(1) With respect to any pension or retirement plan submitted for security holder action, state:

(i) The approximate total amount necessary to fund the plan with respect to past services, the period over which such amount is to be paid and the estimated annual payments necessary to pay the total amount over such period; and

(ii) The estimated annual payment to be made with respect to current services. In the case of a pension or retirement plan, information called for by paragraph (a)(2) of this item may be furnished in the format specified by 17 CFR 229.402(f)(1).

(2)(i) With respect to any specific grant of or any plan containing options, warrants or rights submitted for security holder action, state:

(A) The title and amount of securities underlying such options, warrants or rights;

(B) The prices, expiration dates and other material conditions upon which the options, warrants or rights may be exercised;

(C) The consideration received or to be received by the bank or subsidiary for the granting or extension of the options, warrants or rights;

(D) The market value of the securities underlying the options, warrants, or rights as of the latest practicable date; and

(E) In the case of options, the federal income tax consequences of the issuance and exercise of such options to the recipient and the bank; and

(ii) State separately the amount of such options received or to be received by the following persons if such benefits or amounts are determinable:

(A) Each person (stating name and position) specified in 17 CFR 229.402(a)(3);

(B) All current executive officers as a group;

(C) All current directors who are not executive officers as a group;

(D) Each nominee for election as a director;

(E) Each associate of any of such directors, executive officers or nominees;

(F) Each other person who received or is to receive 5 percent of such options, warrants or rights; and

(G) All employees, including all current officers who are not executive officers, as a group.

Instructions to Item 9.

1. The term *plan* as used in this item means any plan as defined in 17 CFR 229.402(a)(7)(ii).

2. If action is to be taken with respect to a material amendment or modification of an existing plan, the item shall be answered

with respect to the plan as proposed to be amended or modified and shall indicate any material differences from the existing plan.

3. If the plan to be acted upon is set forth in a written document, three copies thereof shall be filed with the FDIC at the time copies of the proxy statement and form of proxy are first filed pursuant to § 335.204(a).

4. Paragraph (b)(2)(ii) of this item does not apply to warrants or rights to be issued to security holders as such on a pro rata basis.

Item 10—Authorization or Issuance of Securities Otherwise than for Exchange.

If action is to be taken with respect to the authorization or issuance of any securities otherwise than in exchange for outstanding securities of the bank, furnish the following information:

(a) State the title and amount of securities to be authorized or issued.

(b) Furnish a description of the material provisions of the securities such as would be required in a registration statement filed pursuant to this part. If the terms of the securities cannot be stated or estimated with respect to any or all of the securities to be authorized, because no offering thereof is contemplated in the proximate future, and if no further authorization by security holders for the issuance thereof is to be obtained, it should be stated that the terms of the securities to be authorized, including dividend or interest rates, conversion prices, voting rights, redemption prices, maturity dates, and similar matters will be determined by the board of directors. If the securities are additional shares of common stock of a class outstanding, the description may be omitted except for a statement of the preemptive rights, if any. Where the statutory provisions with respect to preemptive rights are so indefinite or complex that they cannot be stated in summarized form, it will suffice to make a statement in the form of an opinion of counsel as to the existence and extent of such rights.

(c) Describe briefly the transaction in which the securities are to be issued, including a statement as to: (1) The nature and approximate amount of consideration received or to be received by the bank, and (2) the approximate amount devoted to each purpose so far as determinable, for which the net proceeds have been or are to be used. If it is impracticable to describe the transaction in which the securities are to be issued, state the reason, indicate the purpose of the authorization of the securities, and state whether further authorization for the issuance of the securities by a vote of security holders will be solicited prior to such issuance.

(d) If the securities are to be issued otherwise than in a general public offering for cash, state the reasons for the proposed authorization or issuance and the general effect thereof upon the rights of existing security holders.

Item 11—Modification or Exchange of Securities.

If action is to be taken with respect to the modification of any class of securities of the bank, or the issuance or authorization for issuance of securities of the bank in exchange for outstanding securities of the bank, furnish the following information:

(a) If outstanding securities are to be modified, state the title and amount thereof. If securities are to be issued in exchange for outstanding securities, state the title and amount of securities to be so issued, the title and amount of outstanding securities to be exchanged therefor, and the basis of the exchange.

(b) Describe any material differences between the outstanding securities and the modified or new securities in respect of any of the matters concerning which information would be required in the description of the securities in a registration statement filed under to this part.

(c) State the reasons for the proposed modification or exchange, and the general effect thereof upon the rights of existing security holders.

(d) Furnish a brief statement as to arrears in dividends or as to defaults in principal or interest in respect to the outstanding securities which are to be modified or exchanged and such other information as may be appropriate in the particular case to disclose adequately the nature and effect of the proposed action.

(e) Outline briefly any other material features of the proposed modification or exchange.

Instruction. If the existing security is presently listed and registered on a national securities exchange, state whether it is intended to apply for listing and registration of the new or reclassified security on such exchange or any other exchange. If it is not intended to make such application, state the effect of the termination of such listing and registration.

Item 12—Mergers, Consolidations, Acquisitions and Similar Matters.

If action is to taken with respect to any transaction involving (i) the merger or consolidation of the bank into or with any other person or of any other person into or with the bank, (ii) the acquisition by the bank or any of its security holders of securities of another person, (iii) the acquisition by the bank of any other going business or of the assets thereof, (iv) the sale or other transfer of all or any substantial part of the assets of the bank, or (v) the liquidation or dissolution of the bank, furnish the following information:

(a) *Information about the transaction.* Furnish the following information concerning the bank and (unless otherwise indicated) each other person: which is to be merged into the bank or into or with which the bank is to be merged or consolidated; the business or assets of which are to be acquired; which is the issuer of securities to be acquired by the bank in exchange for all or a substantial part of the bank's assets; or which is the issuer of securities to be acquired by the bank or its security holders:

(1) The name, complete mailing address (including ZIP Code) and telephone number (including the area code) of the principal executive offices.

(2) A brief description of the general nature of the business conducted by the other person.

(3) A summary of the material features of the proposed transaction. If the transaction is set forth in a written document, file three copies thereof with the FDIC at the time preliminary copies of the proxy statement and form of proxy are filed pursuant to § 335.204. The summary shall include, where applicable.

(i) A brief summary of the terms of the transaction agreement;

(ii) The reasons for engaging in the transaction;

(iii) An explanation of any material differences in the rights of security holders of the bank as a result of this transaction;

(iv) A brief statement as to the accounting treatment of the transaction;

(v) The federal income tax consequences of the transaction; and

(vi) The information required in the description of securities in a registration statement (Form F–1, Item 13) filed under this part, for a security being issued in connection with the transaction if the security holders entitled to vote or give an authorization or consent with regard to the transaction will receive such securities, unless: (i) the issuer of the securities is not a bank and would meet the requirements for use of the SEC's Form S–3 and elects to furnish information required by Item 14(b)(1) of the SEC's Schedule 14A (17 CFR 240.14a–101); (ii) capital stock is to be issued and (iii) securities of the same class are registered under section 12 of the Exchange Act and either (a) are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (b) are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association.

(4) A brief statement as to dividends in arrears or defaults in principal or interest in respect of any securities of the bank or of such other person and as to the effect of the transaction thereon and such other information as may be appropriate in the particular case to disclose adequately the nature and effect of the proposed action.

(5) Furnish in comparative columnar form on a historical and (if material) pro-forma basis the selected financial data for the bank referred to below, for

(a) Each of the last five fiscal years of the bank (or for the life of the bank and its predecessors, if less), and

(b) Any additional fiscal years necessary to keep the information from being misleading.

Instructions to paragraph (a)(5)

1. The purpose of the selected financial data shall be to supply in a convenient and readable format selected financial data which highlight certain significant trends in the bank's financial condition and results of operations.

2. The following items shall be included in the table of financial data: net interest income; other operating income; provision for loan and lease losses; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock and cash dividends declared per common share. Banks may include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations.

Briefly describe, or cross-reference to a discussion thereof, factors such as accounting changes, business combinations or dispositions of business operations, that materially affect the comparability of the information reflected in selected financial data. Discussion of, or reference to, any material uncertainties should also be included where such matters might cause the data reflected herein not to be indicative of the bank's future financial condition or results of operations.

3. All references to the bank in the table of selected financial data and in this Item shall mean the bank and its subsidiaries consolidated.

4. If interim period financial statements are included, or are required to be included, banks should consider whether any or all of the selected financial data need to be updated for such interim periods to reflect a material change in the trends indicated; where such updating information is necessary, banks shall provide the information on a comparative basis unless not necessary to an understanding of such updating information.

(6) In comparative columnar form, historical and pro forma per share data of the bank and historical and equivalent pro forma per share data of the other person for the following information items:

(i) Book value per share as of the date selected financial data is presented;

(ii) Cash dividends declared per share for the periods for which selected financial data is presented; and

(iii) Income (loss) per share for the periods for which selected financial data is presented.

Instruction to paragraphs (a)(5) and (a)(6)

For a business combination accounted for as a purchase, the financial information required by paragraphs (a)(5) and (a)(6) shall be presented only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, the financial information required by paragraphs (a)(5) and (a)(6) (except for information with regard to book value) shall be presented for the most recent three fiscal years and interim period. For a business combination accounted for as a pooling, information with regard to book value shall be presented as of the end of the most recent fiscal year and interim period. Equivalent pro forma per share amounts shall be calculated by multiplying the pro forma income (loss) per share before non-recurring charges or credits directly attributable to the transaction, pro forma book value per share, and the pro forma dividends per share of the bank by the exchange ratio so that the per share amounts are equated to the respective values for one share of the other person.

(7) Pro forma financial information with respect to the transaction, in accordance with § 335.628.

(8) A statement as to whether any federal or state regulatory requirements must be complied with or approval must be obtained in connection with the transaction and if so the status of such compliance or approval.

(9) If a report, opinion or appraisal materially relating to the transaction has been received from an outside party, and such report, opinion or appraisal is referred to in the proxy statement, furnish the same information as would be required by Item 9(b) (1) through (6) of the SEC's Schedule 13E–3 (§ 240.13e–100 of 17 CFR).

(10) A description of any past, present or proposed material contracts, arrangements, understandings, relationships, negotiations for transactions during the periods for which financial statements are presented or incorporated by reference pursuant to this Item between the other person or its affiliates and the bank or its affiliates such as those concerning a merger, consolidation or acquisition; a tender offer or other acquisition of securities; an election of directors; or a sale or other transfer of a material amount of assets.

(11) As to each class of securities of the bank or of the other person which is admitted to trading on a national securities exchange or with respect to which a market otherwise exists, and which will be materially affected by the transaction, state the high and low sale prices (or in the absence of trading in a particular period, the range of the bid and asked prices) as of the date preceding public announcement of the proposed transaction, or if no such public announcement was made, as of the day preceding the day the agreement or resolution with respect to the action was made.

(12) A statement as to whether or not representatives of the principal accountants for the current year and for the most recently completed fiscal year

(i) Are expected to be present at the security holders' meeting;

(ii) Will have the opportunity to make a statement if they desire to do so; and

(iii) Are expected to be available to respond to appropriate questions.

(b) *Information about the bank and other persons.* Furnish the information specified below for the bank and for other persons designated in paragraph (a) of this Item, if applicable (hereinafter all references to the bank should be read to include a reference to such other person unless the context otherwise indicates):

(1) Information required by Item 1 of Form F–2 (§ 335.312 of this part), description of business;

(2) Information required by Item 2 of Form F–2 (§ 335.312 of this part) description of property;

(3) Information required by Item 3 of Form F–2 (§ 335.312 of this part), legal proceedings;

(4) Information required by Item 5 of Form F–2 (§ 335.312 of this part), market price of and dividends on the bank's common equity and related stockholder matters;

(5) Financial statements meeting the requirements of subpart F of this part (12 CFR 335.601 *et seq.*), including financial information required with respect to transactions other than that as to which action is to be taken as described in this proxy statement;

(6) Item 6 of Form F–2 (§ 335.312 of this part), selected financial data;

(7) Item 8 of Form F–2 (§ 335.312 of this part), financial statements and supplementary data;

(8) Item 7 of Form F–2 (§ 335.312 of this part), management's discussion and analysis of financial condition and results of operations; and

(9) Items 4, 5, 6, 7 and 8 of this Form F–5.

(c) If the other person is not subject to the reporting requirements of either section 13(a) or 15(d) of the Exchange Act, furnish:

(1) The financial statements that would have been required to be included in an annual report to security holders pursuant to § 335.203 of this part had the company been required to furnish such a report: *Provided, however,* That the balance sheet for the year preceding the latest full fiscal year and the

income statements for the two years preceding the latest full fiscal year need not be audited if they have not previously been audited. In any case, such financial statements need be audited only to the extent practicable.

(2) The quarterly financial and other information that would have been required had the company been required to file Form F–4 (§ 335.331 of this part) for the most recent quarter for which such a report would have been on file at the time the proxy statement is mailed or for a period ending as of a more recent date.

(3) A brief description of the business done by the company which indicates the general nature and scope of the business.

(4) The information required by paragraphs (b)(4) and (6) through (8) of this Item 12 and the information required by items 4, 5, 6, 7 and 8 of this Form F–5.

(5) Schedule VI—Allowance for Possible Loan and Lease Losses.

(d) *Additional method of incorporation by reference.* In lieu of the provision of information about the bank and other persons required in paragraph (b) of this Item, the bank may incorporate by reference into the proxy statement the information required by this Item if it is contained in an annual report sent to security holders pursuant to the requirement of § 335.203 of this part with respect to the same meeting or solicitation of consents or authorizations as that to which the proxy statement relates, provided such information substantially meets the requirements of the appropriate portions of paragraph (b)(3) of this Item.

(e) *Certain nonbank persons.* Where a party to the transaction (other than the bank) is eligible to use SEC Form S–2 or S–3, the bank may comply with this Item by providing the information for the other party that would be required by SEC Schedule 14A (17 CFR 240.14a–101).

Instructions to Item 12. 1. One copy of the definitive proxy statement filed with the FDIC shall include a manually signed copy of the accountant's report. If the financial statements are incorporated by reference, a manually signed copy of the accountant's report shall be filed with the definitive proxy statement.

2. Any or all of the required financial statements and related information which are not material for the exercise of prudent judgment in regard to the matter to be acted upon may be omitted.

3. If the bank or any of its securities or assets is to be acquired by other persons, the information regarding the other persons that is required by this item, other than information required by paragraphs (a) (1) through (3) and (a) (9) through (11) of this Item, need be provided only to the extent that: (1) The bank or its security holders who are entitled to vote or give an authorization or consent with regard to the action will become or remain security holders of the other persons; or (2) such information is otherwise material to an informed voting decision.

4. If the plan being voted on involves only the bank and one or more of its totally held subsidiaries and does not involve a liquidation of the bank or a spin-off, the information required by this Item, other than information required by paragraphs (a) (1) through (4) and (a) (8) through (11) of this Item, may be omitted.

Item 13—Financial Statements.

(a) If action is to be taken with respect to any matter specified in items 10, 11, or 12 above, furnish audited financial statements of the bank and its subsidiaries such as would be required in a registration statement filed under this part. In addition, the latest available interim date balance sheet and statement of income for the interim period between the end of the last fiscal year and the interim balance sheet date, and comparable prior period, shall be furnished. All schedules, except schedule VI—Allowance for Possible Loan and Lease Losses may be omitted.

(b) If action is to be taken with respect to any matter specified in item 12, furnish for each person specified therein, other than the bank, financial statements such as would be required in a registration statement filed under this part. In addition, the latest available interim date balance sheet and statement of income for the interim period between the end of the last fiscal year and the interim balance sheet date, and comparable prior period, shall be furnished. However, the following may be omitted:

(1) All schedules, except schedule VI—Allowance for Possible Loan and Lease Losses; and

(2) Statements for a subsidiary, all of the stock of which is owned by the bank, that is included in the consolidated statement of the bank and its subsidiaries. Such statements shall be audited, if practicable.

(c) Notwithstanding the provisions of this Item, any or all of the information required by paragraph (a) of this Item, not material for the exercise of prudent judgment in regard to the matter to be acted upon may be omitted. In the usual case the information is deemed material to the exercise of prudent judgment where the matter to be acted upon is the authorization or issuance of a material amount of senior securities, but the information is not deemed material where the matter to be acted upon is the authorization or issuance of common stock, otherwise than in an exchange, merger, consolidation, acquisition or similar transaction, the authorization of preferred stock without present intent to issue or the authorization of preferred stock for issuance for cash in an amount constituting fair value.

(d) The statement may incorporate by reference any financial statements contained in an annual report sent to security holders under § 335.203 with respect to the same meeting as that to which the statements relate, provided such financial statements substantially meet the requirements of this item.

Item 14—Action With Respect to Reports.

If action is to be taken with respect to any report of the bank or of its directors, officers, or committees or any minutes of meetings of its security holders, furnish the following information:

(a) State whether or not such action is to constitute approval or disapproval of any of the matters referred to in such reports or minutes.

(b) Identify each of such matters which it is intended will be approved or disapproved, and furnish the information required by the appropriate item or items of this schedule with respect to each such matter.

Item 15—Matters Not Required To Be Submitted.

If action is to be taken with respect to any matter which is not required to be submitted to a vote of security holders, state the nature of such matter, the reasons for submitting it to a vote of security holders and what action is intended to be taken by the management in the event of a negative vote on the matter by the security holders.

Item 16—Amendment of Charter; Bylaws; or Other Documents.

If action is to be taken with respect to any amendment of the bank's charter, bylaws, or other documents as to which information is not required above, state briefly the reasons for and general effect of such amendment.

Instruction. Where the matter to be acted upon is the classification of directors state whether vacancies which occur during the year may be filled by the board of directors to serve only until the next annual meeting or may be so filled for the remainder of the full term.

Item 17—Other Proposed Action.

If action is to be taken with respect to any matter not specifically referred to above, describe briefly the substance of each such matter in substantially the same degree of detail as is required by items 5 to 18, inclusive, above.

Item 18. Voting Procedures

As to each matter which is to be submitted to a vote of security holders, furnish the following information:

(a) State the vote required for approval or election, other than for the approval of auditors.

(b) Disclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as bank charter and by-law provisions.

Item 19—Acquisition or Disposition of Property.

If action is to be taken with respect to the acquisition or disposition of any property, furnish the following information:

(a) Describe briefly the general character and location of the property.

(b) State the nature and amount of consideration to be paid or received by the issuer or any subsidiary. To the extent practicable, outline briefly the facts bearing upon the question of the fairness of the consideration.

(c) State the name and address of the transferer or transferee, as the case may be, and the nature of any material relationship of such person to the issuer or any affiliate of the issuer.

(d) Outline briefly any other material features of the contract or transaction.

Item 20—Restatement of Accounts.

If action is to be taken with respect to the restatement of any asset, capital, or surplus account of the bank, furnish the following information:

(a) State the nature of the restatement and the date as of which it is to be effective.

(b) Outline briefly the reasons for the restatement and for the selection of the particular effective date.

(c) State the name and amount of each account (including any reserve accounts) affected by the restatement and the effect of the restatement thereon. Tabular presentation of the amounts shall be made when appropriate, particularly in the case of recapitalizations.

(d) To the extent practicable, state whether and the extent, if any, to which the restatement will, as of the date thereof, alter the amount available for distribution to the holders of equity securities.

Item 21—Compliance with Section 16(a) of the Exchange Act.

Every bank having a class of equity securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*) shall:

(a) Based solely upon a review of Forms F–7 (§ 335.420) and F–8 (§ 335.421) and amendments thereto furnished to the bank during its most recent fiscal year, and Forms F–8A (§ 335.422) and amendments thereto furnished to the bank with respect to its most recent fiscal year, and any written representation referred to in paragraph (b)(2)(i) of this item:

(1) Identify each person who, at any time during the fiscal year, was a director, officer, beneficial owner of more than 10 percent of any class of equity securities of a bank registered pursuant to section 12 of the Exchange Act, (''reporting person'') that failed

to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years.

(2) For each such person, set forth the number of late reports, the number of transactions that were not reported on a timely basis, and any known failure to file a required Form.

Note: The disclosure requirement is based on a review of the forms submitted to the bank during and with respect to its most recent fiscal year, as specified above. Accordingly, a failure to file timely need only be disclosed once. For example, if in the most recently concluded fiscal year a reporting person filed a Form F–8 disclosing a transaction that took place in the prior fiscal year, and should have been reported in that year, the bank should disclose that late filing and transaction pursuant to this item 21 with respect to the most recently concluded fiscal year, but not in material filed with respect to subsequent years.

(b) With respect to the disclosure required by paragraph (a) of this item:

(1) A form received by the bank within three calendar days of the required filing date may be presumed to have been filed with the FDIC by the required filing date.

(2) If the bank: (i) Receives a written representation from the reporting person that no Form F–8A is required; and (ii) Maintains the representation for two years, making a copy available to the FDIC or its staff upon request, the bank need not identify such reporting person pursuant to paragraph (a) of this section as having failed to file a Form F–8A with respect to that fiscal year.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55556, Dec. 14, 1983; 54 FR 53576, Dec. 29, 1989; 57 FR 4702, Feb. 7, 1992; 57 FR 58136, Dec. 9, 1992; 59 FR 67171, Dec. 29, 1994]

§ 335.213 Form for information statement (Form F–5A).

FORM F–5A

INFORMATION STATEMENT

NOTE: Where any item, other than item 5, calls for information with respect to any matter to be acted upon at the meeting, such item need be answered only with respect to proposals to be made by the bank.

Except as otherwise specifically provided, where any item calls for information for a specified period in regard to directors, officers or other persons holding specified positions or relationships, the information shall be given in regard to any person who held any of the specified positions or relationships at any time during the period. However, information need not be included for any portion of the period during which such person did not hold any such position or relationship provided a statement to that effect is made.

Small Business Issuers: A ''small business issuer'', as defined under 17 CFR 240.12b–2 has the option of providing financial and other item disclosure in conformance with Regulation S–B of the Securities and Exchange Commission (17 CFR Part 228) in lieu of the following referenced disclosure requirements set forth in § 335.212 Item 4(b)(1)(xi); Item 5, paragraph (d); Item 6, paragraphs (a) through (d); Item 7, paragraphs (a) and (c); Item 8, paragraph (c); Item 10, paragraph (b); Item 12, paragraphs (a)(3)(vi), (a)(5), (a)(6), (a)(7), (b)(1) through (b)(8), (c)(1) through (c)(4), and (e); and Item 13. If there is no comparable disclosure requirement in Regulation S–B, a small business issuer need not provide the information requested. The definition of ''small business issuer'', generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

Item 1. Information required by items of Form F–5 (12 CFR 335.212). Furnish the information called for by all of the items of Form F–5 (12 CFR 335.212) (other than items 1, 3, and 4 thereof) which would be applicable to any matter to be acted upon at the meeting if proxies were to be solicited in connection with the meeting.

Item 2. Statement that proxies are not solicited. The following statement shall be set forth on the first page of the information statement in bold-face type:

WE ARE NOT ASKING YOU FOR A PROXY AND YOU ARE REQUESTED NOT TO SEND US A PROXY

Item 3. Date, time and place of meeting. State the date, time and place of the meeting of security holders, unless that information is otherwise disclosed in material furnished to security holders with the information statement.

Item 4. Interest of certain persons in or opposition to matters to be acted upon. (a) Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each of the following persons in any matter to be acted upon, other than elections to office:

(1) Each person who has been a director or officer of the bank at any time since the beginning of the last fiscal year.

(2) Each nominee for election as a director of the bank.

(3) Each associate of the foregoing persons.

(b) Give the name of any director of the bank who has informed the bank in writing that he intends to oppose any action to be taken by the bank at the meeting and indicate the action which he intends to oppose.

Item 5. Proposals by security holders. If any security holder entitled to vote at the meeting has submitted to the bank a reasonable time before the information statement is to

be transmitted to security holders a proposal, other than elections to office, which is accompanied by notice of his intention to present the proposal for action at the meeting, make a statement to that effect, identify the proposal and indicate the disposition proposed to be made of the proposal by the bank at the meeting.

Instructions. 1. This item need not be answered as to any proposal submitted with respect to an annual meeting if the proposal is submitted less than 60 days in advance of a day corresponding to the date of mailing a proxy statement or information statement in connection with the last annual meeting of security holders.

2. If the bank intends to rule a proposal out of order, the FDIC shall be so advised at the time preliminary copies of the information statement are filed with the FDIC, together with a statement of the reasons why the proposal is not deemed to be a proper subject for action by security holders.

[46 FR 25208, May 5, 1981, as amended at 59 FR 67173, Dec. 29, 1994]

§ 335.214 Obligation of banks in communicating with beneficial owners.

(a) If the bank knows that securities of any class entitled to vote at a meeting are held of record by a broker, dealer, bank, association or other entity that exercises fiduciary powers in nominee name or otherwise, the bank shall:

(1) By first class mail or other equally prompt means:

(i) Inquire of each such record holder:

(A) Whether other persons are the beneficial owners of such securities, and if so, the number of copies of the proxy and other soliciting material (or if applicable, the number of copies of the information statement) necessary to supply such material to such beneficial owners.

(B) In the case of an annual (or special meeting in lieu of the annual) meeting, or written consents in lieu of such meeting, at which directors are to be elected, the number of copies of the annual report to security holders necessary to supply such report to beneficial owners to whom such reports are to be distributed by such record holder or its nominee and not by the bank; and

(C) If the record holder has an obligation under 17 CFR 240.14b–1(b)(3) or 17 CFR 240.14b–2(b)(4) (ii) and (iii), whether an agent has been designated to act on its behalf in fulfilling such obligation and, if so, the name and address of such agent; and

(D) Whether it holds the bank's securities on behalf of any respondent bank and, if so, the name and address of each such respondent bank; and

(ii) Indicate to each such record holder:

(A) Whether the bank, pursuant to paragraph (c) of this section, intends to distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to 17 CFR 240.14b–1(b)(3) and 17 CFR 240.14b–2(b)(4)(ii) and (iii);

(B) The record date; and

(C) At the option of the bank, any employee benefit plan established by an affiliate of the bank that holds securities of the bank that the bank elects to treat as exempt employee benefit plan securities;

(2) Upon receipt of a record holder's or respondent bank's response indicating, pursuant to 17 CFR 240.14b–2(b)(1)(i), the names and addresses of its respondent banks, within one business day after the date such response is received, make an inquiry of and give notification to each such respondent bank in the same manner required by paragraph (a)(1) of this section; *Provided, however,* the inquiry required by paragraphs (a)(1) and (2) of this section shall not cover beneficial owners of exempt employee benefit plan securities;

(3)(i) Make the inquiry required by paragraph (a)(1) of this section:

(A) If the bank intends to solicit proxies, consents or authorizations:

(*1*) At least 20 business days prior to the record date of the meeting of security holders; or

(*2*) If such inquiry is impracticable 20 business days prior to the record date of a special meeting, as many days before the record date as practicable; or

(*3*) If consents or authorizations are solicited, and such inquiry is impracticable 20 days before the earliest date on which they may be used to effect corporate action, as many days before that date as is practicable; or

(*4*) At such later time as the rules of a national securities exchange on which the class of securities in question is listed may permit for good cause shown; or

(B) If the bank does not intend to solicit proxies, consents or authorizations, the earlier of:

(*1*) At least 20 business days prior to the record date of the meeting of security holders or the record date of written consents in lieu of a meeting; or

(*2*) At least 20 business days prior to the date the information statement is required to be sent or given pursuant to § 335.201(b).

(ii) *Provided, however,* that if a record holder or respondent bank has informed the bank that a designated office(s) or department(s) is to receive such inquiries, the inquiry shall be made to such designated office(s) or department(s);

(4) Supply in a timely manner, each record holder and respondent bank of whom the inquiries required by paragraphs (a)(1) and (a)(2) of this section are made with copies of the proxy, other proxy soliciting material (or if applicable, copies of the information statement), and/or the annual report to security holders, in such quantities, assembled in such form and at such place(s), as the record holder may reasonably request in order to send such material to each beneficial owner of securities who is to be furnished with such material by the record holder or respondent bank; and

(5) Upon the request of any record holder or respondent bank that is supplied with proxy soliciting material, information statements, and/or annual reports to security holders pursuant to paragraph (a)(4) of this section, pay its reasonable expenses for completing the mailing of such material to beneficial owners.

NOTE 1: If the bank's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to section 17A of the Act (e.g., ''Cede & Co.,'' nominee for the Depository Trust Company), the bank shall make appropriate inquiry of the clearing agency and thereafter of the participants in such clearing agency who may hold on behalf of a beneficial owner or respondent bank, and shall comply with the above paragraph with respect to any such participant (*see* 17 CFR 240.14a–1(i)).

NOTE 2: The attention of banks is called to the fact that each broker, dealer, bank, association or other entity that exercises fiduciary powers has an obligation under 17 CFR 240.14b–1 and 17 CFR 240.14b–2 (except as provided therein with respect to employee benefit plan securities held in nominee name) and, with respect to brokers and dealers, applicable self-regulatory requirements to obtain and forward, within the time periods prescribed therein: Proxies (or in lieu thereof requests for voting instructions) and proxy soliciting materials (or if applicable, copies of the information statement) to beneficial owners on whose behalf it holds securities; and annual reports to security holders to beneficial owners on whose behalf it holds securities, unless the bank has notified the record holder or respondent bank that it has assumed responsibility to mail such material to beneficial owners whose names, addresses and securities positions are disclosed pursuant to 17 CFR 240.14b–1(b)(3) and 17 CFR 240.14b–2(b)(4)(ii) and (iii).

NOTE 3: The attention of banks is called to the fact that banks have an obligation, pursuant to paragraph (d) of this section, to cause proxies (or in lieu thereof requests for voting instructions), proxy soliciting material (or if applicable, copies of the information statement) and annual reports to security holders to be furnished, in a timely manner, to beneficial owners of exempt employee benefit plan securities.

NOTE 4: The requirement for sending an annual report to security holders of record having the same address will be satisfied by sending at least one report to a holder of record at that address provided that those holders of record to whom the report is not sent agree thereto in writing. This procedure is not available, however, where banks, associations, other entities that exercise fiduciary powers, brokers, dealers and other persons hold securities in nominee accounts or ''street names'' on behalf of beneficial owners, and such persons are not relieved of any obligation to obtain or send such annual report to the beneficial owners.

(b) Any bank requesting pursuant to 17 CFR 240.14b–1(b)(3) and 17 CFR 240.14b–2(b)(4) (ii) and (iii) a list of names, addresses and securities positions of beneficial owners of its securities who either have consented or have not objected to disclosure of such information shall:

(1) By first class mail or other equally prompt means, inquire of each record holder and each respondent bank identified to the bank pursuant to 17 CFR 240.14b–2(b)(4)(i) whether such record holder or respondent bank holds the bank's securities on behalf of any respondent banks and, if so, the name and address of each such respondent bank;

(2) Request such list to be compiled as of a date no earlier than five business days after the date of bank's request is received by the record holder or respondent bank; *Provided, however,* that if the record holder or respondent bank has informed the bank that a designated office(s) or department(s) is to receive such requests, the request shall be made to such designated office(s) or department(s);

(3) Make such request to the following persons that hold the bank's securities on behalf of beneficial owners: all brokers, dealers, banks, associations and other entities that exercise fiduciary powers; *Provided, however,* such request shall not cover beneficial owners of exempt employee benefit plan securities as defined in 17 CFR 240.14a–1(d)(1); and, at the option of the bank, such request may give notice of any employee benefit plan established by an affiliate of the bank that holds securities of the bank that the bank elects to treat as exempt employee benefit plan securities;

(4) Use the information furnished in response to such request exclusively for purposes of corporate communications; and

(5) Upon the request of any record holder or respondent bank to whom such request is made, pay the reasonable expenses, both direct and indirect, of providing beneficial owner information.

NOTE: A bank will be deemed to have satisfied its obligations under paragraph (b) of this section by requesting consenting and non-objecting beneficial owner lists from a designated agent acting on behalf of the record holder or respondent bank and paying to that designated agent the reasonable expenses of providing the beneficial owner information.

(c) A bank, at its option, may mail its annual report to security holders to the beneficial owners whose identifying information is provided by record holders and respondent banks, pursuant to 17 CFR 240.14b–1(b)(3) and 17 CFR 240.14b–2(b)(4) (ii) and (iii), provided that such bank notifies the record holders and respondent banks, at the time it makes the inquiry required by paragraph (a) of this section, that the bank will mail the annual report to security holders to the beneficial owners so identified.

(d) If a bank furnishes information statements to, or solicits proxies, consents or authorizations from record holders and respondent banks who hold securities on behalf of beneficial owners, the bank shall cause proxies (or in lieu thereof requests for voting instructions), proxy soliciting material (or if applicable, copies of the information statement) and annual reports to security holders to be furnished, in a timely manner, to beneficial owners of exempt employee benefit plan securities.

[54 FR 53586, Dec. 29, 1989, as amended at 59 FR 67173, Dec. 29, 1994]

§ 335.220 Special provisions applicable to election contests.

(a) *Solicitations to which the section applies.* This section applies to any solicitation subject to this subpart B by any person or group of persons for the purpose of opposing a solicitation subject to this subpart B by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

(b) *Solicitations prior to furnishing required statement.* Notwithstanding the provisions of § 335.201 a solicitation subject to § 335.220 may be made prior to furnishing security holders a written statement containing the information specified in Form F–5 with respect to such solicitation: *Provided,* That—

(1) No form of proxy is furnished to security holders prior to the time the written proxy statement required by § 335.201 is furnished to security holders: *Provided, however,* that this paragraph (b)(1) shall not apply where a proxy statement then meeting the requirements of Form F–5 has been furnished to security holders by or on behalf of the person making the solicitation;

(2) The identity of the participants in the solicitation (as defined in Instruction 3 of Item 3 of Form F–5 (§ 335.212)) and a description of their interests, direct or indirect, by security holdings or otherwise, are set forth in each communication published, sent or given to security holders in connection with the solicitation;

(3) A written proxy statement meeting the requirements of this Subpart B is sent or given to security holders solicited pursuant to this paragraph (b) at the earliest practicable date.

(c) *Solicitations prior to furnishing required statement—filing requirements.* Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishing of the proxy statement required by § 335.201 shall be filed with the FDIC in preliminary form, at least five business days prior to the date copies of such material are first sent or given to security holders, or such shorter period as the FDIC may authorize upon a showing of good cause therefor.

(d) *Application of this section to annual report.* Notwithstanding the provisions of § 335.203 three copies of any portion of the annual report referred to in that section that comments upon or refers to any solicitation subject to this section, or to any participant in any such solicitation, other than the solicitation by the management, shall be filed with the FDIC as proxy material subject to this subpart B. Such portion of the annual report shall be filed with the FDIC in preliminary form at least five business days prior to the date copies of this report are first sent or given to security holders.

(e) *Application of § 335.204.* The provisions of § 335.204(c) through (f) shall apply, to the extent pertinent, to soliciting material subject to paragraphs (c) and (d) of this section.

(f) *Use of reprints or reproductions.* In any solicitation subject to this section, soliciting material that includes, in whole or in part, any reprints or reproductions of any previously published material shall:

(1) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

(2) Except in the case of a public official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

(3) If any participant using the previously published material, or anyone on his behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of such material, state the circumstances.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983; 54 FR 53587, Dec. 29, 1989; 59 FR 67174, Dec. 29, 1994]

§ 335.221 Form for statement in election contests (Form F–6).

FORM F–6

STATEMENT IN ELECTION CONTEST

GENERAL INSTRUCTIONS

All items shall be answered but the text of any item may be omitted provided the answers thereto are prepared in the manner specified in § 335.361. If an item is inapplicable or the answer is in the negative, so state. The information called for by items 2(a) and 3(a) or a fair summary thereof is required to be included in all preliminary soliciting material by § 335.220.

Item 1—Bank, State the name and address of the bank.

Item 2—Identity and Background of Participant.

(a) State the following:

(1) Your name and business address.

(2) Your present principal occupation or employment and the name, principal business, and address of any corporation or other organization in which such employment is carried on.

(b) State the following:

(1) Your residence address.

(2) Information as to all material occupations, positions, offices, or employments during the last ten years, giving starting and ending dates of each and the name, principal business, and address of any business corporation or other business organization in which each such occupation, position, office, or employment was carried on.

(c) State whether or not you are or have been a participant in any other proxy contest involving the bank or other corporations within the past ten years. If so, identify the principals, the subject matter and your relationship to the parties and the outcome.

(d) State whether or not, during the past ten years, you have been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case. A negative answer to this subitem need not be included in

the statement or other proxy soliciting material.

Item 3—Interests in Securities of the Bank.

(a) State the amount of each class of securities of the bank that you own beneficially, directly, or indirectly.

(b) State the amount of each class of securities of the bank that you own of record but not beneficially.

(c) State with respect to the securities specified in (a) and (b) the amounts acquired within the past two years, the dates of acquisition and the amounts acquired on each date.

(d) If any part of the purchase price or market value of any of the shares specified in paragraph (c) is represented by funds borrowed or otherwise obtained for the purpose of acquiring or holding such securities, so state and indicate the amount of the indebtedness as of the latest practicable date. If such funds were borrowed or obtained otherwise than under a margin account or bank loan in the regular course of business of a bank, broker, or dealer, briefly describe the transaction, and state the names of the parties.

(e) State whether or not you are a party to any contracts, arrangements or understandings with any person with respect to any securities of the bank, including but not limited to joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies. If so, name the persons with whom such contracts, arrangements, or understandings exist and give the details thereof.

(f) State the amount of securities of the bank owned beneficially, directly, or indirectly by each of your associates and the name and address of each such associate.

(g) State the amount of each class of securities of any parent or subsidiary of the bank which you own beneficially, directly, or indirectly.

Item 4—Further Matters.

(a) Describe the time and circumstances under which you became a participant in the solicitation and state the nature and extent of your activities or proposed activities as a participant.

(b) Furnish for yourself and your associates the information required by item 7 of Form F–5 (§ 335.212).

(c) State whether or not you or any of your associates have any arrangement or understanding with any person;

(1) With respect to any future employment by the bank or its affiliates; or

(2) With respect to any future transactions to which the bank or any of its affiliates will or may be a party. If so, describe such arrangement or understanding and state the names of the parties thereto.

(d) State the total amount contributed and proposed to be contributed by you in furtherance of the solicitation, directly or indirectly, if such amount exceeds or will exceed $500 in the aggregate.

Item 5—Signature.

The statement shall be dated and signed in the following manner:

I certify that the statements made in this statement are true, complete, and correct, to the best of my knowledge and belief.

_____

(Signature of participant or authorized representative)

Date _____

Instruction. If the statement is signed on behalf of participant by the latter's authorized representative, evidence of the representative's authority to sign on behalf of such participant shall be filed with the statement.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55556, Dec. 14, 1983]

§ 335.222 Notice of Exempt Solicitation to be included in statements submitted by or on behalf of a person pursuant to § 335.204(l) (Form F–6A).

FORM F–6A—NOTICE OF EXEMPT SOLICITATION

1. Name and address of the Bank:

_____

2. Name of person relying on exemption:

_____

3. Address of person relying on exemption:

_____

4. *Written materials.* Attach written material required to be submitted pursuant to § 335.204(l).

[59 FR 67174, Dec. 29, 1994]

Subpart C—Bank Reporting

§ 335.301 Requirement of registration statement.

Securities of a bank (*other than a foreign bank*) shall be registered under the provisions of either section 12(b) or section 12(g) of the act by filing a statement in conformity with the requirements of Form F–1 (or Form F–10, in the case of registration of an additional class of securities). Securities of a foreign bank shall be registered in conformity with applicable requirements of SEC Form 20–F (17 CFR 249.220f). No registration shall be required under the provisions of section

12(b) or section 12(g) of the act of any warrant or certificate evidencing a right to subscribe to or otherwise acquire a security of a bank if such warrant or certificate by its terms expires within 90 days after the issuance thereof.

Note to Small Business Issuers: a ''small business issuer'', as defined under 17 CFR 240.12b–2 has the option of providing the disclosure required by SEC Form 10–SB, optional form for the registration of securities of a small business issuer (17 CFR 249.210b), in lieu of the disclosure requirements set forth in Form F–1 (§ 335.309a). The definition of ''small business issuer'', generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

[46 FR 25208, May 5, 1981, as amended at 59 FR 67174, Dec. 29, 1994]

§ 335.302 Registration of securities of successor bank.

(a) Where in connection with a succession by merger, consolidation, exchange of securities or acquisition of assets, equity securities of a bank, holders of any class of equity securities not previously registered under section 12 of the act, are issued to the holders of any class of equity securities of another bank which is registered under section 12(g) of the act, the class of securities so issued shall be deemed to be registered under section 12(g) of the act unless upon consummation of the succession such class is exempt from such registration or all securities of such class are held of record by less than 300 persons.

(b) Where in connection with a succession by merger, consolidation, exchange of securities or acquisition of assets, equity securities of a bank, which are not registered under section 12 of the act, are issued to the holders of any class of equity securities of another issuer which is required to file a registration statement under section 12(g) of the act but has not yet done so, the duty to file such statement shall be deemed to have been assumed by the bank whose class of securities is so issued and such bank shall file a registration statement under section 12(g) of the act with respect to such class within the period of time the predecessor bank would have been required to file such a statement, or within such extended period of time as the FDIC may authorize upon application under § 335.358 unless upon consummation of the succession such class is exempt from such registration or all securities of the class are held of record by less than 300 persons.

§ 335.303 Registration effective as to class or series.

Depending upon whether the security is to be listed on an exchange, registration shall become effective as provided in section 12(d) or section 12(g)(1) of the act as to the entire class of such security, then or thereafter authorized. If, however, a class of security is issuable in two or more series with different terms, each such series shall be deemed a separate class for the purposes of this paragraph.

§ 335.304 Acceleration of effectiveness of registration.

A request for acceleration of the effective date of registration shall be made in writing by either the bank, an exchange, or both and shall briefly describe the reasons therefor.

§ 335.305 Exchange certification.

(a) Certification that a security has been approved by an exchange for listing and registration under section 12(d) of the act shall be made by the governing committee or other corresponding authority of the exchange.

(b) The certification shall specify: (1) The approval of the exchange for listing and registration; (2) the title of the security so approved; (3) the date of filing with the exchange of the registration statement and of any amendments thereto; and (4) any conditions imposed on such certification. The exchange shall promptly notify the FDIC of the partial or complete satisfaction of any such conditions.

(c) The certification may be made by telegram but in such case shall be confirmed in writing. All certifications in writing and all amendments thereto shall be filed with the FDIC in duplicate and at least one copy shall be manually signed by the appropriate exchange authority.

(d) The date of receipt by the FDIC of the certification approving a security

for listing and registration shall be the date on which the certification is actually received by the FDIC, or the date on which the registration statement to which the certification relates is actually received by the FDIC, whichever date is later.

(e) If an amendment to the registration statement is filed with the exchange and with the FDIC after the receipt by the FDIC of the certification of the exchange approving the security for listing and registration, the certification, unless withdrawn, shall be deemed made with reference to the statement as amended.

(f) An exchange may, by notice to the FDIC, withdraw its certification prior to the time that the registration to which it relates first becomes effective pursuant to paragraph (b) of this section.

(g) An exchange may suspend from trading a bank security listed and registered thereon in accordance with its rules. Suspension of trading shall not terminate the registration of any bank security.

§ 335.306 When securities are deemed to be registered.

A class of securities with respect to which a registration statement has been filed under section 12 of the act shall be deemed to be registered for the purposes of sections 13, 14 and 16 of the act and the regulations in this part only when such registration statement has become effective as provided in section 12, and securities of said class shall not be subject to sections 13, 14 and 16 of the act until such registration statement has become effective as provided in section 12.

§ 335.307 Exemptions for American depository receipts and certain foreign securities.

(a)(1) Securities of any class issued by any foreign bank shall be exempt from section 12(g) of the act if the class has fewer than 300 holders resident in the United States. This exemption shall continue until the next fiscal year end at which the bank has a class of equity securities held by 300 or more persons resident in the United States. For the purpose of determining whether a security is exempt under this paragraph, securities held of record by persons resident in the United States shall be determined as provided in § 335.102(*l*) except that securities held of record by a broker, dealer or bank or nominee for any of them in the United States for the accounts of customers resident in the United States shall be counted as held in the United States by the number of separate accounts for which the securities are held. The bank may rely in good faith on information as to the number of such separate accounts supplied by all owners of the class of its securities which are brokers, dealers or banks in the United States or a nominee for any of them.

(2) Registration of any class of security by a foreign bank under section 12(g) of the act shall be terminated ninety days, or such shorter period as the FDIC may determine, after the bank files a certification with the FDIC that the number of holders resident in the United States of such class of security is reduced to less than 300 persons. Termination of registration shall be deferred pending final determination on the question of denial.

(b)(1) Securities of any foreign private bank shall be exempt from section 12(g) of the act if the bank, or a government official or agency of the country of the bank's domicile or in which it is incorporated or organized.

(i) Shall furnish to the FDIC whatever information in each of the following categories (*required public information*) the bank during its last fiscal year (A) has made public under the law of the country of its domicile or in which it is incorporated or organized, (B) has filed with a stock exchange on which its securities are traded and which was made public by such exchange, or (C) has distributed to its security holders;

(ii) Shall furnish to the FDIC a list identifying the required public information and stating when and by whom it is required to be made public, filed with any such exchange or distributed to security holders;

(iii) Shall furnish to the FDIC, during each subsequent fiscal year, whatever required public information is made public, promptly after such information is made public; and

(iv) Shall furnish to the FDIC a revised list reflecting any changes in the kind of required public information promptly after the end of any fiscal year in which any changes occur.

(2) The required public information shall be furnished on or before the date on which a registration statement under section 12(g) of the act would otherwise be required to be filed.

(3) The required public information is that about which investors ought reasonably to be informed with respect to the bank and its subsidiaries concerning: The financial condition or results of operations; changes in business; acquisitions or dispositions of assets; issuance, redemption or acquisitions or their securities; changes in management or control, the granting of options or the payment of other compensation to directors or officers' transactions with directors, officers or principal security holders; and any other information about which investors ought reasonably to be informed.

(4) Only one complete copy of any information or document need be furnished under paragraph (b)(1) of this section. If the bank has prepared or caused to be prepared an English translation or substantially equivalent English version of any information or document which would otherwise be furnished, such translation or version shall be furnished and the information or document in the original language need not be furnished. Such information and documents need not be under cover of any prescribed form and shall not be deemed to be *filed* with the FDIC or otherwise subject to the liabilities of section 18 of the act.

(5) The furnishing of any information or document under paragraph (b) of this section shall not constitute an admission for any purpose that the bank is subject to the act.

(c) American Depository Receipts for the securities of any foreign bank shall be exempt from section 12(g) of the act.

(d) Securities of any foreign private bank, other than a North American bank, which has any class of securities registered on a national securities exchange under section 12(b) of the act or any foreign private bank which is required to file reports under section 15(d) of the act shall be exempt from section 12(g) of the act.

(e) The exemptions provided by paragraphs (b) and (d) of this section shall not be available for any class of securities if at the end of the last fiscal year of the bank (1) more than 50 per cent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States and (2) the business of such bank is administered principally in the United States or 50 per cent or more of the members of its Board of Directors are residents of the United States. For the purpose of this paragraph the term *resident*, as applied to security holders, shall mean any person whose address appears on the records of the bank, the voting trustee or the depositary as being located in the United States.

(f) The exemption provided by paragraph (b)(1) of this section shall not be available for securities of any foreign bank which within 1 year prior to the date as of which registration of such securities under section 12(g) of the act is required, has had the same or any other class of securities registered under section 12 of the act, nor shall such exemption be available for securities the registration of which under section 12(g) of the act is required as a result of the termination of an exemption under paragraph (d) of this section.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53587, Dec. 29, 1989]

§ 335.308 Reports of foreign private banks.

(a) Every foreign private bank which is subject to § 335.310 shall make reports on Form F–4A, except that this rule shall not apply to issuers of American depositary receipts for securities of any foreign bank.

(b) Such reports shall be transmitted promptly after the information required by Form F–4A is made public by the bank, by the country of its domicile or under the laws of which it was incorporated or organized, or by a foreign securities exchange with which the bank has filed the information.

(c) Reports furnished under this section shall not be deemed to be *filed*

with the FDIC or otherwise subject to the liabilities of section 18 of the act.

§ 335.309a Form for registration of securities of a bank under section 12(b) or section 12(g) of the Securities Exchange Act of 1934 (Form F–1).

FORM F–1

FORM FOR REGISTRATION OF SECURITIES OF A BANK UNDER SECTION 12(b) OR SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934

FDIC Certificate No. _____

_____

(Exact name of bank as specified in charter)
(Address of principal office) _____
(IRS Employer Identification No.) _____
(Bank's telephone number, including area code) _____

Title of each class of securities being registered under section 12(b) of the Act:[1]

Title of class——————————— _____
Name of each exchange on which class is being registered _____

Title of each class of securities being registered under section 12(g) of the Act:[1]

Indicate by check mark if the bank, as a ''small business issuer'' as defined under 17 CFR 240.12b–2, is providing alternative disclosures as permitted for small business issuers in this Form F–1. [ ]

GENERAL INSTRUCTIONS

Form F–1 shall be used for registration under section 12 (b) or (g) of the Securities Exchange Act of 1934 of classes of securities of issuers that are State nonmember banks. This form is not to be used as a blank form to be filled in but only as a guide in the preparation of a registration statement. Particular attention should be given to the definitions in § 335.102 and the general requirements in subpart C of this part. Unless otherwise stated, the information required shall be given as of a date reasonably close to the date of filing the statement. The statement shall contain the numbers and captions of all items, but the text of the items may be omitted if the answers with respect thereto are prepared in the manner specified in § 335.361. Attention is directed to § 335.350 which states: ''In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.''

Section 335.359 requires that three copies of each registration statement (including financial statements) and two copies of each exhibit and each other document filed as a part thereof, shall be filed with the FDIC. At least one complete copy of the registration statement, including financial statements, exhibits and all other papers and documents filed as a part thereof, shall be filed with each exchange on which any class of securities is to be registered. At least one complete copy of the registration statement filed with the FDIC and one such copy filed with each exchange shall be manually signed. Copies not manually signed shall bear typed or printed signatures.

Attention is directed to § 335.353 which provides for the incorporation by reference of information contained in certain documents in answer or partial answer to any item of a registration statement.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

Item 1—Business

(a) State the year in which the bank was organized. If organized as a national bank, state the year of conversion into a State bank. Indicate the approximate number of holders of record of each class of equity securities of the bank.

(b) Describe briefly the business done and intended to be done by the bank and the general development of such business during the preceding five years, or such shorter period as the bank may have been engaged in business. Information should be furnished as to any mergers, consolidations, or other acquisitions of assets of any other person that were consummated during such period. State the number of banking offices in each city (county) in the United States in which the bank has offices and the number of banking offices located in each foreign country or jurisdiction. In describing the business done by the bank, the business of its subsidiaries should be included only insofar as the same is important to an understanding of the character and development of the business conducted by the total enterprise. The description shall include information as to matters such as the following:

(1) Competitive conditions in the industry and the competitive position of the bank if known or reasonably available to the bank. If several services are involved, separate consideration shall be given to the principal services or classes of services,

(2) If a material portion of the bank's deposits has been obtained from a single person or a few persons (including Federal, State and local governments and agencies thereunder), the loss of any of one or more of which would have a materially adverse effect on the business of the bank, or if a material portion of the bank's loans is concentrated within a single industry or group of related industries, a description of such customers, their other relationships, if any, to the bank,

[1] If none, so state.

and material facts regarding their importance to the business of the bank;

(3) The principal services rendered by the bank, the principal markets for, and methods of distribution of, such services, including any significant changes in the kinds of services rendered, or in the market or methods of distribution, during the past three fiscal years.

(4) The importance to the bank and the duration and effect of all material patents, trademarks, licenses, franchises and concessions held.

(5) (a) The estimated dollar amount spent during each of the last two fiscal years on material research activities relating to the development of new services or the improvement of existing bank services.

(b) In addition to the description of the business done and intended to be done required by paragraph 1(b) and without limiting that requirement, if there has been a public announcement of, or if information otherwise has become public about, a new line of business requiring the investment of a material amount of total assets, a description of the status of such product or line (*e.g.,* whether in the planning stage).

(c) Where material, state the approximate number of employees engaged full-time in each of the activities described in (a) above during each fiscal year and in (b) above.

NOTE: Item 1(b)(5)(b) requires a description of the status of service development in addition to the description of the business done and intended to be done required by paragraph 1(a). Item 1(b)(5)(b) is not intended to require disclosure of otherwise non-public corporate information the disclosure of which would adversely affect the bank's competitive position. Subparagraph (a) requires disclosure of financial information relating to research and development activities. Subparagraph (b) is intended to elicit additional specific information only where there has been a public announcement or where information has otherwise become public concerning a new product or line of business requiring the investment of a material amount of total assets.

(6) The number of persons employed by the bank.

(7) The extent to which the business of the bank or a material portion thereof is or may be seasonal.

(8) Present in tabular form, for each of the three years for which a statement of income is being furnished, ratios of the bank's net income to the following items: (a) average equity capital accounts, and (b) average daily total deposits. Ratios for such periods of average daily loans to average daily deposits should also be included.

Instructions: 1. If the bank proposes to enter, or has recently entered or introduced, a new line of business requiring the investment of a material amount of its total assets, provide as supplemental information at the time of filing of the registration statement, but not as a part thereof, a copy of any studies conducted or performed by or for the bank relating to such business, and a statement as to the actual or proposed use of such study. Where material, disclosure of the absence of such a study is required.

2. Positive and negative factors pertaining to the competitive position of the bank, to the extent that they exist, should be explained, if known or reasonably available to the bank. An estimate of the number of competitors should be included, and, where material, the particular markets in which the bank competes should be identified. Where one or a small number of competitors are dominant, they should be identified.

3. Where material to understanding the bank's business, the bank's and industry practices and conditions as they relate to liquidity should be explained (*e.g.,* where the bank's business is highly seasonal).

4. The description shall not relate to the powers and objects specified in the charter, but to the actual business done and intended to be done. Include the business of subsidiaries and affiliates of the bank insofar as is necessary to understand the character and development of the business conducted by the bank.

5. In describing developments, information shall be given as to matters such as the following: The nature and results of any other material reorganization, readjustment, or succession of any of the bank's significant subsidiaries; the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and any material changes in the mode of conducting the business.

6. Appropriate disclosure shall also be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the bank and its subsidiaries.

7. The business of a predecessor or predecessors shall be deemed to be the business of the bank for the purpose of this item.

8. Appropriate disclosure shall be made with respect to any material portion of the business which may be subject to termination at the election of any person (*e.g.,* depositors).

NOTE: The following instruction (9) applies only to banks filing a registration statement on Form F–1 for the first time, who (including predecessors) have not received revenues from operations for each of the three fiscal years immediately prior to the filing of the registration statement.

9. Describe, if formulated, the bank's plan of operation for the remainder of the fiscal year, if the registration statement is filed prior to the end of the bank's second fiscal quarter. Describe, if formulated, the bank's plan of operation for the remainder of the fiscal year and for the first six months of the next fiscal year, if the registration statement is filed subsequent to the end of the second fiscal quarter. If such information is not available, the reasons for its not being available shall be stated. Disclosure relating to any plan must include such matters as:

(a) The bank's opinion as to whether it will have to raise additional funds within the next year in order to meet its capital requirements. The basis of such opinion must be stated. Where such statement is based on a cash budget, such budget will be furnished to the FDIC as supplemental information, but need not be filed as a part of the Form F–1.

(b) Any anticipated material acquisition of property and equipment and the capacity thereof.

(c) Any anticipated material changes in number of employees.

(d) Other material areas which may be peculiar to the bank's business.

(c)(1) *Information as to lines of business.* If the bank and its subsidiaries are engaged in any line of business in addition to normal commercial or mutual savings bank activities, state, for each of the bank's last five fiscal years, or for each fiscal year the bank has been engaged in business, whichever period is less, the approximate amount or percentage of: (i) Total revenues, and (ii) income (or loss) before income taxes and extraordinary items, attributable to each line of business which during either of the last two fiscal years accounted for:

(A) 10 percent or more of the total revenues,

(B) 10 percent or more of income before taxes and extraordinary items computed without deduction of loss resulting from operations of any line of business, or

(C) A loss which equalled or exceeded 10 percent of the amount of income specified in (b) of this paragraph (c)(1); provided, that if total revenues did not exceed $50,000,000 during either of the past two fiscal years, the percentages specified in (A), (B) and (C) of this paragraph (c)(1) shall be 15 percent, instead of 10 percent.

If it is impracticable to state the contribution to income (or loss) before income taxes and extraordinary items for any line of business, state the contribution thereof to the results of operations most closely approaching such income, together with a brief explanation of the reasons why it is not practicable to state the contribution to such income or loss.

(d) If the bank and its subsidiaries engage in material operation in foreign countries, or if a material portion of revenues is derived from customers in foreign countries, appropriate disclosure shall be made with respect to the importance of that part of the business to the bank and the risks attendant thereto. Insofar as practicable, furnish information with respect to volume and profitability of such operations.

(e) The FDIC may, upon written request of the bank, and where consistent with the protection of investors, permit the omission of any of the information herein required or the furnishing in substitution therefor of appropriate information of comparable character. The FDIC may also require the furnishing of other information in addition to, or in substitution for, the information herein required in any case where such information is necessary or appropriate for an adequate description of the business done or intended to be done.

Item 2—Selected Financial Data; Management's Discussion and Analysis of Financial Condition and Results of Operations, and Other Statistical Disclosure

Furnish in comparative columnar form a summary of selected financial data for the bank for:

(a) Each of the last five fiscal years of the bank (or for the life of the bank and its predecessors, if less), and

(b) Any additional fiscal years necessary to keep the summary from being misleading.

Instructions

1. The purpose of the summary of selected financial data shall be to supply in a convenient and readable format selected data which highlight significant trends in the bank's financial condition and results of operations.

2. The following items shall be included in the table of financial data: Net interest income; other operating income; provision for loan and lease losses; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long term obligations and redeemable preferred stock and cash dividends declared per common share. Banks may include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations. Briefly describe, or cross reference to a discussion thereof, factors such as accounting changes, business combinations or dispositions of business operations, that materially affect the comparability of the selected financial data. Discuss any material uncertainties which might cause the data not to be indicative of the bank's future financial condition or results of operations.

3. Those banks which provide five-year summary information in accordance with

SFAS 89* may combine such information with the selected financial data appearing pursuant to this item.

4. All references to the bank in the summary and in these instructions shall mean the bank and its consolidated subsidiaries.

5. In addition, (a) if debt securities are registered under section 12 of the Act, the bank may, at its option, show in tabular form for each fiscal year the ratio of earnings to fixed charges. If appropriate, the ratio of earnings to fixed charges for such periods shall also be shown on a total enterprise basis in a position of equal prominence with the ratio for the bank or the bank and its consolidated subsidiaries.

(b) Earnings shall be computed after all operating and income deductions except fixed charges and taxes based on income or profits and after eliminating undistributed income of unconsolidated subsidiaries and 50 percent or less owned persons.

(c) The term *fixed charges* shall mean (i) interest and amortization of debt discount and expense and premium on all indebtedness; (ii) such portion of rentals as can be demonstrated to be representative of the interest factor in the particular case; and (iii) in case consolidated figures are used, preferred stock dividend requirements of consolidated subsidiaries, excluding in all cases items eliminated in consolidation.

6. Discuss the bank's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in instructions 7, 8, 9, 10, and 11 to this item 2 with respect to liquidity, capital resources, and results of operations, and should also provide such other information which the bank believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the bank's judgment a discussion of segment information or of other subdivisions of the bank's business would be appropriate to an understanding of such business, the discussion would focus on each relevant, reportable segment or other subdivision of the business and on the bank as a whole.

7. Identify any known trends or any known demands, commitments, events or uncertainties which will result in or which are reasonably likely to result in the bank's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action which the bank has taken or proposes to take to remedy the deficiency. Identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

8. Describe the bank's material commitments for capital expenditures as of the end of the latest fiscal period, and indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments. Also, describe any known material trends, favorable or unfavorable, in the bank's capital resources. Indicate any expected material changes in the mix and the relative cost of such resources. This discussion should consider changes between equity, debt and any off-balance sheet financing arrangement.

9. Describe any unusual or infrequent events or transactions or any significant economic changes which materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expense which, in the bank's judgment, should be described in order to understand the bank's results of operations.

10. Describe any known trends or uncertainties which have had or which the bank reasonably expects will have a material favorable or unfavorable impact on revenues or income from continuing operations. If the bank knows of events which will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor) the change in the relationship should be disclosed.

11. To the extent that the financial statements disclose material increases in revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of services being sold or to the introduction of services.

12. Set forth the same information as is required to be furnished by Instruction 7 to Item 7 of Form F–2 at § 335.312.

13. The bank's discussion and analysis shall be of the financial statement and of other statistical data which the bank believes will enhance a reader's understanding of its financial condition, changes in financial condition, cash flows and results of operations. Generally, the discussion should cover the three-year period covered by the financial statements and should utilize year-to-year comparisons or any other formats which in the bank's judgment enhance a reader's understanding. However, where trend information is relevant, reference to the five-year selected financial data appearing in Item 6 of a Form F–2 may be necessary.

14. The purpose of the discussion and analysis should be to provide to investors and

*SFAS 89—Statement of Financial Accounting Standards No. 89, Financial Reporting and Changing Prices, published by the Financial Accounting Standards Board.

other users information relevant to an assessment of the financial condition and results of operations of the bank as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources. The information provided in this item 2 need only include that which is available to the bank without undue effort or expense but which does not clearly appear in the bank's financial statements.

15. The discussion and analysis should specifically focus on material events and uncertainties known to management which would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include description and amounts of (a) matters which would have an impact on future operations and have not had an impact in the past, and (b) matters which have had an impact on reported operations and are not expected to have an impact upon future operations.

16. Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes should be described to the extent necessary to an understanding of the bank's businesses as a whole; *provided, however,* if the causes for a change in one line item also relate to other line items, no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Banks need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion should not merely repeat numerical data contained in the consolidated financial statements.

17. The term *liquidity* refers to the ability of a bank to generate adequate amounts of cash to meet the bank's needs for cash. Except where it is otherwise clear from the discussion, the bank should indicate those balance sheet conditions or income or cash flow items which the bank believes may be indicators of its liquidity condition. Liquidity generally should be discussed on both a long-term and short-term basis. The issue of liquidity should be discussed in the context of the bank's own business or businesses.

18. Banks are encouraged, but not required, to supply forward-looking information. This is to be distinguished from presently-known data which will impact upon future operating results, such as known future increases in costs of labor. This latter data may be required to be disclosed. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See § 335.103.

19. Foreign private banks should also discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors which have materially affected or could materially affect, directly or indirectly, company operations or investments by United States nationals.

Item 3—Properties

State briefly the location and general character, individually or by categories, of (a) properties held in fee, or leased, by the bank and its subsidiaries, in which the banking offices are located, indicating any major encumbrances with respect thereto, and (b) other physical properties of material value that are owned or leased by the bank or its subsidiaries. State the expiration dates of material leases. In the event aggregate annual rentals paid during the bank's last fiscal year exceeded five percent of its operating expenses, state the amount of such rentals and the average term of the leases pursuant to which such rentals were paid.

Instructions. What is required is information essential to an investor's appraisal of the securities to be registered. Such information should be furnished as will reasonably inform investors as to the suitability, adequacy and extent of utilization of the facilities used in the enterprise. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.

Item 4—Parents and Subsidiaries

(a) Furnish a list or diagram of all parents and susidiaries of the bank and as to each person named indicate the percentage of voting securities owned, or other basis of control, by its immediate parent, if any.

Instructions. 1. The list or diagram shall include the bank and shall be so prepared as to show clearly the relationship of each person named to the bank and to the other persons named. If any person is controlled by means of the direct ownership of its securities by two or more persons, so indicate by appropriate cross reference.

2. Designate by appropriate symbols: (a) Subsidiaries for which separate financial statements are filed; (b) subsidiaries included in consolidated financial statements; (c) subsidiaries included in group financial statements filed for unconsolidated subsidiaries; and (d) other subsidiaries, including briefly why financial statements of such subsidiaries are not filed.

3. Indicate the name of the State or other jurisdiction in which each subsidiary was incorporated or organized.

4. The names of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary.

5. If the bank owns directly or indirectly approximately 50 percent of the voting securities of any person and approximately 50

percent of the voting securities of such person are owned directly or indirectly by another single interest, or if the bank takes up the equity in undistributed earnings of any other unconsolidated person, such person shall be deemed to be a subsidiary for the purpose of this item.

NOTE: If any person is controlled by means of the direct ownership of its securities by two or more persons listed in response to this item, so indicate by appropriate cross reference.

(b) Describe any contractual arrangement known to the bank, including any pledge of securities of the bank or any of its parents the operation of the terms of which may at a subsequent date result in a change of control of the bank.

Instruction. This paragraph does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the bank.

Item 5—Security Ownership of Certain Beneficial Owners and Management

Set forth the same information as is required to be furnished by items 5 (d)(1), (d)(2), and (f) of Form F–5 at § 335.212.

NOTE: The information required by item 5 (d)(2) of Form F–5 need not be included for any nominee for election as a director.

Item 6—Directors and Principal Officers

(a) *Directors.* Set forth the same information as is required to be furnished by item 6(a) of Form F–5 at § 335.212 except with respect to any nominee for election as a director.

(b) *Principal officers.* List the names and ages of all principal officers of the bank and all persons chosen to become principal officers; indicate all positions and offices with the bank held by each such person; state the person's term of office as officer and the period during which the person has served as such and briefly describe any arrangement or understanding between the person and any other person under which the person was selected as an officer.

Instructions. 1. Do not include arrangements or understandings with directors or officers of the bank acting solely in their capacities as such.

2. No person chosen to become a principal officer who has not consented to act as such should be named in response to this item.

(c) *Significant employees.* Where the bank employs persons such as special consultants who are not principal officers, but who make or are expected to make significant contributions to the business of the bank, such persons should be identified and their background disclosed to the same extent as in the case of principal officers.

(d) *Business experience.* (1) Give a brief account of the business experience during the past five years of each director, person chosen to become a director or principal officer, and each person named in answer to paragraph (c) of this item, including the person's principal occupations and employment during that period and the name and principal business of any corporation or other organization in which such occupations and employment were carried on. When a principal officer or person named in response to paragraph (c) of this item has been employed by the bank or a subsidiary of the bank for less than five years, a brief explanation should be included as to the nature of the responsibilities undertaken by the individual in prior positions to provide adequate disclosure of his prior business experience. The requirement is information relating to the level of the person's professional competence which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

(2) *Directorships.* Indicate any other directorships held by each director or person nominated or chosen to become a director in any company with a class of securities registered pursuant to section 12 of the Act.

(e) *Family relationships and involvement in certain legal proceedings.* Set forth the same information as is required to be furnished by items 6(b) and (d) of Form F–5 at § 335.212 for each director, principal officer, person chosen to become a director or principal officer, and each person named in answer to paragraph (c).

Item 7—Compensation of Directors and Executive Officers

Set forth the same information as is required to be furnished by item 7(a) of Form F–5 (§ 335.212).

Item 8—Interest of Management and Others in Certain Transactions

Set forth the same information for the past three years, as is required to be furnished by items 7(b), (c) and (d) of Form F–5 (§ 335.212).

NOTE: The information required by items 7(b), (c) and (d) of Form F–5 need not be included for any nominee for election as a director.

Item 9—Legal Proceedings

Briefly describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the bank or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties

thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

Instructions. 1. Notwithstanding instruction 2 to this item, administrative or judicial proceedings arising under section 8 of the Federal Deposit Insurance Act shall be deemed material and shall be described.

2. No information need be given with respect to any proceeding which involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the equity capital accounts of the bank and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

3. Any material proceedings to which any director, officer or affiliate of the bank, any owner of record or beneficially of more than 5 percent of any class of voting securities of the bank, or any associate of any such director, officer or security holder is a party adverse to the bank or any of its subsidiaries or has a material interest adverse to the bank or any of its subsidiaries, also shall be described.

4. Notwithstanding the foregoing, if a receiver, fiscal agent or similar officer has been appointed for the bank or its parent, in a proceeding under the Bankruptcy Act or in any other proceeding under State or Federal law in which a court or governmental agency has assumed jurisdiction over substantially all of the assets or business of the bank or its parent, or if such jurisidiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental body, identify the proceeding, the court or governmental body, the date jurisdiction was assumed, the identity of the receiver, fiscal agency or similar officer and the date of the person's appointment.

5. Discuss the extent of insurance coverage if appropriate to the type of proceeding.

Item 10—Number of Equity Security Holders

State in the tabular form indicated below, the approximate number of holders of record of each class of equity securities of the bank as of the end of the last fiscal year.

(1)	(2)
Title of class	Number of record holders
–	.....

Instructions. 1. Attention is directed to the definitions of the term *equity security* in section 3(a)(11) of the Act and to the definition of the term *held of record* in § 335.102(p)(1).

2. Information need not be given with respect to the number of holders of *restricted stock options*, *qualified stock options*, or options granted pursuant to a plan qualified as an *employee stock purchase plan*, as those terms are defined in sections 422 through 424 of the Internal Revenue Code of 1986, as amended.

Item 11—Nature of Trading Market

As to each class of securities to be registered under section 12(g) of the Act, state briefly the nature of the trading market, if any, in such securities, including the names of the principal market makers and the reported high and low bid prices for each quarterly period during the past three years.

Instruction. In furnishing high and low bid prices the bank may rely on quotations published in publications of national circulation, provided the source of the information is identified. If the principal market makers are not known, it will suffice to name three market makers which are believed to be actively engaged in making a market in the securities.

Item 12—Recent Sales of Securities

Furnish the following information as to all securities of the bank sold by the bank within the past three years, or presently proposed to be sold. Include reacquired securities, securities issued in exchange for property, services, or other securities, and new securities resulting from the modification of outstanding securities.

(a) Give the date of sale, title, and amount of securities sold.

(b) Give the names of the principal underwriters, if any. As to any securities sold privately, name the persons or identify the class of persons to whom the securities were sold.

(c) As to securities sold for cash, state the aggregate offering price and the aggregate underwriting discounts or commissions. As to any securities sold otherwise than for cash, state the nature of the transaction and the nature and aggregate amount of consideration received by the bank.

(d) Give a reasonably itemized statement of the purposes, so far as determinable, for which the net proceeds have been or are to be used and the approximate amount to be used for each purpose.

Instructions. 1. Information need not be set forth as to notes, drafts, bills of exchange, or bank acceptances that mature not later than 12 months from the date of issuance.

2. If the sales were made in a series of transactions, the information may be given by such totals and periods as will reasonably convey the information required.

Item 13—Securities Being Registered

(a) *Capital stock.* If capital stock is to be registered, state the title of the class and describe such of the matters listed in paragraphs (a) (1) through (5) as are relevant. A complete legal description of the securities need not be given.

(1) Outline briefly: (i) Dividend rights; (ii) terms of conversion; (iii) sinking fund provisions; (iv) redemption provisions; (v) voting rights, including any provisions specifying the vote required by security holders to take action; (vi) any classification of the Board of Directors, and the impact of such classification where cumulative voting is permitted or required; (vii) liquidation rights; (viii) preemption rights; and (ix) liability to further calls or to assessment by the bank and for liabilities of the bank imposed on its stockholders under state statutes (e.g., to laborers, servants or employees of the bank), unless such disclosure would be immaterial because the financial resources of the bank or other factors make it improbable that liability under such state statutes would be imposed; (x) any restriction on alienability of the securities to be registered; and (xi) any provision discriminating against any existing or prospective holder of such securities as a result of such security holder owning a substantial amount of securities.

(2) If the rights of holders of such stock may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(3) If preferred stock is to be registered, describe briefly any restriction on the repurchase or redemption of shares by the bank while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

(4) If the rights evidenced by, or amounts payable with respect to, the shares to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, include the information regarding such other securities as will enable investors to understand such limitations or qualifications. No information need be given, however, as to any class of securities all of which will be retired, provided appropriate steps to ensure such retirement will be completed prior to or upon delivery by the bank of the shares.

(5) Describe briefly or cross-reference to a description in another part of the document, any provision of the bank's charter or bylaws that would have an effect of delaying, deferring or preventing change in control of the bank and that would operate only with respect to an extraordinary corporate transaction involving the bank [or any of its subsidiaries], such as a merger, reorganization, tender offer, sale or transfer of substantially all of its assets, or liquidation. Provisions and arrangements required by law or imposed by governmental or judicial authority need not be described or discussed pursuant to this paragraph (a)(5). Provisions or arrangements adopted by the bank to effect, or further, compliance with laws or governmental or judicial mandate are not subject to the immediately preceding sentence where such compliance did not require the specific provisions or arrangements adopted.

(b) *Debt securities.* If debt securities are to be registered, state the title of such securities, the principal amount being offered, and, if a series, the total amount authorized and the total amount outstanding as of the most recent practicable date; and describe the matters listed in paragraphs (b) (1) through (10) as are relevant. A complete legal description of the securities need not be given. For purposes solely of this Item, debt securities that differ from one another only as to the interest rate or maturity shall be regarded as securities of the same class. Outline briefly:

(1) Provisions with respect to maturity, interest, conversion, redemption, amortization, sinking fund, or retirement;

(2) Provisions with respect to the kind and priority of any lien securing the securities, together with a brief identification of the principal properties subject to such lien;

(3) Provisions with respect to the subordination of the rights of holders of the securities to other security holders or creditors of the bank. Where debt securities are designated as subordinated in accordance with Instruction 1 to this Item, set forth the aggregate amount of outstanding indebtedness as of the most recent practicable date that by the terms of such debt securities would be senior to such subordinated debt and describe briefly any limitation on the issuance of such additional senior indebtedness or state that there is no such limitation;

(4) Provisions restricting the declaration of dividends or requiring the maintenance of any asset ratio or the creation or maintenance of reserves;

(5) Provisions restricting the incurrence of additional debt or the issuance of additional securities; in the case of secured debt, whether the securities being registered are to be issued on the basis of unbonded bondable property, the deposit of cash or otherwise; as of the most recent practicable date, the approximate amount of unbonded bondable property available as a basis for the issuance of bonds; provisions permitting the withdrawal of cash deposited as a basis for the issuance of bonds; and provisions permitting the release or substitution of assets securing the issue; *Provided, however,* That provisions permitting the release of assets upon the deposit of equivalent funds or the pledge of equivalent property, the release of property no longer required in the business, obsolete property, or property taken by eminent

domain or the application of insurance moneys, and other similar provisions need not be described;

(6) The general type of event that constitutes a default and whether or not any periodic evidence is required to be furnished as to the absence of default or as to compliance with the terms of the indenture;

(7) Provisions relating to modification of the terms of the security or the rights of security holders;

(8) If the rights evidenced by the securities to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, the information regarding such other securities as will enable investors to understand the rights evidenced by the securities to the extent not otherwise disclosed pursuant to this Item; no information need be given, however, as to any class of securities all of which will be retired, provided appropriate steps to ensure such retirement will be completed prior to or upon delivery by the bank;

(9) If debt securities are to be offered at a price such that they will be deemed to be offered at an ''original issue discount'' as defined in paragraph (a) of section 1273 of the Internal Revenue Code (26 U.S.C. 1273), or if a debt security is sold in a package with another security and the allocation of the offering price between the two securities may have the effect of offering the debt security at such an original issue discount, the tax effects thereof pursuant to sections 1271 through 1278;

(10) The name of the trustee(s) and the nature of any material relationship with the bank or with any of its affiliates; the percentage of securities of the class necessary to require the trustee to take action; and what indemnification the trustee may require before proceeding to enforce the lien.

(c) *Warrants and rights.* If the securities described are to be offered pursuant to warrants or rights state:

(1) The amount of securities called for by such warrants or rights;

(2) The period during which and the price at which the warrants or rights are exercisable;

(3) The amount of warrants or rights outstanding;

(4) Provisions for changes to or adjustments in the exercise price; and

(5) Any other material terms of such rights or warrants.

(d) *Other securities.* If securities other than capital stock, debt, warrants or rights are to be registered, include a brief description (comparable to that required in paragraphs (a), (b) and (c) of this Item 13) of the rights evidenced thereby.

(e) *Market information for securities other than common equity.* If securities other than common equity are to be registered and there is an established public trading market for the securities, provide market information with respect to the securities comparable to that required by Item 12 of this Form F–1.

Instructions to Item 13

1. Wherever the title of securities is required to be stated, there shall be given such information as will indicate the type and general character of the securities, including the following:

A. In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or non-cumulative; a brief indication of the preference, if any; and if convertible or redeemable, a statement to that effect;

B. In the case of debt, the rate of interest; the date of maturity or, if the issue matures serially, a brief indication of the serial maturities, such as ''maturing serially from 1955 to 1960''; if the payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication of the priority of the issue; and, if convertible or callable, a statement to that effect; or

C. In the case of any other kind of security, appropriate information of comparable character.

2. Where convertible securities or stock purchase warrants are being registered that are subject to redemption or call, the description of the conversion terms of the securities or material terms of the warrants shall disclose:

A. Whether the right to convert or purchase the securities will be forfeited unless it is exercised before the date specified in a notice of the redemption or call;

B. The expiration or termination date of the warrants;

C. The kinds, frequency and timing of notice of the redemption or call, including the cities or newspapers in which notice will be published (where the securities provide for a class of newspapers or group of cities in which the publication may be made at the discretion of the bank, the bank should describe such provision); and

D. In the case of bearer securities, that investors are responsible for making arrangements to prevent loss of the right to convert or purchase in the event of redemption of call, for example, by reading the newspapers in which the notice of redemption or call may be published.

Item 14—Indemnification of Directors and Officers

State the general effect of any charter provision, bylaw, contract, arrangement, or statute under which any director or officer of the bank is insured or indemnified in any manner against any liability that he may incur in this capacity as such.

Item 15—Applicability of State Laws

Describe briefly the manner in which the laws of the State where the bank is located may materially affect such matters as the following:

(a) *De novo* branching, banking facilities, and mergers;

(b) Interest rate ceilings; and

(c) Bank holding companies.

Item 16—Financial Statements and Exhibits

List all financial statements and exhibits filed as part of the registration statement.

(a) Financial statements.

(b) Exhibits.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the bank has duly caused this registration statement to be signed on its behalf by the undersigned thereunto duly authorized.

(Name of bank) _____

Date _____

By _____

(Name and title of signing officer) _____

INSTRUCTIONS AS TO FINANCIAL STATEMENTS

These instructions specify the balance sheets and statements of income required to be filed as part of a registration to be filed as part of a registration statement on this form. Subpart F governs the certification, form, and content of the balance sheets and statements of income required, including the basis of consolidation, and prescribes the statement of changes in capital accounts, statement of changes in financial position, statement of cash flows, and the schedules to be filed in support thereof.

A. Financial Statements of the Bank

1. *Balance Sheets.* (a) The bank shall file an audited balance sheet as of the close of its latest fiscal year unless such fiscal year has ended within 90 days prior to the date of filing the registration statement, in which case the balance sheet may be as of the close of the preceding fiscal year.

(b) If the latest fiscal year of the bank has ended within 90 days prior to the date of filing the registration statement and the balance sheet required by paragraph (a) is filed as of the end of the preceding fiscal year, there shall be filed as an amendment to the registration statement, within 120 days after the date of filing, an audited balance sheet of the bank as of the end of the latest fiscal year.

2. *Statements of Income.* (a) The bank shall file audited statements of income for each of the three fiscal years preceding the date of the balance sheet required by instruction 1(a).

(b) There shall be filed with each balance sheet filed under instruction 1(b) an audited statement of income of the bank for the fiscal year immediately preceding the date of the balance sheet.

3. *Omission of Banks' Financial Statements in Certain Cases.* Notwithstanding instructions 1 and 2, the individual financial statements of the bank may be omitted if consolidated statements of the bank and one or more of its subsidiaries are filed.

B. Consolidated Statements

4. *Consolidated Balance Sheets.* (a) There shall be filed an audited consolidated balance sheet of the bank and its majority-owned: (i) Bank premises subsidiaries, (ii) subsidiaries doing a foreign banking business, and (iii) significant subsidiaries, as of the close of the latest fiscal year of the bank unless such fiscal year has ended within 90 days prior to the date of filing the registration statement, in which case this balance sheet may be as of the close of the preceding fiscal year.

(b) If the latest fiscal year of the bank has ended within 90 days prior to the date of filing the registration statement, and the balance sheet required by paragraph (a) is filed as of the end of the preceding fiscal year, there shall be filed as an amendment to the registration statement, within 120 days after the date of filing an audited consolidated balance sheet of the bank and such subsidiaries as of the end of the latest fiscal year.

5. *Consolidated Statement of Income.* (a) There shall be filed audited statements of income of the bank and its majority-owned (i) bank premises subsidiaries, (ii) subsidiaries doing a foreign banking business, and (iii) significant subsidiaries, for each of the three fiscal years preceding the date of the consolidated balance sheet required by instruction 4(a).

(b) There shall be filed with each balance sheet filed under instruction 4(b), an audited consolidated statement of income of the bank and such subsidiaries for the fiscal year immediately preceding the date of the balance sheet.

C. Unconsolidated Subsidiaries and Other Persons

6. *Separate Statements of Unconsolidated Subsidiaries and Other Persons.* There shall be filed such other audited financial statements with respect to unconsolidated subsidiaries and other persons as are material to a proper understanding of the financial position and results of operations of the total enterprise. For purposes of this item, ''other persons'' include 50 percent owned persons and unconsolidated persons in which the bank takes up equity in undistributed earnings.

D. Special Provisions

7. *Succession to Other Businesses.* (a) If during the period for which its statements of income are required, the bank has by merger, consolidation, or otherwise succeeded to one or more businesses, the additions, eliminations, and other changes effected in the succession shall be appropriately set forth in a note or supporting schedule to the balance sheets filed. In addition, statements of income for each constitutent business, or combined statements, if appropriate, shall be filed for such period prior to the succession as may be necessary when added to the time, if any, for which statements of income after the succession are filed to cover the equivalent of the period as specified in instructions 2 and 5 above.

(b) If the bank by merger, consolidation, or otherwise is about to succeed to one or more businesses, there shall be filed for the constituent businesses financial statements, combined if appropriate, that would be required if they were registering securities under the Act. In addition, there shall be filed a balance sheet of the bank giving effect to the plan of succession. These balance sheets shall be set forth in such form, preferably columnar, as will show in related manner the balance sheets of the constituent businesses, the changes to be effected in the succession and the balance sheet of the bank after giving effect to the plan of succession. By a footnote or otherwise, a brief explanation of the changes shall be given.

(c) This instruction shall not apply with respect to the bank's succession to the business of any majority-owned subsidiary or to any acquisition of a business by purchase.

8. *Acquisition of Other Businesses.* (a) There shall be filed for any business directly or indirectly acquired by the bank after the date of the balance sheet filed under part A of B above and for any business to be directly or indirectly acquired by the bank, the financial statements that would be required if such business were a bank.

(b) The acquisition of securities shall be deemed to be the acquisition of a business if such securities give control of the business or combined with securities already held give such control. In addition, the acquisition of securities that will extend the bank's control of a business shall be deemed the acquisition of the business if any of the securities being registered hereunder are to be offered in exchange for the securities to be acquired.

(c) No financial statements need be filed, however, for any business acquired or to be acquired from a majority-owned subsidiary. In addition, the statements of any one or more businesses may be omitted if such businesses, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary.

9. *Filing of Other Statements in Certain Cases.* The FDIC may, upon the request of the bank, and where consistent with the protection of investors, permit the omission of one or more of the statements herein required or the filing in substitution therefor of appropriate statements of comparable character. The FDIC may also require the filing of other statements in addition to, or in substitution for, the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of any person whose financial statements are required, or whose statements are otherwise necessary for the protection of investors.

E. Historical Financial Information

10. *Scope of Part E.* The information required by part E shall be furnished for the seven-year period preceding the period for which statements of income are filed, as to the accounts of each person whose balance sheet is filed. The information is to be given as to all of the accounts specified whether they are presently carried on the books or not. Part E does not call for certification but only for a survey or review of the accounts specified. It should not be detailed beyond a point material to an investor.

11. *Revaluation of assets.* (a) If there were any material increases or decreases resulting from revaluing of assets, state: (1) In what year or years such revaluations were made; (2) the amounts of such increases or decreases, and the accounts affected, including all related entries; and (3) if in connection with such revaluations any related adjustments were made in reserve accounts, the accounts and amounts with explanations.

(b) Information is not required as to adjustments made in the ordinary course of business, but only as to major revaluations made for the purpose of entering on the books current values, reproduction cost, or any values other than original cost.

(c) No information need be furnished with respect to any revaluation entry that was subsequently reversed or with respect to the reversal of a revaluation entry recorded prior to the period if a statement as to the reversal is made.

12. *Capital Shares.* (a) If there were any material restatements of capital shares that resulted in transfers from capital share liability to surplus, undivided profits, or reserves, state the amount of each such restatement and all related entries. No statement need be made as to restatements resulting from the declaration of share dividends.

(b) If there was an original issue of capital shares, any part of the proceeds of which was credited to accounts other than capital stock accounts, state the title of the class, the accounts, and the respective amounts credited thereto.

13. *Debt Discount and Expense Written Off.* If any material amount of debt discount and expense, on long-term debt still outstanding, was written off earlier than as required under any periodic amortization plan, give the following information: (1) Title of the securities, (2) date of the writeoff, (3) amount written off, and (4) to what account charged.

14. *Premiums and Discount and Expense on Securities Retired.* If any material amount of long-term debt or preferred shares was retired, and if either the retirement was made at a premium or there remained, at the time of retirement, a material amount of unamortized discount and expense applicable to the securities retired, state for each class: (1) Title of the securities retired, (2) date of retirement, (3) amount of premium paid and of unamortized discount and expense, (4) to what account charged, and (5) whether being amortized and, if so, the plan of amortization.

15. *Other Changes in Surplus or Undivided Profits.* If there were any material increases or decreases in surplus or undivided profits, other than those resulting from transactions specified above, the closing of the income account, or the declaration or payment of dividends, state: (1) The year or years in which such increases or decreases were made; (2) the nature and amounts thereof; and (3) the accounts affected, including all material related entries. Instruction 10(c) above also applies here.

16. *Predecessors.* The information shall be furnished, to the extent material, as to any predecessor of the bank from the beginning of the period to the date of succession, not only as to the entries made respectively in the books of the predecessor or the successor, but also as to the changes effected in the transfer of the assets from the predecessor. No information need be furnished, however, as to any one or more predecessors that, considered in the aggregate, would not constitute a significant predecessor.

17. *Omission of Certain Information.* (a) No information need be furnished as to any subsidiary, whether consolidated or unconsolidated, for the period prior to the date on which the subsidiary became a majority-owned subsidiary of the bank or of a predecessor for which information is required above.

(b) No information need be furnished hereunder as to any one or more unconsolidated subsidiaries for which separate financial statements are filed if all subsidiaries for which the information is so omitted, considered in the aggregate, would not constitute a significant subsidiary.

(c) Only the information specified in instruction 16 need be given as to any predecessor or any subsidiary thereof if immediately prior to the date of succession thereto by a person for which information is required, the predecessor or subsidiary was in insolvency proceedings.

INSTRUCTIONS AS TO EXHIBITS

Subject to the rules regarding incorporation by reference, the following exhibits shall be filed as a part of the registration statement. Exhibits shall be appropriately lettered or numbered for convenient reference. Exhibits incorporated by reference may bear the designation given in the previous filing. Where exhibits are incorporated by reference, the reference shall be made in the list of exhibits in item 19.

1. Copies of the charter (or a composite or restatement thereof) and the bylaws (or instruments corresponding thereto) as presently in effect.

2. Copies of any plan of acquisition, reorganization, readjustment, or succession described in answer to items 1 and 13.

3. (a) Specimens or copies of all securities being registered hereunder, and copies of all constituent instruments defining the rights of holders of long-term debt of the bank and of all subsidiaries for which consolidated or unconsolidated financial statements are required to be filed.

(b) There need not be filed, however, (1) Any instrument with respect to long-term debt not being registered hereunder if the total amount of securities authorized thereunder does not exceed 25 percent of the equity capital accounts of the bank and its subsidiaries on a consolidated basis and if there is filed an agreement to furnish a copy of such instrument to the FDIC upon request, (2) any instrument with respect to any class of securities if appropriate steps to assure the redemption or retirement of such class will be taken prior to or upon delivery by the bank of the securities being registered, or (3) copies of instruments evidencing scrip certificates for fractions of shares.

4. Copies of all pension, retirement, or other deferred compensation plans, contracts, or arrangements. If any such plan, contract, or arrangement is not set forth in a formal document, furnish a reasonably detailed description thereof. Copies of any booklet or other description of any such plan, contract, or arrangement shall also be filed.

5. Copies of any plan setting forth the terms and conditions upon which outstanding options, warrants, or rights to purchase securities of the bank or its subsidiaries from the bank or its affiliates have been issued, together with specimen copies of such options, warrants, or rights; or, if they were not issued pursuant to such a plan, copies of each such option, warrant, or right.

6. Copies of any voting trust agreement referred to in answer to item 5.

7. (a) Copies of every material contract not made in the ordinary course of business that is to be performed in whole or in part at or

after the filing of the registration statement or that was made not more than two years before such filing and performance of which has not been completed. Only contracts need be filed as to which the bank or a subsidiary is a party or has succeeded to a party by assumption or assignment, or in which the bank or such subsidiary has a beneficial interest.

(b) If the contract is such as ordinarily accompanies the kind of business conducted by the bank and its subsidiaries, it is made in the ordinary course of business and need not be filed, unless it falls within one or more of the following categories, in which case it should be filed except where immaterial in amount or significance:

(1) Directors, officers, promoters, voting trustees, or security holders named in answer to item 5 are parties thereto except where the contract merely involves purchase or sale of current assets having a determinable market price, at such price.

(2) It calls for the acquisition or sale of fixed assets for a consideration exceeding 15 percent of the value of all fixed assets of the bank and its subsidiaries.

(3) It is a lease under which a significant part of the property described under item 3 is held by the bank, or

(4) The amount of the contract, or its importance to business of the bank and its subsidiaries, is material, and the terms and conditions are of a nature of which investors reasonably should be informed.

(c) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the bank, as defined by 17 CFR 229.402(a)(3), participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the bank participates shall be filed unless immaterial in amount or significance except as follows: Notwithstanding the above, any compensatory plan, contract, or arrangement which pursuant to its terms is available to employees, officers or directors generally and which in operation provides for the same method of allocation of benefits between management and nonmanagement participants.

8. A statement setting forth in reasonable detail the computation of per share earnings, unless the computation can be clearly determined from the material contained in the registration statement.

9. A statement setting forth in reasonable detail the computation of ratios of earnings to fixed charges which appears in the registration statement.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55556, Dec. 14, 1983; 48 FR 56734, Dec. 23, 1983; 54 FR 53587, Dec. 29, 1989; 57 FR 58136, Dec. 9, 1992; 59 FR 67174, Dec. 29, 1994]

§ 335.309b Form for registration of additional class of securities of a bank under section 12(b) or section 12(g) of the Securities Exchange Act of 1934 (Form F–10).

FORM F–10—REGISTRATION STATEMENT FOR ADDITIONAL CLASSES OF SECURITIES OF A BANK UNDER SECTION 12(b) OR SECTION 12(g) OF THE SECURITIES EXCHANGE ACT OF 1934

_____

(Exact name of bank as specified in charter)

_____

(Address of principal office)

Securities being registered under section 12(b) of the Act:

_____

Title of class _____

Name of each exchange on which class is being registered _____

Title of each class of equity securities being registered under section 12(g) of the Act:

GENERAL INSTRUCTIONS

1. *Applicability of This Form.* This form may be used for registration of the following securities under the Securities Exchange Act of 1934:

(a) For registration under section 12(g) of the Act of any class of equity securities of a bank which has one or more other classes of securities registered under either section 12(b) or (g) of the Act.

(b) For registration on a national securities exchange under section 12(b) of the Act of any class of securities of a bank which has one or more other classes of securities so registered on the same or another securities exchange.

2. *Preparation of Registration Statement.* This form is not to be used as a blank form to the filled in but only as a guide in the preparation of a registration statement. Particular attention should be given to the general requirements in Subpart C. The statement shall contain the numbers and captions of all items, but the text of the items may be omitted if the answers with respect thereto are prepared in the manner specified in § 335.361.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

Item 1—Stock To Be Registered.

If stock is being registered, state the title of the class and furnish the following information (see instruction 1):

(a) Outline briefly: (1) Dividend rights; (2) voting rights; (3) liquidation rights; (4) preemptive rights; (5) conversion rights; (6) redemption provisions; (7) sinking fund provisions; and (8) liability to further calls or to assessment.

(b) If the rights of holders of such stock may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(c) Outline briefly any restriction on the repurchase or redemption of shares by the bank while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

Instructions. 1. If a description of the securities comparable to that required here is contained in any other document filed with the FDIC, such description may be incorporated by reference to such other filing in answer to this item. If the securities are to be registered on a national securities exchange and the description has not previously been filed with such exchange, copies of the description shall be filed with copies of the registration statement filed with the exchange.

2. This item requires only a brief summary of the provisions which are pertinent from an investment standpoint. A complete legal description of the provisions referred to is not required and should not be given. Do not set forth the provisions of the governing instrument verbatim; only a succinct resume is required.

3. If the rights evidenced by the securities to be registered are materially limited or qualified by the rights evidenced by any other class of securities or by the provisions of any contract or other document, include such information regarding such limitation or qualification as will enable investors to understand the rights evidenced by the securities to be registered.

Item 2—Debt Securities To Be Registered.

If the securities to be registered hereunder are bonds, debentures or other evidences of indebtedness, outline briefly such of the following as are relevant (see instruction 2 below):

(a) Provisions with respect to interest, conversion, maturity, redemption, amortization, sinking fund, or retirement.

(b) Provisions with respect to the kind and priority of any lien, securing the issue, together with a brief identification of the principal properties subject to such lien.

(c) Provisions restricting the declaration of dividends or requiring the maintenance of any ratio of assets, the creation or maintenance of reserves or the maintenance of properties.

(d) Provisions permitting or restricting the issuance of additional securities, the withdrawal of cash deposited against such issuance, the incurring of additional debt, the release or substitution of assets securing the issue, the modification of the terms of the security, and similar provisions.

Instruction. Provisions permitting the release of assets upon the deposit of equivalent funds or the pledge of equivalent property, the release of property no longer required in the business, obsolete property or property taken by eminent domain, the application of insurance moneys, and similar provisions, need not be described.

(e) The name of the trustee and the nature of any material relationship with the bank or any of its affiliates; the percentage of securities of the class necessary to require the trustee to take action; and what indemnification the trustee may require before proceeding to enforce the lien.

(f) The general type of event which constitutes a default and whether or not any periodic evidence is required to be furnished as to the absence of default or as to compliance with the terms of the indenture.

Instruction. 1. In most cases, debt securities issued by banks need not be registered under section 12(g) of the Securities Exchange Act; the registration requirements of that section apply only to an *equity security*. The term *equity security* is defined by section 3(a)(11) of the Act to mean ''any stock or similar security; or any security convertible, with or without consideration, into such a security; or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the FDIC shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.''

Instruction. 2. The instructions to item 1 also apply to this item.

Item 3—Other Securities To Be Registered.

If securities other than those referred to in items 1 and 2 are to be registered hereunder, outline briefly the rights evidenced thereby. If subscription warrants or rights are to be registered, state the title and amount of securities called for, and the period during which and the price at which the warrants or rights are exercisable.

Instruction. The instructions to item 1 also apply to this item.

Item 4—Exhibits.

List all exhibits filed as a part of the registration statement.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the bank has duly caused this registration statement to be

signed on its behalf by the undersigned, thereunto duly authorized.

(Name of Bank)
Date ——— By ————

(Name and title of signing officer)

INSTRUCTIONS AS TO EXHIBITS

I. If the securities to be registered hereunder are to be registered on an exchange on which other securities of the bank are registered, or are to be registered under section 12(g) of the Act, the following exhibits shall, subject to § 335.357 regarding incorporation of exhibits by reference, be filed with each copy of the registration statement filed with the FDIC with an exchange:

1. Specimens or copies of each security to be registered hereunder.

2. Copies of all constituent instruments defining the rights of the holders of each class of such securities, including any contracts or other documents which limit or qualify the rights of such holders.

II. If the securities to be registered are to be registered on an exchange on which no other securities of the bank are registered the following exhibits shall be filed with each copy of the registration statement filed with each such exchange, but need not be filed with, or incorporated by reference in, copies of the registration statement filed with the FDIC.

3. Copies of the last annual report filed under section 13 of the Act or, if no such report has yet been filed, copies of the latest registration statement filed under section 12(b) or (g) of the Act.

4. Copies of all current or quarterly reports filed under section 13 of the Act since the end of the fiscal year covered by the annual report filed under instruction 3 above, or if none, since the effective date of the latest registration statement so filed.

5. Copies of the latest definitive proxy statement or information statement, if any, filed with the FDIC under section 14 of the Act.

6. Copies of the charter and bylaws, or instruments corresponding thereto, and copies of any other documents defining the rights of holders of the securities to be registered.

7. Specimens or copies of each security to be registered hereunder.

8. Copies of the last annual report submitted to stockholders by the bank or its predecessors. Such annual report shall not be deemed to be ''filed'' with the exchange or otherwise subject to the liabilities of section 18 of the Act, except to the extent it may already be subject thereto.

§ 335.310 Requirement of annual reports and annual reports of predecessors.

(a) Every registrant bank (except foreign banks) shall file an annual report for each fiscal year after the last full fiscal year for which financial statements were filed with the registration statement. Foreign banks shall file in accordance with the applicable requirements of 17 CFR 249.220f and SEC Form 20–F. The report, which shall conform to the requirements of Form F–2 (or SEC Form 20–F), shall be filed within 90 days after the close of the fiscal year or within 30 days of the mailing of the bank's annual report to stockholders, whichever occurs first.

(b) Every bank which changes its fiscal closing date after the last fiscal year for which financial statements were filed in a Form F–1 or Form F–2 shall file a report on Form F–2 covering the resulting interim period not more than 120 days after the close of the interim period or after the date of the determination to change the fiscal closing date, whichever is later. A separate report, however, need not be filed for any period of less than three months if the Form F–2 filed for the succeeding full fiscal year covers the interim period as well as the fiscal year. In such case, balance sheets need be furnished only as of the close of the entire period but all other financial statements and schedules shall be filed separately for both periods.

(c) *Annual reports of predecessors.* Every bank having securities registered under section 12 of the act on Form F–1 (or Form F–10, in the case of registration of an additional class of securities) shall file an annual report under this section for each of its predecessors which had securities registered under section 12 of the act covering the last full fiscal year of the predecessor prior to the bank's succession, unless such report has been filed by the predecessor. Such annual report shall contain the information that would be required if filed by the predecessor.

Note to Small Business Issuers: a ''small business issuer'', as defined under 17 CFR 240.12b-2 has the option of providing the disclosure required by SEC Form 10–KSB, optional form for annual and transitional reports of small business issuers (17 CFR

249.310b), in lieu of the disclosure requirements set forth in Form F–2 (§335.312). The definition of ''small business issuer'', generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53590, Dec. 29, 1989; 59 FR 67174, Dec. 29, 1994]

§335.311 Exception from requirement for annual report.

Notwithstanding §335.310, any bank that has filed, within the period prescribed for filing an annual report pursuant to that paragraph, a registration statement that has become effective and is not subject to any proceeding under section 15(c) or section 12 of the act, or to an order thereunder, need not file an annual report if such statement covers the fiscal period that would be covered by such annual report and contains all of the information, including financial statements and exhibits, required for annual reports.

§335.312 Form for annual report of bank (Form F–2).

FORM F–2—ANNUAL REPORT UNDER SECTION 13 OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended _____
FDIC Certificate No. _____
(Exact name of bank as specified in its charter) _____

_____

(State or other jurisdiction of incorporation or organization) _____
(I.R.S. Employer Identification No.) _____
(Address of principal office) _____

_____

(ZIP Code) _____
Bank's telephone number, including area code _____

Securities registered under section 12(b) of the Act:
Title of each class _____
Name of each exchange on which registered

_____

Securities registered under section 12(g) of the Act:

(Title of class) _____
(Title of class) _____

Indicate by check mark if the bank, as a ''small business issuer'' as defined under 17 CFR 240.12b-2, is providing alternative disclosures as permitted for small business issuers in this Form F–2. [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to item 10 is not contained herein, and will not be contained, to the best of bank's knowledge, in definitive proxy or information statements incorporated by reference in part III of this Form F–2 or any amendment of this Form F–2. [ ]

Indicate by check mark whether the bank (1) has filed all reports required to be filed by section 13 of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the bank was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES— NO—.

State the aggregate market value of the voting stock held by nonaffiliates of the registrant. The aggregate market value shall be computed by reference to the price at which the stock was sold, or the average bid and asked prices of such stock, as of a specified date within 60 days prior to the date of filing.——

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date.——

DOCUMENTS INCORPORATED BY REFERENCE

List hereunder the following documents if incorporated by reference and the part of the Form F–2 (e.g., part I, part II, etc.) into which the document is incorporated: (1) Any annual report to security holders; and (2) Any proxy or information statement. The listed documents should be clearly described for identification purposes (e.g., annual report to security holders for fiscal year ended December 24, 1980).

GENERAL INSTRUCTIONS

A. Rule as to Use of Form F–2

This form shall be used for annual reports pursuant to section 13 of the Securities Exchange Act of 1934 (the ''Act'') for which no other form is prescribed. Reports on this form shall be filed within 90 days after the end of the fiscal year covered by the report. However, all schedules required by §335.626 may, at the option of the bank be filed as an amendment to the report not later than 120 days after the end of the fiscal year covered by the report.

B. Application of Other Rules and Regulations

Subparts A and C of part 335 contain certain general requirements which are applicable to reports on a form. These general requirements should be carefully read and observed in the preparation and filing of reports on this form.

C. Preparation of Report

(1) This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report. Except as provided in general instruction F the answers to the items shall be prepared in the manner specified in §335.361. The report shall contain

the item numbers and captions of all items but the text of such items may be omitted.

(2) Except where information is required to be given for the fiscal year or as of a specified date, it shall be given as of the latest practicable date.

(3) Attention is directed to § 335.350, which states: ''In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.''

D. Signature and Filing of Report

Three complete copies of the report, including financial statements, financial statement schedules, exhibits, and all other papers and documents filed as part thereof, shall be filed with the FDIC. At least one complete copy of the report, including financial statements, financial statement schedules, exhibits, and all other papers and documents filed as a part thereof, shall be filed with each exchange on which any class of securities of the bank is registered. At least one complete copy of the report filed with the FDIC and one such copy filed with each exchange shall be manually signed. Copies not manually signed shall bear typed or printed signatures. The report shall be signed by the bank, and on behalf of the bank by its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and by at least the majority of the board of directors or persons performing similar functions. Any person who occupies more than one of the specified positions shall indicate each capacity in which he signs the report.

E. Disclosure With Respect to Foreign Subsidiaries

Information required by any item or other requirement of this form with respect to any foreign subsidiary may be omitted to the extent that the required disclosure would be detrimental to the bank. However, financial statements and financial statement schedules, otherwise required, shall not be omitted pursuant to this instruction. Where information is omitted pursuant to this instruction, a statement shall be made that such information has been omitted and the names of the subsidiaries involved shall be separately furnished to the FDIC. The FDIC may, in its discretion, call for justification that the required disclosure would be detrimental.

F. Information to be Incorporated By Reference

(1) Attention is directed to § 335.353 which provides for the incorporation by reference of information contained in certain documents in answer or partial answer to any item of a report.

(2) The information called for by parts I and II of this form [items 1 through 8 or any portion thereof] may, at the bank's option, be incorporated by reference from the bank's annual report to security holders furnished to the FDIC pursuant to § 335.203 or from the bank's annual report to security holders, even if not furnished to the FDIC pursuant to § 335.203 provided such annual report contains the information required by § 335.203.

NOTE: In order to fulfill the requirements of part I of Form F–2 the incorporated portion of the annual report to security holders must contain the information required by items 1–4 of Form F–2 to the extent applicable.

(3) The information called for by part III (items 9 and 10) shall be incorporated by reference from the bank's definitive proxy statement (filed or to be filed under § 335.204(C) or definitive information statement (filed or to be filed under § 335.204(C) which involves the election of directors, if such definitive proxy statement or information statement is filed with the FDIC not later than 120 days after the end of the fiscal year covered by the Form F–2. However, if such definitive proxy or information statement is not filed with the FDIC in the 120-day period, the items comprising the part III information must be filed as part of the Form F–2, or as an amendment to the Form F–2 not later than the end of the 120-day period.

(4) No item numbers or captions of items need be contained in the material incorporated by reference into the report. However, the bank's attention is directed to § 335.353(e) regarding the specific disclosure required in the report concerning information incorporated by reference. When the bank combines all of the information in parts I and II of this form (items 1 through 8) by incorporation by reference from the bank's annual report to security holders and all of the information in part III of this form (items 9 and 10) by incorporation by reference from a definitive proxy statement or information statement involving the election of directors, then, notwithstanding general instruction C(1), this form shall consist of the facing or cover page, those sections incorporated from the annual report to security holders, the proxy or information statement, and the information, if any, required by part IV of this form, signatures, and a cross reference sheet setting forth the item numbers and captions in parts I, II and III of this form and the page and/or pages in the referenced materials where the corresponding information appears.

PART I (SEE GENERAL INSTRUCTION F–2

Item 1—Business

(a) Briefly describe the business done and intended to be done by the bank and its subsidiaries. If material is necessary for an understanding of the business, briefly describe the information specified in item 1(b)(1) to (8) below.

(b) Describe any material changes and developments since the beginning of the fiscal year in the business done and intended to be done by the bank and its subsidiaries. The description shall include information as to matters such as the following:

(1) Competitive conditions in the industry involved and the competitive position of the bank if known or reasonably available to the bank. If several services are involved, separate consideration shall be given to the principal services or classes of services;

(2) If a material portion of the bank's deposits has been obtained from a single person or a few persons (including Federal, State and local governments and agencies thereunder), the loss of any of one or more of which would have a materially adverse effect on the business of the bank, or if a material portion of the bank's loans is concentrated within a single industry or group of related industries, a description of such customers, their other relationships, if any, to the bank, and material facts regarding their importance to the business of the bank;

(3) The principal services rendered by the bank, the principal markets for, and methods of distribution of, such services, including any significant changes in the kinds of services rendered, or in the market or methods of distribution, during the past three fiscal years;

(4) The importance to the business and the duration and effect of, all material patents, trademarks, licenses, franchises, and concessions held;

(5)(i) The estimated dollar amount spent during each of the last two fiscal years on material research activities relating to the development of services or the improvement of existing services;

(ii) If there has been a public announcement of, or if information otherwise has become public about, a new product or line of business requiring the investment of a material amount of total assets, a description of the status of such line (*e.g.,* whether in the planning state).

(iii) Where material state the approximate number of employees engaged full time in each of the activities described in (i) above during each fiscal year and in (ii).

NOTE: Item 1(b)(5)(ii) is not intended to require disclosure of otherwise non-public corporate information the disclosure of which would adversely affect the bank's competitive position. Subparagraph (i) requires disclosure of financial information relating to research and development activities. Subparagraph (ii) is intended to elicit additional specific information only where there has been a public announcement or where information has otherwise become public about a new line of business requiring the investment of a material amount of total assets.

(6) The material effects that compliance with Federal, State, and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the discharge of materials into the environment, may have upon the capital expenditures, earnings, and competitive position of the bank and its subsidiaries.

(7) The number of persons employed by the bank.

(8) The extent to which the business of the bank or material portion thereof is or may be seasonal.

Instructions

1. If the bank proposes to enter, or has recently entered or introduced a new line of business requiring the investment of a material amount of its total assets, provide as supplemental information, but not as a part of the report, a copy of any market studies conducted or performed by or for the bank relating to such business and a statement as to the actual or proposed use of such study. Where material, disclosure in the report of the absence of such a study is required.

2. Positive and negative factors pertaining to the competitive position of the bank, to the extent that they exist, should be explained, if known or reasonably available to the bank. An estimate of the number of competitors should be included, and, where material, the particular markets in which the bank competes should be identified. Where one or a small number of competitors are dominant, they should be identified.

3. Where material to understanding the bank's business, the bank's and industry practices and conditions as they relate to liquidity items should be explained (*e.g.,* where the bank's business is highly seasonal).

4. The description shall not relate to the powers and objects specified in the charter, but to the actual business done and intended to be done. Include the business of subsidiaries and affiliates of the bank insofar as is necessary to understand the character and development of the business conducted by the bank.

5. In describing development, information shall be given as to matters such as the following: The nature and results of any material reorganization, readjustment, or succession of the bank or any of its significant subsidiaries; the acquisition or disposition of any material amount of assets otherwise

than in the ordinary course of business; and any material changes in the mode of conducting the business.

6. The business of a predecessor or predecessors shall be deemed to be the business of the bank for the purpose of this item.

7. Appropriate disclosure shall be made with respect to any material portion of the business which may be subject to termination at the election of any person (*e.g.,* depositor).

(c) Information as to lines of business. If the bank and its subsidiaries are engaged in any business, in addition to normal commercial or mutual savings bank activities, state, for each of the bank's last five fiscal years, or for each fiscal year the bank has been engaged in business, whichever period is less, the approximate amount or percentage of: (i) Total revenues, and (ii) income (or loss) before income taxes and extraordinary items, attributable to each line of business which during either of the last two fiscal years accounted for:

(A) 10 percent or more of the total of revenues.

(B) 10 percent or more of income before income taxes and extraordinary items computed without deduction of loss resulting from operations of any line of business, or

(C) A loss which equalled or exceeded 10 percent of the amount of income specified in paragraph (B) of this paragraph (c); provided, however, that if total revenues did not exceed $50,000,000 during either of the last two fiscal years, the percentages specified in items (A), (B), and (C) of this paragraph shall be 15 percent, instead of 10 percent.

If it is impracticable to state the contribution to income (or loss) before income taxes and extraordinary items for any line of business, state the contribution thereof to the results of operations most closely approaching such income, together with a brief explanation of the reasons why it is not practicable to state the contribution to such income or loss. The term *revenue* includes the total of the amounts reported in items (1), (6) and (7) of the income statement (Format F–9B).

(d) If the bank and its subsidiaries engage in material operations in foreign countries, or if a material portion of revenues is derived from customers in foreign countries, appropriate disclosure shall be made with respect to the importance of that part of the business to the bank and the risks attendant thereto. Insofar as practicable, furnish information with respect to volume and relative profitability of such operations.

(e) The FDIC may, upon written request of the bank and where consistent with the protection of investors, permit the omission of any of the information herein required or the furnishing in substitution therefor of appropriate information of comparable character. The FDIC may also require the furnishing of other information in addition to, or in substitution for, the information herein required in any case where such information is necessary or appropriate for an adequate description of the business done or intended to be done.

Item 2—Properties

State briefly the location and general character, individually or by categories, of (a) properties held in fee, or leased, by the bank and its subsidiaries, in which the banking offices are located, indicating any major encumbrances with respect thereto, and (b) other physical properties of material value that are owned or leased by the bank or its subsidiaries. State the expiration dates of material leases. In the event aggregate annual rentals paid during the bank's last fiscal year exceeded five percent of its operating expenses, state the amount of such rentals and the average term of the leases pursuant to which such rentals were paid.

Instruction. What is required is such information as will reasonably inform investors as to the suitability, adequacy and extent of utilization of the facilities used in the enterprise. Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.

Item 3—Legal Proceedings

Briefly describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the bank or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

Instructions. 1. Notwithstanding Instruction 2 to this item, administrative or judicial proceedings arising under section 8 of the Federal Deposit Insurance Act shall be deemed material and shall be described.

2. No information need be given with respect to any proceeding which involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the equity capital accounts of the bank and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

3. Any material proceedings to which any director, officer or affiliate of the bank, any owner of record or beneficially of more than

5 percent of any class of voting securities of the bank, or any associate of any such director, officer or security holder is a party adverse to the bank or any of its subsidiaries or has a material interest adverse to the bank or any of its subsidiaries, also shall be described.

4. Notwithstanding the foregoing, if a receiver, fiscal agent or similar officer has been appointed for the bank or its parent, in a proceeding under the Bankruptcy Act or in any other proceeding under State or Federal law in which a court or governmental agency has assumed jurisdiction over substantially all of the assets or business of the bank or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental body, identify the proceeding, the court or governmental body, the date jurisdiction was assumed, the identity of the receiver, fiscal agent or similar officer and the date of the person's appointment.

5. Discuss the extent of insurance coverage if appropriate to the type of proceeding.

Item 4—Security Ownership of Certain Beneficial Owners and Management

Set forth the same information as is required to be furnished by items 5 (d)(1), (d)(2), and (f) of Form F–5 at § 335.212.

NOTE: The information required by item 5(d)(2) of Form F–5 need not be included for any nominee for election as a director.

PART II—[SEE GENERAL INSTRUCTION F(2)]

Item 5—Market for the Bank's Common Stock and Related Security Holder Matters

(a) Identify the principal market or markets on which the bank's common stock is being traded and, if a principal market for such stock is an exchange, state the high and low sales prices for the stock as reported in the consolidated transaction reporting system or, if not so reported, on such principal exchange for each quarterly period during the past two years. If the principal market for such common stock is not an exchange, state the range of high and low bid quotations for each quarterly period during the past two years, the source of such quotations and, if there is no market for such stock (excluding limited or sporadic quotations), furnish a statement to that effect.

(b) Set forth the approximate number of holders of common stock securities of the bank as of the latest practicable date.

(c) State the frequency and amount of any dividends declared during the past two years with respect to such common stock and briefly describe any restriction on the bank's present or future ability to pay such dividends. Where banks have a record of paying no dividends although earnings indicate an ability to do so, they are encouraged to consider the question of their intention to pay cash dividends in the foreseeable future and, if no such intention exists to make a statement of that fact in the filing. Banks which have a history of paying dividends are also encouraged to indicate whether there is a present expectation that dividends will continue to be paid in the future.

Instructions

1. The computation of the approximate number of holders of such common stock may be based upon the number of record holders or may also include individual participants in security position listings. See § 335.501(b)(8). The method of computation which is chosen should be indicated.

2. If the bank is a foreign bank: (a) Describe briefly any governmental laws, decrees or regulations in the country in which the foreign bank is organized relating to restrictions on the export or import of capital, including but not limited to foreign exchange controls, affecting the remittance of dividends, interest and other payments of nonresident holders of the foreign bank's securities.

(b) State whether there are any limitations, either by the law of the country under which the foreign bank is organized or in the charter or other constituent document of the foreign bank, on the right of foreigners to hold or vote securities. Outline briefly any such limitations.

(c) Outline briefly all taxes, including withholding provisions, to which United States security holders are subject under existing laws and regulations of the foreign country of origin. A brief description of pertinent provisions of any reciprocal tax treaties between such foreign country and the United States regarding withholding should be included. If there are no such treaties, so state.

Item 6—Selected Financial Data

Furnish in comparative columnar form a summary of selected financial data for the bank for:

(a) Each of the last five fiscal years of the bank (or for the life of the bank and its predecessors, if less), and

(b) Any additional fiscal years necessary to keep the summary from being misleading.

Instructions

1. The purpose of the summary of selected financial data shall be to supply in a convenient and readable format selected data which highlight significant trends in the bank's financial condition and results of operations.

2. The following items shall be included in the table of financial data: net interest income; other operating income; provision for

loan and lease losses; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock and cash dividends declared per common share. Banks may include additional items which they believe would enhance an understanding of and would highlight other trends in their financial condition and results of operations. Briefly describe, or cross reference to a discussion thereof, factors such as accounting changes, business combinations or dispositions of business operations, that materially affect the comparability of the selected financial data. Discuss any material uncertainties which might cause the data not to be indicative of the bank's future financial condition or results of operations.

3. Those banks which provide five-year summary information in accordance with SFAS 89 may combine such information with the selected financial data appearing pursuant to this item.

4. All references to the bank in the summary and in these instructions shall mean the bank and its consolidated subsidiaries.

5. In addition, (a) if debt securities are registered under section 12 of the Act, the bank shall show in tabular form for each fiscal year the ratio of earnings to fixed charges. If appropriate, the ratio of earnings to fixed charges for such periods shall also be shown on a total enterprise basis in a position of equal prominence with the ratio for the bank or the bank and its consolidated subsidiaries.

(b) Earnings shall be computed after all operating and income deductions except fixed charges and taxes based on income or profits and after eliminating undistributed income of unconsolidated subsidiaries and 50 percent or less owned persons.

(c) The term *fixed charges* shall mean (i) interest and amortization of debt discount and expense and premium on all indebtedness; (ii) such portion of rentals as can be demonstrated to be representative of the interest factor in the particular case; and (iii) in case consolidated figures are used, preferred stock dividend requirements of consolidated subsidiaries, excluding in all cases items eliminated in consolidation.

Item 7—Management's Discussion and Analysis of Financial Condition and Results of Operations

Discuss the bank's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a), (b) and (c) of this item with respect to liquidity, capital resources, and results of operations, and should also provide such other information which the bank believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the bank's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion would focus on each relevant, reportable segment or other subdivision of the business and on the bank as a whole.

(a) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties which will result in or which are reasonably likely to result in the bank's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action which the bank has taken or proposes to take to remedy the deficiency. Identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(b) *Capital resources.* Describe the bank's material commitments for capital expenditures as of the end of the latest fiscal period, and indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments. Describe any known material trends, favorable or unfavorable, in the bank's capital resources. Indicate any expected material changes in the mix and the relative cost of such resources. This discussion should consider changes between equity, debt and any off-balance sheet financing arrangement.

(c) *Results of operations.* Describe any unusual or infrequent events or transactions or any significant economic changes which materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expense which, in the bank's judgment, should be described in order to understand the bank's results of operations. Describe any known trends or uncertainties which have had or which the bank reasonably expects will have a material favorable or unfavorable impact on revenues or income from continuing operations. If the bank knows of events which will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor) the change in the relationship should be disclosed. To the extent that the financial statements disclose material increases in revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of services being sold or to the introduction of new services.

Instructions

1. The bank's discussion and analysis shall be of the financial statement and of other statistical data which the bank believes will

enhance a reader's understanding of its financial condition, changes in financial condition and results of operations. Generally, the discussion should cover the three year period covered by the financial statements and should utilize year-to-year comparisons or any other formats which in the bank's judgment enhance a reader's understanding. However, where trend information is revelant, reference to the five-year selected financial data appearing in item 6 of a Form F–2 may be necessary.

2. The purpose of the discussion and analysis should be to provide to investors and other users information relevant to an assessment of the financial condition and results of operations of the bank as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources. The information provided in this item 7 need only include that which is available to the bank without undue effort or expense but which does not clearly appear in the bank's financial statements.

3. The discussion and analysis should specifically focus on material events and uncertainties known to management which would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include description and amounts of (a) matters which would have an impact on future operations and have not had an impact in the past, and (b) matters which have had an impact on reported operations and are not expected to have an impact upon future operations.

4. Where the consolidated financial statements reveal material changes from year to year in one or more line items, the causes for the changes should be described to the extent necessary to an understanding of the bank's businesses as a whole; *provided, however,* if the cause for a change in one line item also relate to other line items, no repetition is required and a line-by-line analysis of the financial statements as a whole is not required or generally appropriate. Banks need not recite the amounts of changes from year to year which are readily computable from the financial statements. The discussion should not merely repeat numerical data contained in the consolidated financial statements.

5. The term *liquidity* as used in paragraph (a) of this item refers to the ability of a bank generate adequate amounts of cash to meet the bank's needs for cash. Except where it is otherwise clear from the discussion, the bank should indicate those balance sheet conditions or income or cash flow items which the bank believes may be indicators of its liquidity condition. Liquidity generally should be discussed on both a long-term and short-term basis. The issue of liquidity should be discussed in the context of the bank's own business or businesses.

6. Banks are encouraged, but not required, to supply forward-looking information. This is to be distinguished from presently-known data which will impact upon future operating results, such as known future increases in costs of labor. This latter data may be required to be disclosed. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See § 335.103.

7. Banks should furnish statistical information similar to that required by Securities Exchange Act Industry Guide 3 [Statistical disclosure by bank holding companies] SEC Rel. No. 34–23846, 51 FR 43599 (November 25, 1986), 17 CFR part 241 (1988) (''Guide 3'') for each of the last three fiscal years of the bank, except, if the bank had assets of less than $200,000,000 or net worth of $10,000,000 or less as of the end of its latest fiscal year, information may be furnished for each of the last two fiscal years with respect to all items. If a material change in the information presented or the trend evidenced thereby has occurred, it may be appropriate to furnish statistical information for an additional interim period to keep the information from being misleading.

The information should be presented in tabular form and include descriptions of: I. Distribution of Assets, Liabilities, and Stockholder's Equity; Interest Rates and Interest Differentials; II. Investment Portfolio; III. Loan Portfolio; IV. Summary of Loan Loss Experience; V. Deposits; VI. Return on Equity and Assets; and VII. Short-Term Borrowings. Although no specific guidance as to the form and content is provided, relevant data, material to a description of lending and deposit activities, should include information about (a) yields and costs of various assets and liabilities, (b) maturities and repricing characteristics of various assets and liabilities and (c) risk elements, such as nonaccrual and past-due items in the lending portfolio. Generally, statistical information called for by Guide 3 should be based on average daily amounts. However, weekly or month-end averages may be used if compiling daily information is too costly or difficult as long as it is representative of operations. Banks are not required to justify, but are required to disclose, which method of computing averages is selected.

NOTE: If any such information is not reasonably available to the bank, the bank may present comparable information. Where information required by Guide 3 is substantially similar to that required by Call Report schedules (i.e.—Guide 3 items II and III, Investment Portfolio and Loan Portfolio, etc.), the Call Report schedule information may be presented instead.

8. All references to the bank in the discussion and in these instructions shall mean the bank and its subsidiaries consolidated.

9. Foreign private banks should also discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors which have materially affected or could materially affect, directly or indirectly, company operations or investments by United States nationals.

Item 8—Financial Statements and Supplementary Data

These instructions specify the balance sheets and statements of income required to be filed as a part of annual reports on this form. Subpart F governs the certification, form, and content of the balance sheets and statements of income required, including the basis of consolidation, and prescribes the statement of changes in capital accounts, statement of changes in financial position, and/or statement of cash flows and the schedules to be filed in support thereof.

(a) Financial Statements of the Bank. (1) There shall be filed for the bank, in comparative columnar form, audited balance sheets as of the close of the last two fiscal years and audited statements of income for each of the three fiscal years preceding the date of the most recent balance sheet being filed.

(2) Notwithstanding paragraph (1), the individual financial statements of the bank may be omitted if consolidated statements of the bank and one or more of its subsidiaries are filed.

(b) *Consolidated Statements.* There shall be filed for the bank and its majority-owned: (1) Bank premises subsidiaries, (2) subsidiaries doing a foreign banking business, and (3) significant subsidiaries, in comparative columnar form, audited consolidated balance sheets as of the close of the last two fiscal years of the bank and audited consolidated statements of income for three fiscal years.

(c) *Separate Statements of Unconsolidated Subsidiaries and Other Persons.* There shall be filed such other audited financial statements with respect to unconsolidated subsidiaries and other persons as are material to a proper understanding of the financial position and results of operations of the total enterprise. For purposes of this item, *other persons* include 50 percent owned persons and unconsolidated persons in which the bank takes up equity in undistributed earnings.

(d) *Filing of Other Statements in Certain Cases*—The FDIC may, upon the informal written request of the bank and where consistent with the protection of investors, permit the omission of one or more of the statements herein required or the filing in substitution therefor of appropriate statements of comparable character. The FDIC may also by informal written notice require the filing of other statements in addition to, or in substitution for, the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of any person whose financial statements are required, or whose statements are otherwise necessary for the protection of investors.

PART III—[SEE GENERAL INSTRUCTION F(3)]

Item 9—Directors and Principal Officers of the Bank

(a) *Directors of the Bank.* Set forth the same information as is required to be furnished by item 6 (a), (b), (c) and (d) of Form F–5 at § 335.212.

NOTE: The information required by item 6 (a), (b), (c) and (d) of Form F–5 need not be included for any nominee for election as a director.

(b) *Principal Officers of the Bank.* (1) *Principal officers.* List the names and ages of all principal officers of the bank and all persons chosen to become principal officers; indicate all positions and offices with the bank held by each such person; state the person's term of office as officer and the period during which the person has served as such and briefly describe any arrangement or understanding between the person and any other person pursuant to which the person was selected as an officer.

Instructions. 1. Do not include arrangements or understandings with directors of officers of the bank acting solely in their capacities as such.

2. No person chosen to become a principal officer who has not consented to act as such should be named in response to this item.

(2) *Significant employees.* Where the bank employs persons such as special consultants who are not principal officers, but who make or are expected to make significant contributions to the business of the bank, such persons should be identified and their background disclosed to the same extent as in the case of principal officers.

(3) *Business experience.* Give a brief account of the business experience during the past five years of each person chosen to become a principal officer, and each person named in answer to paragraph (2) of this item, including the person's principal occupations and employment during that period and the name and principal business of any corporation or other organization in which such occupations and employment were carried on. When a principal officer or person named in response to paragraph (2) of this item has been employed by the bank or a subsidiary of the bank for less than five years, a brief explanation should be included as to the nature of the responsibilities undertaken by the individual in prior positions to provide adequate disclosure of his prior business experience. The requirement is information relating to the level of this person's professional competence which may include, depending

upon the circumstances, such specific information as the size of the operation supervised.

(c) *Family relationships and involvement in certain legal proceedings.* Set forth the same information as is required to be furnished by items 6(b) and (d) of Form F–5 at § 335.212 for each principal officer, person chosen to become a principal officer, and each person named in answer to paragraph (2).

Item 10—Management compensation and transactions.

Furnish the information required by items 7 and 21 of Form F–5 at § 335.212.

Instruction

Checking the box provided on the cover page of this form to indicate that disclosure of delinquent Form F–7, F–8, or F–8A filers is not contained herein is intended to facilitate form processing and review. Failure to provide such indication will not create liability for violation of the federal securities laws. The space should be checked only if there is no disclosure in this form of reporting person delinquencies and the bank at the time of filing the Form F–2, has reviewed the information necessary to ascertain, and has determined that, disclosure of delinquencies is not expected to be contained in Part III of the Form F–2 or incorporated by reference.

PART IV

Item 11—Exhibits, Financial Statement Schedules, and Reports on Form F–3

(a) *Contents.* List the following documents filed as a part of the report:

(1) All financial statements.

(2) Those financial statement schedules required to be filed by item 8 of this form.

(3) Those exhibits required by paragraph (c) of this Item 11. Identify in the list each management contract or compensatory plan or arrangement required to be filed as an exhibit to this form pursuant to paragraph (c)(3)(ii) of this Item 11.

Instruction. Where any financial statement, financial statement schedule, or exhibit is incorporated by reference, the incorporation by reference shall be set forth in the list required by this item. For purposes of all rules concerning incorporation by reference a financial statement schedule shall constitute an *exhibit.* See § 335.353.

(b) *Reports on Form F–3.* State whether any reports on Form F–3 have been filed during the last quarter of the period covered by this report, listing the items reported, any financial statements filed and the dates of any such reports.

(c) *Exhibits.* The following exhibits shall be filed:

(1) *Articles of incorporation and bylaws*—whenever amendments to the articles or bylaws of the registrant are filed, there shall also be filed a complete copy of the articles or bylaws as amended.

(2) *Instruments defining the rights of security holders, including indentures.*

(3) *Material contracts.* (i) If the contract is such as ordinarily accompanies the kind of business conducted by the bank and its subsidiaries, it will be deemed to have been made in the ordinary course of business and need not be filed, unless if falls within one or more of the following categories, in which case it should be filed except where immaterial in amount or significance:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15% of the fixed assets of the bank on a consolidated basis; or

(C) Any lease under which a significant part of the property described in the registration statement or report is held by the bank.

(ii) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the ''named executive officers'' of the bank, as defined by 17 CFR 229.402(a)(3), participates shall be deemed material and shall be filed; and any other management contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the bank participates shall be filed unless immaterial in amount or significance except as follows: notwithstanding the above, any compensatory plan, contract, or arrangement which pursuant to its terms is available to employees, officers or directors generally and which in operation provides for the same method of allocation of benefits between management and nonmanagement participants.

(4) *Statement re computation of per share earnings.* A statement setting forth in reasonable detail the computation of per share earnings, unless the computation can be clearly determined from the material contained in the registration statement or report.

(5) *Statements re computation of ratios.* A statement setting forth in reasonable detail the computation of ratios of earnings to fixed charges which appears in the report.

(6) *Annual report to security holders.* The bank's annual report to security holders for its last fiscal year if all or a portion thereof

are incorporated by reference in the filing. Such report, except for those portions thereof which are expressly incorporated by reference in the filing, is to be furnished for the information of the FDIC and is not to be deemed *filed* as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed on one copy.

(7) *Letter re change in accounting principles.* Unless previously filed, a letter from the bank's independent accountant indicating whether any change in accounting principles or practices followed by the bank, or any change in the method of applying any such accounting principles or practices which affected the financial statements being filed with the FDIC in the report or which is reasonably certain to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board requiring such a change.

(8) *Previously unfiled documents.* All contracts and other documents of a type required to be filed as an exhibit to an original registration statement on Form F–1 or a report on Form F–4 which were executed or in effect during the reporting period and not previously filed, as well as all amendments or modifications, not previously filed, to all exhibits previously filed with Forms F–1, F–2, and F–4.

(9) *List all subsidiaries of the bank, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business.* The names of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as of the end of the year covered by this report. (See the definition of *significant subsidiary* in § 335.102(nn).) This list should be repeated in each annual filing or an express reference made to the most recent filing containing a complete and accurate list.

SIGNATURES—(SEE GENERAL INSTRUCTION D)

Pursuant to the requirements of section 13 of the Securities Exchange Act of 1934, the bank has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Bank) _____

By (Signature and Title)* _____

_____

Date _____

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

(Signature and Title)* _____

_____

(Date) _____

* * * * *

(Signature and Title)* _____

_____

(Date) _____

*Print the name and title of each signing officer under his signature.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55557, Dec. 14, 1983; 54 FR 53590, Dec. 29, 1989; 57 FR 4702, Feb. 7, 1992; 57 FR 58136, Dec. 9, 1992; 59 FR 67175, Dec. 29, 1994]

§ 335.320 Current reports.

Every registrant bank shall file a current report in conformity with the requirements of Form F–3 within 10 days after the close of any month during which any of the events specified in that form occurs, unless substantially the same information as required by that form has been previously reported by the bank.

§ 335.321 Form for current report of a bank (Form F–3).

FORM F–3.—CURRENT REPORT

Under Section 13 of the Securities Exchange Act of 1934

For the month of_____, 19—

_____

(Exact name of bank as specified in charter)

_____

(Address of principal office)

GENERAL INSTRUCTIONS

A. Preparation of Report

This form is not to be used as a blank form to be filled in but only as a guide in the preparation of the report. The report shall contain the numbers and captions of all applicable items, but the text of such items may be omitted if the answers with respect thereto are prepared in the manner specified in § 335.361. All items which are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. Particular attention should be given to the definitions in § 335.102 and the general requirements in Subpart C.

B. Events To Be Reported

A report on this form is required to be filed upon the occurrence of any one or more of

the events specified in the items of this form. Reports are to be filed within 10 days after the close of each month during which any of the specified events occur except for items 10 or 11. A report of an event specified in items 10 or 11 is to be filed within 5 business days after the occurence of the event; if the event occurs on a Saturday, Sunday, or holiday on which the FDIC is not open for business, then the 5 business day period shall begin to run on and include the first business day thereafter. However, if substantially the same information as that required by this form has been previously reported by the bank, an additional report of the information in this form need not be made.

C. Incorporation by Reference to Proxy Statement, Statement Where Management Does Not Solicit Proxies, or Annual Report to Security Holders

Information contained in any statement previously filed with the FDIC under § 335.201 or in an annual report to security holders furnished to the FDIC under § 335.203 may be incorporated by reference in answer or partial answer to any item or items of this form. In addition, any financial statements contained in any such statement or annual report may be incorporated by reference provided such financial statements substantially meet the requirements of this form.

INFORMATION TO BE INCLUDED IN REPORT

Item 1—Changes in Control of Bank

(a) If, to the knowledge of management, a change in control of the bank has occurred, state the name of the person(s) who acquired such control; the amount and the source of the consideration used by such person(s); the basis of the control; the date and a description of the transaction(s) which resulted in the change in control; the percentage of voting securities of the bank now beneficially owned directly or indirectly by the person(s) who acquired control; and the identity of the person(s) from whom control was assumed. If the source of all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined in section 3(a)(6) of the Act, the identity of such bank shall be omitted provided a request for confidentiality has been made pursuant to section 13(d)(1)(B) of the Act by the person(s) who acquired control. In lieu thereof, the material shall indicate that disclosure of the identity of the bank has been so omitted and filed separately with the FDIC.

Instructions

1. State the terms of any loans or pledges obtained by the new control group for the purpose of acquiring control, and the names of the lenders or pledgees, unless confidential treatment has been requested under section 13(d)(1)(B) of the Act in which case the identity of the lending bank shall be omitted.

2. Any arrangements or understandings among members of both the former and new control groups and their associates with respect to the election of directors or other matters shall be described.

(b) Describe any contractual arrangements, including any pledge of securities of the bank, or any of its parents, known to management, the operation of the terms of which may be at a subsequent date result in a change in control of the bank.

Instruction

Paragraph (b) does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the bank.

(c) If the source of all or any part of the funds used to acquire control of the bank is a loan made by a bank as defined in section 3(a)(6) of the Act, indicate whether there exists any agreement, arrangement, or understanding under which the registrant bank maintains or would maintain a correspondent deposit account at such lending bank.

Item 2—Acquisition or Disposition of Assets

If the bank or any of its significant subsidiaries has acquired or disposed of a significant amount of assets, otherwise than in the ordinary course of business, state the date and manner of acquisition or disposition and briefly describe the assets involved, the nature and amount of consideration given or received therefor, the principle followed in determining the amount of such consideration, the identity of the persons from whom the assets were acquired or to whom they were sold and the nature of any material relationship between such persons and the bank or any of its affiliates, any director or officer of the bank, or any associate of any such director or officer. If any assets so acquired by the bank or its subsidiaries constituted plant, equipment or other physical property, state the nature of the business in which the assets were used by the persons from whom acquired and whether the bank intends to continue such use or intends to devote the assets to other purposes, indicating such other purposes.

Instructions

1. No information need be given as to: (i) Any transaction between any person and any wholly owned subsidiary of such person: *i.e.*, a subsidiary substantially all of whose outstanding voting securities are owned by such person and/or its other wholly owned subsidiaries; (ii) any transaction between two or

more wholly owned subsidiaries of any person; or (iii) the redemption or other acquisition of securities from the public, or the sale or other disposition of securities to the public, by the issuer of such securities.

2. The term *acquisition* includes every purchase, acquisition by lease, exchange, merger, consolidation, succession or other acquisition; provided that such term does not include the construction or development of property by or for the bank or its subsidiaries or the acquisition of materials for such purpose, and does not include the acquisition of assets acquired: (i) In collecting a debt previously contracted in good faith or (ii) in a fiduciary capacity. The term *disposition* includes every sale, disposition by lease exchange, merger, consolidation, mortgage, or hypothecation of assets, assignment, abandonment, destruction, or other disposition, but does not include disposition of assets acquired: (i) In collecting a debt previously contracted in good faith or (ii) in a fiduciary capacity.

3. The information called for by this item is to be given as to each transaction or series of related transactions of the size indicated. The acquisition or disposition of securities shall be deemed the indirect acquisition or disposition of the assets represented by such securities if it results in the acquisition or disposition of control of such assets.

4. An acquisition or disposition shall be deemed to involve a significant amount of assets: (i) If the net book value of such assets or the amount paid or received there for upon such acquisition or disposition exceeded five percent of the equity capital accounts of the bank, or (ii) if it involved the acquisition or disposition of a business whose gross operating revenues for its last fiscal year exceeded five percent of the gross operating revenues of the bank and its consolidated subsidiaries for the bank's latest fiscal year.

5. Where assets are acquired or disposed of through the acquisition or disposition of control of a person, the person from whom such control was acquired or to whom it was disposed of shall be deemed the person from whom the assets were acquired or to whom they were disposed of, for the purposes of this item. Where such control was acquired from or disposed of to not more than five persons, their names shall be given, otherwise it will suffice to identify in any appropriate manner the class of such persons.

6. Attention is directed to the requirements at the end of this form with respect to the filing of financial statements for businesses acquired and to the filing of copies of the plans of acquisition or disposition as exhibits to the report.

Item 3—Legal Proceedings

The description of legal proceedings shall include the information required by item 3 of Form F–2 at § 335.312. As to such proceedings which have been terminated during the period covered by the report, provide similar information, including the date of termination and a description of the disposition thereof with respect to the bank and its subsidiaries.

Instruction

A legal proceeding need only be reported in the Form F–3 filed for the month in which it first became a reportable event and in subsequent months in which there have been material developments. Subsequent Form F–3 filings in the same fiscal year in which a legal proceeding or a material development is reported should reference any previous reports in that year.

Item 4—Changes in Securities

(a) If the instruments defining the rights of the holders of any class of registered securities have been materially modified, give the title of the class of securities involved and state briefly the general effect of such modification upon the rights of holders of such securities.

(b) If the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or modification of any other class of securities, state briefly the general effect of the issuance or modification of such other class of securities upon the rights of the holders of the registered securities.

Instruction

Working capital restrictions and other limitations upon the payment of dividends are to be reported hereunder.

Item 5—Changes in Security for Registered Securities

If there has been a material withdrawal or substitution of assets securing any class of registered securities of the bank, furnish the following information:

(a) Give the title of the securities.

(b) Identify and describe briefly the assets involved in the withdrawal or substitutions.

(c) Indicate the provision in the underlying indenture, if any, authorizing the withdrawal or substitution.

Item 6—Defaults Upon Senior Securities

(a) If there has been any material default in the payment of the principal, interest, a sinking or purchase fund installment, or any other material default not cured within 30 days, with respect to any indebtedness of the bank or any of its significant subsidiaries exceeding five percent of the equity capital accounts of the bank, identify the indebtedness and state the nature of the default. In the case of such a default in the payment of principal, interest, or a sinking or purchase fund

installment, state the amount of the default and the total arrearage on the date of filing this report.

Instruction

This paragraph refers only to events which have become defaults under the governing instruments, *i.e.,* after the expiration of any period of grace and compliance with any notice requirements.

(b) If any material arrearage in the payment of dividends has occurred or if there has been any other material delinquency not cured within 30 days, with respect to any class of preferred stock of the bank which is registered or which ranks prior to any class or registered securities, or with respect to any class of preferred stock of any significant subsidiary of the bank, give the title of the class and state the nature of the arrearage or delinquency. In the case of an arrearage in the payment of dividends, state the amount and the total arrearage on the date of filing this report.

Item 7—Increase in Amount of Securities Outstanding

If the amount of securities of the bank outstanding has been increased through the issuance of any new class of securities or through the issuance or reissuance of any additional securities of a class outstanding and the aggregate amount of all such increases not previously reported exceeds five percent of the previously outstanding securities of the class, furnish the following information:

(a) Title of class, the amount outstanding as last previously reported, and the amount presently outstanding (as of a specified date).

(b) A brief description of the transaction or transactions resulting in the increase and a statement of the aggregate net cash proceeds or the nature and aggregate amount of any other consideration received or to be received by the bank.

(c) The names of the principal underwriters, if any, indicating any such underwriters which are affiliates of the bank.

(d) A reasonably itemized statement of the purposes, so far as determinable, for which the net proceeds have been or are to be used and the approximate amount used or to be used for each such purpose.

(e) If the securities were capital shares, a statement of the amount of the proceeds credited or to be credited to any account other than the appropriate capital share account.

Instructions

1. This item does not apply to notes, drafts, bills of exchange, or bank acceptances which mature not later than 12 months from the date of issuance. No report need be made where the amount not previously reported, although in excess of five percent of the amount previously outstanding, does not exceed $50,000 face amount of indebtedness of 1,000 shares or other units.

2. This item includes the reissuance of Treasury securities and securities held for the account of the issuer thereof. The extension of the maturity date of indebtedness shall be deemed to be the issuance of new indebtedness for the purpose of this item. In the case of such an extension, the percentage shall be computed upon the basis of the principal amount of the indebtedness extended.

Item 8—Decrease in Amount of Securities Outstanding

If the amount of any class of securities of the bank outstanding has been decreased through one or more transactions and the aggregate amount of all such decreases not previously reported exceeds five percent of the amount of securities of the class previously outstanding, furnish the following information:

(a) Title of the class, the amount outstanding as last previously reported, and the amount presently outstanding (as of a specified date).

(b) A brief description of the transaction or transactions involving the decrease and a statement of the aggregate amount of cash or the nature and aggregate amount of any other consideration paid or to be paid by the bank in connection with such transaction or transactions.

Instruction

Instruction 1 to item 7 shall also apply to this item. This item need not be answered as to decreases resulting from ordinary sinking fund operations, similar periodic decreases made pursuant to the terms of the constituent instruments, decreases resulting from the conversion of securities or decreases resulting from the payment of indebtedness at maturity.

Item 9—Submission of Matters to a Vote of Security Holders

If any matter has been submitted to a vote of security holders, through the solicitation of proxies or otherwise, furnish the following information:

(a) The date of the meeting and whether it was an annual or special meeting.

(b) If the meeting involved the election of directors, state the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker nonvotes, as to each such matter, including a

separate tabulation with respect to each nominee for office.

(d) Describe the terms of any settlement between the bank and any other participant (as defined in § 335.220) terminating any solicitation subject to § 335.220, including the cost or anticipated cost to the bank.

Instructions

1. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be furnished. The solicitation of any authorization or consent (other than a proxy to vote at a security holders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

2. Paragraph (a) need be answered only if paragraph (b) or (c) is required to be answered.

3. Paragraph (b) need not be answered if: Proxies for the meeting were solicited pursuant to subpart B of this part; there was no solicitation in opposition to the management's nominees as listed in the proxy statement; and all of such nominees were elected. If the bank did not solicit proxies and the board of directors as previously reported to the FDIC was reelected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto.

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

5. If the bank has furnished to its security holders proxy soliciting material containing the information called for by paragraph (d), the paragraph may be answered by reference to the information contained in such material.

6. If the bank has published a report containing all of the information called for by this item, the item may be answered by a reference to the information contained in such report, provided copies of such report are filed as an exhibit to the report on this form.

Item 10—Changes in Bank's Certifying Accountant

If an independent accountant who was previously engaged as the principal accountant to audit the bank's financial statements resigns (or indicates he declines to stand for re-election after the completion of the current audit) or is dismissed as the bank's principal accountant, or another independent accountant is engaged as principal accountant or if an independent accountant on whom the principal accountant expressed reliance in his report regarding a significant subsidiary resigns (or formally indicates he declines to stand for re-election after the completion of the current audit) or is dismissed or another independent accountant is engaged to audit that subsidiary:

(a) State the date of such resignation (or declination to stand for re-election) dismissal or engagement.

(b) State whether in connection with the audits of the two most recent fiscal years and any subsequent interim period preceding such resignation, dismissal or engagement there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreements if not resolved to the satisfaction of the former accountant would have caused him to make reference in connection with his report to the subject matter of the disagreement(s); also, describe each such disagreement. The disagreements required to be reported in response to the preceding sentence include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this rule are those which occur at the decision-making level; *i.e.*, between personnel of the bank responsible for the presentation of its financial statements and personnel of the accounting firm responsible for rendering its report.

(c) State whether the principal accountant's report on the financial statements for any of the past two years contained an adverse opinion or a disclaimer of opinion or was qualified as to uncertainty, audit scope, or accounting principles; also describe the nature of each such adverse opinion, disclaimer of opinion, or qualification.

(d) The bank shall request the former accountant to furnish the bank with a letter addressed to the FDIC stating whether he agrees with the statements made by the bank in response to this item and, if not, stating the respects in which he does not agree. The bank shall file a copy of the former accountant's letter as an exhibit with all copies of the Form F–3 required to be filed under § 335.359.

(e) State whether the decision to change accountants was recommended or approved by

(1) Any audit or similar committee of the board of directors, if the bank has such a committee; or

(2) The board of directors, if the bank has no such committee.

Item 11—Resignations of Bank's Directors

(a) If a director has resigned or declined to stand for re-election to the board of directors since the date of the last annual meeting of shareholders because of a disagreement with the bank on any matter relating to the bank's operations, policies or practices, and if the director has furnished the bank with a

letter describing such disagreement and requesting that the matter be disclosed, the bank shall state the date of such resignation or declination to stand for re-election and summarize the director's description of the disagreement.

(b) If the bank believes that the description provided by the director is incorrect or incomplete, it may include a brief statement presenting its views of the disagreement.

(c) The bank shall file a copy of the director's letter as an exhibit with all copies of this Form F–3.

Item 12—Other Materially Important Events

The bank shall, at its option, report under this item any events that it deems of material importance to security holders, even though information as to such events is not otherwise called for by this form.

Item 13—Financial Statements and Exhibits

List below the financial statements and exhibits, if any, filed as a part of this report:

(a) Financial statements.

(b) Exhibits.

SIGNATURES

Under the requirements of the Securities Exchange Act of 1934, the bank has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Name of bank)

Date _____

By _____

(Name and title of signing officer)

FINANCIAL STATEMENTS OF BUSINESSES ACQUIRED

1. *Business for which statements are required.* The financial statement specified below shall be filed for any business the acquisition of which by the bank or any of its majority-owned subsidiaries is required to be described in answer to item 2 above.

2. *Statements required.*

(a) There shall be filed a balance sheet of the business as of a date reasonably close to the date of acquisition. The balance sheet need not be audited, but if it is not audited there shall also be filed an audited balance sheet as of the close of the preceding fiscal year.

(b) Statements of income of the business shall be filed for each of the last three full fiscal years and for the period, if any, between the close of the latest of such fiscal years and the date of the latest balance sheet filed. These statements of income shall be verified up to the date of the audited balance sheet.

(c) If the business was in insolvency proceedings immediately prior to its acquisition, the balance sheets required above need not be audited. In such case, the statements of income required shall be audited to the close of the latest full fiscal year.

(d) No supporting schedules need be filed.

(e) Except as otherwise provided in this instruction, the principles applicable to a bank and its subsidiaries with respect to the filing of individual, consolidated and group statements in an original application or annual report shall be applicable to the statements required by this instruction.

3. *Filing of other statements in certain cases.* The FDIC may, upon the informal written request of the bank, and where consistent with the protection of investors, permit the omission of one or more of the statements herein required or the filing in substitution therefor of appropriate statements of comparable character. The FDIC may also by informal written notice require the filing of other statements in addition to or in substitution for the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of any person for which financial statements are required, or whose statements are otherwise necessary for the protection of investors.

EXHIBITS

Subject to the rules as to incorporation by reference, the following documents shall be filed as exhibits to this report:

1. Copies of any contract, plan, or arrangement for any acquisition or disposition described in answer to item 2, including a plan of reorganization, readjustment, exchange, merger, consolidation, or succession in connection therewith.

2. Copies of any judgment or any document setting forth the terms of any settlement described in answer to item 3.

3. Copies of the amendments to all constituent instruments and other documents described in answer to item 4.

4. Copies of all constituent instruments defining the rights of the holders of any class of securities referred to in answer to item 7.

5. Copies of the plan pursuant to which the options referred to in answer to item 9 were granted, or if there is no such plan, specimen copies of the options.

6. Copies of any material amendments to the bank's charter or bylaws, not otherwise required to be filed.

7. Copies of the text of any proposal described in answer to item 9.

8. Copies of any published report furnished in response to item 9. (See item 9, instruction 6.)

9. Letters from the bank and the independent accountants furnished pursuant to item 10.

10. Letters from directors furnished pursuant to item 11.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55562, Dec. 14, 1983; 54 FR 53592, Dec. 29, 1989; 59 FR 67175, Dec. 29, 1994]

§ 335.330 Quarterly reports.

Every registrant bank shall file a quarterly report in conformity with the requirements of Form F–4 for each fiscal quarter ending after the close of the latest fiscal year for which financial statements were filed in a registration statement except that no report need be filed for the fiscal quarter which coincides with the end of the fiscal year of the bank. Such reports shall be filed not later than 45 days after the end of such quarterly period, except that the report for any period ending prior to the date on which a class of securities of the bank first becomes effectively registered may be filed not later than 45 days after the effective date of such registration.

Note to Small Business Issuers: a ''small business issuer'', as defined under 17 CFR 240.12b-2 has the option of providing the disclosure required by SEC Form 10–QSB, optional form for quarterly and transitional reports of small business issuers (17 CFR 249.310b), in lieu of the disclosure requirements set forth in Form F–4 (§ 335.330). The definition of ''small business issuer'', generally includes banks with annual revenues of less than $25 million, whose voting stock does not have a public float of $25 million or more.

[46 FR 25208, May 5, 1981, as amended at 59 FR 67175, Dec. 29, 1994]

§ 335.331 Form for quarterly report of a bank (Form F–4).

FORM F–4

Quarterly Report Under Section 13 of the Securities Exchange Act of 1934 for Quarter Ended _____

FDIC Insurance Certificate Number _____

(Exact name of bank as specified in its charter) _____

_____

(State or other jurisdiction of incorporation or organization) _____

_____

(IRS Employer Identification No.) _____

(Address of principal executive offices) _____

_____

(Zip Code) _____

Bank's telephone number, including area code _____

(Former name, former address and former fiscal year, if changed since last report) —

_____

Indicate by check mark if the bank, as a ''small business issuer'' as defined under 17 CFR 240.12b-2, is providing alternative disclosures as permitted for small business issuers in this Form F–4. [ ]

Indicate by check mark whether the bank (1) has filed all reports required to be filed by section 13 of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the bank was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes — No —

Indicate the number of shares outstanding of each of the bank's classes of common stock, as of the latest practicable date.

A. Rule as to Use of Form F–4

(a) Form F–4 shall be used for quarterly reports under section 13 of the Securities Exchange Act of 1934, filed under § 335.330.

(b) A report on this form shall be filed within 45 days after the end of each of the first three fiscal quarters of each fiscal year. No report need be filed for the fourth quarter of any fiscal year.

B. Application of General Rules and Regulations

Particular attention is directed to § 335.360 which contains general requirements regarding matters such as the kind and size of paper to be used, the printing and the language; § 335.364 regarding the information to be given whenever the title of securities is required to be stated; and § 335.701 regarding the filing of the report. The definitions contained in § 335.102 should be especially noted.

C. Preparation of Report

(a) This is not a blank form to be filled in. It is a guide to be used in preparing the report in accordance with § 335.330. The FDIC does not furnish blank copies of this form to be filled in for filing.

(b) These general instructions are not to be filed with the report. The instructions to the various captions of the form are also to be omitted from the report as filed.

D. Incorporation by Reference to Published Statements

If the bank makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a financial statement containing the information required by this form, such information may be incorporated by reference to such published statement if copies thereof are filed as an exhibit to this report.

E. Signature and Filing of Report

Three copies of the report shall be filed with the FDIC. At least one copy of the report shall be filed with each exchange on which any class of securities of the bank is listed and registered. At least one copy of the report filed with the FDIC and one copy filed with each such exchange shall be manually signed on the bank's behalf by a duly authorized officer of the bank and by the principal financial officer or chief accounting officer of the bank. Copies not manually signed shall bear typed or printed signatures.

Item 1—Financial Statements

(a) *Condensed statements.*

Interim financial statements shall follow the general form and content of presentation prescribed by Subpart F of this Part 335 with the following exceptions:

(1) Interim financial statements required by this rule need only be provided as to the bank and its subsidiaries consolidated and may be unaudited. Separate statements of other entities which may otherwise be required by this regulation may be omitted.

(2) Interim balance sheets shall include only major captions prescribed by §335.627A. Where any major balance sheet caption is less than 10 percent of total assets, and the amount in the caption has not increased or decreased by more than 25 percent since the end of the preceding fiscal year, the caption may be combined with others.

(3) Interim statements of income shall also include major captions prescribed by §335.627B. When any major income statement caption is less than 15 percent of average net income for the most recent three fiscal years and the amount in the caption has not increased or decreased by more than 20 percent as compared to the corresponding interim period of the preceding fiscal year, the caption may be combined with others. In calculating average net income, loss years should be excluded. If losses were incurred in each of the most recent three years, the average loss shall be used for purposes of this text.

(4) The statement of changes in financial position and/or statement of cash flows may be abbreviated, as appropriate.

(5) The interim financial information shall include disclosure either on the face of the financial statements or in accompanying footnotes sufficient so as to make the interim information presented not misleading. Banks may presume that users of the interim financial information have read or have access to the audited financial statements for the preceding fiscal year and that the adequacy of additional disclosure needed for a fair presentation, except in regard to material contingencies, may be determined in that context. Accordingly, footnote disclosure which would substantially duplicate the disclosure contained in the most recent annual report to security holders or latest audited financial statements, such as a statement of significant accounting policies and practices, details of accounts which have not changed significantly in amount or composition since the end of the most recently completed fiscal year, and detailed disclosures prescribed by §335.621 or §335.622, may be omitted. However, disclosure shall be provided where events subsequent to the end of the most recent fiscal year have occurred which have a material impact on the bank. Disclosures should encompass for example, significant changes since the end of the most recently completed fiscal year in such items as: accounting principles and practices; estimates inherent in the preparation of financial statements; status of long-term contracts; capitalization including significant new borrowings or modification of existing financing arrangements; and the reporting entity resulting from business combinations or dispositions. Notwithstanding the above, where material contingencies exist, disclosure of such matters shall be provided even though a significant change since year end may not have occurred.

(6) Detailed schedules otherwise required by §335.626 may be omitted for purposes of preparing interim financial statements.

(b) *Other instructions as to content.* The following additional instructions shall be applicable for purposes of preparing interim financial statements:

(1) Summarized income statement information shall be given separately as to each subsidiary not consolidated or 50 percent or less owned persons or as to each group of such subsidiaries or fifty percent or less owned persons for which separate individual or group statements would otherwise be required for annual periods.

(2) If appropriate, the income statement shall show earnings per share and dividends per share applicable to common stock and the basis of the earnings per share computation shall be stated together with the number of shares used in computation. The bank shall file as an exhibit, a statement setting forth in reasonable detail the computation of per share earnings, unless the computation is otherwise clearly set forth in the report.

(3) If, during the most recent interim period presented, the bank or any of its consolidated subsidiaries entered into a business combination treated for accounting purposes as a pooling of interests, the interim financial statements for both the current year and the preceding year shall reflect the combined results of the pooled businesses. Supplemental disclosure of the separate results of the combined entities for periods prior to the combination shall be given, with appropriate explanations.

(4) Where a material business combination accounted for as a purchase has occurred

during the current fiscal year, pro forma disclosure shall be made of the results of operations for the current year up to the date of the most recent interim balance sheet provided (and for the corresponding period in the preceding year) as though the companies had combined at the beginning of the period being reported on. This pro forma information shall as a minimum show revenue, income before extraordinary items and the cumulative effect of accounting changes, including such income on a per share basis, and net income and net income per share.

(5) In addition to meeting the reporting requirements specified by existing standards for accounting changes, the bank shall state the date of any material accounting change and the reasons for making it. In addition, a letter from the bank's independent accountant shall be filed as an exhibit in the first Form F–4 subsequent to the date of an accounting change indicating whether or not the change is to an alternative principle which in his judgment is preferable under the circumstances; except that no letter from the accountant need be filed when the change is made in response to a standard adopted by the Financial Accounting Standards Board which requires such change.

(6) Any material retroactive prior period adjustment made during any period covered by the interim financial statements shall be disclosed, together with the effect thereof upon net income—total and per share—of any prior period included and upon the balance of undivided profits. If results of operations for any period presented have been adjusted retroactively by such an item subsequent to the initial reporting of such period, similar disclosure of the effect of the change shall be made.

(7) The interim financial statements furnished shall reflect all adjustments which are, in the opinion of management, necessary to a fair statement of the results for the interim periods presented. A statement to that effect shall be included. Such adjustments shall include, for example, appropriate estimated provisions for bonus and profit sharing arrangements normally determined or settled at year-end.

(c) *Periods to be covered.* For filings on Form F–4, financial statements shall be provided as set forth below:

(1) An interim balance sheet as of the end of the most recent fiscal quarter and a balance sheet as of the end of the preceding fiscal year shall be provided. The balance sheet as of the end of the preceding fiscal year may be condensed to the same degree as the interim balance sheet provided. An interim balance sheet as of the end of the corresponding fiscal quarter of the preceding fiscal year need not be provided unless necessary for an understanding of the impact of seasonal fluctuations on the bank's financial condition.

(2) Interim statements of income shall be provided for the most recent fiscal quarter, for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter, and for the corresponding periods of the preceding fiscal year. Such statements may also be presented for the cumulative twelve-month period ended during the most recent fiscal quarter and for the corresponding preceding period.

(3) Interim statements of cash flows/changes in financial position (See Statement of Financial Accounting Standards No. 95, Statement of Cash Flows) and statements of changes in capital accounts shall be provided for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter, and for the corresponding period of the preceding fiscal year. Such statements may also be presented for the cumulative twelve-month period ending during the most recent fiscal quarter and for the corresponding preceding period.

NOTE: Restatement of prior years' statements of financial position is encouraged but is not required.

(d) *Review by independent public accountant.* The interim financial information included in filings with the FDIC need not be reviewed by an independent public accountant prior to filing. If, however, a review of the data is made in accordance with established professional standards and procedures for such a review, the bank may state that the independent accountant has performed such a review. If such a statement is made, the report of the independent accountant on such review shall accompany the interim financial information.

(e) *Filing of other interim financial information in certain cases.* The FDIC may, upon the informal written request of the bank, and where consistent with the protection of investors, permit the omission of any of the interim financial information herein required or the filing in substitution therefor of appropriate information of comparable character. The FDIC may also by informal written notice require the filing of other information in addition to, or in substitution for, the interim information herein required in any case where such information is necessary or appropriate for an adequate presentation of the financial condition of any person for which interim financial information is required, or whose financial information is otherwise necessary for the protection of investors.

Item 2—Management's Discussion and Analysis of Financial Condition and Results of Operations

Management's discussion and analysis of the financial condition and results of operations shall be provided so as to enable the

reader to assess material changes in financial condition and results of operations between the periods specified in (c)(1) and (c)(2) of item 1 of this Form F–4. The discussion and analysis shall include a discussion of material changes in the bank's liquidity, capital resources and results of operations.

(a) *Material changes in financial condition.* Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided shall also be discussed. If discussions of changes from both the year-end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the bank.

(b) *Material changes in results of operations.* Discuss any material changes in the bank's results of operations with respect to the most recent fiscal year-to-date period for which an income statement is provided and the corresponding year-to-date period of the preceding fiscal year. The discussion also shall cover material changes with respect to the most recent fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year. In addition, if the bank has elected to provide an income statement for the twelve-month period ended as of the date of the most recent interim balance sheet provided, the discussion shall also cover material changes with respect to that twelve-month period and the twelve-month period ended as of the corresponding interim balance sheet date of the preceding fiscal year.

Instructions. 1. In preparing the discussion and analysis required by this paragraph, the bank may presume that users of the interim financial information have read or have access to the discussion and analysis required in the bank's most recent Form F–2 or Form F–1.

2. The discussion and analysis required by this paragraph is required to focus only on material changes. Where the interim financial statements reveal material changes from period to period in one or more significant line items, the causes for the changes should be described if they have not already been disclosed; *provided, however,* if the causes for a change in one line item also relate to other line items, no repetition is required. Banks need not recite the amounts of changes from period to period which are readily computable from the financial statements. The discussion should not merely repeat numerical data contained in the financial statements. The information provided should include that which is available to the bank without undue effort or expense and which does not clearly appear in the bank's interim financial statements.

3. The bank's discussion of material changes in results of operations should identify any significant elements of the bank's income or loss from continuing operations which do not arise from or are not necessarily representative of the bank's ongoing business.

4. The bank should discuss any seasonal aspects of its business which have had a material effect upon its financial condition or results of operation.

5. Banks are encouraged but are not required to discuss forward-looking information.

SIGNATURES

Under the requirements of the Securities Exchange Act of 1934, the bank has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

(Name of bank) _____

_____

Date _____ (Signature)[1] _____

Date _____ (Signature)[1] _____

[1] Print name and title of signing officer under his signature.

[48 FR 55562, Dec. 14, 1983, as amended at 54 FR 53592, Dec. 29, 1989; 57 FR 58136, Dec. 9, 1992; 59 FR 67175, Dec. 29, 1994]

§ 335.332 Report of foreign issuer to be filed under section 13(a) of the Securities Exchange Act of 1934 (Form F–4A).

Federal Deposit Insurance Corporation
Washington, DC 20429

FORM F–4A—REPORT UNDER SECTION 13(a) OF THE SECURITIES EXCHANGE ACT OF 1934

For the month of _____ 19—

_____

(Translation of bank's name into English)

_____

(Address of principal executive offices)

General Instructions

A. Rule as to Use of Form F–4A.

This form shall be used by foreign banks which are required to furnish reports under § 335.308.

B. Information and Document Required to be Furnished.

Subject to General Instruction D herein, a bank furnishing report on this form shall furnish whatever information, not previously furnished, such bank (i) is required to make public in the country of its domicile or in which it is incorporated or organized pursuant to the law of that country, or (ii) filed with a foreign stock exchange on which its securities are traded and which was made

public by that exchange, or (iii) distributed to its security holders.

The information required to be furnished pursuant to paragraphs (i), (ii), or (iii) of the previous paragraph is that which is significant with respect to the bank and its subsidiaries concerning: Changes in management or control; acquisitions or dispositions of assets; bankruptcy or receivership; changes in bank's certifying accountants; the financial condition and results of operations; material legal proceedings; changes in securities or in the security for registered securities; defaults upon senior securities; material increases or decreases in the amount outstanding of securities or indebtedness; the results of the submission of matters to a vote of security holders; and any other information which the bank deems of material importance to security holders.

This report is required to be furnished promptly after the material contained in the report is made public as described above. The information and documents furnished in this report shall not be deemed to be ''filed'' for the purpose of section 18 of the Act or otherwise subject to the liabilities of that section.

C. Preparation and Filing of Report.

This report shall consist of a cover page, the document or report furnished by the bank, and a signature page. Three complete copies of each report on this form shall be sent to the FDIC. At least one complete copy shall be filed with each United States stock exchange on which any security of the bank is listed and registered under section 12(b) of the Act. At least one of the copies sent to the FDIC and one filed with each such exchange shall be manually signed. Unsigned copies shall be conformed.

D. Translations of Papers and Documents into English.

Information required to be furnished pursuant to general instruction B in the form of press releases and all communications or materials distributed directly to securityholders of each class of securities to which any reporting obligation under section 13(a) of the Act relates shall be in the English language. English versions or adequate summaries in the English language of such materials may be furnished in lieu of original English translations.

Notwithstanding general instruction B, no other documents or reports, including prospectuses or offering circulars relating to entirely foreign offerings, need be furnished unless the bank otherwise has prepared or caused to be prepared English translation, English versions or summaries in English thereof. If no such English translations, versions or summaries have been prepared, it will be sufficient to provide a brief description in English of any such documents or reports. In no event are copies of original language documents or reports required to be furnished.

SIGNATURES

Under the requirements of the Securities Exchange Act of 1934, the bank has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Bank)
Date _____
By _____
(Signature)*

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.340 Notification to national securities associations.

Each bank having securities registered under section 12(g) of the Act, upon being notified by a national securities association registered under section 15A of the Act that a class of the bank's securities is to be quoted on an interdealer quotation system, which is sponsored and governed by the rules of such association, shall thereafter notify such association promptly of:

(a) Any increase or decrease in the amount of securities of such class outstanding which exceeds five percent of the amount of such class last reported to the association and

(b) Any change in the name of the bank. The obligation to report pursuant to this section shall continue until notification is received from the association that all classes of securities are no longer quoted on such interdealer quotation system.

§ 335.350 Additional information.

In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

§ 335.351 Information not available.

Information required need be given only insofar as it is known or reasonably available to the bank. If any required information is unknown and not reasonably available to the bank, either because the obtaining thereof would involve unreasonable effort or

*Print the name and title of the signing officer under his signature.

expense or because it rests peculiarly within the knowledge of another person not affiliated with the bank, the information may be omitted, subject to the following conditions:

(a) The bank shall give such information on the subject as it possesses or can acquire without unreasonable effort or expense together with the sources thereof, and

(b) The bank shall include a statement either showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information. No such request need be made, however, to any foreign government, or an agency or instrumentality thereof, if, in the opinion of the bank, such request would be harmful to existing relationships.

§ 335.352 Disclaimer of control.

If the existence of control is open to reasonable doubt in any instance, the bank may disclaim the existence of control and any admission thereof; in such case, however, the bank shall state the material facts pertinent to the possible existence of control.

§ 335.353 Incorporation by reference.

(a) Information contained in any part of a registration statement or report, other than exhibits, may be incorporated by reference in answer or partial answer to any item of the same statement or report. Information contained in an exhibit may be so incorporated to the extent permitted in § 335.357.

(b) Any information, other than financial statements, contained in any of the following documents may be incorporated by reference in answer or partial answer to any item of a registration statement or report: (1) A definitive proxy statement filed under section 14(a) of the Act or a definitive information statement filed under section 14(c) of the Act; or (2) a report to security holders.

(c) Any financial statement contained in any document referred to in paragraph (b) of this section or filed with the FDIC may be incorporated by reference in a registration statement or report if such financial statement substantially meets the requirements of the form on which the statement or report is filed. Financial statements or other financial data required to be given in comparative form for two or more fiscal years or periods shall not be incorporated by reference unless the material incorporated by reference includes the entire period for which the comparative data is required to be given.

(d) Copies of any information or financial statement incorporated by reference under paragraph (b) or (c) of this section, or copies of the pertinent pages of the document containing such information or statement, shall be submitted with the statement or report and shall be deemed to be filed with the FDIC for all purposes of the Act.

(e) Matter incorporated by reference shall be clearly identified in the reference by page, paragraph, caption, or otherwise. Where only certain pages of a document are incorporated by reference and filed with the statement or report, the document from which the material is taken shall be clearly identified in the reference. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement or report where the information is required. Matter shall not be incorporated by reference in any case where such incorporation would render the statement or report incomplete, unclear, or confusing.

§ 335.354 Summaries or outlines of documents.

Where an item requires a summary or outline of the provisions of any document, only a brief statement shall be made, in succinct and condensed form, as to the most important provisions. In addition to such statement, the summary or outline may incorporate by reference particular items, sections, or paragraphs of any exhibit and may be qualified in its entirety by such reference. Matter contained in an exhibit may be incorporated by reference in answer to an item only to the extent permitted by this paragraph.

§ 335.355 Omission of substantially identical documents.

In any case where two or more indentures, contracts, franchises, or other documents required to be filed as exhibits are substantially identical in all material respects except as to the parties thereto, the dates of execution, or other details, the bank need file a copy of only one of such documents, with a schedule identifying the documents omitted and setting forth the material details in which such documents differ from the document of which a copy is filed. The FDIC may at any time in its discretion require the filing of copies of documents so omitted.

§ 335.356 Additional exhibits.

The bank may file such exhibits as it may desire, in addition to those required by the appropriate form. Such exhibits shall be so marked as to indicate clearly the subject matters to which they refer.

§ 335.357 Incorporation of exhibits by reference.

(a) Any document or part thereof previously filed with the FDIC under this part may, subject to the following limitations, be incorporated by reference as an exhibit to any registration statement or report filed with the FDIC by the same or any other person. Any document or part thereof filed with an exchange under the Act may be incorporated by reference as an exhibit to any registration statement or report filed with the exchange by the same or any other person.

(b) Any document incorporated by reference under § 335.357 shall be so incorporated only by reference to the specific document and to the prior filing in which it was physically filed, not to another file which incorporates it by reference.

(c) If any modification has occurred in the text of any document incorporated by reference since the filing thereof, the registrant shall file with the reference a statement containing the text of any such modification and the date thereof.

(d) No document which has been on file with the FDIC under this part for a period of more than 10 years may be incorporated by reference. This limitation shall not, however, apply to a corporate charter or bylaws if such document has not been amended more than twice since such filing.

§ 335.358 Notification of inability to timely file all or any required portion of a Form F–2, F–4 or SEC Form 20–F.

(a) If all or any required portion of an annual report on Form F–2 or SEC Form 20–F or a quarterly report on Form F–4 required to be filed pursuant to section 13 of the Act and rules thereunder is not filed within the time period prescribed for such report, the bank, no later than one business day after the due date for such report, shall file a notification with the FDIC which shall contain disclosure of the inability to file the report timely and the reasons therefor in reasonable detail.

(b) With respect to any report or portion of any report described in paragraph (a) of this section which is not timely filed because the bank is unable to do so without unreasonable effort or expense, such report shall be deemed to be filed on the prescribed due date for such report if:

(1) The bank files a notification in compliance with paragraph (a) of this section and, when applicable, furnishes the exhibit required by paragraph (c) of this section;

(2) The bank represents in the notification that:

(i) The reason(s) causing the inability to file timely could not be eliminated by the bank without unreasonable effort or expense; and

(ii) Either the subject annual report/portion thereof will be filed no later than the fifteenth calendar day following the prescribed due date or the subject quarterly report/portion thereof will be filed no later than the fifth calendar day following the prescribed due date; and

(3) The report/portion thereof is actually filed within the period specified by paragraph (b)(2)(ii) of this section.

(c) If paragraph (b) of this section is applicable and the reason the subject report/portion thereof cannot be filed timely without unreasonable effort or expense relates to the inability of any person, other than the bank to furnish

any required opinion, report or certificate, the notification shall have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.

(d) If a notification filed pursuant to paragraph (a) of this section relates only to a portion of a subject report, the bank shall:

(1) File the balance of such report and indicate on the cover page thereof which disclosure items are omitted; and

(2) Include, on the upper right corner of the amendment to the report which includes the previously omitted information, the following statement:

The following items were the subject of a notification under § 335.358 and are included herein: (*List Item Numbers*)

[48 FR 55564, Dec. 14, 1983]

§ 335.359 Number of copies; signatures; binding.

(a) Except where otherwise provided in a particular form, three copies of each registration statement and report (including financial statements) and two copies of each exhibit and each other document filed as part thereof, shall be filed with the FDIC. At least one complete copy of each statement shall be filed with each exchange, if any on which the securities covered thereby are being registered. At least one copy of each report shall be filed with each exchange, if any, on which the bank has securities registered.

(b) At least one copy of each statement or report filed with the FDIC and one copy thereof filed with an exchange shall be manually signed. If the statement or report is typewritten, one of the signed copies filed with the FDIC shall be an original ''ribbon'' copy. Unsigned copies shall be conformed. If the signature of any person is affixed under a power of attorney or other similar authority, a copy of such power or other authority shall also be filed with the statement or report.

(c) Each copy of a statement or report filed with the FDIC or with an exchange shall be bound in one or more parts. Copies filed with the FDIC shall be bound without stiff covers. The statement or report shall be bound on the left side in such a manner as to leave the reading matter legible.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.360 Specifications for paper, printing, and language.

(a) Statements and reports shall be filed on good quality unglazed white paper 8½ x 13 inches in size, insofar as practicable. Tables, charts, maps, and financial statements may, however, be on larger paper if folded to that size.

(b) The statement or report and, insofar as practicable, all papers and documents filed as a part thereof, shall be printed, lithographed, mimeographed, xeroxcopied, or typewritten. The statement or report or any portion thereof may, however, be prepared by any similar process that, in the opinion of the FDIC produces copies suitable for a permanent record. Irrespective of the process used, all copies of any such material shall be clear, easily readable, and suitable for repeated photocopying. Debits in credit categories and credits in debit categories shall be designated so as to be clearly distinguishable as such on photocopies.

(c) The body of all printed statements and reports shall be in roman type at least as large as a 10-point modern type. To the extent necessary for convenient presentation, however, financial statements and other statistical or tabular data and the notes thereto may be in type at least as large as 8-point modern type. All type shall be leaded at least 2 points.

(d) Statements and reports shall be in English. If any exhibit or other paper or document filed with a statement or report is in a foreign language, it shall be accompanied by a translation into English.

§ 335.361 Preparation of statement or report.

Each statement and report shall contain the numbers and captions of all items of the appropriate form, but the text of the items may be omitted provided the answers thereto are so prepared as to indicate to the reader the coverage of the items without the necessity of his referring to the text of the items or instructions thereto.

Where any item requires information to be given in tabular form, however, it shall be given in substantially the tabular form specified in the item. All instructions, whether appearing under the items of the form or elsewhere therein, are to be omitted. Unless expressly provided otherwise, if any item is inapplicable or the answer thereto is in the negative, an appropriate statement to that effect shall be made.

§ 335.362 Riders; inserts.

Riders shall not be used. If the statement or report is typed on a printed form, and the space provided for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and caption and the complete answer are given.

§ 335.363 Amendments.

All amendments shall comply with all pertinent requirements applicable to statements and reports. Amendments shall be filed separately for each separate statement or report amended. Amendments to a statement may be filed either before or after registration becomes effective.

§ 335.364 Title of securities.

Whenever the title of securities is required to be stated, information shall be given that will indicate the type and general character of the securities, including:

(a) In the case of shares, the par or stated value, if any; the rate of dividends, if fixed, and whether cumulative or noncumulative; a brief indication of the preference, if any; and if convertible, a statement to that effect.

(b) In the case of funded debt, the rate of interest; the date of maturity, or if the issue matures serially, a brief indication of the serial maturities, such as ''maturing serially from 1970 to 1980''; if payment of principal or interest is contingent, an appropriate indication of such contingency; a brief indication of the priority of the issue; and if convertible, a statement to that effect.

(c) In the case of any other kind of security, appropriate information of comparable character.

§ 335.365 Interpretation of requirements.

Unless the context clearly shows otherwise:

(a) The forms require information only as to the bank.

(b) Whenever any fixed period of time in the past is indicated, such period shall be computed from the date of filing.

(c) Whenever words relate to the future, they have reference solely to present intention.

(d) Any words indicating the holder of a position or office include persons, by whatever titles designated, whose duties are those ordinarily performed by holders of such positions or offices.

Subpart D—Shareholder Reports

§ 335.401 Requirement of acquisition statements.

(a) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a bank of a class which is registered under section 12 of the Act (except nonvoting securities), is directly or indirectly the beneficial owner of more than five (5) percent of such class shall, within 10 days after such acquisition, send to the bank at its principal office, by registered or certified mail, and to each exchange where the security is traded, and file with the FDIC, a statement containing the information required by Form F–11. Three copies of the statement, including all exhibits, shall be filed with the FDIC.

(b)(1) A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Form F–11 may, in lieu thereof, file with the FDIC, within 45 days after the end of the calendar year in which such person became so obligated, three copies, including all exhibits, of a short form ownership statement on Form F–11A and send one copy each of such form to the bank at its principal office, by registered or certified mail, and to the principal national securities exchange where the security is traded: *Provided,* That it shall not be necessary to file a Form F–11A unless the percentage of the class of equity security beneficially owned as of the end of the calendar

year is more than five (5) percent: *And provided further,* That

(i) Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the bank, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 335.403(b);

(ii) Such person is:

(A) A broker or dealer registered under section 15 of the Act;

(B) A bank as defined in section 3(a)(6) of the Act;

(C) An insurance company as defined in section 3(a)(19) of the Act;

(D) An investment company registered under section 8 of the Investment Company Act of 1940;

(E) An investment adviser registered under section 203 of the Investment Advisers Act of 1940;

(F) An employee benefit plan, or pension fund which is subject to the provisions of the Employee Retirement Income Security Act of 1974 (''ERISA'') or an endowment fund;

(G) A parent holding company: *Provided,* The aggregate amount held directly by the parent, and directly and indirectly by its subsidiaries which are not persons specified in paragraphs (b)(1)(ii) (A) through (G) of this section, does not exceed one percent of the securities of the subject class;

(H) A group, provided that all the members are persons specified in paragraphs (b)(1)(ii) (A) through (G) of this section; and

(iii) Such person has promptly notified any other person (or group within the meaning of section 13(d)(3) of the Act) on whose behalf it holds, on a discretionary basis, securities exceeding five percent of the class, of any acquisition or transaction on behalf of such other person which might be reportable by the person under section 13(d) of the Act. This paragraph only requires notice to the account owner of information which the filing person reasonably should be expected to know and which would advise the account owner of an obligation he may have to file a statement under section 13(d) of the Act or an amendment thereto.

(2) Any person relying on paragraph (b)(1) of this section and § 335.402(b) shall, in addition to filing any statement required thereunder, file a statement on Form F–11A within ten days after the end of the first month in which such person's direct or indirect beneficial ownership exceeds ten percent of a class of equity securities specified in paragraph (a) of this section computed as of the last day of the month, and thereafter within ten days after the end of any month in which such person's beneficial ownership of securities of such class, computed as of the last day of the month, increased or decreased by more than five percent of such class of equity securities. Three copies of such statement, including all exhibits, shall be filed with the FDIC and one each sent, by registered or certified mail, to the bank at its principal office and to the principal national securities exchange where the security is traded. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by paragraph (b)(2) of this section unless the person thereafter becomes the beneficial owner of more than ten percent of the class and is required to file pursuant to this provision.

(3)(i) Notwithstanding paragraphs (b)(1) and (2) of this section and § 335.402(b), a person shall immediately become subject to paragraph (a) of this section and § 335.402(a) and shall promptly, but not more than 10 days later, file a statement on Form F–11 if such person:

(A) Has reported that the person is the beneficial owner of more than five percent of a class of equity securities in a statement on Form F–11A pursuant to paragraph (b)(1) or (b)(2) of this section, or is required to report such acquisition but has not yet filed the form;

(B) Determines that the person no longer has acquired or hold such securities in the ordinary course of business or not with the purpose nor with the effect of changing or influencing the control of the bank, nor in connection with or as a participant in any

transaction having such purpose or effect, including any transaction subject to § 335.403(b); and

(C) Is at that time the beneficial owner of more than five percent of a class of equity securities described in paragraph (a) of this section.

(ii) For the ten-day period immediately following the date of the filing of a Form F–11 under paragraph (b)(3) of this section, such person shall not:

(A) Vote or direct the voting of the securities described in paragraph (b)(3)(i)(A) of this section; nor,

(B) Acquire an additional beneficial ownership interest in any equity securities of the bank, nor of any person controlling the bank.

(4) Any person who has reported an acquisition of securities in a statement of Form F–11A under paragraph (b)(1) or (b)(2) of this section and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section shall immediately become subject to paragraph (a) of this section and § 335.402(a) and shall file, within ten days thereafter, a statement on Form F–11 in the event such person is a beneficial owner at that time of more than five percent of the class of equity securities.

(c) Any person who, as of December 31, 1979, or as of the end of any calendar year thereafter, is directly or indirectly the beneficial owner of more than five percent of any equity security of a class specified in paragraph (d) of this section and who is not required to file a statement under paragraph (a) of this section by virtue of the exemption provided by section 13(d)(6)(A) or (B) of the Act, or because such beneficial ownership was acquired prior to December 22, 1970, or because such person otherwise (except for the exemption provided by section 13(d)(6)(C) of the Act) is not required to file such statement, shall, within 45 days after the end of the calendar year in which such person became obligated to report under this paragraph, send to the bank at its principal office, by registered or certified mail, and file with the FDIC, a statement containing the information required by Form F–11A. Three copies of the statement, including all exhibits, shall be filed with the FDIC.

(d) For the purposes of section 13(d) and 13(g), any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the bank's most recent quarterly or annual report, and any current report subsequent thereto, filed with the FDIC pursuant to the Act, unless the person knows or has reason to believe that the information contained therein is inaccurate.

(e)(1) Whenever two or more persons are required to file a statement containing the information required by Form F–11 or Form F–11A with respect to the same securities, only one statement need be filed; *Provided*, That:

(i) Each person on whose behalf the statement is filed is individually eligible to use the form on which the information is filed;

(ii) Each person on whose behalf the statement is filed is responsible for the timely filing of such statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing, unless such person knows or has reason to believe that such information is inaccurate; and

(iii) Such statement identifies all such persons, contains the required information with regard to each such person, indicates that such statement is filed on behalf of all such persons, and includes, as an exhibit, their agreement in writing that such statement is filed on behalf of each of them.

(2) A group's filing obligation may be satisfied either by a single joint filing or by each of the group's members making an individual filing. If the group's members elect to make their own filings, each filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing person knows or has reason to know.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989; 57 FR 58136, Dec, 9, 1992]

§ 335.402 Amendments to acquisition statements.

(a) Form F–11—If any material change occurs in the facts set forth in the statement required by § 335.401(a) including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file such statement shall promptly file or cause to be filed with the FDIC and send or cause to be sent to the bank at its principal office, by registered or certified mail, and to each exchange on which the security is traded, an amendment disclosing such change. An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed ''material'' for purposes of this section; acquisitions or dispositions of less than such amounts may be material, depending upon the facts and circumstances. Three copies of each amendment shall be filed with the FDIC.

(b) Form F–11A—Notwithstanding paragraph (a) of this section and provided that the person or persons filing a statement under § 335.401(b) continue to meet the requirements set forth therein, any person who has filed a short form statement on Form F–11A shall amend such statement within 45 days after the end of each calendar year to reflect, as of the end of the calendar year, any changes in the information reported in the previous filing on that form. Three copies of the amendment, including all exhibits, shall be filed with the FDIC and one each sent, by registered or certified mail, to the bank at its principal office and to the principal national securities exchange where the security is traded. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required unless the person thereafter becomes the beneficial owner of more than five percent of the class and is required to file under § 335.401.

NOTE: For persons filing a short form statement pursuant to § 335.401(b), see also § 335.401(b) (2), (3), and (4).

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.403 Determination of beneficial owner.

(a) For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

(1) *Voting power* which includes the power to vote, or to direct the voting of, such security; and/or

(2) *Investment power* which includes the power to dispose, or to direct the disposition, of such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the requirements of section 13(d) or 13(g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

(c) All securities of the same class beneficially owned by a person, regardless of the form which such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

(d) Notwithstanding the provisions of other paragraphs of this section:

(1)(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this section, if that person has the right to acquire beneficial ownership of such security, as defined in paragraph (a) of this section at any time within sixty days including but not limited to any right to acquire:

(A) Through the exercise of any option, warrant or right;

(B) Through the conversion of a security;

(C) Pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or

(D) Pursuant to the automatic termination of a trust, discretionary account or similar arrangement;

Provided, however, any person who acquires a security or power specified in paragraph (d)(1)(i) (A), (B), or (C) of this section, with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the beneficial owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person, but shall not be deemed to be outstanding for the purposes of computing the percentage of the class by any other person.

(ii) Paragraph (d)(1)(i) of this section remains applicable for the purpose of determining the obligation to file with respect to the underlying security even though the option, warrant, right or convertible security is of a class of equity security and may therefore give rise to a separate obligation to file.

(2) A member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, under the rules of such exchange, may direct the vote of such securities, without instruction, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted, but is otherwise precluded by the rules of such exchange from voting without instruction.

(3) A person who in the ordinary course of business is a pledgee of securities under a written pledge agreement shall not be deemed to be the beneficial owner of such pledged securities until the pledgee has taken all formal steps necessary which are required to declare a default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised, *Provided*, That:

(i) The pledgee agreement is bona fide and was not entered into with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with any transaction having such purpose or effect, including any transaction subject to paragraph (b) of this section;

(ii) The pledgee is a person specified in § 335.401(b)(1)(ii), including persons meeting the conditions set forth in § 335.401(b)(1)(ii)(G); and

(iii) The pledgee agreement, prior to default, does not grant to the pledgee:

(A) The power to vote or to direct the vote of the pledged securities; or

(B) The power to dispose or direct the disposition of the pledged securities, other than the grant of such power(s) pursuant to a pledge agreement under which credit is extended subject to Regulation T (12 CFR 220.1 to 220.8) and in which the pledgee is a broker or dealer registered under section 15 of the Act.

§ 335.404 Disclaimer of beneficial ownership.

Any person may expressly declare in any statement filed that the filing of such statement shall not be construed as an admission that such person is, for the purposes of sections 13(d) or 13(g) of the Act, the beneficial owner of any securities covered by the statement.

§ 335.405 Acquisition of securities.

(a) A person who becomes a beneficial owner of securities shall be deemed to have acquired such securities for purposes of section 13(d)(1) of the Act, whether such acquisition was through purchase or otherwise. However, executors or administrators of a decedent's estate generally will be presumed not to have acquired beneficial ownership of the securities in the decedent's estate until such time as the executors or administrators are qualified under local law to perform their duties.

(b)(1) When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of a bank, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and 13(g)

of the Act, as of the date of such agreement, of all equity securities of that bank beneficially owned by any such person.

(2) Notwithstanding the previous paragraph, a group shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group solely by virtue of their concerted actions relating to the purchase of equity securities directly from a bank in a transaction not involving a public offering: *Provided*, That: (i) All the members of the group are persons specified in § 335.401(b)(1)(ii);

(ii) The purchase is in the ordinary course of each member's business and not with the purpose nor with the effect of changing or influencing control of the bank, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 335.403(b);

(iii) There is no agreement among, or between any members of the group to act together with respect to the bank or its securities except for the purpose of facilitating the specific purpose involved; and

(iv) The only actions among or between any members of the group with respect to the bank or its securities subsequent to the closing date of the non-public offering are those which are necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities.

§ 335.406 Exemption of certain acquisitions.

The acquisition of securities of a bank by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the outstanding securities of the same class as those acquired shall be exempt from section 13(d) of the Act: *Provided*, That:

(a) The acquisition is made pursuant to preemptive subscription rights in an offering made to all holders of securities of the class to which the preemptive subscription rights pertain;

(b) Such person does not acquire additional securities except through the exercise of the person's pro rata share of the preemptive subscription rights; and

(c) The acquisition is duly reported, if required, under section 16(a) of the Act and the rules and regulations thereunder.

§ 335.407 Acquisition statement to be filed under section 13(d) of the Securities Exchange Act of 1934 (Form F–11).

Federal Deposit Insurance Corporation
Washington, DC 20429

FORM F–11—ACQUISITION STATEMENT UNDER SECTION 13(d) OF THE SECURITIES EXCHANGE ACT OF 1934

(Amendment No. ———)

(Name and address of issuing bank)

(Title of class of securities)
(CUSIP Number) ———

(Name, address and telephone number of person authorized to receive notices and communications)
(Date of event which requires filing of this statement)

If the filing person has previously filed a statement on Form F–11A to report the acquisition which is the subject of this Form F–11, and is filing this form because of § 335.401(b) (3) or (4), check the following box [ ].

(Continuing on following pages)
Page 1 of ——— pages

NOTE: Three copies of this form including all exhibits, should be filed with the FDIC.

See § 335.401(a) for other parties to whom copies are to be sent.

Special Instructions for Complying With Form F–11

Under sections 13(d) and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the FDIC is authorized to solicit the information required to be supplied by this form by certain security holders of certain banks.

Disclosure of the information specified in this form is mandatory, except for Social Security or IRS identification numbers, disclosure of which is voluntary. The information will be used for the primary purpose of determining and disclosing the holdings of certain beneficial owners of certain equity securities. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the FDIC can utilize it for a variety

of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statements or provisions. Social Security or IRS identification numbers, if furnished, will assist the FDIC in identifying security holders and, therefore, in promptly processing statements of beneficial ownership of securities.

Failure to disclose the information requested by this form, except for Social Security or I.R.S. identification numbers, may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules promulgated thereunder.

General Instructions

A. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render an answer misleading, incomplete, unclear or confusing. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required. A copy of any information or a copy of pertinent pages of a document containing information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be considered filed with the FDIC for purposes of the Act.

C. If the statement is filed by a general or limited partnership, syndicate, or other group, the information called for by items 2–6, inclusive, shall be given with respect to:

(i) Each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such partner or member. If the statement is filed by a corporation or if a person referred to in paragraphs (i), (ii), (iii) or (iv) of this instruction is a corporation, the information called for by the above mentioned items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation. Executive officer shall mean the president, secretary, treasurer, and any vice president in charge of a principal business function (such as sales, administration or finance) and any other person who performs or has the power to perform similar policy making functions for the corporation.

Item 1—Security and Bank

State the title of the class of equity securities to which this statement relates and the name and address of the principal office of the bank.

Item 2—Identity and Background

If the person filing this statement or any person enumerated in Instruction C of this statement is a corporation, general partnership, limited partnership, syndicate or other group of persons, state its name, the state or other place of its organization, its principal business, the address of its principal office and the information required by (d) and (e) of this item. If the person filing this statement or any person enumerated in instruction C is a natural person, provide the information specified in (a) through (f) of this Item with respect to such person(s).

(a) Name;

(b) Residence or business address;

(c) Present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is conducted;

(d) Whether or not, during the last five years, such person has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give the dates, nature of conviction, name and location of court, any penalty imposed, or other disposition of the case;

(e) Whether or not, during the last five years, such person was a party to a civil proceeding of a judicial or administrative body of competent jurisdiction and as a result of such proceeding was or is subject to a judgment, decree or final order enjoining future violations of, or prohibiting or mandating activities subject to, Federal or State securities laws or finding any violation with respect to such laws; and, if so, identify and describe such proceedings and summarize the terms of such judgment, decree or final order; and

(f) Citizenship.

Item 3—Source and Amount of Funds or Other Consideration

State the source and the amount of funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is or will be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading or voting the securities, a description of the transaction and the

names of the parties thereto. Where material, such information should also be provided with respect to prior acquisitions not previously reported pursuant to this regulation. If the source of all or any part of the funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of the Act, the name of the bank shall not be made available to the public if the person at the time of filing the statement so requests in writing and files such request, naming such bank, with the FDIC. If the securities were acquired other than by purchase, describe the method of acquisition.

Item 4—Purpose of Transaction

State the purpose or purposes of the acquisition of securities of the bank. Describe any plans or proposals which the reporting persons may have which related or would result in:

(a) The acquisition by any person of additional securities of the bank, or the disposition of securities of the bank;

(b) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the bank or any of its subsidiaries;

(c) A sale or transfer of a material amount of assets of the bank or of any of its subsidiaries;

(d) Any change in the present board of directors or management of the bank, including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board;

(e) Any material change in the present capitalization or dividend policy of the bank;

(f) Any other material change in the bank's business or corporate structure;

(g) Changes in the bank's charter, bylaws or instruments corresponding thereto or other actions which may impede the acquisition of control of the bank by any person;

(h) Causing a class of securities of the bank to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association;

(i) A class of equity securities of the bank becoming eligible for termination of registration under section 12(g)(4) of the Act; or

(j) Any action similar to any of those enumerated above.

Item 5—Interest in Securities of the Bank

(a) State the aggregate number and percentage of the class of securities identified pursuant to item 1 (which may be based on the number of securities outstanding as contained in the most recently available filing with the FDIC by the bank unless the filing person has reason to believe such information is not current) beneficially owned (identifying those shares which there is a right to acquire) by each person named in item 2. The above mentioned information should also be furnished with respect to persons who, together with any of the persons named in item 2, comprise a group within the meaning of section 13(d)(3) of the Act.

(b) For each person named in response to paragraph (a), indicate the number of shares as to which there is sole power to vote or to direct the vote, shared power to vote or to direct the vote, sole power to dispose or to direct the disposition, or shared power to dispose or to direct the disposition. Provide the applicable information required by item 2 with respect to each person with whom the power to vote or to direct the vote or to dispose or direct the disposition is shared.

(c) Describe any transactions in the class of securities reported on that were effected during the past sixty days or since the most recent filing on Form F–11, whichever is less, by the persons named in response to paragraph (a).

Instruction

The description of a transaction required by item 5(c) shall include, but not necessarily be limited to, (1) the identity of the person covered by item 5(c) who effected the transaction, (2) the date of the transaction, (3) the amount of securities involved, (4) the price per share or unit, and (5) where and how the transaction was effected.

(d) If any other person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities, a statement to that effect should be included in response to this item and, if such interest relates to more than five percent of the class, such person should be identified. A listing of the shareholders of an investment company registered under the Investment Company Act of 1940 or the beneficiaries of an employee benefit plan, pension fund or endowment fund is not required.

(e) If applicable, state the date on which the reporting person ceased to be the beneficial owner of more than five percent of the class of securities.

Instruction

For computations regarding securities which represent a right to acquire an underlying security, see § 335.403(d)(1).

Item 6—Contracts, Arrangements, Understandings or Relationships with Respect to Securities of the Bank

Describe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in item 2 and between such persons and any person with respect to any securities of the bank, including but not limited to transfer or voting of

any of the securities, finder's fees, joint ventures, loan or option arrangements, puts or calls, guarantees of profits, division of profits or losses, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

Item 7—Material to be Filed as Exhibits

The following shall be filed as exhibits: Copies of written agreements relating to the filing of joint acquisition statements as required by § 335.401(e) and copies of all written agreements, contracts, arrangements, understandings, plans, or proposals relating to: (1) The borrowing of funds to finance the acquisition as disclosed in item 3; (2) the acquisition of bank control, liquidation, sale of assets, merger, or change in business or corporate structure, or any other matter as disclosed in item 4; and (3) the transfer or voting of the securities, finder's fees, joint ventures, options, puts, calls, guarantees of loans, guarantees against loss or of profit, or the giving or withholding of any proxy as disclosed in item 6.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete, and correct.

Date———

Signature————————

Name/Title————————

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative (other than an executive officer or general partner of the filing person), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement, provided, however, that a power of attorney for this purpose which is already on file with the FDIC may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath the person's signature.

Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (See 18 U.S.C. 1001).

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.408 Short form acquisition/ownership statement to be filed under section 13(d) or section 13(g) of the Securities Exchange Act of 1934 (Form F–11A).

Federal Deposit Insurance Corporation
Washington, DC 20429

FORM F–11A—SHORT FORM ACQUISITION/OWNERSHIP STATEMENT UNDER SECTION 13 (d) OR (g) OF THE SECURITIES EXCHANGE ACT OF 1934

(Amendment No. ———)

———————————————————————

(Name and address of issuing bank)

———————————————————————

(Title of class of securities)

———————————————————————

(CUSIP Number) ———

(Continued on following pages)

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Special Instructions for Complying With Form F–11A

Under sections 13(d), 13(g) and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the FDIC is authorized to solicit the information required to be supplied by this schedule by certain security holders of certain banks.

Disclosure of the information specified in this schedule is mandatory, except for Social Security or IRS identification numbers, disclosure of which is voluntary. The information will be used for the primary purpose of determining and disclosing the holdings of certain beneficial owners of certain equity securities. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the FDIC can utilize it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions. Social Security or IRS identification numbers, if furnished, will assist the FDIC in identifying security holders and, therefore, in promptly processing statements of beneficial ownership of securities.

Failure to disclose the information requested by this schedule, except for Social Security or IRS identification numbers, may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules promulgated thereunder.

General Instructions

A. Statements containing the information required by this form shall be filed not later than February 14 following the calendar year covered by the statement or within the time specified in § 335.401(b)(2), if applicable.

B. Information contained in a form which is required to be filed by the Securities and Exchange Commission's rules under section 13(f) of the Act (15 U.S.C. 78m(f)) for the same calendar year as that covered by a statement on this form may be incorporated by reference in response to any of the items of this form. If such information is incorporated by reference in this form, copies of the relevant pages of such form shall be filed as an exhibit to this form.

C. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

Item 1(a)—Name of the Bank Issuer:

Item 1(b)—Address of Bank's Principal Executive Offices:

Item 2(a)—Name of Person Filing:

Item 2(b)—Address of Principal Business Office, or if None, Residence:

Item 2(c)—Citizenship:

Item 2(d)—Title of Class of Securities:

Item 2(e)—CUSIP Number:

Item 3—If this statement is filed under § 335.401(b), or § 335.402(b), check whether the person filing is a:

(a) [ ] Broker or Dealer registered under section 15 of the Act

(b) [ ] Bank as defined in section 3(a)(6) of the Act

(c) [ ] Insurance Company as defined in section 3(a)(19) of the Act

(d) [ ] Investment Company registered under section 8 of the Investment Company Act

(e) [ ] Investment Adviser registered under section 203 of the Investment Advisers Act of 1940

(f) [ ] Employee Benefit Plan, Pension Fund which is subject to the provisions of the Employee Retirement Income Security Act of 1974 or Endowment Fund; see § 335.401(b)(1)(ii)(F).

(g) [ ] Parent Holding Company, in accordance with § 335.401(b)(1)(ii)(G), (Note: See item 7)

(h) [ ] Group, in accordance with § 335.401(b)(1)(ii)(H).

Item 4—Ownership.

If the percent of the class owned, as of December 31 of the year covered by the statement, or as of the last day of any month described in § 335.401(b)(2), if applicable, exceeds five percent, provide the following information as of that date and identify those shares which there is a right to acquire.

(a) Amount Beneficially Owned:

(b) Percent of Class:

(c) Number of shares as to which such person has:

(i) sole power to vote or to direct the vote....

(ii) shared power to vote or to direct the vote....

(iii) sole power to dispose or to direct the disposition of....

(iv) shared power to dispose or to direct the disposition of....

Instruction: For computations regarding securities which represent a right to acquire an underlying security see § 335.403(d)(1).

Item 5—Ownership of Five Percent or Less of a Class.

If this statement is being filed to report the fact that as of the date hereof the reporting person has ceased to be the beneficial owner of more than five percent of the class of securities, check the following [ ].

Instruction: Dissolution of a group requires a response to this item.

Item 6—Ownership of More Than Five Percent on Behalf of Another Person.

If any other person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities, a statement of that effect should be included in response to this item and, if such interest relates to more than five percent of the class, such person should be identified. A listing of the shareholders of an investment company registered under the Investment Company Act of 1940 or the beneficiaries of an employee benefit plan, pension fund or endowment fund is not required.

Item 7—Identification and Classification of the Subsidiary Which Acquired the Security Being Reported on by the Parent Holding Company.

If a parent holding company has filed this schedule, under § 335.401(b)(1)(ii)(G) so indicate under item 3(g) and attach an exhibit

stating the identity and the item 3 classification of the relevant subsidiary. If a parent holding company has filed this schedule under § 335.401(c) attach an exhibit stating the identification of the relevant subsidiary.

Item 8—Identification and Classification of Members of the Group.

If a group has filed this schedule, under § 335.401(b)(1)(ii)(H), so indicate under item 3(h) and attach an exhibit stating the identity and item 3 classification of each member of the group. If a group has filed this schedule under § 335.401(c) attach an exhibit stating the identity of each member of the group.

Item 9—Notice of Dissolution of Group.

Notice of dissolution of a group may be furnished as an exhibit stating the date of the dissolution and that all further filings with respect to transactions in the security reported on will be filed, if required, by members of the group, in their individual capacity. See item 5.

Item 10—Certification.

The following certification shall be included if the statement is filed under § 335.401(b).

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were acquired in the ordinary course of business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transactions having such purpose or effect.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete, and correct.

Date

_____

Signature

_____

Name/Title

The original statement shall be signed by each person on whose behalf the statement is filed or the person's authorized representative. If the statement is signed on behalf of a person by the person's authorized representative (other than an executive officer or general partner of the filing person), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement, *Provided, however,* That a power of attorney for this purpose which is already on file with the FDIC may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath the person's signature.

NOTE: Three copies of this statement, including all exhibits, should be filed with the FDIC.

Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (See 18 U.S.C. 1001).

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.409 Going private transactions by a bank or its affiliates.

A bank or its affiliates (as defined in 17 CFR 240.13e–3) shall not engage in a Rule 13e–3 transaction (as defined in 17 CFR 240.13e–3) unless it meets the requirements of 17 CFR 240.13e–3, except that all filings shall be made with the FDIC and be titled with the name of the FDIC instead of the Securities and Exchange Commission.

[54 FR 53592, Dec. 29, 1989]

§ 335.410 Requirements of section 16 of the Act.

Persons subject to section 16 of the Act with respect to securities registered under part 335 shall follow the applicable and currently effective SEC regulations issued under section 16 of the Act (17 CFR 240.16a–1 through 240.16e–1), except that:

(a) The forms required by §§ 335.420 (Form F–7), 335.421 (Form F–8), and 335.422 (Form F–8A) of this part 335 shall be used in lieu of SEC Form 3, Form 4, or Form 5; and

(b) Any SEC regulations specified in § 335.411, as superseded by the FDIC, shall not be followed and any other rules adopted and published in § 335.411 in lieu of those superseded regulations shall be followed.

[57 FR 4702, Feb. 7, 1992]

§ 335.411 Superseded SEC regulations and FDIC substituted regulations.

The following is a list of SEC regulations superseded by the FDIC: None.

[57 FR 4702, Feb. 7, 1992]

§ 335.420 Initial statement of beneficial ownership of securities (Form F–7).

(a) This form shall be filed in lieu of SEC Form 3 pursuant to SEC rule 16a–

3 (17 CFR 240.16a–3) for initial statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78p and 78w) and the rules and requlations thereunder. (SEC rules referenced in this form appear at 17 CFR 240.16a–1 through 240.16e–1.)

(b) Disclosure of information specified on this form is mandatory, except for disclosure of IRS (Tax Identification) or Social Security Numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the FDIC in distinguishing reporting persons with similar names and wiIl facilitate the prompt processing of the form. The information will be used for the primary purpose of disclosing the holdings of directors, officers and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The FDIC can use the information in investigations or litigation involving the Federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the Federal securities laws and rules.

(c) Copies of this form and the instructions thereto can be obtained from the Registration and Disclosure Section, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

[57 FR 4703, Feb. 7, 1992]

§ 335.421 Statement of changes in beneficial ownership of securities (Form F–8).

(a) This form shall be filed pursuant to SEC rule 16a–3 (17 CFR 240.16a–3) for statements of changes in beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78p and 78w) and the rules and regulations thereunder. (SEC rules referenced in this form appear at 17 CFR 240.16a–1 through 16e–1).

(b) Disclosure of information specified on this form is mandatory, except for disclosure of IRS (Tax Identification) or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will assist the FDIC in distinguishing reporting persons with similar names and will facilitate the prompt processing of the form. The information will be used for the primary purpose of disclosing the transactions and holdings of directors, officers and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The FDIC can use the information in investigations or litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the federal securities laws and rules.

(c) Copies of this form and the instructions thereto can be obtained from the Registration and Disclosure Section, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington DC 20429.

[57 FR 4703, Feb. 7, 1992]

§ 335.422 Annual statement of beneficial ownership of securities (Form F–8A).

(a) This form shall be filed pursuant to SEC rule 16a–3 (17 CFR 240.16a–3) for annual statements of beneficial ownership of securities. The FDIC is authorized to solicit the information required by this form pursuant to sections 16(a) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78p and 78w), and the rules and regulations thereunder. (SEC rules referenced in this form appear at 17 CFR 16a–1 through 16e–1.)

(b) Disclosure of information specified on this form is mandatory, except for disclosure of IRS (Tax Identification) or Social Security numbers of the reporting person, which is voluntary. If such numbers are furnished, they will

assist the FDIC in distinguishing reporting persons with similar names and will facilitate the prompt processing of the form. The information will be used for the primary purpose of disclosing the transactions and holdings of officers, directors and beneficial owners of registered companies. Information disclosed will be a matter of public record and available for inspection by members of the public. The FDIC can use the information in investigations or litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions, as well as for referral to other governmental authorities and self-regulatory organizations. Failure to disclose required information may result in civil or criminal action against persons involved for violations of the federal securities laws and rules.

(c) Copies of this form and the instructions thereto can be obtained from the Registration and Disclosure Section, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

[57 FR 4703, Feb. 7, 1992]

Subpart E—Tender Offers

§ 335.501 Scope and definitions applicable to subpart E (the "tender offer regulations").

(a) *Scope.* Subpart E (the *tender offer regulations*) shall apply to any tender offer which is subject to section 14(d)(1) of the Act, including, but not limited to, any tender offer for securities of a class described in that section which is made by an affiliate of the bank issuer of such class.

(b) *Definitions.* Unless the context otherwise requires, all terms used in the tender offer regulations have the same meaning as in the Act and in § 335.102. In addition, for purposes of section 14(d) of the Act and the tender offer regulations, the following definitions apply:

(1) The term *bidder* means any person who makes a tender offer or on whose behalf a tender offer is made: *Provided, however,* That the term does not include a bank which makes a tender offer for securities of any class of which it is the issuer.

(2) The term *subject bank* means any issuer of securities which are sought by a bidder pursuant to a tender offer.

(3) The term *security holders* means holders of record and beneficial owners of securities which are the subject of a tender offer.

(4) The term *beneficial owner* shall have the same meaning as that set forth in § 335.403: *Provided, however,* That, except with respect to §§ 335.503 and 335.509(d) and item 6 of Form F–13, the term shall not include a person who does not have or share investment power or who is deemed to be a beneficial owner by virtue of § 335.403(d)(1).

(5) The term *tender offer material* means:

(i) The bidder's formal offer, including all the material terms and conditions of the tender offer and all amendments thereto;

(ii) The related transmittal letter (whereby securities of the subject bank which are sought in the tender offer may be transmitted to the bidder or its depositary) and all amendments thereto; and

(iii) Press releases, advertisements, letters and other documents published by the bidder or sent or given by the bidder to security holders which, directly or indirectly, solicit, invite or request tenders of the securities being sought in the tender offer.

(6) The term *executive officer* means the president, secretary, treasurer, any vice president in charge of a principal business function (such as sales, administration or finance) or any other person who performs similar policy making functions for a corporation.

(7) The term *business day* means any day, other than Saturday, Sunday or a Federal holiday, and shall consist of the time period from 12:01 a.m. through 12:00 midnight Eastern time. In computing any time period under section 14(d)(5) or section 14(d)(6) of the Act or under these tender offer regulations the date of the event which begins the running of such time period shall be included *except that* if such event occurs on other than a business day such period shall begin to run on and shall include the first business day thereafter.

(8) The term *security position listing* means, with respect to securities of any issuer held by a registered clearing

agency in the name of the clearing agency or its nominee, a list of those participants in the clearing agency on whose behalf the clearing agency holds the issuer's securities and of the participants' respective positions in such securities as of a specified date.

§335.502 Date of commencement of a tender offer.

(a) *Commencement.* A tender offer shall commence for the purposes of section 14(d) of the Act and the rules promulgated thereunder at 12:01 a.m. on the date when the first of the following events occurs:

(1) The long form publication of the tender offer is first published by the bidder under §335.504(a)(1);

(2) The summary advertisement of the tender offer is first published by the bidder under §335.504(a)(2);

(3) The summary advertisement or the long form publication of the tender offer is first published by the bidder under §335.504(a)(3);

(4) Definitive copies of a tender offer, in which the consideration offered by the bidder consists of securities registered under the Securities Act of 1933 (15 U.S.C. 77), are first published or sent or given by the bidder to security holders; or

(5) The tender offer is first published or sent or given to security holders by the bidder by any means not otherwise referred to in paragraphs (a) (1) through (4) of this section.

(b) *Public announcement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77) shall be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section *except that* such tender offer shall not be deemed to be first published or sent or given to security holders by the bidder under paragraph (a)(5) of this section on the date of such public announcement if within five business days of such public announcement, the bidder either:

(1) Makes a subsequent public announcement stating that the bidder has determined not to continue with such tender offer, in which event paragraph (a)(5) of this section shall not apply to the initial public announcement; or

(2) Complies with §335.503(a) and contemporaneously disseminates the disclosure required by §335.506 to security holders under §335.504 or otherwise in which event:

(i) The date of commencement of such tender offer under paragraph (a) of this section will be determined by the date on which information required by §335.506 is first published or sent or given to security holders under §335.504 or otherwise; and

(ii) Notwithstanding the preceding paragraph, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

(c) *Information.* The information referred to in paragraph (b) of this section is as follows:

(1) The identity of the bidder;

(2) The identity of the subject bank; and

(3) The amount and class of securities being sought and the price or range of prices being offered therefor.

(d) *Announcements not resulting in commencement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which only discloses the information in paragraphs (d) (1) through (3) of this section concerning a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77) shall not be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section.

(1) The identity of the bidder;

(2) The identity of the subject bank; and

(3) A statement that the bidder intends to make a tender offer in the future for a class of equity securities of the subject bank which statement does not specify the amount of securities of such class to be sought or the consideration to be offered therefor.

(e) *Announcement made under SEC Rule 135.* A public announcement by a

bidder through a press release, newspaper advertisement or public statement which discloses only the information in SEC Rule 135(a)(4) (17 CFR 230.135(a)(4)) concerning a tender offer in which the consideration consists solely or in part of securities to be registered under the Securities Act of 1933 (15 U.S.C. 77) shall not be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section: *Provided* That such bidder files a registration statement with the SEC concerning the securities promptly after the public announcement.

§ 335.503 Filing and transmission of tender offer statement.

(a) *Filing and transmittal.* No bidder shall make a tender offer if, after consummation thereof, such bidder would be the beneficial owner of more than 5 percent of the class of the subject bank's securities for which the tender offer is made, unless as soon as practicable on the date of the commencement of the tender offer the bidder:

(1) Files with the FDIC three copies of a Tender Offer Statement on Form F–13 (§ 335.512), including all exhibits thereto;

(2) Hand delivers a copy of such Form F–13, including all exhibits thereto:

(i) To the subject bank at its principal executive office; and

(ii) To any other bidder, which has filed a Form F–13 with the FDIC relating to a tender offer which has not yet terminated for the same class of securities of the subject bank, at such bidder's principal executive office or at the address of the person authorized to receive notices and communications (which is disclosed on the cover sheet of such other bidder's Form F–13);

(3) Gives telephonic notice of the information required by § 335.506(e)(2) (i) and (ii) and mails by means of first class mail a copy of such Form F–13, including all exhibits thereto:

(i) To each national securities exchange where such class of the subject bank's securities is registered and listed for trading (which may be based upon information contained in the subject bank's most recent Annual Report on Form F–2 (§ 335.312) filed with the FDIC unless the bidder has reason to believe that such information is not current) which telephonic notice shall be made when practicable prior to the opening of such exchange; and

(ii) To the National Association of Securities Dealers, Inc. (*NASD*) if such class of the subject bank's securities is authorized for quotation in the NASDAQ interdealer quotation system.

(b) *Additional materials.* The bidder shall file with the FDIC three copies of any additional tender offer materials as an exhibit to the Form F–13 required by this section, and if a material change occurs in the information set forth in such Form F–13, six copies of an amendment to Form F–13 (each of which shall include all exhibits other than those required by item 11(a) of Form F–13) disclosing such change and shall send a copy of such additional tender offer material or such amendment to the subject bank and to any exchange and/or the NASD, as required by paragraph (a) of this section, promptly but not later than the date such additional tender offer material or such change is first published, sent or given to security holders.

(c) *Certain announcements.* Notwithstanding paragraph (b) of this section, if the additional tender offer material or an amendment to Form F–13 discloses only the number of shares deposited to date, and/or announces an extension of the time during which shares may be tendered, then the bidder may file such tender offer material or amendment and send a copy of such tender offer material or amendment to the subject bank, any exchange and/or the NASD, as required by paragraph (a) of this section, promptly after the date such tender offer material is first published or sent or given to security holders.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.504 Dissemination of certain tender offers.

(a) *Materials deemed published or sent or given.* A tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77) shall be deemed ''published or sent or given to security holders'' within the meaning

of section 14(d)(1) of the act if the bidder complies with all of the requirements of any one of the following subparagraphs: *Provided, however,* That any such tender offers may be published or sent or given to security holders by other methods, but with respect to summary publication, and the use of stockholder lists and security position listings under § 335.505, only paragraphs (a) (2) and (3) of this section can be followed.

(1) *Long-form publication.* The bidder makes adequate publication in a newspaper or newspapers of long-form publication of the tender offer.

(2) *Summary publication.* (i) The bidder makes adequate publication in a newspaper or newspapers of a summary advertisement of the tender offer; and

(ii) Mails by first-class mail or otherwise furnishes with reasonable promptness the bidder's tender offer materials to any security holder who requests such tender offer materials in response to the summary advertisement or otherwise.

(3) *Use of stockholder lists and security position listings.* Any bidder using stockholder lists and security position listings under § 335.505 shall comply with paragraph (a)(1) or (2) of this section on or prior to the date of the bidder's request for such lists or listing under § 335.505(a).

(b) *Adequate publication.* Depending on the facts and circumstances involved, adequate publication of a tender offer under this section may require publication in a newspaper with a national circulation or may only require publication in a newspaper with metropolitan or regional circulation or may require publication in a combination thereof: *Provided, however,* That publication in all editions of a daily newspaper with a national circulation shall be deemed to constitute adequate publication.

(c) *Publication of changes.* If a tender offer has been published or sent or given to security holders by one or more of the methods enumerated in paragraph (a) of this section, a material change in the information published, sent or given to security holders shall be promptly disseminated to security holders in a manner reasonably designed to inform security holders of such change: *Provided, however,* That if the bidder has elected under § 335.505(f)(1) to require the subject bank to disseminate amendments disclosing material changes to the tender offer materials under § 335.505 the bidder shall disseminate material changes in the information published or sent or given to security holders at least pursuant to § 335.505.

§ 335.505 Dissemination of certain tender offers by the use of stockholder lists and security position listings.

(a) *Obligations of the subject bank.* Upon receipt by a subject bank at its principal executive offices of a bidder's written request, meeting the requirements of paragraph (e) of this section, the subject bank shall comply with the following paragraphs.

(1) The subject bank shall notify promptly transfer agents and any other persons who will assist the subject bank in complying with the requirements of this section of the receipt by the subject bank of a request by a bidder under this section.

(2) The subject bank shall promptly ascertain whether the most recently prepared stockholder list, written or otherwise, within the access of the subject bank was prepared as of a date earlier than ten business days before the date of the bidder's request and, if so, the subject bank shall promptly prepare or cause to be prepared a stockholder list as of the most recent practicable date which shall not be more than ten business days before the date of the bidder's request.

(3) The subject bank shall make an election to comply and shall comply with all of the provisions of either paragraph (b) or (c) of this section. The subject bank's election once made shall not be modified or revoked during the bidder's tender offer and extensions thereof.

(4) No later than the second business day after the date of the bidder's request, the subject bank shall orally notify the bidder, which notification shall be confirmed in writing, of the subject bank's election made under paragraph (a)(3) of this section. Such notification shall indicate (i) the approximate number of security holders of the class of securities being sought by the bidder,

and (ii) if the subject bank elects to comply with paragraph (b) of this section, appropriate information concerning the location for delivery of the bidder's tender offer materials and the approximate direct costs incidental to the mailing to security holders of the bidder's tender offer materials computed in accordance with paragraph (g)(2) of this section.

(b) *Mailing of tender offer materials by the subject bank.* A subject bank which elects under paragraph (a)(3) of this section to comply with the provisions of this paragraph shall perform the acts prescribed by the following subparagraphs.

(1) The subject bank shall promptly contact each participant named on the most recent security position listing of any clearing agency within the access of the subject bank and make inquiry of each participant as to the approximate number of beneficial owners of the subject bank securities being sought in the tender offer held by each such participant.

(2) No later than the third business day after delivery of the bidder's tender offer materials under paragraph (g)(1) of this section, the subject bank shall begin to mail or cause to be mailed by means of first class mail a copy of the bidder's tender offer materials to each person whose name appears as a record holder of the class of securities for which the offer is made on the most recent stockholder list referred to in paragraph (a)(2) of this section. The subject bank shall use its best efforts to complete the mailing in a timely manner but in no event shall such mailing be completed in a substantially greater period of time than the subject bank would complete a mailing to security holders of its own materials relating to the tender offer.

(3) No later than the third business day after the delivery of the bidder's tender offer materials under paragraph (g)(1) of this section, the subject bank shall begin to transmit or cause to be transmitted a sufficient number of sets of the bidder's tender offer materials to the participants named on the security position listings described in paragraph (b)(1) of this section. The subject bank shall use its best efforts to complete the transmittal in a timely manner but in no event shall such transmittal be completed in a substantially greater period of time than the subject bank would complete a transmittal to such participants using security position listings of clearing agencies of its own material relating to the tender offer.

(4) The subject bank shall promptly give oral notification to the bidder, which notification shall be confirmed in writing, of the commencement of the mailing under paragraph (b)(2) of this section and of the transmittal under paragraph (b)(3) of this section.

(5) During the tender offer and any extension thereof the subject bank shall use reasonable efforts to update the stockholder list and shall mail or cause to be mailed promptly following each update a copy of the bidder's tender offer materials (to the extent sufficient sets of such materials have been furnished by the bidder) to each person who has become a record holder since the later of (i) the date of preparation of the most recent stockholder list referred to in paragraph (a)(2) or (a)(2)(ii) of this section the last preceding update.

(6) If the bidder has elected under paragraph (f)(1) of this section to require the subject bank to disseminate amendment disclosing material changes to the tender offer materials under this section, the subject bank promptly following delivery of each such amendment, shall mail or cause to be mailed a copy of each such amendment to each record holder whose name appears on the shareholder list described in paragraphs (a)(2) and (b)(5) of this section and shall transmit or cause to be transmitted sufficient copies of such amendment to each participant named on security position listings who received sets of the bidder's tender offer materials under paragraph (b)(3) of this section.

(7) The subject bank shall not include any communication other than the bidder's tender offer materials or amendments thereto in the envelopes or other containers furnished by the bidder.

(8) Promptly following the termination of the tender offer, the subject bank shall reimburse the bidder the excess, if any, of the amounts advanced under paragraph (f)(3)(iii) of this section over the direct costs incidental to

compliance by the subject bank and its agents in performing the acts required by this section computed in accordance with paragraph (g)(2) of this section.

(c) *Delivery of stockholder lists and security position listings.* A subject bank which elects under paragraph (a)(3) of this section to comply with the provisions of this paragraph shall perform the acts prescribed by the following subparagraphs.

(1) No later than the third business day after the date of the bidder's request, the subject bank shall furnish to the bidder at the subject bank's principal executive office a copy of the names and addresses of the record holders on the most recent stockholder list referred to in paragraph (a)(2) of this section and a copy of the names and addresses of participants identified on the most recent security position listing of any clearing agency which is within the access of the subject bank.

(2) If the bidder has elected under paragraph (f)(1) of this section to require the subject bank to disseminate amendments disclosing material changes to the tender offer materials, the subject bank shall update the stockholder list by furnishing the bidder with the name and address of each record holder named on the stockholder list, and not previously furnished to the bidder, promptly after such information becomes available to the subject bank during the tender offer and any extensions thereof.

(d) *Liability of subject bank and others.* Neither the subject bank nor any affiliate or agent of the subject bank nor any clearing agency shall be:

(1) Deemed to have made a solicitation or recommendation respecting the tender offer within the meaning of section 14(d)(4) of the Act based solely upon the compliance or noncompliance by the subject bank or any affiliate or agent of the subject bank with one or more requirements of this section;

(2) Liable under any provision of the Federal securities laws to the bidder or to any security holder based solely upon the inaccuracy of the current names or addresses on the stockholder list or security position listing, unless such inaccuracy results from a lack of reasonable care on the part of the subject bank or any affiliate or agent of the subject bank;

(3) Deemed to be an ''underwriter'' within the meaning of section (2)(11) of the Securities Act of 1933 (15 U.S.C. 77) for any purpose of that Act or any rule or regulation issued thereunder based solely upon the compliance or noncompliance by the subject bank or any affiliate or agent of the subject bank with one or more or the requirements of this section; or

(4) Liable under any provision of the Federal securities laws for the disclosure in the bidder's tender offer materials, including any amendment thereto, based solely upon the compliance or noncompliance by the subject bank or any affiliate or agent of the subject bank with one or more of the requirements of this section.

(e) *Content of the bidder's request.* The bidder's written request referred to in paragraph (a) of this section shall include the following:

(1) The identity of the bidder;

(2) The title of the class of securities which is the subject of the bidder's tender offer;

(3) A statement that the bidder is making a request to the subject bank under paragraph (a) of this section for the use of the stockholder list and security position listings for the purpose of disseminating a tender offer to security holders;

(4) A statement that the bidder is aware of and will comply with the provisions of paragraph (f) of this section;

(5) A statement as to whether or not it has elected under paragraph (f)(1) of this section to disseminate amendments disclosing material changes to the tender offer material under this section; and

(6) The name, address and telephone number of the person whom the subject bank shall contact under paragraph (a)(4) of this section.

(f) *Obligations of the bidder.* Any bidder who requests that a subject bank comply with the provisions of paragraph (a) of this section shall comply with the following subparagraphs.

(1) The bidder shall make an election whether or not to require the subject bank to disseminate amendments disclosing material changes to the tender offer materials under this section,

which election shall be included in the request referred to in paragraph (a) of this section and shall not be revocable by the bidder during the tender offer and extensions thereof.

(2) With respect to a tender offer subject to section 14(d)(1) of the Act in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77), the bidder shall comply with § 335.504(a)(3).

(3) If the subject bank elects to comply with paragraph (b) of this section,

(i) The bidder shall promptly deliver the tender offer materials after receipt of the notification from the subject bank as provided in paragraph (a)(4) of this section;

(ii) The bidder shall promptly notify the subject bank of any amendment to the bidder's tender offer materials requiring compliance by the subject bank with paragraph (b)(6) of this section and shall promptly deliver such amendment to the subject bank under paragraph (g)(1) of this section;

(iii) The bidder shall advance to the subject bank an amount equal to the approximate cost of conducting mailings to security holders computed in accordance with paragraph (g)(2) of this section;

(iv) The bidder shall promptly reimburse the subject bank for the direct costs incidental to compliance by the subject bank and its agents in performing the acts required by this section computed in accordance with paragraph (g)(2) of this section which are in excess of the amount advanced under paragraph (f)(2)(iii) of this section; and

(v) The bidder shall mail by means of first class mail or otherwise furnish with reasonable promptness the tender offer materials to any security holder who requests such materials.

(4) If the subject bank elects to comply with paragraph (c) of this section,

(i) The subject bank shall use the stockholder list and security position listings furnished to the bidder under paragraph (c) of this section exclusively in the dissemination of tender offer materials to security holders in connection with the bidder's tender offer and extensions thereof;

(ii) The bidder shall return the stockholder lists and security position listings furnished to the bidder under paragraph (c) of this section promptly after the termination of the bidder's tender offer;

(iii) The bidder shall accept, handle and return the stockholder lists and security position listings furnished to the bidder under paragraph (c) of this section to the subject bank on a confidential basis;

(iv) The bidder shall not retain any stockholder list or security position listing furnished by the subject bank under paragraph (c) of this section, or any copy thereof, nor retain any information derived from any such list or listing or copy thereof after the termination of the bidder's tender offer;

(v) The bidder shall mail by means of first class mail, at its own expense, a copy of its tender offer materials to each person whose identity appears on the stockholder list as furnished and updated by the subject bank under paragraphs (c) (1) and (2) of this section;

(vi) The bidder shall contact the participants named on the security position listing of any clearing agency, make inquiry of each participant as to the approximate number of sets of tender offer materials required by each participant, and furnish, at its own expense, sufficient sets of tender offer materials and any amendment thereto to each participant for subsequent transmission to the beneficial owners of the securities being sought by the bidder;

(vii) The bidder shall mail by means of first class mail or otherwise furnish with reasonable promptness the tender offer materials to any security holder who requests such materials; and

(viii) The bidder shall promptly reimburse the subject bank for direct costs incidental to compliance by the subject bank and its agents in performing the acts required by this section computed in accordance with paragraph (g)(2) of this section.

(g) *Delivery of materials, computation of direct costs.* (1) Whenever the bidder is required to deliver tender offer materials or amendments to tender offer materials, the bidder shall deliver to the subject bank at the location specified by the subject bank in its notice

given under paragraph (a)(4) of this section a number of sets of the materials or of the amendment, as the case may be, at least equal to the approximate number of security holders specified by the subject bank in such notice, together with appropriate envelopes or other containers therefor: *Provided, however,* That delivery shall be deemed not to have been made unless the bidder has complied with paragraph (f)(3)(iii) of this section at the time the materials or amendments, as the case may be, are delivered.

(2) The approximate direct cost of mailing the bidder's tender offer materials shall be computed by adding—

(i) The direct cost incidental to the mailing of the subject bank's last annual report to shareholders (excluding employees' time), less the costs of preparation and printing of the report, and postage, plus

(ii) The amount of first class postage required to mail the bidder's tender offer materials. The approximate direct costs incidental to the mailing of the amendments to the bidder's tender offer materials shall be computed by adding

(iii) The estimated direct costs of preparing mailing labels, of updating shareholders lists and of third parity handling charges plus

(iv) The amount of first class postage required to mail the bidder's amendment.

Direct costs incidental to the mailing of the bidder's tender offer materials and amendments thereto when finally computed may include all reasonable charges paid by the subject bank to third parties for supplies or services, including costs attendant to preparing shareholder lists, mailing labels, handling the bidder's materials, contacting participants named on security position listings, and for postage, but shall exclude indirect costs, such as employee time which is devoted to either contesting or supporting the tender offer on behalf of the subject bank. The final billing for direct costs shall be accompanied by an appropriate accounting in reasonable detail.

§ 335.506 Disclosure requirements with respect to tender offers.

(a) *Information required on date of commencement*—(1) *Long-form publication.* If a tender offer is published, sent or given to security holders on the date of commencement by means of long-term publication under § 335.504(a)(1) , such long-form publication shall include the information required by § 335.505(e)(1).

(2) *Summary publication.* If a tender offer is published, sent or given to security holders on the date of commencement by means of summary publication under.

(i) The summary advertisement shall contain and shall be limited to, the information required by paragraph (e)(2) of this section; and

(ii) The tender offer materials furnished by the bidder upon the request of any security holder shall include the information required by paragraph (e)(1) of this section.

(3) *Use of stockholder lists and security position listing.* If a tender offer is published or sent or given to security holders on the date of commencement by the use of stockholder lists and security position listings under § 335.504(a)(3).

(i) Either (A) the summary advertisement shall contain, and shall be limited to the information required by paragraph (e)(2) of this section, or (B) if long-form publication of the tender offer is made, such long-form publication shall include the information required by paragraph (e)(1) of this section; and

(ii) The tender offer materials transmitted to security holders by use of such lists and security position listings and furnished by the bidder upon the request of any security holder shall include the information required by paragraph (e)(1) of this section.

(4) *Other tender offers.* If a tender offer is published or sent or given to security holders other than under § 335.504(a), the tender offer materials which are published or sent or given to security holders on the date of commencement of such offer shall include the information required by paragraph (e)(1) of this section.

(b) *Information required in summary advertisement made after commencement.* A summary advertisement published

subsequent to the date of commencement of the tender offer shall include at least the information specified in paragraphs (e)(1) (i) through (iv) and (e)(2)(iv) of this section.

(c) *Information required in other tender offer materials published after commencement.* Except for summary advertisement described in paragraph (b) of this section and tender offer materials described in paragraphs (a)(2)(ii) and (a)(3)(ii) of this section, additional tender offer materials published, sent or given to security holders subsequent to the date of commencement shall include the information required by paragraph (e)(1) of this section and may omit any of the information required by paragraphs (e)(1) (v) through (viii) of this section which has been previously furnished by the bidder in connection with the tender offer.

(d) *Material changes.* A material change in the information published or sent or given to security holders shall be promptly disclosed to security holders in additional tender offer materials.

(e) *Information to be included*—(1) *Long-form publication and tender offer materials.* The information required to be disclosed by paragraphs (a)(1), (a)(2)(ii), (a)(3)(i)(B) and (a)(4) of this section shall include the following:

(i) The identity of the bidder;

(ii) The identity of the subject bank;

(iii) The amount of the class of securities being sought and the type and amount of consideration being offered therefor;

(iv) The scheduled expiration date of the tender offer, whether the tender offer may be extended and, if so, the procedures for extension of the tender offer;

(v) The exact dates prior to which, and after which, security holders who deposit their securities will have the right to withdraw their securities under section 14(d)(5) of the Act and § 335.507 and the manner in which shares will be accepted for payment and in which withdrawal may be effected;

(vi) If the tender offer is for less than all the outstanding securities of a class of equity securities and the bidder is not obligated to purchase all of the securities tendered, the period of periods, and in the case of the period from the commencement of the offer, the date of the expiration of such period during which the securities will be taken up pro rata under section 14(d)(6) of the Act or § 335.508, and the present intention or plan of the bidder with respect to the tender offer in the event of an oversubscription by security holders;

(vii) The disclosure required by items 1(c); 2 (with respect to persons other than the bidder; excluding sub-items (b) and (d); 3; 4; 5; 6; 7; 8; and 10 of Form F–13 (§ 335.512) or a fair and adequate summary thereof; *Provided, however,* That negative responses to any item or sub-item of Form F–13 (§ 335.512) need not be included; and

(viii) The disclosure required by item 9 of Form F–13 or a fair and adequate summary thereof. (Under normal circumstances, summary financial information equivalent to that required by paragraph (e) of SEC Guide 59 of the Guides for Preparation and Filing of Registration Statements under the Securities Act of 1933 (15 U.S.C. 77) for the periods covered by the financial information furnished in response to item 9 will be a sufficient summary. (If the information required by item 9 is summarized, appropriate instructions shall be included stating how complete financial information can be obtained.)

(2) *Summary publication.* The information required to be disclosed by paragraphs (a)(2)(i) and (a)(3)(i)(A) of this section in a summary advertisement is as follows:

(i) The information required by paragraphs (e)(1) (i) through (vi) of this section;

(ii) If the tender offer is for less than all the outstanding securities of a class of equity securities, a statement as to whether the purpose or one of the purposes of the tender offer is to acquire or influence control of the business of the subject bank;

(iii) A statement that the information required by paragraph (e)(1)(vii) of this section is incorporated by reference into the summary advertisement;

(iv) Appropriate instructions as to how security holders may obtain promptly, at the bidder's expense, the bidder's tender offer materials; and

(v) In a tender offer published or sent or given to security holders by the use of stockholders lists and security position listings under § 335.504(a)(3), a statement that a request is being made for such lists and listings and that tender offer materials will be mailed to record holders and will be furnished to brokers, banks and similar persons whose name appears or whose nominee appears on the list of stockholders or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal to beneficial owners of such securities.

(3) *No transmittal letter.* Neither the initial summary advertisement nor any subsequent summary advertisement shall include a transmittal letter (whereby securities of the subject bank which are sought in the tender offer may be transmitted to the bidder or its depository) or any amendment thereto.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983]

§ 335.507 Additional withdrawal rights.

(a) *Rights.* In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the following period such offer, request or invitation remains open.

(1) At any time until the expiration of fifteen business days from the date of commencement of such tender offer; and

(2) On the date and until the expiration of ten business days following the date of commencement of another bidder's tender offer other than under § 335.502(b) for securities of the same class: *Provided,* That the bidder has received notice or otherwise has knowledge of the commencement of such other tender offer and: *Provided, further,* That withdrawal may only be effected with respect to securities which have not been accepted for payment in the manner set forth in the bidder's tender offer prior to the date such other tender offer is first published, sent or given to security holders.

(b) *Computation of time periods.* The time periods for withdrawal rights under this section shall be computed on a concurrent, as opposed to a consecutive basis.

(c) *Knowledge of competing offer.* For the purposes of this section, a bidder shall be presumed to have knowledge of another tender offer, as described in paragraph (a)(2) of this section, on the date such bidder receives a copy of the Form F–13 (§ 335.512) under § 335.502 from such other bidder.

(d) *Notice of Withdrawal.* Notice of withdrawal under this section shall be deemed to be timely upon the receipt by the bidder's depository of a written notice of withdrawal specifying the name(s) of the tendering stockholder(s), the number or amount of the securities to be withdrawn and the name(s) in which the certificate(s) is (are) registered, if different from that of the tendering security holder(s). A bidder may impose other reasonable requirements, including certificate numbers and a signed request for withdrawal accompanied by a signature guarantee, as conditions precedent to the physical release of withdrawn securities.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53592, Dec. 29, 1989]

§ 335.508 Exemption from statutory pro rata requirement.

Notwithstanding the pro rata provisions of section 14(d)(6) of the Act, if any person makes a tender offer or request or invitation for tenders, for less than all of the outstanding equity securities of a class, and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor during the period such offer, request or invitation remains open.

[48 FR 55564, Dec. 14, 1983]

§ 335.509 Solicitation/recommendation statements with respect to certain tender offers (Form F–12).

(a) *Filing and transmittal of recommendation statement.* No solicitation or recommendation to security holders shall be made by any person described

in paragraph (d) of this section with respect to a tender offer for the securities unless as soon as practicable on the date the solicitation or recommendation is first published or sent or given to security holders the person complies with the following paragraphs.

(1) The person shall file with the FDIC three copies of a Solicitation/Recommendation Statement on Form F–12 (§ 335.513), including all exhibits thereto; and

(2) If the person is either the subject bank or an affiliate of the subject bank,

(i) The person shall hand deliver a copy of the Form F–12 to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Form F–13 (§ 335.512) filed with the FDIC); and

(ii) The persons shall give telephonic notice (which notice to the extent possible shall be given prior to the opening of the market) of the information required by items 2 and 4(a) of Form F–12 and shall mail a copy of the form to each national securities exchange where the class of securities is registered and listed for trading and, if the class is authorized for quotation in the NASDAQ interdealer quotation system, to the National Association of Securities Dealers, Inc. (*NASD*).

(3) If the person is neither the subject bank nor an affiliate of the subject bank,

(i) The person shall mail a copy of the Form F–12 to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Form F–13 (§ 335.512) filed with the FDIC); and

(ii) The person shall mail a copy of the Form F–12 to the subject bank at its principal office.

(b) *Amendments.* If any material change occurs in the information set forth in Form F–12 (§ 335.513) required by this section, the person who filed Form F–12 shall:

(1) File with the FDIC three copies of an amendment of Form F–12 (§ 335.513) disclosing the change promptly, but not later than the date the material is first published, sent or given to security holders; and

(2) Promptly deliver copies and give notice of the amendment in the same manner as that specified in paragraph (a)(2) or (a)(3) of this section, whichever is applicable; and

(3) Promptly disclose and disseminate the change in a manner reasonably designed to inform security holders of the change.

(c) *Information required in solicitation or recommendation.* Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for the securities shall include the name of the person making the solicitation or recommendation and the information required by items 1, 2, 3(b), 4, 6, 7 and 8 of Form F–12 (§ 335.513) or a fair and adequate summary thereof: *Provided, however,* That the solicitation or recommendation may omit any of the information previously furnished to security holders of the class of securities by the person with respect to the tender offer.

(d) *Applicability.* (1) Except as provided in paragraphs (d)(2) and (e) of this section, shall only apply to the following persons:

(i) The subject bank, any director, officer, employee, affiliate or subsidiary of the subject bank;

(ii) Any record holder or beneficial owner of any security issued by the subject bank, by the bidder, or by any affiliate of either the subject bank or the bidder; and

(iii) Any person who makes a solicitation or recommendation to security holders on behalf of any of the foregoing or on behalf of the bidder other than by means of a solicitation or recommendation to security holders which has been filed with the FDIC under this section or § 335.503.

(2) Notwithstanding paragraph (d)(1) of this section, shall not apply to the following persons:

(i) A bidder who has filed Form F–13 (§ 335.512) under § 335.503;

(ii) Attorneys, banks, brokers, fiduciaries or investment advisers who are not participating in a tender offer in more than a ministerial capacity and who furnish information and/or advice

regarding the tender offer to their customers or clients on the unsolicited request of such customers or clients or solely pursuant to a contract or a relationship providing for advice to the customer or client to whom the information and/or advice is given.

(e) *Stop-look-and-listen communications.* This section shall not apply to the subject bank with respect to its communication to its security holders which only:

(1) Identifies the tender offer by the bidder;

(2) States that the tender offer is under consideration by the subject bank's board of directors and/or management;

(3) States that on or before a specified date (which shall be no later than 10 business days from the date of commencement of the tender offer) the subject bank will advise its security holders of (i) whether the subject bank recommends acceptance or rejection of the tender offer; expresses no opinion and remains neutral toward the tender offer; or is unable to take a position with respect to the tender offer and (ii) the reason(s) for the position taken by the subject bank with respect to the tender offer (including the inability to take a position); and

(4) Requests its security holders to defer making determination whether to accept or reject the tender offer until they have been advised of the subject bank's position with respect thereto under paragraph (e)(3) of this section.

(f) *Statement of management's position.* A statement by the subject bank of its position with respect to a tender offer which is required to be published or sent or given to security holders under § 335.511 of this part shall constitute a solicitation or recommendation within the meaning of this section and section 14(d)(4) of the Act.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983; 54 FR 53592, Dec. 29, 1989]

§ 335.509a Equal treatment of security holders.

(a) No bidder shall make a tender offer unless:

(1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and

(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during the tender offer.

(b) Paragraph (a)(1) of this section shall not:

(1) Affect dissemination under § 335.505; or

(2) Prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:

(1) Security holders are afforded equal rights to elect among each of the types of consideration offered; and

(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(d) If the offer and sale of securities constituting consideration offered in a tender offer is prohibited by the appropriate authority of a state after a good faith effort by the bidder to register or qualify the offer and sale of such securities in such state:

(1) The bidder may offer security holders in such state an alternative form of consideration; and

(2) Paragraph (c) of this section shall not operate to require the bidder to offer or pay the alternative form of consideration to security holders in any other state.

(e) This section shall not apply to any tender offer with respect to which the FDIC, upon written request or upon its own motion, either unconditionally or on specified terms and conditions, determines that compliance with this section is not necessary or appropriate in the public interest or for the protection of investors.

[54 FR 53592, Dec. 29, 1989]

§ 335.510 Unlawful tender offer practices.

No person who makes a tender offer subject to this Part 335 shall:

(a) Hold such tender offer open for less then twenty business days from the date such tender offer is first published or sent or given to security holders: *Provided, however,* That this paragraph shall not apply to a tender offer by a bank relating to its class of securities which are being sought which is not made in anticipation of or in response to another person's tender offer for securities of the same class;

(b) Increase or decrease the percentage of the class of securities being sought or the consideration offered or the dealers' soliciting fee to be given in a tender offer unless such tender offer remains open for at least ten business days from the date that notice of such increase or decrease is first published or sent or given to security holders: *Provided, however,* That, for purposes of this paragraph, the acceptance for payment of an additional amount of securities not to exceed two percent of the class of securities that is the subject of the tender offer shall not be deemed to be an increase. For purposes of this paragraph, the percentage of a class of securities shall be calculated in accordance with section 14(d)(3) of the Act.

(c) Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer;

(d) Extend the length of a tender offer without issuing a notice of such extension by press release or other public announcement, which notice shall include disclosure of the approximate number of securities deposited to date and shall be issued no later than the earlier of (1) 9:00 a.m. Eastern time, on the next business day after the scheduled expiration date of the offer or (2) if the class of securities which is the subject of the tender offer is registered on one or more national securities exchanges, the first opening of any one of such exchanges on the next business day after the scheduled expiration date of the offer.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53593, Dec. 29, 1989]

§ 335.511 Position of subject bank with respect to a tender offer.

(a) *Position of bank.* The bank, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the bank:

(1) Recommends acceptance or rejection of the bidder's tender offer;

(2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or

(3) Is unable to take a position with respect to the bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

(b) *Material change.* If any material change occurs in the disclosure required by paragraph (a) of this section, the Bank shall promptly publish, send or give a statement disclosing such material change to security holders.

§ 335.512 Tender offer statement to be filed under section 14(d)(1) of the Securities Exchange Act of 1934 (Form F–13).

Federal Deposit Insurance Corporation
Washington, DC 20429.

FORM F–13—TENDER OFFER STATEMENT UNDER SECTION 14(d)(1) OF THE SECURITIES EXCHANGE ACT OF 1934

(Amendment No. ———)

(Name of Subject Bank)

(Bidder)

(Title of Class of Securities)

(CUSIP Number of Class of Securities)

(Name, address and telephone number of person authorized to receive notices and communications on behalf of bidder)

Instruction

Two copies of this statement, including all exhibits, and one additional copy of this statement, including only the exhibits described in item 11(a) of this statement, should be filed with the FDIC.

General Instructions

A. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the

items shall be prepared so as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

B. Information in exhibits to the statement may be incorporated by reference in answer or partial answer to any item of subitem of the statement unless it would render an answer misleading, incomplete, unclear or confusing. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required. A copy of any information or a copy of the pertinent pages of a document containing information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be considered filed with the FDIC for purposes of the Act.

C. If the statement is filed by a partnership, limited partnership, syndicate or other group, the information called for by items 2–7, inclusive, shall be given with respect to: (i) Each partner of a partnership; (ii) each partner who is named a general partner or who functions as a general partner of a limited partnership; (iii) each member of a syndicate or group; and (iv) each person controlling a partner or member. If the statement is filed by a corporation, or if a person referred to in (i), (ii), (iii), or (iv) of this instruction is a corporation, the information called for by the above mentioned items shall be given with respect to: (a) each executive officer and director of a corporation; (b) each person controlling a corporation; and (c) each executive officer and director of any corporation ultimately in control of a corporation. A response to an item in the statement is required with respect to the bidder and to all other persons referred to in this instruction unless the item specifies to the contrary.

D. Upon termination of the tender offer, the bidder shall promptly file a final amendment to this Form F–13 disclosing all material changes in the items of this Form F–13 and stating that the tender offer has terminated, the date of such termination and the results of such tender offer.

E. If the bidder, before filing this statement, has filed a Form F–11 (§ 335.407) with respect to the acquisition of securities of the same class referred to in item 1(a) of this statement, the bidder shall amend such Form F–11 (§ 335.407) and may do so by means of this statement and amendments thereto, including the final amendment required to be filed by instruction D: *Provided*, That the bidder indicated on the cover sheet of this statement that it is amending its Form F–11 (§ 335.407) by means of this statement.

F. The final amendment required to be filed by instruction D shall be deemed to satisfy the reporting requirements of section 13(d) of the Act with respect to all securities acquired by the bidder pursuant to the tender offer as reported in such final amendment.

G. For purposes of this statement, the following definitions shall apply:

(i) The term *bidder* means any person on whose behalf a tender offer is made; and

(ii) The term *subject bank* means any bank whose securities are sought by a bidder pursuant to a tender offer.

Item 1—Security and Subject Bank

(a) State the name of the subject bank and the address of its principal office;

(b) State the exact title and the number of shares outstanding of the class of equity securities being sought (which may be based upon information contained in the most recently available filing with the FDIC by the subject bank unless the bidder has reason to believe such information is not current), the exact amount of such securities being sought and the consideration being offered therefor; and

(c) Identify the principal market in which such securities are traded and state the high and low sales prices for such securities in such principal market (or, in the absence thereof, the range of high and low bid quotations) for each quarterly period during the past two years.

Item 2—Identity and Background

If the person filing this statement or any person enumerated in instruction C of this statement is a corporation, partnership, limited partnership, syndicate or other group of persons, state its name, the state or other place of its organization, its principal business, the address of its principal office and the information required by (e) and (f) of this item. If the person filing this statement or any person enumerated in instruction C is a natural person, provide the information specified in (a) through (g) of this item with respect to such person(s).

(a) Name;

(b) Residence or business address;

(c) Present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment or occupation is conducted;

(d) Material occupations, positions, offices or employments during the last 5 years, giving the starting and ending dates of each and the name, principal business and address of any business corporation or other organization in which such occupation, position, office or employment was carried on.

INSTRUCTION

If a person has held various positions with the same organization, or if a person holds

comparable positions with multiple related organizations, each and every position need not be specifically disclosed.

(e) Whether or not, during the last 5 years, such person has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give the dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case.

INSTRUCTION

While a negative answer to this sub-item is required in this schedule, it need not be furnished to security holders.

(f) Whether or not, during the last 5 years, such person was a party to a civil proceeding of a judicial or administrative body of competent jurisdiction and as a result of such proceeding, was or is subject to a judgment, decree or final order enjoining future violations of, or prohibiting activities subject to, Federal or State securities laws or finding any violation of such laws; and, if so, identify and describe such proceeding and summarize the terms of such judgment, decree or final order.

INSTRUCTION

While a negative answer to this subitem is required in this schedule, it need not be furnished to security holders.

(g) Citizenship(s).

Item 3—Past Contacts, Transactions or Negotiations With the Subject Bank

(a) Briefly state the nature and approximate amount (in dollars) of any transaction, other than those described in item 3(b) of this schedule, which has occurred since the commencement of the subject bank's third full fiscal year preceding the date of this schedule, between the person filing this schedule (including those persons enumerated in instruction C of this schedule) and:

(1) The subject bank or any of its affiliates which are corporations: *Provided, however,* That no disclosure need be made with respect to any transaction if the aggregate amount involved in such transaction was less than one percent of the subject bank's consolidated revenues (which may be based upon information contained in the most recently available filing with the FDIC by the subject bank, unless the bidder has reason to believe otherwise): (i) For the fiscal year in which such transaction occurred, or (ii) for the portion of the current fiscal year which has occurred, if the transaction occurred in such year; and

(2) The executive officers, directors, or affiliates of the subject bank which are not corporations, if the aggregate amount involved in such transaction or in a series of similar transactions, including all periodic installments in the case of any lease or other agreement providing for periodic payments or installments, exceeds $40,000.

(b) Describe any contacts, negotiations or transactions which have occurred since the commencement of the subject bank's third full fiscal year preceding the date of this schedule between the bidder or its subsidiaries (including those persons enumerated in instruction C of this schedule) and the subject bank or its affiliates concerning: A merger, consolidation or acquisition; a tender offer or other acquisition of securities; an election of directors; or a sale or other transfer of a material amount of assets.

Item 4—Source and Amount of Funds or Other Consideration

(a) State the source and the total amount of funds or other consideration for the purchase of the maximum number of securities for which the tender offer is being made.

(b) If all or any part of such funds or other consideration are or are expected to be, directly or indirectly, borrowed for the purpose of the tender offer:

(1) Provide a summary of each loan agreement or arrangement containing the identify of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions relative to such loan agreement; and

(2) Briefly describe any plans or arrangements to finance or repay such borrowings, or if no such plans or arrangements have been made, make a statement to that effect.

(c) If the source of all or any part of the funds to be used in the tender offer is a loan made in the ordinary course of business by a bank as defined in section 3(a)(6) of the Act, the name of such bank shall not be made available to the public if the person filing the statement so requests in writing and files such request, naming such bank, with the FDIC.

(d) If the source of all or any part of the funds to be used in the tender offer is a loan made by a bank as defined in section 3(a)(6) of the Act, indicate whether there exists any agreement, arrangement, or understanding pursuant to which the subject bank maintains or would maintain a correspondent deposit account at such lending bank.

Item 5—Purpose of the Tender Offer and Plans or Proposals of the Bidder

State the purpose or purposes of the tender offer for the subject bank's securities. Decribe any plans or proposals which relate to or would result in:

(a) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the subject bank or any of its subsidiaries;

(b) A sale or transfer of a material amount of assets of the subject bank or any of its subsidiaries;

(c) Any change in the present board of directors or management of the subject bank including, but not limited to, any plans or proposals to change the number or the term of directors or to fill any exising vacancies on the board;

(d) Any material change in the present capitalization or dividend policy of the subject bank;

(e) Any other material change in the subject bank's corporate structure or business;

(f) Causing a class of securities of the subject bank to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association; or

(g) A class of equity securities of the subject bank becoming eligible for termination of registration under section 12(g)(4) of the Act.

Item 6—Interest in Securities of the Subject Bank

(a) State the aggregate number and percentage of the class represented by such shares (which may be based on the number of shares outstanding as contained in the most recently available filing with the FDIC by the subject bank unless the bidder has reason to believe such information is not current), beneficially owned (identifying those shares for which there is a right to acquire) by each person named in item 2 of this schedule and by each associate and majority-owned subsidiary of such person giving the name and address of any such associate or subsidiary.

(b) Describe any transaction in the class of securities reported on that was effected during the past 60 days by the persons named in response to paragraph (a) of this item or by any executive officer, director or subsidiary of such person.

INSTRUCTIONS

1. The description of a transaction required by item 6(b) shall include, but not necessarily be limited to: (1) The identity of the person covered by item 6(b) who effected the transaction; (2) the date of the transaction; (3) the amount of securities involved; (4) the price per share; and (5) where and how the transaction was effected.

2. If the information required by item 6(b) of this Form F–13 is available to the bidder at the time this statement is initially filed with the FDIC under § 335.503(a)(1), the information should be included in the initial filing. However, if the information is not available to the bidder at the time of the initial filing, it shall be filed with the FDIC promptly but in no event later that two business days after the date of filing and, if material, shall be disclosed in a manner reasonably designed to inform security holders. The procedure specified by this instruction is provided for the purpose of maintaining the confidentiality of the tender offer in order to avoid possible misuse of inside information.

Item 7—Contracts, Arrangements, Understandings, or Relationships With Respect to the Subject Bank's Securities

Describe any contract, arrangement, understanding, or relationship (whether or not legally enforceable) between the bidder (including those persons enumerated in instruction C to this Form F–13) and any person with respect to any securities of the subject bank, (including, but not limited to, any contract, arrangement, understanding or relationship concerning the transfer or the voting of any of such securities, joint ventures, loan or option arrangements, puts or calls, guaranty of loans, guaranty against loss, or the giving or withholding of proxies) naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into and giving the material provisions thereof. Include such information for any of such securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person the power to direct the voting or disposition of such securities, except that, disclosure of standard default and similar provisions contained in loan agreements need not be included.

Item 8—Persons Retained, Employed or To Be Compensated

Identify all persons and classes of persons employed, retained or to be compensated by the bidder, or by any person on the bidder's behalf, to make solicitations or recommendations in connection with the tender offer and describe briefly the terms of such employment, retainer or arrangement for compensation.

Item 9—Financial Statements of Certain Bidders

Where the bidder is other than a natural person and the bidder's financial condition is material to a decision by a security holder of the subject company whether to sell, tender or hold securities being sought in the tender offer, furnish current, adequate financial information concerning the bidder; *Provided,* That if the bidder is controlled by another entity which is not a natural person and has been formed for the purpose of making the tender offer, furnish current, adequate financial information concerning such parent.

INSTRUCTIONS

1. The facts and circumstances concerning the tender offer, particularly the terms of the tender offer, may influence a determination as to whether disclosure of financial information is material. However, once the materiality requirement is applicable, the

adequacy of the financial information will depend primarily on the nature of the bidder.

In order to provide guidance in making this determination, the following types of financial information will be deemed adequate for purposes of this item for the type of bidder specified: (a) Financial statements prepared in compliance with SEC Form 10 as amended (17 CFR 249.210) for a domestic bidder which is otherwise eligible to use such form; and (b) financial statements prepared in compliance with SEC Form 20 (17 CFR 249.220) for a foreign bidder which is otherwise eligible to use such form.

2. If the bidder is subject to the periodic reporting requirements of sections 13(a) or 15(d) of the Act, financial statements contained in any document filed with the FDIC under the Act may be incorporated by reference in this Form F–13 solely for the purposes of this Form F–13: *Provided,* That such financial statements substantially meet the requirements of this item; an express statement is made that such financial statements are incorporated by reference; the matter incorporated by reference is clearly identified by page, paragraph, caption or otherwise; and an indication is made where such information may be inspected and copies obtained. Financial statements which are required to be presented in comparative form for two or more fiscal years or periods shall not be incorporated by reference unless the material incorporated by reference includes the entire period for which the comparative data is required to be given.

3. If the bidder is not subject to the periodic reporting requirements of the Act, the financial statements required by this item need not be audited if such financial statements are not available or obtainable without unreasonable cost or expense and a statement is made to that effect disclosing the reasons therefor.

Item 10—Additional Information

If material to a decision by a security holder whether to sell, tender or hold securities being sought in the tender offer, furnish information as to the following:

(a) Any present or proposed material contracts, arrangements, understandings or relationships between the bidder or any of the persons listed in general instruction C or any of its subsidiaries and the subject bank or any of its executive officers, directors, controlling persons or subsidiaries (other than any contract, arrangement or understanding required to be disclosed under item 3 or 7 of this schedule);

(b) To the extent known by the bidder after reasonable investigation, the applicable regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer;

(c) The applicability of antitrust laws;

(d) The applicability of the margin requirements of section 7 of the Act and the regulations promulgated thereunder;

(e) Any material pending legal proceedings relating to the tender offer including the name and location of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto and a brief summary of the proceedings.

INSTRUCTION

In connection with this sub-item, a copy of any document relating to a major development (such as pleadings, an answer, complaint, temporary restraining order, injunction, opinion, judgment or order) in a material pending legal proceeding should be promptly furnished to the FDIC on a supplemental basis.

(f) Such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

Item 11—Material To Be Filed as Exhibits

Furnish a copy of: (a) Tender offer material which is published, sent or given to security holders by or on behalf of the bidder in connection with the tender offer;

(b) Any loan agreement referred to in item 4 of this schedule.

Instruction. The identity of any bank which is a party to a loan agreement need not be disclosed if the person filing the statement has requested that the identity of such bank not be made available to the public under item 4 of this Form F–13.

(c) Any document setting forth the terms of any contracts, arrangements, understandings or relationships referred to in item 7 or 10(a) of this Form F–13;

(d) Any written opinion prepared by legal counsel at the bidder's request and communicated to the bidder pertaining to the tax consequences of the tender offer;

(e) In an exchange offer where securities of the bidder have been or are to be registered under the Securities Act of 1933, the prospectus containing the information required to be included therein by SEC Rule 434b (17 CFR 230.434b) of that Act; and

(f) If any oral solicitation of security holders is to be made by or on behalf of the bidder, any written instruction, form or other material which is furnished to the persons making the actual oral solicitation for their use, directly or indirectly, in connection with the tender offer.

Signature

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Date ————.

(Signature)

(Name and Title)

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative (other than an executive officer or general partner of the bidder), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983; 54 FR 53593, Dec. 29, 1989]

§ 335.513 Solicitation/recommendation statement to be filed under section 14(d)(4) of the Securities Exchange Act of 1934 (Form F–12).

Federal Deposit Insurance Corporation
Washington, DC 20429

FORM F–12—SOLICITATION/RECOMMENDATION STATEMENT UNDER SECTION 14(d)(4) OF THE SECURITIES EXCHANGE ACT OF 1934

(Amendment No. ———)

(Name of Subject Bank)

(Name of Person(s) Filing Statement)

(Title of Class of Securities)

((CUSIP) Number of Class of Securities)

(Name, address and telephone number of person authorized to receive notice and communications on behalf of the person(s) filing statement)

Instruction: Three copies of this statement, including all exhibits, should be filed with the FDIC.

GENERAL INSTRUCTION

A. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative so state.

B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render such answer misleading, incomplete, unclear or confusing. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be considered filed with the FDIC for purposes of the Act.

Item 1—Security and Subject Bank

State the title of the class of equity securities to which this statement relates and the name and the address of the principal office of the subject bank.

Item 2—Tender Offer of the Bidder

Identify the tender offer to which this statement relates, the name of the bidder and the address of its principal executive offices or, if the bidder is a natural person, the bidder's residence or business address (which may be based on the bidder's Form F–13) (§ 335.512) filed with the FDIC.

Item 3—Identity and Background

(a) State the name and business address of the person filing this statement.

(b) If material, describe any contract, agreement, arrangement or understanding and any actual or potential conflict of interest between the person filing this statement or its affiliates and: (1) The subject bank, its principal officers, directors or affiliates; or (2) the bidder, its executive officers, directors or affiliates.

Instruction

If the person filing this statement is the subject bank and if the materiality requirement of item 3(b) is applicable to any contract, agreement, arrangement or understanding between the subject bank or any affiliate of the subject bank and any principal officer or director of the subject bank, it shall not be neccessary to include a description thereof in this statement, or in any solicitation or recommendation published, sent or given to security holders if substantially similar information has been disclosed in any proxy statement, report or other communication sent within one year of the filing date of this statement by the subject bank to the then holders of the securities and has been filed with the FDIC: *Provided* That this

statement and the solicitation or recommendation published, sent or given to security holders shall contain specific reference to the proxy statement, report or other communication and that a copy of the pertinent portion(s) thereof is filed as an exhibit to this statement.

Item 4—The Solicitation or Recommendation

(a) State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the person filing this statement is advising security holders of the securities being sought by the bidder to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, furnish a description of such other action being recommended. If the person filing this statement is the subject bank and a recommendation is not being made, state whether the subject bank is either expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) State the reason(s) for the position (including the inability to take a position) stated in (a) of this item.

Instruction

Conclusory statements such as ''The tender offer is in the best interest of shareholders,'' will not be considered sufficient disclosure in response to item 4(b).

Item 5—Persons Retained, Employed or to be Compensated

Identify any person or class of persons employed, retained or to be compensated by the person filing this statement or by any person on its behalf, to make solicitation or recommendations to security holders and describe briefly the terms of such employment, retainer or arrangement for compensation.

Item 6—Recent Transactions and Intent with Respect to Securities

(a) Describe any transaction in the securities referred to in item 1 which was effected during the past 60 days by the person(s) named in response to item 3(a) and by any executive officer, director, affiliate or subsidiary of such person(s).

(b) To the extent known by the person filing this statement, state whether the persons referred to in item 6(a) presently intend to tender to the bidder, sell or hold securities of the class of securities being sought by the bidder which are held of record or beneficially owned by such persons.

Item 7—Certain Negotiations and Transactions by the Subject Bank

(a) If the person filing this statement is the subject bank, state whether or not any negotiation is being undertaken or is underway by the subject bank in response to the tender offer which relates or would result in:

(1) An extraordinary transaction such as a merger or reorganization, involving the subject bank or any subsidiary of the subject bank;

(2) A purchase, sale or transfer of a material amount of assets by the subject bank or any subsidiary of the subject bank;

(3) A tender offer for or other acquisition of securities by or of the subject bank; or

(4) Any material change in the present capitalization or dividend policy of the subject bank.

Instruction

If no agreement in principle had yet been reached, the possible terms of any transaction or the parties thereto need not be disclosed if in the opinion of the Board of Directors of the subject bank disclosure would jeopardize continuation of the negotiations. In that event, disclosure that negotiations are being undertaken or are underway and are in a preliminary stage will be sufficient.

(b) Describe any transaction, board resolution, agreement in principle, or a signed contract in response to the tender offer, other than one described in item 3(b) of this statement, which relates to or would result in one or more of the matters listed in item 7(a) (1), (2), (3) or (4).

Item 8—Additional Information to be Furnished

Furnish any additional information necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

Item 9—Material to be Filed as Exhibits

Furnish a copy of:

(a) Any written solicitation or recommendation which is published or sent or given to security holders in connection with the solicitation or recommendation referred to in item 4.

(b) Any written instruction, or other material which is furnished to persons making any actual oral solicitation or recommendation for their use, directly or indirectly, in connection with the solicitation or recommendation.

(c) Any contract, agreement, arrangement or understanding described in item 3(b) or the pertinent portion(s) of any proxy statement, report or other communication referred to in item 3(b).

Signature

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

(Date)

(Signature)

(Name and Title)

Instruction

The original statement shall be signed by each person on whose behelf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative (other than an executive officer of a corporation or a general partner of a partnership), evidence of the representative's authority to sign on behalf of that person shall be filed with the statement. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53593, Dec. 29, 1989]

§ 335.520 Purchase of securities by the bank and others.

When a person other than the issuing bank or any person described in section 13(e)(2) of the Act makes a tender offer for, or request or invitation for tenders of, any class of equity securities of a bank subject to section 13(e) of the Act, and such person has filed a statement with the FDIC under subpart E and the issuing bank has received notice thereof, such issuing bank or any person described in section 13(e)(2) of the Act shall not thereafter, during the period such tender offer, request or invitation continues, purchase any equity securities of the issuing bank unless:

(a) The issuing bank or any person described in section 13(e)(2) of the Act has filed with the FDIC a statement containing the information specified below with respect to proposed purchases:

(1) The title and amount of securities to be purchased, the names of the persons or classes of persons from whom, and the market in which, the securities are to be purchased, including the name of any exchange on which the purchase is to be made;

(2) The purpose for which the purchase is to be made and any plan or proposal for the disposition of such securities; and

(3) The source and amount of funds or other consideration used or to be used in making the purchases, and, if any part of the purchase price or proposed purchase price is represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading the securities, a description of the transaction and the names of the parties thereto.

(b) The issuing bank or any person described in section 13(e)(2) of the Act has at any time within the past six months sent or given to the equity security holders of the issuing bank the substance of the information contained in the statement required by § 335.520(a).

§ 335.521 Tender offers by issuers.

A bank or its affiliates shall not make an ''issuer tender offer'' unless the offer meets the requirements of 17 CFR 240.13e–4, except that all filings shall be made with the FDIC and be titled with the name of the FDIC instead of the Securities and Exchange Commission.

[54 FR 53593, Dec. 29, 1989]

§ 335.530 Change in majority of directors.

If, under any arrangement or understanding with the person or persons acquiring securities in a transaction subject to section 13(d) or section 14(d) of the Act, any persons are to be elected or designated as directors of the bank, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the bank, then, not less than 10 days prior to the date any such person takes office as a director, or such shorter period prior to that date as the FDIC may authorize upon a showing of good cause therefor, the bank shall file with the FDIC and transmit to all holders of record of securities of the bank who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by items 5 (a), (d), (e), and (f), 6 and 7 of Form F–5 to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Subpart F—Financial Statement Requirements

BASIC PRINCIPLES

§ 335.601 Principles of financial reporting.

Financial statements filed with the FDIC under this part shall be prepared in accordance with generally accepted accounting principles and practices applicable to banks. The FDIC may from time to time issue releases on accounting principles and practices to be used with respect to specific areas.

QUALIFICATIONS AND REPORTS OF ACCOUNTANTS

§ 335.602 General rules.

Every accountant's report with respect to financial statements filed under this part shall be dated, shall be signed manually, shall indicate the city and State where issued, and shall identify without detailed enumeration the financial statements covered by the report.

[54 FR 53593, Dec. 29, 1989]

§ 335.603 [Reserved]

§ 335.604 Examination by independent public accountants.

(a) *Qualifications of independent public accountants.* (1) The FDIC will not recognize any person as a certified public accountant who is not duly registered and in good standing as such under the laws of the place of his/her residence or principal office. The FDIC will not recognize any person as a public accountant who is not in good standing and entitled to practice as such under the laws of the place of his/her residence or principal office.

(2)(i) The FDIC will not recognize any certified public accountant or public accountant as independent who is not in fact independent. For example, an accountant will be considered not independent with respect to any person or any of its parents, its subsidiaries, or other affiliates—

(A) In which, during the period of his/her professional engagement to examine the financial statements being reported on or at the date of his report, the firm or a member of the firm had, or was committed to acquire a direct financial interest or any material indirect financial interest or

(B) With which during the period of his/her professional engagement to examine the financial statements being reported on, at the date of the report or during the period covered by the financial statements, the firm or a member of the firm was connected as a promoter, underwriter, voting trustee, director, officer, or employee.

A firm will be deemed independent in regard to a particular person if a former officer or employee of the person is employed by the firm and the individual has been completely disassociated from the person and its affiliates and does not participate in auditing financial statements of the person or its affiliates covering any period of his/her employment by the person.

(ii) For the purposes of this section, the term *member* means (A) all partners, shareholders, and other principals in the firm, (B) any professional employee involved in providing any professional service to the person, its parents, subsidiaries, or other affiliates, and (C) any professional employee having managerial responsibilities and located in the engagement office or other office of the firm which participates in a significant portion of the audit.

(3) In determining whether a public accountant is, in fact, independent with respect to a particular person, the FDIC will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant and that person or any affiliate thereof, and will not confine itself to the relationships existing in connection with the filing of reports with the FDIC.

(b) *Representations as to the audit.* The independent public accountant's report:

(1) Shall state whether the audit was made in accordance with generally accepted auditing standards; and

(2) Shall designate any auditing procedures generally recognized as normal (or deemed necessary by the accountant under the circumstances of the particular case) that have been omitted, and the reasons for their omission.

Nothing in this provision shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit made for the purpose of expressing the opinions required by paragraph (c) of this section.

(c) *Opinions to be expressed.* The independent public accountant's report shall state clearly:

(1) The opinion of the accountant with respect to the financial statements covered by the report and the accounting principles and practices reflected therein; and

(2) The opinion of the accountant as to the consistency of the application of the accounting principles, or as to any changes in the principles which have a material effect on the financial statements required to be set forth by § 335.614.

(d) *Exceptions.* If the accountant making the report considers that he/she must take exceptions or express qualifications with respect thereto, each exception or qualification shall be stated specifically and clearly and, to the extent practicable, shall indicate the effect of the matter on the financial statements to which it relates.

(e) *Association with unaudited note covering interim financial data.* If the financial statements covered by the accountant's report designate as ''unaudited'' the note required by § 335.622(g), it shall be presumed that appropriate professional standards and procedures with respect to the data in the note have been followed by the independent accountant who is associated with the unaudited footnote by virtue of reporting on the financial statements in which the note is included.

(f) *Examination of financial statements by more than one independent public accountant.* If, with respect to the examination of the financial statements, part of the examination is made by an independent accountant other than the principal accountant and the principal accountant elects to place reliance on the work of the other accountant and makes reference to that effect in his report, the separate report of the other accountant shall be filed. However, notwithstanding the provisions of this section, reports of other accountants which may otherwise be required in filings need not be presented in annual reports to security holders furnished pursuant to the proxy and information statement rules.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983; 54 FR 53593, Dec. 29, 1989]

MAINTENANCE OF RECORDS AND PREPARATION OF REQUIRED REPORTS

§ 335.605 Falsification of accounting records.

No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act.

§ 335.606 Bank's representation in connection with the preparation of required reports and documents.

No director or officer of a bank shall directly or indirectly make or cause to be made a materially false or misleading statement, or omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading to an accountant in connection with (a) any audit or examination of the financial statements of the bank required to be made under this part or (b) the preparation or filing of any document or report required to be filed with the FDIC under this part or otherwise.

PROVISIONS OF GENERAL APPLICATION

§ 335.610 Requirements as to form.

Financial statements shall be prepared in accordance with the applicable requirements of Formats 9 A, B, C, and D. All money amounts required to be shown in financial statements may be expressed in even dollars or thousands of dollars. If shown in even thousands, an indication to that effect shall be inserted immediately beneath the caption of the statement or schedule, or at the top of each money column. The individual amounts shown need not be adjusted to the nearest dollar or thousand if the failure of the items to add to the totals shown is stated in a

note as due to the dropping of amounts of less than $1.00 or $1,000, as appropriate.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53593, Dec. 29, 1989]

§ 335.611 Items not material.

If the amount that would otherwise be required to be shown with respect to any item is not material, it need not be separately set forth.

§ 335.612 Inapplicable captions and omission of unrequired or inapplicable financial statements.

No caption need be shown in any financial statement required by the forms set forth in this part as to which the items and conditions are not present. Financial statements not required or inapplicable because the required matter is not present need not be filed, but the statements omitted and the reasons for their omission shall be indicated in the list of financial statements required by the applicable form.

§ 335.613 Additional information.

In addition to the information required with respect to any financial statement, further information shall be furnished as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

§ 335.614 Changes in accounting principles and practices and retroactive adjustments of accounts.

Any change in accounting principle or practice, or in the method of applying any accounting principle or practice, made during any period for which financial statements are filed that affects comparability of the financial statements with those of prior or future periods and the effect thereof upon the net income for each period for which financial statements are filed, shall be disclosed in a note to the appropriate financial statement. Any material retroactive adjustment made during any period for which financial statements are filed, and the effect thereof upon net income of prior periods, shall be disclosed in a note to the appropriate financial statement.

§ 335.615 Summary of accounting principles and practices.

Information required in notes as to accounting principles and practices reflected in the financial statements may be presented in the form of a single statement. In such a case specific references shall be made in the appropriate financial statements to the applicable portion of the single statement.

§ 335.616 Reacquired evidences of indebtedness.

Reacquired evidences of indebtedness shall be deducted from the appropriate liability caption.

§ 335.617 Reacquired shares.

When authorized by statute, reacquired shares not retired shall be shown separately as a deduction from capital shares, or from the total of capital shares and other stockholders' equity, at either par of stated value, or cost, as circumstances require.

§ 335.618 Foreign activities.

If assets, revenue, or income (loss) before taxes and securities gains (losses), or net income (loss) associated with foreign activities, exceeded 10 percent of the corresponding amount in the related financial statements, the following disclosures concerning foreign activities shall be furnished in a note to the financial statements. The term *revenue* includes the total of the amounts reported in items (1), (6) and (7) of the income statement, Format F–9B.

(a) *Loans.* State separately loan categories as prescribed by schedule A column C of Consolidated Report of Condition, Schedule RC–C, FFIEC 031, as applicable. Categories of less than 10 percent of total loans related to foreign activities may be grouped with all other loans.

(b) *Balances with banks in foreign countries.* State separately balances with foreign branches of other U.S. banks and with other banks in foreign countries. (See lines 3 (a) and (b) of Scheduled RC–A of the Consolidated Report of Condition, FFIEC 031. Also furnish the amount of interest-bearing balances included above.

(c) *Deposit liabilities.* Furnish deposit information as prescribed in Schedule RC–E, Part II of Consolidated Report of Condition, FFIEC 031. State also the amount of interest-bearing deposits in denominations of $100,000 or more.

(d) *Other borrowings.* State separately short-term borrowings, other liabilities for borrowed money, and other indebtedness related to foreign activities corresponding to the amounts reported on Schedule RC, FFIEC 031, items 14, 16, 17, 18, and 19.

(e) *Income and expense summary.* For each period for which an income statement is filed, furnish information as prescribed in part 1, column B and part 2 of the Statement of Income, Schedule RI–D, Part I, FFIEC 031. State in a note the basis of pricing money transfers and the policy governing allocation of income and expenses to foreign activities.

(f) *Allowance for possible loan and lease losses.* For each period for which a statement of income is filed, furnish in a note a reconciliation of changes in the allowance for possible loan and lease losses applicable to loans related to foreign activities.

(g) If disclosure above is required, state separately in a note for each significant geographic area, and in the aggregate for all other geographic areas not deemed significant, the following:

(1) Total assets (net of valuation allowances;

(2) Total net interest income;

(3) Provisions for loan and lease losses and for allocated transfer risk;

(4) Other net noninterest income (expense) including gains (losses) on securities not held in trading accounts; and

(5) Net income (loss).

NOTE: A *significant geographic area* is one whose assets, operating income, or net income exceed 10 percent of the comparable amount as reported in the related financial statements.

[54 FR 53593, Dec. 29, 1989]

§ 335.619 Foreign currencies.

The basis of conversion of all items in foreign currencies shall be stated, and the amount and disposition of the resulting unrealized profit or loss shown. Disclosure should be made as to the effect, insofar as this can be reasonably determined, of foreign exchange restrictions upon the consolidated financial position and operating results of the bank and its subsidiaries.

§ 335.620 Commitments.

If material in amount, the pertinent facts relative to firm commitments for the acquisition, directly or indirectly, of fixed assets and for the purchase, repurchase, construction, or rental of assets under long-term leases shall be stated briefly in the balance sheet or in footnotes referred to therein. Where the rentals or obligations under long-term leases are material the following shall be set forth in a note to the appropriate financial statement:

(a) Total rental expense (reduced by rentals from subleases, with disclosure of such amounts) entering into the determination of results of operations for each period for which an income statement is presented shall be disclosed. Rental payments under short-term leases for a month or less which are not expected to be renewed need not be included. Contingent rentals, such as those based upon usage or sales, shall be reported separately from the basic or minimum rentals.

(b) The minimum rental commitments under all noncancelable leases shall be disclosed, as of the date of the latest balance sheet required, in the aggregate for (1) each of the five succeeding fiscal years and (2) the remainder as a single amount. The amounts so determined should be reduced by rentals to be received from existing noncancelable subleases (with disclosure of the amounts of such rentals). For purposes of this rule, a noncancelable lease is defined as one that has an initial or remaining term of more than one year and is noncancelable, or is cancelable only upon the occurrence of some remote contingency or upon the payment of a substantial penalty.

(c) Additional disclosures shall be made to report in general terms: (1) The basis for calculating rental payments if dependent upon factors other than the lapse of time;

(2) Existence and terms of renewal or purchase options, escalation clauses, etc;

(3) The nature and amount of related guarantees made or obligations assumed;

(4) Restrictions on paying dividends, incurring additional debt, further leasing, etc; and

(5) Any other information necessary to assess the effect of lease commitments upon the financial position, results of operations, and changes in financial position of the lessee.

§ 335.621 General notes to balance sheets.

If present with respect to the bank for which the statement is filed, the following shall be set forth in the balance sheet or in referenced notes. Information required by paragraphs (a), (e), (f), (g), (h), (i), and (j) of this section shall be provided with the most recent fiscal year balance sheet and any interim date balance sheet being filed.

(a) *Assets subject to lien.* The amounts of assets mortgaged, pledged, or otherwise subject to a lien or security interest shall be designated and the obligation secured thereby, if any, shall be identified briefly.

(b) *Intercompany profits and losses.* The effect upon any balance sheet item of profits or losses, resulting from transactions with affiliated companies and not eliminated shall be stated. If impracticable of accurate determination without unreasonable effort or expense, an estimate or explanation shall be given.

(c) *Pension and retirement plans.* (1) A brief description of the essential provisions of any employee pension or retirement plan and of the accounting and funding policies relating thereto shall be given;

(2) The estimated annual cost of the plan shall be stated;

(3) If a plan has not been funded or otherwise provided for, the estimated amount that would be necessary to fund or otherwise provide for the past-service cost of the plan shall be disclosed;

(4) The excess, if any, of the actuarially computed value of vested benefits over the total of the pension fund and any balance sheet accruals, less any pension prepayments or deferred charges, shall be stated as of the most recent practicable date;

(5) A statement shall be given of the nature and effect of significant matters affecting comparability of pension costs for which income statements are presented.

(d) *Capital stock optioned to officers and employees.* (1) A brief description of the terms of each option arrangement shall be given, including the title and amount of securities subject to the option, the year or years during which the options were granted, and the year or years during which the optionees became, or will become, entitled to exercise the options;

(2) There shall be stated the number of shares under option at the balance sheet date, and the option price and the fair value thereof (per share and in total) at the dates the options were granted; the number of shares with respect to which options became exercisable during the period, and the option price and the fair value thereof (per share and in total) at the dates the options became exercisable; the number of shares with respect to which options were exercised during the period, and the option price and the fair value thereof (per share and in total) at the dates the options were exercised; and the number of unoptioned shares available at the beginning and at the close of the latest period presented, for the granting of options under an option plan. A brief description of the terms of each other arrangement covering shares sold or offered for sale to only directors, officers, and key employees shall be given, including the number of shares, and the offered price and the fair value thereof (per share and in total) at the dates of sale or offer to sell, as appropriate. The required information may be summarized as appropriate with respect to each of the categories referred to in paragraphs (d)(2) of this section;

(3) The basis of accounting for the option arrangements and the amount of charges if any, reflected in income with respect thereto shall be stated.

(e) *Restrictions that limit the availability of surplus and/or undivided profit for dividend purposes.* Describe the most restrictive of any such restriction, other than as reported under item 22(b) of Format F–9A, indicating briefly its source, its pertinent provisions, and

where appropriate and determinable, the amount of the surplus and/or undivided profits (1) so restricted or (2) free of such restrictions.

(f) *Contingent liabilities.* A brief statement as to contingent liabilties not reflected in the balance sheet shall be made.

(g) *Standby letters of credit.* State the amount of outstanding *standby letters of credit.* For the purpose of this paragraph, *standby letters of credit* include every letter of credit (or similar arrangement however named or designated) which represents an obligation to the beneficiary on the part of the issuing bank—

(1) To repay money borrowed by or advanced to or for the account of the account party or

(2) To make payment on account of any evidence of indebtedness undertaken by the account party, or

(3) To make payment on account of any default by the account party in the performance of an obligation,[1] except that, if prior to or at the time of issuance of a standby letter of credit, the issuing bank is paid an amount equal to the bank's maximum liability under the standby letter of credit, or has set aside sufficient funds in a segregated, clearly earmarked deposit account to cover the bank's maximum liability under the standby letter of credit, then the amount of that standby letter of credit need not be stated.

(h) *Defaults.* The facts and amounts concerning any default in principal, interest, sinking fund, or redemption provisions with respect to any issue of securities or credit agreements, or any breach of covenant of a related indenture or agreement, which default or breach existed at the date of the most recent balance sheet being filed and which as not been subsequently cured, shall be stated. Notation of such default or breach of covenant shall be made in the financial statements. If a default or breach exists, but acceleration of the obligation has been waived for a stated period of time beyond the date of the most recent balance sheet being filed, state the amount of the obligation and the period of the waiver.

(i) *Significant changes in bonds, mortgages, and similar debt.* Any significant changes in the authorized or issued amounts of bonds, mortgages, and similar debt since the date of the latest balance sheet being filed for a particular person or group shall be stated.

(j) *Warrants or rights outstanding.* Information with respect to warrants or rights outstanding at the date of the related balance sheet shall be set forth as follows:

(1) Title of issue of securities called for by warrants or rights outstanding;

(2) Aggregate amount of securities called for by warrants or rights outstanding;

(3) Date from which warrants or rights are exercisable and expiration date;

(4) Price at which warrant or right is exercisable.

[46 FR 25208, May 5, 1981, as amended at 48 FR 55564, Dec. 14, 1983; 54 FR 53594, Dec. 29, 1989]

§ 335.622 General notes to statement of income.

If present with respect to the bank for which the statement is filed, the following shall be set forth in the statement of income or in referenced notes thereto:

(a) *Intercompany profits and losses.* The amount of any profits or losses resulting from transactions between unconsolidated affiliated companies shall be stated. If impracticable of determination without unreasonable effort and expense, an estimate or explanation shall be given.

(b) *Depreciation and amortization.* For the period for which statements of income are filed, there shall be stated the policy followed with respect to:

(1) The provision for depreciation of physical properties or valuation allowances created in lieu thereof, including the methods and, if practicable, the rates used in computing the annual amounts;

[1] As defined, *standby letter of credit* would not include (1) commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer and which do not ''guaranty'' payment of a money obligation or (2) a guaranty or similar obligation issued by a foreign branch in accordance with and subject to the limitations of regulation M of the Board of Governors of the Federal Reserve System.

(2) The provision for depreciation and amortization of intangible assets, or valuation allowances created in lieu thereof, including the methods and, if practicable, the rates used in computing the annual amounts;

(3) The accounting treatment for maintenance, repairs, renewals, and improvements; and

(4) The adjustment of the accumulated valuation allowances for depreciation and amortization at the time the properties were retired or otherwise disposed of, including the disposition made of any profit or loss on sale of the properties.

(c) *Bonus, profit sharing, and other similar plans.* Describe the essential provisions of any plans in which only directors, officers or key employees may participate, and state, for each of the fiscal periods for which income statements are required to be filed, the aggregate amount provided for all plans by charges to expense.

(d) *Income tax expense.* (1) Disclosure shall be made, in the income statement or a note thereto, of the components of income tax expense, including:

(i) Taxes currently payable;

(ii) The net tax effects, as applicable, of (A) timing differences (indicate separately the amount of the estimated tax effect of each of the various types of timing differences where the amount of each such tax effects exceeds 5 percent of the amount computed by multiplying the income before tax by the applicable statutory Federal income tax rates; other differences may be combined) and (B) operating losses; and

(iii) The net deferred investment tax credits.

Amounts applicable to United States Federal income taxes, to foreign income taxes and to other income taxes shall be stated separately for each major component, unless the amounts applicable to foreign and other income taxes do not exceed 5 percent of the total for the component.

(2) If it is expected that the cash outlay for income taxes with respect to any of the succeeding three years will substantially exceed income tax expense for such year, that fact should be disclosed together with the approximate amount of the excess the year (or years) of occurrence and the reasons therefor.

(3) Provide a reconciliation between the amount of reported total income tax expense and the amount computed by multiplying the income before tax by the applicable statutory Federal income tax rate, showing the estimated dollar amount of each of the underlying causes for the difference. If no individual reconciling item amounts to more than 5 percent of the amount computed by multiplying the income before tax by the applicable statutory Federal income tax rate, and the total difference to be reconciled is less than 5 percent of the computed amount, no reconciliation need be provided unless it would be significant in appraising the trend of earnings. Reconciling items that are individually less than 5 percent of the computed amount may be aggregated in the reconciliation. The reconciliation may be presented in percentages rather than in dollar amounts.

(4) Those banks adopting SFAS No. 96, Accounting for Income Taxes, should disclose such adoption and provide appropriate income tax expense disclosure as therein required, in lieu of paragraph (d)(1) of this section.

(e) *Interest capitalized.* The amount of interest cost capitalized in each period for which an income statement is presented shall be shown within the income statement. Banks which follow a policy of capitalizing interest cost shall make the following additional disclosures:

(1) The reason for the policy of interest capitalization and the way in which the amount to be capitalized is determined.

(2) The effect on net income for each period for which an income statement is presented of following a policy of capitalizing interest as compared to a policy of charging interest to expense as incurred.

(f) *Disagreements on accounting and financial disclosure matters.* If, (1) within the twenty-four months prior to the date of the most recent financial statements, a Form F–3 has been filed reporting a change of accountants,

(2) Included in the Form F–3 there was a reported disagreement on any matter of accounting principles or

practices or financial statement disclosure,

(3) During the fiscal year in which the change in accountants took place or during the subsequent fiscal year there have been any transactions or events similar to those which involved the reported disagreement, and

(4) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required, state the existence and nature of the disagreement and also state the effect on the financial statements if the method had been followed which the former accountant apparently concluded was required. The effects on the financial statements need not be disclosed if the method asserted by the former accountant ceases to be generally accepted because of authoritative standards or interpretations subsequently issued.

(g) *Disclosure of selected quarterly financial data in notes to financial statements*—(1) *Exemption.* This paragraph (g) shall not apply unless the bank meets the tests prescribed by 17 CFR 229.302(a)(5).

(2) *Disclosure requirement.* (i) Disclosure shall be made in a note to financial statements of total interest income, total interest expense, net interest income, provision for loan and lease losses, other income (expense) net, income before extraordinary items and cumulative effect of a change in accounting, net income, and per share data based upon such income for each full quarter within the two most recent fiscal years and any subsequent interim period for which income statements are presented.

(ii) When the data required by the preceding paragraph above vary from the amounts previously reported on the Form F–4 filed for any quarter, such as would be the case when a pooling of interests occurs or where an error is corrected, reconcile the amounts given with those previously reported describing the reason for the difference.

(iii) Describe the effect of any unusual or infrequently occurring items recognized in each full quarter within the two most recent fiscal years and any subsequent interim period for which income statements are presented, as well as the aggregate effect and the nature of year-end or other adjustments that are material to the results of that quarter.

(iv) Where this note is part of audited financial statements, it may be designated ''unaudited.''

[46 FR 25208, May 5, 1981, as amended at 54 FR 53594, Dec. 29, 1989; 59 FR 67175, Dec. 29, 1994]

§ 335.623 Consolidated financial statements.

(a) Consolidated statements generally present more meaningful information to the investor than unconsolidated statements. Except where good reason exists, consolidated statement of the bank and its majority-owned significant subsidiaries should be filed.

(b) Every majority-owned bank-premises subsidiary and every majority-owned subsidiary operating under the provisions of section 25 or section 25(a) of the Federal Reserve Act (''Agreement Corporations'' and ''Edge Act Corporations'') shall be consolidated with that of the reporting bank irrespective of whether such subsidiary is a significant subsidiary.

(c) If the financial statements of a subsidiary are as of a date or for periods different from those of the bank, such statements may be used as the basis for consolidation of the subsidiary only if the date of such statements is not more than 93 days from the date of the close of the bank's fiscal year; the closing date of the subsidiary is specified; the necessity for the use of different closing dates is explained briefly; and any changes in the respective fiscal periods of the bank and subsidiary made during the period of report are indicated clearly.

(d) There shall be set forth in a note to each consolidated balance sheet filed a statement of any difference between the investment in subsidiaries consolidated, as shown by the bank's books, and the bank's equity in the net assets of such subsidiaries as shown by the subsidiaries' books. If any such difference exists, there shall be set forth the amount of the difference and the disposition made thereof in preparing the consolidated statements, naming

the balance sheet captions, and stating the amount included in each.

(e) There may be filed financial statements in which majority-owned subsidiaries not consolidated with the parent are consolidated or combined in one or more groups, and 50 percent or less owned persons, the investments in which are accounted for by the equity method are consolidated or combined in one or more groups, principles of inclusion or exclusion which will clearly exhibit the financial position and results of operations of the group or groups.

(f) A brief description of the principles followed in consolidating or combining the separate financial statements, including the principles followed in determining the inclusion or exclusion of (1) subsidiaries and (2) companies in consolidated or combined financial statements, shall be stated in the notes to the respective financial statements.

(g) As to each consolidated financial statement and as to each combined financial statement, if there has been a change in the persons included or excluded in the corresponding statement for the preceding fiscal period filed with the FDIC which has a material effect on the financial statements, the persons included and the persons excluded shall be disclosed. If there have been any changes in the respective fiscal periods of the persons included made during the periods of the report which have a material effect on the financial statements, indicate clearly such changes and the manner of treatment.

(h) A statement shall be made in a note to the latest balance sheet of the amount and the accounting treatment of any difference between the investment of a bank and its consolidated subsidiaries, as shown in the consolidated balance sheet, in the unconsolidated subsidiaries and 50 percent or less owned persons accounted for by the equity method, and their equity in the net assets of such unconsolidated subsidiaries and 50 percent or less owned persons.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53594, Dec. 29, 1989]

§ 335.624 Statement of changes in equity capital.

A statement of changes in equity capital shall be filed with each statement of income filed under this part.

§ 335.625 Statement of changes in financial position, and/or statement of cash flows.

A statement of changes in financial position and/or statement of cash flows, as appropriate, shall be filed with each statement of income filed pursuant to this part.

[54 FR 53594, Dec. 29, 1989]

§ 335.626 Schedules to be filed.

(a) The following schedules shall be filed with each balance sheet filed under this part: Schedule I—Securities; Schedule III—Loans and Lease Financing Receivables; and Schedule IV—Bank Premises and Equipment.

(b) The following schedule shall be filed with each statement of income filed under this part; schedule II—Loans to Officers, Directors, Principal Security Holders, and any Associates of the Foregoing Persons; schedule V—Investments in, Income from Dividends, and Equity in Earnings or losses of Subsidiaries and Associated Companies; and schedule VI—Allowance for Possible Loan Losses.

(c) Reference to the schedules referred to in paragraphs (a) and (b) of this section shall be made against the appropriate captions of the balance sheet or statement of income.

(d) The schedules shall be examined by the independent accountant if the related financial statements are so examined.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53594, Dec. 29, 1989]

§ 335.627 Format F–9 financial statements.

A. Balance Sheet (Format F–9A)

B. Statement of Income (Format F–9B)

C. Statement of Changes in Equity Capital (Format F–9C)

D. Schedules (Format F–9D)

GENERAL INSTRUCTIONS

1. Preparation of Financial Statements

The formats are intended to serve as guides for preparation of financial statements required to be filed under this part. The formats are recommended presentations, but financial statements may be filed in such form and order as will best indicate their significance and character. Requirements for inclusion of financial statements in certain other guideline forms required by part 335 are found in the instructions to such forms.

The formats for the statements of changes in financial position and cash flows are not set forth herein. Refer to SFAS No. 95 ''Statement of Cash flows'', appendix C for an illustrative example of an acceptable format for banks.

Banks have the option of conforming their financial statement formats to the provisions of Article 9 of Regulation S–X of the SEC (17 CFR 210.9) in lieu of the formats set forth herein. Savings banks are encouraged to utilize Call Report formats for the Balance Sheet, Statement of Income, Statement of Changes in Equity Capital, and appropriate schedules.

2. Accrual Accounting

Financial statements shall generally be prepared on the basis of accrual accounting whereby all revenues and all expenses shall be recognized during the period earned or incurred regardless of the time received or paid, with certain exceptions: (a) Where the results would be only insignificantly different on a cash basis, or (b) where accrual is not feasible. Statements with respect to the first fiscal year that a bank reports on the accrual basis shall indicate clearly, by footnote or otherwise, the beginning-of-year adjustments that were necessary and their effect on prior financial statements filed under this part.

3. Negative Amounts

Negative amounts shall be shown in brackets or parentheses and so described in the related caption, columnar heading or a note to the statement or schedule, as appropriate.

4. Items not Material

If the amount that would otherwise be required to be shown with respect to any items is not material, it need not be separately set forth.

5. Inapplicable Captions and Omission of Unrequired or Inapplicable Financial Statements and Schedules

No caption need be shown in any financial statement or schedule if the items and conditions are not present. Financial statements and schedules not required or inapplicable because the required matter is not present need not be filed, but the statements and schedules omitted and the reasons for their omission shall be indicated in the list of financial statements and schedules required by the applicable form.

A. BALANCE SHEET

The Balance Sheet shall be prepared in accordance with the instructions for the preparation of the Consolidated Report of Condition (FFIEC 031, 032, 033, 034 as applicable) except to the extent revised or expanded financial data presentation is necessary to meet the disclosure standards of the Securities Exchange Act of 1934, as amended.

NOTE: Banks subject to this part are required to report on the accrual basis of accounting.

The following captions and added *supplemental* instructions shall be observed in the preparation of the Balance Sheet required under this part.

Assets

1. *Cash and balances due from depository institutions.* (a) State separately (1) interest-bearing balances in other banks and (2) non-interest-bearing balances and cash.

(b) Any withdrawal and usage restrictions (including requirements of the Federal Reserve to maintain certain average reserve balances) or compensating balance requirements should be disclosed.

2. *Securities.* (a) Include securities held for investment only. Disclose the aggregate book value of investment securities: show on the balance sheet parenthetically the aggregate market value at balance sheet date. The aggregate amounts should include securities pledged, loaned or sold under repurchase agreements and similar arrangements; borrowed securities and securities purchased under resale agreements or similar arrangements should be excluded.

(b) Disclose in a note the carrying value and market value of securities of (1) the U.S. Treasury and other U.S. Government agencies and corporations; (2) states of the U.S. and political subdivisions; and (3) other securities.

3. *Federal funds sold and securities purchased under agreements to resell.* These amounts should be presented gross and not netted against Federal funds purchased and securities sold under agreements to repurchase.

4. *Loans and lease financing receivables.* Disclose separately (1) total loans and lease financing receivables, (2) the related allowance for losses and (3) unearned income.

(a) Disclose on the balance sheet or in a note the amount of total loans in each of the following categories:

(1) Commercial, financial and agricultural, (2) real estate-construction, (3) real estate-

mortgage, (4) installment loans to individuals, (5) lease financing receivables, (6) foreign, (7) other. (State separately any other loan category regardless of relative size if necessary to reflect any unusual risks or uncertainties such as a substantial portion of total loans which are concentrated in one or a few industries or foreign countries).

(b) A series of categories other than those specified in (a) above may be used to present details of loans if considered a more appropriate presentation.

(c) The amount of foreign loans must be presented if the disclosures specified by § 335.618 are required.

(d) For each period for which an income statement is required, furnish in a note a statement of changes in the allowance for loan and lease losses showing the balances at beginning and end of the period, provision charged to income, recoveries of amounts charged off and losses charged to the allowance.

(e)(1)(i) For each balance sheet date, disclose in a note the aggregate dollar amount of loans (exclusive of loans to any such persons which in the aggregate do not exceed $60,000 during the latest year) made by the bank or any of its subsidiaries to directors, principal-officers, or principal holders of equity securities of the bank or any of its significant subsidiaries, or to any associate of such persons. For the latest fiscal year, an analysis of activity with respect to such aggregate loans to related parties should be provided. The analysis should include the aggregate amount at the beginning of the period, new loans, repayments, and other changes. (Other changes, if significant, should be explained).

(ii) This disclosure need not be furnished when the aggregate amount of such loans at the balance sheet date (or with respect to the latest fiscal year, the maximum amount outstanding during the period) does not exceed 5 percent of equity capital at the balance sheet date.

(2) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to paragraph (e)(1)(i) of this section A, relates to loans which are nonaccrual, past due (over 90 days) or restructured, as those terms are used in the Call Report, so state and disclose the aggregate amount of such loans along with such other information necessary to an understanding of the effects of the transactions of the financial statements.

(3) Notwithstanding the aggregate disclosure called for by paragraph (e)(1) of this section A, if any loans were not made in the ordinary course of business during any period for which an income statement is required to be filed, provide an appropriate description of each such loan.

5. *Assets held in trading accounts.* Include securities or any other investments held for trading purposes only.

6. *Premises and fixed assets.*

7. *Other real estate owned.* State in a note (1) the basis at which carried, (2) the aggregate fair market value of all real estate owned other than bank premises with an explanation of the method of determining such fair market value, and (3) for each period for which an income statement is required, a reconciliation of any valuation allowance account, including the balance at the beginning and end of the period, provisions charged to income, and losses charged to the allowance.

8. *Investments in an indebtedness of unconsolidated subsidiaries and associated companies.*

9. *Customers' liability to the bank on acceptances outstanding.*

10. *Intangible assets.*

11. *Other assets.* Disclose separately on the balance sheet or in a note thereto any of the following assets or any other assets the amount of which exceeds 30 percent of equity capital. The remaining assets may be shown as one amount.

(1) Accrued interest.

(2) Net deferred tax charges.

12. *Total assets.*

Liabilities

13. *Deposits.* (a) Disclose separately the amounts of noninterest bearing deposits and interest bearing deposits. The amount of noninterest bearing deposits and interest bearing deposits in foreign banking offices must be presented if the disclosures provided by § 335.618 are required.

(b) State in a note the aggregate amount of (1) time certificates of deposit in denominations of $100,000 or more and (2) other time deposits in denominations of $100,000 or more, in domestic offices and, if § 335.618 applies, foreign offices.

14. *Federal funds purchased and securities sold under agreements to repurchase and other short term borrowings.* (a) Disclose separately on the balance sheet or in a note, amounts payable for (1) Federal funds purchased and securities sold under agreements to repurchase; (2) commercial paper, and (3) other short term borrowings. Disclose any unused lines of credit for short-term financing.

(b) If the average balance outstanding during the period for any category was 30 percent or more of equity capital, provide the following information, with respect to each category, in a note:

(1) Weighted average interest rate at balance sheet date.

(2) Maximum amount of borrowings at any month-end during each period for which an end of period balance sheet is required.

(3) Approximate average borrowings outstanding during the period.

(4) Approximate weighted average interest rate for such average borrowings outstanding during the period.

15. *Demand notes issued to the U.S. Treasury.*

16. *Other borrowed money.* See supplemental instruction to Item 14.

17. *Mortgage indebtedness and obligations under capitalized leases.* (a) Report the amount of mortgages, liens, or other encumbrances on premises and fixed assets and on other real estate owned for which the bank or its consolidated subsidiaries are liable. If the bank is the lessee on capitalized lease property, include the bank's liability for capitalized lease payments. (See the Call Report Glossary entry for ''lease accounting'' for a discussion of accounting with bank as lessee.)

(b) State in a note material terms and conditions of each obligation, including (but not limited to): (1) The general character of the debt; (2) the rate of interest; (3) the date of maturity or if maturing serially, a brief indication of the serial maturities; (4) if the payment of principal or interest is contingent, an appropriate indication of such contingency; (5) a brief indication of priority; and (6) the amount outstanding at the balance sheet date.

18. *Bank's liability or acceptances executed and outstanding.* Report the amount of liability that is represented by drafts and bills of exchange that have been accepted by the reporting bank, or by others for its account, and that are outstanding. See the Call Report Glossary entry for ''Bankers Acceptances'' for further information.

19. *Notes and debentures subordinated to deposits.* (a) Report the amount of outstanding notes and debentures (including mandatory convertible debt) that are subordinated to the deposits of the consolidated bank (see the Call Report Glossary entry for ''Subordinated Notes and Debentures'').

(b) State in a note the material terms and conditions of each obligation including, but not limited to: (1) The general character of the debt; (2) the rate of interest; (3) the date of maturity, or if maturing serially, an indication of serial maturities; (4) if the payment of principal or interest is contingent, an appropriate indication of such contingency; (5) a brief indication of priority; (6) the amount outstanding at the balance sheet date; and (7) if convertible, the basis.

20. *Other liabilities.* Disclose separately on the balance sheet or in a note any of the following liabilities or any other items which are individually in excess of 25 percent of the equity capital (except that amounts in excess of 5 percent of equity capital should be disclosed with respect to item (4)). The remaining items may be shown as one amount. (1) Income taxes payable, (2) Deferred income taxes, (3) Indebtedness to affiliates and other persons the investments in which are accounted for by the equity method, (4) Indebtedness to directors, executive officers, and principal holders of equity securities of the bank or any of its significant subsidiaries, (5) Accounts payable and accrued expenses, (6) Commitments and contingent liabilities, minority interest in consolidated subsidiaries.

21. *Total Liabilities.*

22. *Limited-life preferred stock.* (a) Report the amount of any preferred stock that has a stated maturity date that can be redeemed at the option of the holder (excluding those issues of preferred stock that automatically convert into perpetual preferred stock or common stock at a stated date). State on the face of the balance sheet the title of each issue, the carrying amount and redemption amount. (If there is more than one issue, these amounts may be aggregated on the face of the balance sheet and details concerning each issue may be presented in the note required by paragraph (b) below.) Show also the dollar amount of any shares subscribed but unissued, and show the deduction of subscriptions receivable therefrom. If the carrying amount is different from the redemption amount, describe the accounting treatment for such difference in the note required by paragraph (b) below. Also state in this note or on the face of the balance sheet, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate.

(b) State in a separate note captioned ''Redeemable Preferred Stock'': (1) A general description of each issue, including its redemption features (e.g., sinking fund, at option of holders, out of future earnings) and the rights, if any, of holders in the event of default, including the effect, if any, on junior securities in the event that a required dividend, sinking fund, or other redemption payment(s) is not made; (2) the combined aggregate amount of redemption requirements for all issues each year for the five years following the date of the latest balance sheet; and (3) the changes in each issue for each period for which an income statement is required to be filed.

Equity Capital

23. *Perpetual preferred stock.* Report the amount of preferred stock that does not have a stated maturity date or that cannot be redeemed at the option of the holder (including those issues of preferred stock that automatically convert into common stock at a stated date). State on the face of the balance sheet, or if more than one issue is outstanding, state in a note, the title of each issue and the dollar amount thereof. Show also the dollar amount of any shares subscribed but unissued, and show the deduction of subscriptions receivable therefrom. State on the face of the balance sheet or in a note, for each issue, the number of shares authorized

and the number of shares issued or outstanding, as appropriate. Show in a note or separate statement the changes in each class of preferred shares reported herein for each period for which an income statement is required to be filed.

24. *Common stock.* Report the aggregate par or stated value of outstanding common stock. State for each class of shares the title of issue, the number of shares authorized, issued and outstanding, the par value per share and the dollar amount thereof. Show also the dollar amount, if any, of each class of shares subscribed to but unissued, and show the deduction of subscriptions receivable therefrom. Disclose in the statement or in a note the changes in the aggregate par or stated value of outstanding common stock for each period for which an income statement is required.

25. *Surplus.*

26. *Undivided profits and capital reserves.* Report the amounts appropriated and unappropriated; restrictions which limit the payment of dividends; and the amount of undivided profits which represents undistributed earnings of 50 percent or less owned companies.

27. *Cumulative foreign currency translation adjustments.* (Not applicable to banks with domestic offices only).

28. *Total equity capital.*

29. *Total liabilities, limited-life preferred stock, and equity capital.*

B. STATEMENT OF INCOME

The statement of income shall conform generally to the Consolidated Report of Income (FFIEC 031, 032, 033, 034 as applicable) and related instructions thereto, except to the extent revised or expanded financial data presentation is necessary to meet the disclosure standards of the Securities Exchange Act of 1934, as amended.

NOTE: See § 335.601 for general requirements of financial reporting.

The following captions and added supplemental instructions shall be observed in the preparation of the statement of income required under this subpart.

1. *Interest income.* Include commitment and origination fees, late changes and current amortization of premium and accretion of discount on loans which are related to or are an adjustment of the loan interest rate. Disclose separately.

(a) Interest and fee income on loans.

(b) Income from lease financing receivables.

(c) Interest income on balance due from depository institutions.

(d) Interest and dividend income on securities—Disclose separately (1) taxable interest income, (2) nontaxable interest income, and (3) dividends. State in a note interest and dividend income on

(i) U.S. Treasury securities and U.S. Government agency and corporation obligations.

(ii) Securities issued by states and political subdivisions in the U.S.

(iii) Other domestic securities (debt and equity).

(iv) Foreign securities (debt and equity).

(e) Interest income from assets held in trading accounts.

(f) Interest income on federal funds sold and securities purchased under agreements to resell.

2. *Interest expense.* Disclose separately:

(a) Interest on deposits.

(i) Interest on time certificates of deposit of $100,000 or more.

(ii) Interest on other deposits.

(b) Expense of federal funds purchased and securities sold under agreements to repurchase.

(c) Interest on demand notes issued to the U.S. Treasury and on other borrowed money.

(d) Interest on mortgage indebtedness and obligations under capitalized leases.

(e) Interest on notes and debentures subordinated to deposits.

3. *Net interest income.*

4. *Provision for loan and lease losses.*

5. *Net interest income after provision for loan and lease losses.*

6. *Noninterest income.* Disclose separately:

(a) Income from fiduciary activities.

(b) Service charges on deposit accounts.

(c) Trading gains (losses) and fees from foreign exchange transactions.

(d) Other foreign transaction gains (losses).

(e) Gains (losses) and fees from assets held in trading account. Report the net gain or loss from the sale of assets reportable in item 5, ''Assets held in trading accounts,'' other than those trading gains (losses) and fees relating to foreign exchange transactions reported in item 6(c) above.

(f) Other noninterest income. Report all operating income of the bank not required to be reported in item 1(a) through 1(f) and 6(a) through 6(e). State separately the dollar amount of any individual component of this item which exceeds 25 percent of the total.

7. *Gain (losses) on securities not held in trading accounts.* Report the net gain or loss. Disclose in a note the method used to determine the cost of investments sold and the related income taxes.

8. *Noninterest expense.* (a) Salaries and employee benefits.

(b) Expenses of premises and fixed assets.

(c) Other noninterest expense. See item 6(f) for threshold for disclosure of individual components.

(d) Total noninterest expense.

(e) Amortization of goodwill.

(f) Minority interest in income of consolidated subsidiaries.

9. *Income (loss) before income taxes and extraordinary items and other adjustments.*

10. *Applicable income taxes (on item 9). See § 335.622(d).*

11. *Income (loss) before extraordinary items and other adjustments.*

12. *Extraordinary items and other adjustments.*

(a) Extraordinary items and other adjustments, gross of income taxes.

(b) Applicable income taxes (on item 12(a)).

(c) Extraordinary items and other adjustments, net of income taxes.

13. *Net income (loss).* Report the sum of items 11 and 12(c).

14. *Earnings per share data.*

C. STATEMENT OF CHANGES IN EQUITY CAPITAL

The format and content of the Statement of Changes in Equity Capital shall conform generally to section B of the Consolidated Report of Income (FDIC 8040/02) and related instruction thereto except to the extent revised or expanded financial data presentation is necessary to meet the disclosure standards of the Securities Exchange Act of 1934, as amended.

The following supplemental instructions shall be observed in the preparation of the Statement of Changes in Equity Capital required under this part.

Reconcile the various equity capital accounts individually as follows:

1. *Balance end of previous year.*

2. *Prior period adjustment.*[2]

(a) Cumulative effect type changes in accounting principles shall be reported under item 9 of the Statement of Income.

3. *Adjusted balance end of previous* year.

4. *Net income (loss).*

5. *Sale, conversion, acquisition, or retirement of capital net:* (a) *Transactions with own holding company or affiliates.* (b) *Other.*

6. *Changes incident to mergers and absorptions, net.*

7. *Less: Cash dividends declared on common stock.*

8. *Less: Cash dividends declared on preferred stock.*

9. *Stock dividend issued.*

10. *Other increases (decreases).*[2]

11. *Balance end of period.*

D. SCHEDULES (FORMAT F–9D)

Schedule I—Securities

Exclude assets held in trading accounts.

	Book value (Col. A)	Market value (Col. B)
1. U.S. Treasury securities		
2. U.S. Government agency and corporation obligations:		
a. All holdings of U.S. Government-issued or guaranteed certificates of participation in pools of residential mortgages		
b. All other		
3. Securities issued by states and political subdivisions in the U.S		
4. Other domestic securities (debt and equity):		
a. All holdings of private (i.e., nongovernment-issued or guaranteed) certificates of participation in pools of residential mortgages		
b. All other		
5. Foreign securities (debt and equity)		
6. Total (sum of items 1 through 5) (total of column A must equal call report schedule RC, item 2)		
7. Pledged securities		

[2] State separately any material amounts, indicating clearly the nature of the transaction out of which the item arose.

SCHEDULE II—LOANS TO OFFICERS, DIRECTORS, PRINCIPAL SECURITY HOLDERS, AND ANY ASSOCIATES OF THE FOREGOING PERSONS [1]

[NOTE: See footnotes at end of schedule.]

Col. A	Col. B	Col. C	Col. D		Col. E
			Deductions		
Name of borrower [2]	Balance at beginning of period	Additions	(1) Amounts collected [3]	(2) Amounts charged off	Balance at end of period

[1] Provide information if at any time during the period for which related income statements are required to be filed, loans to a specified person and associates exceeded 2½% of equity capital of the bank or $500,000, whichever is less.

It shall not be necessary to include amount of loans related to individuals for household, family and other personal expenditures made in the ordinary course of business.

Loans to directors (and any associates) who are neither officers nor principal security holders may be stated in the aggregate. The number of directors for whom loans are stated in the aggregate shall be indicated in column A.

[2] State in a note hereto pertinent information such as the maturity date, interest rate, terms of repayment and collateral, if any, of loans made to the specified persons named in column A as of the date of the most recent balance sheet being filed.

[3] If collection was other than cash, explain.

SCHEDULE III—LOANS AND LEASE FINANCING RECEIVABLES

Net of unearned income and before adjustment for allowance for loan and lease losses. Excluding assets held in trading accounts.

	Book value
1. Loans secured by real estate:	
a. Construction and land development	.....
b. Secured by farmland (including farm residential and other improvements)	.....
c. Secured by 1–4 family residential properties	.....
d. Secured by multifamily (5 or more) residential properties	.....
e. Secured by nonfarm nonresidential properties	.....
2. Loans to depository institutions:	
a. To commercial banks in the U.S.:	
(1) To U.S. branches and agencies of foreign banks	.....
(2) To other commercial banks in the U.S	.....
b. To other depository institutions in the U.S	.....
c. To banks in foreign countries:	
(1) To foreign branches of other U.S. banks	.....
(2) To other banks in foreign countries	.....
3. Loans to finance agricultural production and other loans to farmers	.....
4. Commercial and industrial loans:	
a. To U.S. addressees (domicile)	.....
b. To non-U.S. addressees (domicile)	.....
5. Acceptance of other banks	.....
6. Loans to individuals for household, family, and other personal expenditures (includes purchased paper):	
a. Credit cards and related plans	.....
b. Other	.....
7. Loans to foreign governments and official institutions (including foreign central banks)	.....
8. Obligations (other than securities) of states and political subdivision in the U.S.:	
a. Nonrated industrial development obligations	.....
b. Other obligations (excluding securities)	.....
9. Other loans:	
a. Loans for purchasing or carrying securities (secured and unsecured)	.....
b. All other loans	.....
10. Lease financing receivables (net of unearned income)	.....
11. Less: Any unearned income on loans reflected in items 1–9 above	.....
12. Total loans and leases, net of unearned income (sum of items 1 through 10 minus item 11) (must equal call report schedule RC, item 4a)	.....
Note: Commercial paper included in call report schedule RC–C	.....

SCHEDULE IV—BANK PREMISES AND EQUIPMENT

[NOTE: See footnotes at end of schedule.]

Classification	Column A	Column B	Column C
	Gross book value [1]	Accumulated depreciation and amortization [2]	Amount at which carried on balance sheet
Bank premises (including land)	.....	.....	.....
Equipment	.....	.....	.....
Leasehold improvements	.....	.....	.....

SCHEDULE IV—BANK PREMISES AND EQUIPMENT—Continued

[NOTE: See footnotes at end of schedule.]

Classification	Column A	Column B	Column C
	Gross book value [1]	Accumulated depreciation and amortization [2]	Amount at which carried on balance sheet
Totals			

[1] State the basis of determining the amounts in column A.
[2] The nature and amount of significant additions (other than provisions for depreciation and amortization) and deductions from depreciation accounts shall be stated in an explanatory footnote.

SCHEDULE V—INVESTMENTS IN, INCOME FROM DIVIDENDS, AND EQUITY IN EARNINGS OR LOSSES OF SUBSIDIARIES AND ASSOCIATED COMPANIES

[NOTE: See footnotes at end of schedule.]

Name of issuer [1]	Col. A	Col. B	Col. C	Col. D	Col. E
	Percent of voting stock owned	Total investment	Equity in underlying net assets at balance sheet date [2]	Amount of dividends [3]	Bank's proportionate part of earnings or loss for the period
Totals					

[1] Group separately securities of (a) subsidiaries consolidated, (b) subsidiaries not consolidated, and (c) associated companies. Show shares, bonds, notes and advances separately in each case.
[2] Equity shall include advances and other obligations reported in column B to the extent recoverable.
[3] State as to any dividends other than cash the basis on which they have been reported as income. If any such dividend received has been credited to income in an amount differing from that charged to surplus and/or undivided profits by the disbursing subsidiary, state the amount of such difference and explain.

SCHEDULE VI—ALLOWANCE FOR POSSIBLE LOAN LOSSES

[NOTE: See footnotes at end of schedule.]

	Amount
Balance end of previous period	
Recoveries credited to allowance	
Changes incident to mergers and absorptions [1]	
Provisions for possible loan losses	
Less: Losses charged to allowance	
Foreign currency translation adjustment	
Balance end of period [2]	

[1] Describe briefly in a footnote any such addition.
[2] State in a footnote (1) the amount deducted for Federal income tax purposes, (2) the maximum amount that could have been deducted for Federal income tax purposes, and (3) the balance of the allowance at the end of the period as reported for Federal income tax purposes.

Note: See schedule C of FDIC 8040/02.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53594, Dec. 29, 1989; 57 FR 58136, Dec. 9, 1992]

§ 335.628 Pro forma financial information.

I. PRESENTATION REQUIREMENTS

(a) Pro forma financial information shall be furnished when any of the following conditions exist:

(1) During the most recent fiscal year or subsequent interim period for which a balance sheet is required, a significant business combination accounted for as a purchase has occurred;

(2) After the date of the most recent balance sheet required to be filed, consummation of a significant business combination to be accounted for by either the purchase method or pooling-of-interests method of accounting has occurred or is probable;

(3) The bank is offering its securities to the security holders of a significant business to be acquired or the proceeds from the offered securities will be applied, directly or indirectly, to the purchase of a specific significant business;

(4) The disposition of a significant portion of a business either by sale, abandonment or distribution to shareholders by means of a spin-off, split-up or split-off has occurred or is probable and such disposition is not fully reflected in the bank's financial statements included in the filing; or

(5) Other transactions or events have occurred or are probable for which disclosure of pro forma financial information would be material to investors.

(b) A business combination or disposition of a business shall be considered significant if:

(1) A comparison of the most recent annual financial statements of the business acquired or to be acquired and the bank's most recent annual consolidated financial statements filed at or prior to the date of acquisition indicates that the business would be a significant subsidiary under conditions specified in § 335.103(nn): or

(2) The business to be disposed of meets the conditions of a significant subsidiary in § 335.102(nn).

(c) When consummation of more than one transaction has occurred or is probable during a fiscal year, the tests of significance in paragraph (b) of this section shall be applied to the cumulative effect of those transactions. If the cumulative effect of the transactions is significant, pro forma financial information shall be presented.

(d) For purposes of this section the term *business* should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity's operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations. A presumption exists that a separate entity, a subsidiary, or a division is a business. However, a lesser component of an entity may also constitute a business. Among the facts and circumstances which should be considered in evaluating whether an acquisition of a lesser component of an entity constitutes a business are the following:

(1) Whether the nature of the revenue-producing activity of the component will remain generally the same as before the transaction; or

(2) Whether any of the following attributes remain with the component after the transaction:

(i) Physical facilities,

(ii) Employee base,

(iii) Market distribution system,

(iv) Sales force,

(v) Customer base,

(vi) Operating rights,

(vii) Production techniques, or

(viii) Trade names.

(e) This section does not apply to transactions between a bank and its totally owned subsidiaries.

II. PREPARATION REQUIREMENTS

(a) *Objective.* Pro forma financial information should provide investors with information about the continuing impact of a particular transaction by showing how it might have affected historical financial statements if the transaction had been consummated at an earlier time. Such statement should assist investors in analyzing the future prospects of the bank because they illustrate the possible scope of the change in the bank's historical financial position and results of operations caused by the transactions.

(b) *Form and content.* Pro forma financial information shall consist of a pro forma condensed balance sheet, pro forma condensed statements of income, and accompanying explanatory notes. Where a limited number of pro forma adjustments are required and those adjustments are easily understood, a narrative description of the pro forma effects of the transaction may be furnished in lieu of the statements described herein.

(2) The pro forma financial information shall be accompanied by an introductory paragraph which briefly sets forth a description of (i) the transaction; (ii) the entities involved, and (iii) the periods for which the pro forma information is presented. In addition, an explanation of what the pro forma presentation shows shall be set forth.

(3) The pro forma condensed financial information need only include major captions (*i.e.,* the numbered captions) prescribed by § 335.627 A and B. Where any major balance sheet caption is less than 10 percent of total assets, the caption may be combined with others. When any major income statement caption is less than 15 percent of average net income of the bank for the most recent three fiscal years, the caption may be combined with others. In calculating average net income, loss years should be excluded, unless losses were incurred in each of the most recent three years, in which case the average loss shall be used for purposes of this test. Notwithstanding these tests, *de minimis* amounts need not be shown separately.

(4) Pro forma statements shall ordinarily be in columnar form showing condensed historical statement, pro forma adjustments, and the pro forma results.

(5) The pro forma condensed income statement shall disclose income (loss) from continuing operations before nonrecurring charges or credits directly attributable to the transaction. Material nonrecurring charges or credits and related tax effects which result directly from the transaction and which will be included in the income of the Bank within the 12 months succeeding the transaction shall be disclosed separately. It should be clearly indicated that such charges or credits were not considered in the pro forma condensed income statement. If the transaction for which pro forma financial information is presented related to the disposition of a business, the pro forma results should give effect to the disposition and be presented under an appropriate caption.

(6) Pro forma adjustments related to the pro forma condensed income statement shall be computed assuming the transaction was consummated at the beginning of the fiscal year presented and shall include adjustment which give effect to events that are (i) directly attributable to the transaction, (ii) expected to have a continuing impact on the bank, and (iii) factually supportable. Pro

forma adjustments related to the pro forma condensed balance sheet shall be computed assuming the transaction was consummated at the end of the most recent period for which a balance sheet is required and shall include adjustments which give effect to events that are directly attributable to the transaction and factually supportable, regardless of whether they have a continuing impact or are nonrecurring. All adjustments should be referenced to notes which clearly explain the assumption involved.

(7) Historical, primary and fully diluted per share data based on continuing operations (or net income if the bank does not report discontinued operations, extraordinary items, securities gains (losses), or the cumulative effects of accounting changes) for the bank, and primary and fully diluted pro forma per share data based on continuing operations before nonrecurring charges or credits directly attributable to the transaction shall be presented on the face of the pro forma condensed income statement together with the number of shares used to compute such per share data. For transactions involving the issuance of securities, the number of shares used in the calculation of the pro forma per shares outstanding during the period, adjusted to give effect to shares subsequently issued or assumed to be issued had the particular transaction or event taken place at the beginning of the period presented. If a convertible security is being issued in the transaction, consideration should be given to the possible dilution of the pro forma per share data.

(8) If the transaction is structured in such a manner that significantly different results may occur, additional pro forma presentations shall be made which give effect to the range of possible results.

INSTRUCTIONS

1. The historical statement of income used in the pro forma financial information shall not report operations of a segment that has been discontinued, extraordinary items, securities gains (losses), or the cumulative effects of accounting changes. If the historical statement of income includes such items, only the appropriate portion of the statement (and appropriate captions) should be used in preparing pro forma results.

2. For a purchase transaction, pro forma adjustments for the income statement shall include amortization of any intangible asset, depreciation and other adjustments based on the allocated purchase price of net assets acquired. Disclose in a note the effect which the purchase adjustment will have on the reported results of operations for each of the next five years if such adjustments:

(a) Involve a significant write-down of the historical cost of the acquired assets to their fair value at the acquisition date; and

(b) Will have a significant effect on earnings in periods immediately following the acquisition which will be progressively eliminated over a relatively short period.

3. For a disposition transaction, the pro forma financial information shall begin with the historical financial statements of the bank and show the deletion of the business to be divested along with the necessary pro forma adjustments, including adjustments relating to expenses that will be or have been incurred on behalf of the business to be divested, *e.g.*, advertising costs and personnel expenses.

4. When consummation of more than one transaction has occurred or is probable during a fiscal year, the pro forma financial information may be presented on a combined basis; however, in some circumstances, *e.g.*, where some transactions have been consummated and the others are probable, it may be more useful to present the pro forma financial information on a nonaggregated basis, even though some or all of the transactions would not meet the tests of significance individually. For combined presentations, a note should explain the various transactions and disclose the maximum variances in the pro forma financial information which would occur for any of the possible combinations. If the pro forma financial information is presented in a proxy or information statement for purposes of obtaining shareholder approval of one of the transactions, the effects of that transaction must be clearly set forth.

5. Income tax effects, if any, of pro forma adjustments normally should be calculated at the statutory rate in effect during the periods for which pro forma condensed income statements are presented and should be reflected as a separate pro forma adjustment.

(c) Periods to be presented. (1) A pro forma condensed balance sheet as of the end of the most recent period for which a consolidated balance sheet of the bank is required shall be filed, unless the transaction is already reflected in such balance sheet.

(2)(i) Pro forma condensed statements of income shall be filed for only the most recent fiscal year and for the period from the end of the most recent fiscal year to the most recent interim date for which a balance sheet is required. A pro forma condensed statement of income may be filed for the corresponding interim period of the preceding fiscal year. A pro forma condensed statement of income shall not be filed when the historical income statement reflects the transaction for the entire period.

(ii) For a business combination accounted for as a pooling of interests, the pro forma income statements (which are in effect a restatement of the historical income statements as if the combination had been consummated) shall be filed for all periods for

which historical income statements of the bank are required.

(3) Pro forma condensed statements of income shall be presented using the bank's fiscal year-end. If the most recent fiscal year-end of any other entity involved in the transaction differs from the bank's most recent fiscal year-end by more than 93 days, the other entity's income statement shall be brought up to within 93 days of the bank's most recent fiscal year-end, if practicable. This updating could be accomplished by adding subsequent interim period results to the most recent fiscal year-end information and deducting the comparable preceding year interim period results. Disclosure shall be made of the periods combined and of the sales or revenues and income for any periods which were excluded from or included more than once in the condensed pro forma income statements (*e.g.*, an interim period that is included both as part of the fiscal year and the subsequent interim period).

(4) Whenever unusual events enter into the determination of the results shown for the most recently completed fiscal year, the effect of such unusual events should be disclosed and consideration should be given to presenting a pro forma condensed income statement for the most recent twelve-month period, in addition to those required in paragraph (c)(2)(i) of this section, if the most recent twelve-month period is more representative of normal operations.

III. PRESENTATION OF FINANCIAL FORECAST

(a) A financial forecast may be filed in lieu of the pro forma condensed statements of income required by § 335.628 II(b)(1).

(1) The financial forecast shall cover a period of at least 12 months from the later of (i) the date of the most recent balance sheet included in the filing or (ii) the consummation date or estimated consummation date of the transaction.

(2) The forecasted statement of income shall be presented in the same degree of detail required by § 335.628 II(b)(3) for the pro forma condensed statements of income.

(3) Assumptions particularly relevant to the transaction and effects thereof should be clearly set forth.

(4) Historical condensed financial information of the bank and the business acquired or to be acquired, if any, shall be presented for at least a recent 12 month period in parallel columns with the financial forecast.

(b) Such financial forecast shall be presented in accordance with the guidelines established by the American Institute of Certified Public Accountants.

(c) Forecasted earnings-per-share data shall be substituted for pro forma per-share data.

(d) This section does not permit the filing of a financial forecast in lieu of pro forma information required by generally accepted accounting principles.

[54 FR 53597, Dec. 29, 1989, as amended at 57 FR 58137, Dec. 9, 1992]

Subpart G—Public Reference and Confidentiality

§ 335.701 Filing of material with the FDIC.

All papers required to be filed with the FDIC under the Act or regulations thereunder shall be filed at its office in Washington, DC. Material may be filed by delivery to the FDIC, through the mails, or otherwise. The date on which papers are actually received by the FDIC shall be the date of filing thereof if all of the requirements with respect to the filing have been complied with.

NOTE: Official filings made at the FDIC's office in Washington, DC should be addressed as follows:

Attention: Registration and Disclosure Section, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53600, Dec. 29, 1989]

§ 335.702 Inspection.

Except as provided in § 335.703 of this part, all information filed regarding a security registered with the FDIC will be available for inspection at the Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC. In addition, copies of the registration statement and reports required by subpart C (exclusive of exhibits), the statements required by § 335.201, and the annual reports to security holders required by § 335.203 will be available for inspection at the Reserve bank of the district in which the bank filing the statements or reports is located.

[46 FR 25208, May 5, 1981, as amended at 54 FR 53600, Dec. 29, 1989]

§ 335.703 Nondisclosure of certain information filed.

Any person filing any statement, report, or document under the Act may make written objection to the public disclosure of any information contained therein in accordance with the procedure set forth below:

(a) The person shall omit from the statement, report, or document, when it is filed, the portion thereof that it desires to keep undisclosed (hereinafter called the confidential portion). In lieu thereof, it shall indicate at the appropriate place in the statement, report, or document that the confidential portion has been so omitted and filed separately with the FDIC.

(b) The person shall file with the copies of the statement, report, or document filed with the FDIC.

(1) As many copies of the confidential portion, each clearly marked ''Confidential Treatment'', as there are copies of the statement, report, or document filed with the FDIC and with each exchange, if any. Each copy shall contain the complete text of the item and, notwithstanding that the confidential portion does not constitute the whole of the answer, the entire answer thereto; except that in case the confidential portion is part of a financial statement or schedule, only the particular financial statement or schedule need be included. All copies of the confidential portion shall be in the same form as the remainder of the statement, report, or document;

(2) An application making objection to the disclosure of the confidential portion. Such application shall be on a sheet or sheets separate from the confidential portion, and shall contain: (i) An identification of the portion of the statement, report, or document that has been omitted, (ii) a statement of the grounds of objection, (iii) consent that the FDIC may determine the question of public disclosure upon the basis of the application, subject to proper judicial reviews, (iv) the name of each exchange, if any, with which the statement, report, or document is filed. The copies of the confidential portion and the application filed in accordance with this paragraph shall be enclosed in a separate envelope marked ''Confidential Treatment'' and addressed to Executive Secretary, Federal Deposit Insurance Corporation, Washington, DC 20429.

(c) Pending the determination by the FDIC as to the objection filed in accordance with paragraph (b) of this section the confidential portion will not be disclosed by FDIC.

(d) If the FDIC determines that the objection shall be sustained, a notation to that effect will be made at the appropriate place in the statement, report, or document.

(e) If the FDIC shall have determined that disclosure of the confidential portion is in the public interest, a finding and determination to that effect will be entered and notice of the finding and determination will be sent by registered or certified mail to the person.

(f) The confidential portion shall be made available to the public:

(1) Upon the lapse of 15 days after the dispatch of notice by registered or certified mail of the finding and determination of the FDIC described in paragraph (e) of this section, if prior to the lapse of such 15 days the person shall not have filed a written statement that he intends in good faith to seek judicial review of the finding and determination;

(2) Upon the lapse of 60 days after the dispatch of notice by registered or certified mail of the finding and determination of the FDIC, if the statement described in paragraph (f)(1) of this section shall have been filed and if a petition for judicial review shall not have been filed within such 60 days; or

(3) If such petition for judicial review shall have been filed within such 60 days upon final disposition, adverse to the person, of the judicial proceedings.

(g) If the confidential portion is made available to the public, a copy thereof shall be attached to each copy of the statement, report, or document filed with the FDIC and with each exchange concerned.

PART 336—FDIC EMPLOYEES

Subpart A—Employee Responsibilities and Conduct

Sec.
336.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Subpart B—Minimum Standards of Fitness for Employment With the Federal Deposit Insurance Corporation

336.2 Authority, purpose and scope.
336.3 Definitions.
336.4 Minimum standards for appointment to a position with the FDIC.

336.5 Minimum standards for employment with the FDIC.
336.6 Verification of compliance.
336.7 Employee responsibility, counseling and distribution of regulation.
336.8 Sanctions and remedial actions.
336.9 Finality of determination.

SOURCE: 61 FR 28728, June 6, 1996, unless otherwise noted.

Subpart A—Employee Responsibilities and Conduct

AUTHORITY: 5 U.S.C. 7301; 12 U.S.C. 1819(a).

§ 336.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Employees of the Federal Deposit Insurance Corporation (Corporation) are subject to the Executive Branch-wide Standards of Ethical Conduct at 5 CFR part 2635, the Corporation regulation at 5 CFR part 3201 which supplements the Executive Branch-wide Standards, the Executive Branch-wide financial disclosure regulations at 5 CFR part 2634, and the Corporation regulation at 5 CFR part 3202, which supplements the Executive Branch-wide financial disclosure regulations.

Subpart B—Minimum Standards of Fitness for Employment With the Federal Deposit Insurance Corporation

AUTHORITY: 12 U.S.C. 1819 (Tenth), 1822(f).

§ 336.2 Authority, purpose and scope.

(a) *Authority.* This part is adopted pursuant to section 12(f) of the Federal Deposit Insurance Act, 12 U.S.C. 1822, and the rulemaking authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. This part is in addition to, and not in lieu of, any other statutes or regulations which may apply to standards for ethical conduct or fitness for employment with the FDIC and is consistent with the goals and purposes of 18 U.S.C. 201, 203, 205, 208, and 209.

(b) *Purpose.* The purpose of this part is to state the minimum standards of fitness and integrity required of individuals who provide service to or on behalf of the FDIC and provide procedures for implementing these requirements.

(c) *Scope.* (1) This part applies to applicants for employment with the FDIC under title 5 of the U.S. Code appointing authority in either the excepted or competitive service, including Special Government Employees. This part applies to all appointments, regardless of tenure, including intermittent, temporary, time-limited and permanent appointments.

(2) In addition, this part applies to all employees of the FDIC who serve under an appointing authority under chapter 21 of title 5 of the U.S. Code.

(3) Further, this part applies to any individual who, pursuant to a contract or any other arrangement, performs functions or activities of the Corporation, under the direct supervision of an officer or employee of the Corporation.

§ 336.3 Definitions.

For the purposes of this part:

(a) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, or any other organization or institution, but shall not include any corporation the majority of the shares of which are owned by the United States, any state, or the District of Columbia.

(b) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company, the ability to direct in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership. For purposes of this part, an entity or individual shall be presumed to have control of a company if the entity or individual directly or indirectly, or acting in concert with one or more entities or individuals, or through one or more subsidiaries, owns or controls 25 percent or

more of its equity, or otherwise controls or has power to control its management or policies.

(c) *Default on a material obligation* means a loan or advance from an insured depository institution which is or was delinquent for 90 or more days as to payment of principal or interest, or any combination thereof.

(d) *Employee* means any officer or employee, including a liquidation graded or temporary employee, providing service to or on behalf of the FDIC who has been appointed to a position under an authority contained in title 5 of the U.S. Code. This definition excludes those individuals designated by title 5 of the U.S. Code as officials in the Federal Executive Schedule.

(e) *Federal banking agency* means the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, or their successors.

(f) *Federal deposit insurance fund* means the Bank Insurance Fund, the Savings Association Insurance Fund, the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Fund, or the funds that were formerly maintained by the Resolution Trust Corporation (RTC), or their successors, for the benefit of insured depositors.

(g) *FDIC* means the Federal Deposit Insurance Corporation, in its receivership and corporate capacities.

(h) *Insured depository institution* means any bank or savings association the deposits of which are insured by the FDIC.

(i) *Pattern or practice of defalcation regarding obligations* means:

(1) A history of financial irresponsibility with regard to debts owed to insured depository institutions which are in default in excess of $50,000 in the aggregate. Examples of such financial irresponsibility include, without limitation:

(i) Failure to pay a debt or debts totalling more than $50,000 secured by an uninsured property which is destroyed; or

(ii) Abuse of credit cards or incurring excessive debt well beyond the individual's ability to repay resulting in default(s) in excess of $50,000 in the aggregate.

(2) Wrongful refusal to fulfill duties and obligations to insured depository institutions. Examples of such wrongful refusal to fulfill duties and obligations include, without limitation:

(i) Any use of false financial statements;

(ii) Misrepresentation as to the individual's ability to repay debts;

(iii) Concealing assets from the insured depository institution;

(iv) Any instance of fraud, embezzlement or similar misconduct in connection with an obligation to the insured depository institution; and

(v) Any conduct described in any civil or criminal judgment against an individual for breach of any obligation, contractual or otherwise, or any duty of loyalty or care that the individual owed to an insured depository institution.

(3) Defaults shall not be considered a pattern or practice of defalcation where the defaults are caused by catastrophic events beyond the control of the employee such as death, disability, illness or loss of financial support.

(j) *Substantial loss to federal deposit insurance funds.* (1) *Substantial loss to federal deposit insurance funds* means:

(i) A loan or advance from an insured depository institution, which is now owed to the FDIC, RTC, FSLIC or their successors, or any federal deposit insurance fund, that is delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of $50,000; or

(ii) A final judgment in excess of $50,000 in favor of any federal deposit insurance fund, the FDIC, RTC, FSLIC, or their successors regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding.

(2) For purposes of computing the $50,000 ceiling in paragraphs (j)(1)(i) and (ii) of this section, all delinquent judgments, loans, or advances currently owed to the FDIC, RTC, FSLIC or their successors, or any federal deposit insurance fund, shall be aggregated. In no event shall delinquent

loans or advances from different insured depository institutions be separately considered.

§ 336.4 Minimum standards for appointment to a position with the FDIC.

(a) No person shall become employed on or after June 18, 1994, by the FDIC or otherwise perform any service for or on behalf of the FDIC who has:

(1) Been convicted of any felony;

(2) Been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by any appropriate federal banking agency;

(3) Demonstrated a pattern or practice of defalcation regarding obligations to insured depository institutions; or

(4) Caused a substantial loss to federal deposit insurance funds.

(b) Prior to an offer of employment, any person applying for employment with the FDIC shall sign a certification of compliance with the minimum standards listed in paragraphs (a)(1) through (4) of this section. In addition, any person applying for employment with the FDIC shall provide as an attachment to the certification any instance in which the applicant, or a company under the applicant's control, defaulted on a material obligation to an insured depository institution within the preceding five years.

(c) Incumbent employees who separate from the FDIC and are subsequently reappointed after a break in service of more than three days are subject to the minimum standards listed in paragraphs (a)(1) though (4) of this section. The former employee is required to submit a new certification statement including attachments, as provided in paragraph (b) of this section, prior to appointment to the new position.

§ 336.5 Minimum standards for employment with the FDIC.

(a) No person who is employed by the FDIC shall continue in employment in any manner whatsoever or perform any service for or on behalf of the FDIC who, beginning June 18, 1994 and thereafter:

(1) Is convicted of any felony;

(2) Is prohibited from participating in the affairs of any insured depository institution pursuant to any final enforcement action by any appropriate federal banking agency;

(3) Demonstrates a pattern or practice of defalcation regarding obligations to insured depository institution(s); or

(4) Causes a substantial loss to federal deposit insurance funds.

(b) Any noncompliance with the standards listed in paragraphs (a)(1) through (4) of this section is a basis for removal from employment with the FDIC.

§ 336.6 Verfication of compliance.

The FDIC's Division of Administration shall order appropriate investigations as authorized by 12 U.S.C. 1819 and 1822 on newly appointed employees, either prior to or following appointment, to verify compliance with the minimum standards listed under § 336.4(a)(1) through (4).

§ 336.7 Employee responsibility, counseling and distribution of regulation.

(a) Each employee is responsible for being familiar with and complying with the provisions of this part.

(b) The Ethics Counselor shall provide a copy of this part to each new employee within 30 days of initial appointment.

(c) An employee who believes that he or she may not be in compliance with the minimum standards provided under § 336.5(a)(1) through (4), or who receives a demand letter from the FDIC for any reason, shall make a written report of all relevant facts to the Ethics Counselor within ten (10) business days after the employee discovers the possible noncompliance, or after the receipt of a demand letter from the FDIC.

(d) The Ethics Counselor shall provide guidance to employees regarding the appropriate statutes, regulations and corporate policies affecting employee's ethical responsibilities and conduct under this part.

(e) The Ethics Counselor shall provide the Personnel Services Branch with notice of an employee's noncompliance.

§336.8 Sanctions and remedial actions.

(a) Any employee found not in compliance with the minimum standards except as provided in paragraph (b) of this section below shall be terminated and prohibited from providing further service for or on behalf of the FDIC in any capacity. No other remedial action is authorized for sanctions for noncompliance.

(b) Any employee found not in compliance with the minimum standards under §336.5(a)(3) based on financial irresponsibility as defined in §336.3(i)(1) shall be terminated consistent with applicable procedures and prohibited from providing future services for or on behalf of the FDIC in any capacity, unless the employee brings him or herself into compliance with the minimum standards as provided in paragraphs (b)(1) and (2) of this section.

(1) Upon written notification by the Corporation of financial irresponsibility, the employee will be allowed a reasonable period of time to establish an agreement that satisfies the creditor and the FDIC as to resolution of outstanding indebtedness or otherwise resolves the matter to the satisfaction of the FDIC prior to the initiation of a termination action.

(2) As part of the agreement described in paragraph (b)(1) of this section, the employee shall provide authority to the creditor to report any violation by the employee of the terms of the agreement directly to the FDIC Ethics Counselor.

§336.9 Finality of determination.

Any determination made by the FDIC pursuant to this part shall be at the FDIC's sole discretion and shall not be subject to further review.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

Sec.

337.1 Scope.
337.2 Standby letters of credit.
337.3 Limits on extensions of credit to executive officers, directors, and principal shareholders of insured nonmember banks.
337.4 Securities activities of subsidiaries of insured nonmember banks: bank transactions with affiliated securities companies.
337.5 Exemption.
337.6 Brokered deposits.
337.7—337.9 [Reserved]
337.10 Waiver.
337.11 Effect on other banking practices.

AUTHORITY: 12 U.S.C. 375a(4), 375b, 1816, 1818(a), 1818(b), 1819, 1821(f), 1828(j)(2), 1831f, 1831f–1.

SOURCE: 39 FR 29179, Aug. 14, 1974, unless otherwise noted.

§337.1 Scope.

The provisions of this part apply to certain banking practices which are likely to have adverse effects on the safety and soundness of insured State nonmember banks or which are likely to result in violations of law, rule, or regulation.

§337.2 Standby letters of credit.

(a) *Definition*. As used in this section, the term *standby letter of credit* means any letter of credit, or similar arrangement however named or described, which represents an obligation to the beneficiary on the part of the issuer: (1) To repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default (including any statement of default) by the account party in the performance of an obligation.[1] The term *similar arrangement* includes the creation of an acceptance or similar undertaking.

(b) *Restriction*. A standby letter of credit issued by an insured State nonmember bank shall be combined with all other standby letters of credit and all loans for purposes of applying any legal limitation on loans of the bank (including limitations on loans to any one borrower, on loans to affiliates of

[1] As defined in this paragraph (a), the term *standby letter of credit* would not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not ''guaranty'' payment of a money obligation of the account party and which do not provide that payment is occasioned by default on the part of the account party.

the bank, or on aggregate loans); *Provided, however,* That if such standby letter of credit is subject to separate limitation under applicable State or federal law, then the separate limitation shall apply in lieu of the loan limitation.[2]

(c) *Exceptions.* All standby letters of credit shall be subject to the provisions of paragraph (b) of this section except where:

(1) Prior to or at the time of issuance, the issuing bank is paid an amount equal to the bank's maximum liability under the standby letter of credit; or,

(2) Prior to or at the time of issuance, the issuing bank has set aside sufficient funds in a segregated deposit account, clearly earmarked for that purpose, to cover the bank's maximum liability under the standby letter of credit.

(d) *Disclosure.* Each insured State nonmember bank must maintain adequate control and subsidiary records of its standby letters of credit comparable to the records maintained in connection with the bank's direct loans so that at all times the bank's potential liability thereunder and the bank's compliance with this section may be readily determined. In addition, all such standby letters of credit must be adequately reflected on the bank's published financial statements.

§ 337.3 Limits on extensions of credit to executive officers, directors, and principal shareholders of insured nonmember banks.

(a) With the exception of 12 CFR 215.5(b), 215.5(c)(3), 215.5(c)(4), and 215.11, insured nonmember banks are subject to the restrictions contained in subpart A of Federal Reserve Board Regulation O (12 CFR Part 215, subpart A) to the same extent and to the same manner as though they were member banks.

(b) For the purposes of compliance with § 215.4(b) of Federal Reserve Board Regulation O, no insured nonmember bank may extend credit or grant a line of credit to any of its executive officers, directors, or principal shareholders or to any related interest of any such person in an amount that, when aggregated with the amount of all other extensions of credit and lines of credit by the bank to that person and to all related interests of that person, exceeds the greater of $25,000 or five percent of the bank's capital and unimpaired surplus,[3] or $500,000 unless (1) the extension of credit or line of credit has been approved in advance by a majority of the entire board of directors of that bank and (2) the interested party has abstained from participating directly or indirectly in the voting.

(c)(1) No insured nonmember bank may extend credit in an aggregate amount greater than the amount permitted in paragraph (c)(2) of this section to a partnership in which one or more of the bank's executive officers are partners and, either individually or together, hold a majority interest. For the purposes of paragraph (c)(2) of this section, the total amount of credit extended by an insured nonmember bank to such partnership is considered to be extended to each executive officer of the insured nonmember bank who is a member of the partnership.

(2) An insured nonmember bank is authorized to extend credit to any executive officer of the bank for any other purpose not specified in § 215.5(c)(1) and (2) of Federal Reserve Board Regulation O (12 CFR 215.5(c)(1) and (2)) if the aggregate amount of such other extensions of credit does not exceed at any one time the higher of 2.5 percent of the bank's capital and unimpaired surplus or $25,000 but in no event more than $100,000, provided, however, that no such extension of credit shall be subject to this limit if the extension of credit is secured by:

(i) A perfected security interest in bonds, notes, certificates of indebtedness, or Treasury bills of the United States or in other such obligations fully guaranteed as to principal and interest by the United States;

[2] Where the standby letter of credit is subject to a non-recourse participation agreement with another bank or other banks, this section shall apply to the issuer and each participant in the same manner as in the case of a participated loan.

[3] For the purposes of § 337.3, an insured nonmember bank's capital and unimpaired surplus shall have the same meaning as found in § 215.2(f) of Federal Reserve Board Regulation O (12 CFR 215.2(f)).

(ii) Unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission or establishment of the United States or any corporation wholly owned directly or indirectly by the United States; or

(iii) A perfected security interest in a segregated deposit account in the lending bank.

(3) Any extension of credit that was outstanding on May 28, 1992 and that would if made on or after that date violate paragraph (c)(1) or paragraph (c)(2) of this §337.3 shall be reduced in amount by May 28, 1993 so that the extension of credit is in compliance with the lending limit set forth in paragraphs (c)(1) and (c)(2) of this section. Any renewal or extension of such an extension of credit on or after May 28, 1992 shall be made only on terms that will bring the extension of credit into compliance with the lending limit of paragraphs (c)(1) and (c)(2) of this section by May 28, 1993, however, any extension of credit made before May 28, 1992 that bears a specific maturity date of May 28, 1993 or later shall be repaid in accordance with its repayment schedule in existence on or before May 28, 1992.

(4) If an insured nonmember bank is unable to bring all extensions of credit outstanding as of May 28, 1992 into compliance as required by paragraph (c)(3) of this §337.3, the bank may at the discretion of the appropriate FDIC regional director (Division of Supervision) obtain, for good cause shown, not more than two additional one-year periods to come into compliance.

(5) For the purposes of paragraph (c) of this section, the definitions of the terms used in Federal Reserve Board Regulation O shall apply including the exclusion of executive officers of a bank's parent bank holding company and executive officers of any other subsidiary of that bank holding company from the definition of executive officer for the purposes of complying with the loan restrictions contained in section 22(g) of the Federal Reserve Act. For the purposes of complying with §215.5(d) of Federal Reserve Board Regulation O, the reference to ''the amount specified for a category of credit in paragraph (c) of this section'' shall be understood to refer to the amount specified in paragraph (c)(2) of this §337.3.

(Approved by the Office of Management and Budget under control number 3064–0108)

[47 FR 47003, Oct. 22, 1982, as amended at 48 FR 42971, Sept. 21, 1983; 57 FR 7649, Mar. 4, 1992; 57 FR 17850, Apr. 28, 1992; 57 FR 28457, June 25, 1992; 59 FR 66668, Dec. 28, 1994]

§337.4 Securities activities of subsidiaries of insured nonmember banks: bank transactions with affiliated securities companies.

(a) *Definitions:* for the purposes of this section,

(1) *Affiliate* shall mean any company that directly or indirectly, through one or more intermediaries, controls or is under common control with an insured nonmember bank.

(2) *Bona fide subsidiary* means a subsidiary of an insured nonmember bank that at a minimum: (i) is adequately capitalized; (ii) is physically separate and distinct in its operations from the operation of the bank;[4] (iii) maintains separate accounting and other corporate records; (iv) observes separate formalities such as separate board of directors' meetings; (v) maintains separate employees who are compensated by the subsidiary;[5] (vi) shares no common officers with the bank; (vii) a majority of its board of directors is composed of persons who are neither directors nor officers of the bank; and (viii) conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary

[4] If the subsidiary conducts business in the same location in which the bank conducts business, the subsidiary must utilize physically separate offices or office space from that used by the bank. Such offices or office space must be clearly and prominently identified so as to distinguish the subsidiary from the bank. The physically separate office or office space requirement only applies in areas to which the public has access.

[5] This requirement shall not be construed to prohibit the use by the subsidiary of bank employees to perform functions which do not directly involve customer contact such as accounting, data processing and recordkeeping, so long as the bank and the subsidiary contract for such services on terms and conditions comparable to those agreed to by independent entities.

that the subsidiary is a separate organization from the bank and that investments recommended, offered or sold by the subsidiary are not bank deposits, are not insured by the FDIC, and are not guaranteed by the bank nor are otherwise obligations of the bank.

(3) *Company* shall mean any corporation (other than a bank), any partnership, business trust, association, joint venture, pool syndicate, or other similar business organization.

(4) *Control* shall mean the power to directly or indirectly vote 25 per centum or more of the voting stock of a bank or company, the ability to control in any manner the election of a majority of a bank's or company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a bank or company.

(5) *Extension of credit* shall mean the making or renewal of any loan, a draw upon a line of credit, or an extending of credit in any manner whatsoever and includes, but is not limited to:

(i) A purchase, whether or not under repurchase agreement, of securities, other assets, or obligations;

(ii) An advance by means of an overdraft, cash item, or otherwise;

(iii) Issuance of a standby letter of credit (or other similar arrangement regardless of name or description);

(iv) An acquisition by discount, purchase, exchange, or otherwise of any note, draft, bill of exchange, or other evidence of indebtedness upon which a natural person or company may be liable as maker, drawer, endorser, guarantor, or surety;

(v) A discount of promissory notes, bills of exchange, conditional sales contracts, or similar paper, whether with or without recourse;

(vi) An increase of an existing indebtedness, but not if the additional funds are advanced by the bank for its own protection for (A) accrued interest or (B) taxes, insurance, or other expenses incidental to the existing indebtedness; or

(vii) Any other transaction as a result of which a natural person or company becomes obligated to pay money (or its equivalent) to a bank, whether the obligation arises directly or indirectly, or because of an endorsement on an obligation or otherwise, or by any means whatsoever.

(6) *Insured nonmember bank* shall mean state and federally chartered banks insured by FDIC that are not members of the Federal Reserve System. The term shall not include foreign banks with insured branches in the United States nor insured branches of foreign banks.

(7) *Investment quality debt security* shall mean a marketable obligation in the form of a bond, note, or debenture that is rated in the top four rating categories by a nationally recognized rating service or a marketable obligation in the form of a bond, note, or debenture the investment characteristics of which are equivalent to the investment characteristics of such a top-rated obligation.

(8) *Investment quality equity security* shall mean marketable common stock that is ranked or graded in the top four categories or equivalent categories by a nationally recognized rating service, marketable preferred corporate stock that is rated in the top four rating categories by a nationally recognized rating service, or marketable preferred corporate stock that has investment characteristics that are equivalent to the investment characteristics of top rated preferred corporate stock.

(9) *Subsidiary* shall mean any company controlled by an insured nonmember bank.

(b) *Investment in securities subsidiaries.* (1) An insured nonmember bank may not establish or acquire a subsidiary that engages in the sale, distribution, or underwriting of stocks, bonds, debentures, notes or other securities; conducts any activities for which the subsidiary is required to register with the Securities and Exchange Commission as a broker/dealer; acts as an investment adviser to any investment company; or engages in any other securities activity unless:

(i) Except as otherwise provided by § 337.4(b)(2), the subsidiary's underwriting activities that would not be authorized to the bank under section 16 of the Glass-Steagall Act (12 U.S.C. 24 (Seventh)) as made applicable to insured nonmember banks by section 21 of the Glass-Steagall Act (12 U.S.C. 378) are limited to, and thereafter continue

to be limited to, one or more of the following:

(A) Underwriting of investment quality debt securities;

(B) Underwriting of investment quality equity securities;

(C) Underwriting of investment companies not more than 25 percent of whose investments consist of investments other than investment quality debt securities and/or investment quality equity securities; or

(D) Underwriting of investment companies not more than 25 percent of whose investments consist of investments other than obligations of the United States or United States Government agencies, repurchase agreements involving such obligations, bank certificates of deposit, banker's acceptances and other bank money instruments, short-term corporate debt instruments, and other similar investments normally associated with a money market fund; and

(ii) The subsidiary is, and thereafter continues to be, a bona fide subsidiary if that subsidiary conducts securities activities not authorized to the bank under section 16 of the Glass-Steagall Act as made applicable to insured nonmember banks by section 21 of the Glass-Steagall Act.

(2) Paragraph (b)(1)(i) of this section notwithstanding, a subsidiary of an insured nonmember bank may engage in underwriting activities other than as limited thereby provided that the following conditions are met:

(i) The subsidiary is a member in good standing of the National Association of Securities Dealers (''NASD'');

(ii) The subsidiary has been in continuous operation for the five year period preceding notice to the FDIC as required by this part;

(iii) No director, officer, general partner, employee, or 10 percent shareholder of any class of voting securities of the subsidiary has been convicted within five years of the notice required by this part of any felony or misdemeanor in connection with the purchase or sale of any security involving the making of a false filing with the Securities and Exchange Commission or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(iv) Neither the subsidiary nor any of its directors, officers, general partners, employees, or 10 percent shareholders of any class of voting securities of the subsidiary is subject to any state or federal administrative order or court order, judgment, or decree entered within five years of the notice required by this part temporarily or preliminarily enjoining or restraining such person or the subsidiary from engaging in, or continuing, any conduct or practice in connection with the purchase or sale of any security involving the making of a false filing with the Securities and Exchange Commission or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(v) None of the subsidiary's directors, officers, general partners, employees, or 10 percent shareholders of any class of voting securities of the subsidiary are subject to an order entered within five years of the notice required by this part of the Securities and Exchange Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 780, 78o–4) or section 203(c) or (f) of the Investment Advisors Act of 1940 (15 U.S.C. 80b–3(c), (f)); and

(vi) All officers of the subsidiary who have supervisory responsibility for underwriting activities have at least five year experience in similar activities at NASD member securities firms.

(3) An insured nonmember bank's direct investment in a securities subsidiary described in paragraph (b)(1) or (b)(2) of this section will not be counted toward the bank's capital.

(c) *Affiliation with a securities company*. An insured nonmember bank is prohibited from becoming affiliated with any company that directly engages in the sale, distribution, or underwriting of stocks, bonds, debentures, notes, or other securities unless:

(1) The securities business of the affiliate is physically separate and distinct from the operation of the bank;[6]

[6] If the affiliate conducts business in the same location in which the bank conducts

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(2) The bank and affiliate share no common officers;

(3) A majority of the board of directors of the bank is composed of persons who are neither directors nor officers of the affiliate;

(4) Any employee of the affiliate who is also an employee of the bank does not conduct any securities activities on behalf of the affiliate on the premises of the bank that involve customer contact;

(5) The affiliate conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the affiliate that the affiliate is a separate organization from the bank and that investments recommended, offered or sold by the affiliate are not bank deposits, are not insured by the FDIC, and are not guaranteed by the bank nor are otherwise obligations of the bank.[7]

(d) *Filing of notice.* Every insured nonmember bank that intends to acquire or establish a subsidiary that—

(1) Engages in the sale, distribution, or underwriting of stocks, bonds, debentures, notes, or other securities;

(2) Acts as an investment adviser to any investment company;

(3) Conducts any activity for which the subsidiary is required to register with the Securities and Exchange Commission as a broker/dealer; or

(4) Engages in any other securities activity, shall notify the regional director of the FDIC region in which the bank is located of such intent.

Notice shall be in writing and must be received in the regional office at least 60 days prior to consummation of the acquisition or commencement of the operation of the subsidiary, whichever is earlier. The bank shall also notify the regional office in writing within 10 days after the consummation of the acquisition or commencement of the operation of the subsidiary, whichever is earlier. The 60-day notice requirement may be waived in FDIC's discretion where such notice is impracticable such as in the case of a purchase and assumption transaction or an emergency merger. Where the above notices pertain solely to the transfer of securities activities previously performed by the bank to the subsidiary, an additional written notice must be filed with the regional office if the subsidiary commences any securities activity covered by § 337.4 (b)(1)(i) or (2) of this part. This notice must be received in the regional office within thirty days after the subsidiary commences the new activity. If the 60-day advance notice and 10-day follow-up notice pertain to the establishment or acquisition of a subsidiary that engages in underwriting activities as limited by § 337.4(b)(1)(i), an additional written notice must be filed with the regional office if the subsidiary commences underwriting activities as permitted by § 337.4(b)(2) of this part. This notice must be received in the regional office within thirty days after the subsidiary commences the new activity.

(e) *Restrictions.* An insured nonmember bank which has a subsidiary or affiliate that engages in the sale, distribution, or underwriting of stocks, bonds, debentures, notes, or other securities, or acts as an investment adviser to any investment company shall not:

(1) Purchase in its discretion as fiduciary, co-fiduciary, or managing agent any security currently distributed, currently underwritten, or issued by such subsidiary or affiliate or purchase as fiduciary, co-fiduciary, or managing agent any security currently issued by an investment company advised by such subsidiary or affiliate, unless (i) the purchase is expressly authorized by the trust instrument, court order, or local law, or specific authority for the purchase is obtained from all interested parties after full disclosure, (ii) the purchase, although not expressly authorized under paragraph (e)(1)(i) of this section, is otherwise consistent with the insured nonmember bank's fiduciary obligation, or (iii) the purchase

business, the affiliate must utilize physically separate offices or office space from that used by the bank. Such offices or office space must be clearly and prominently identified so as to distinguish the affiliate from the bank. The physically separate office or office space requirement only applies in areas to which the public has access.

[7] This requirement shall not be construed to prohibit the affiliate from brokering deposits to the extent and in the manner as otherwise permitted by statute and regulation.

is permissible under applicable federal and/or state statute or regulation;

(2) Transact business through its trust department with such subsidiary or affiliate unless the transactions are at least comparable to transactions with an unaffiliated securities company or a securities company that is not a subsidiary of the bank;

(3) Extend credit or make any loan directly or indirectly to any company the stocks, bonds, debentures, notes or other securities of which are currently underwritten or distributed by such subsidiary or affiliate of the bank unless the company's stocks, bonds, debentures, notes or other securities that are underwritten or distributed (i) qualify as investment quality debt securities, or (ii) qualify as investment quality equity securities;[8]

(4) Extend credit or make any loan directly or indirectly to any investment company whose shares are currently underwritten or distributed by such subsidiary or affiliate of the bank;

(5) Extend credit or make any loan where the purpose of the extension of credit or loan is to acquire (i) any stock, bond, debenture, note, or other security currently underwritten or distributed by such subsidiary or affiliate; (ii) any security currently issued by an investment company advised by such subsidiary or affiliate; or (iii) any stock, bond, debenture, note, or other security issued by such subsidiary or affiliate, except that a bank may extend credit or make a loan to employees of the subsidiary or affiliate for the purpose of acquiring securities of such subsidiary or affiliate through an employee stock bonus or stock purchase plan adopted by the board of directors or board trustees of the subsidiary or affiliate;[9]

(6) Make any loan or extension of credit to a subsidiary or affiliate of the bank that (i) distributes or underwrites stocks, bonds, debentures, notes, or other securities, or (ii) advises any investment company, if such loans or extensions of credit would be in excess of the limit as to amount, and not in accordance with the restrictions imposed on ''covered transactions'' by section 23A of the Federal Reserve Act (12 U.S.C. 371c) and that are not within any exemptions established thereby;

(7) Make any loan or extension of credit to any investment company for which the bank's subsidiary or affiliate acts as an investment adviser if the loan or extension of credit would be in excess of the limit as to amount, and not in accordance with the restrictions imposed on ''covered transactions'' by section 23A of the Federal Reserved Act and that are not within any exemptions established thereby; and

(8) Directly or indirectly condition any loan or extension of credit to any company on the requirement that the company contract with, or agree to contract with, the bank's subsidiary or affiliate to underwrite or distribute the company's securities or directly or indirectly condition any loan or extension of credit to any person on the requirement that that person purchase any security currently underwritten or distributed by the bank's subsidiary or affiliate.[10]

(f) Nothing in this section prohibits an insured nonmember bank from establishing or acquiring a subsidiary that sells, distributes, or underwrites stocks, bonds, debentures, notes, or other securities or engages in any other securities activity if those activities would be permitted to an insured nonmember bank by sections 16 and 21 of the Glass-Steagall Act (12 U.S.C. 24 (Seventh) and 378).

(g) Nothing in this section authorizes an insured nonmember bank to directly

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[8] This restriction shall not be construed to prohibit the bank from honoring a loan commitment or revolving loan agreement or funding a line of credit where the loan commitment, revolving loan agreement, or line of credit was entered into prior in time to the underwriting or distribution. This restriction does not apply to any extension of credit to a non-U.S. company whose securities are underwritten or distributed outside the United States by a non-U.S. affiliate of an insured nonmember bank.

[9] In complying with § 337.4(e)(5) of this part, the bank shall be entitled to rely in good faith on the customer's statement as to the purpose of the extension of credit or loan.

[10] An insured nonmember bank in complying with the requirements of §§ 337.4 (e)(1), (e)(3), and (e)(4) of this part concerning ''current'' underwritings and distributions may rely upon the affiliate's or subsidiary's statement that the underwriting or distribution of any particular security has terminated.

engage in any securities activity not authorized to it under sections 16 and 21 of the Glass-Steagall Act (12 U.S.C. 24 (Seventh) and 378).

(h) *Disclosure*—(1) *Applicability*. Any subsidiary of an insured nonmember bank required by §337.4(b)(1)(ii) to be a bona fide subsidiary, and any affiliate of an insured nonmember bank whose affiliation with such a bank is governed by § 337.4(c), which:

(i) Shares the same or a similar name or logo with the insured nonmember bank,

(ii) Conducts business in the same location in which the insured nonmember bank conducts business,

(iii) Advertises or promotes particular securities or solicits purchasers for particular securities in advertisements, promotions, solicitations or other similar communications in which the insured nonmember bank also advertises or promotes its services, or

(iv) Places or causes to be placed in communications from the insured nonmember bank to the bank's customers advertisements, promotions or solicitations concerning particular securities, must comply with the disclosure requirements of paragraphs (h)(2) and (3) of this section in order for the subsidiary to meet the definition of a bona fide subsidiary and in order for the affiliation to be permissible.

Any insured nonmember bank that established or acquired a securities subsidiary or become affiliated with a securities company prior to December 28, 1984 and which as of December 14, 1987, conducted business in the same location as its securities subsidiary or affiliate or shared the same or a similar name or logo with its securities subsidiary or affiliate has until not later than June 1, 1988 to comply with paragraphs (h)(2) and (3) of this section.

(2) *Content of Disclosure.* Sections 337.4(a)(2)(viii) and 337.4(c)(5) notwithstanding, any subsidiary and/or affiliate of an insured nonmember bank described in paragraph (h)(1) of this section must disclose to its customers and prospective customers that securities recommended, offered or sold by or through the subsidiary and/or affiliate are not FDIC insured deposits (unless otherwise indicated), that such securities are not guaranteed by, nor are they obligations of, the bank, and that the subsidiary and/or affiliate and the bank are separate organizations. The following or a similar statement will satisfy the disclosure requirement:

> [name of affiliate/subsidiary] is not a bank and securities offered by it are not backed or guaranteed by any bank nor are they insured by the FDIC.

(3) *Timing and Placement of Disclosure.* In order for any subsidiary or affiliate of an insured nonmember bank described in paragraph (h)(1) of this section, to comply with paragraph (h)(2) of this section, the subsidiary/affiliate must make disclosure to its customers prominently, in writing, in opening account documents and periodically (at least semiannually) in customer statements. Disclosure may be made in confirmations in lieu of customer statements. In the case of joint advertisements, promotions, or solicitations and advertisements, promotions, or solicitations placed in bank communications, the advertisement, promotion, or solicitation must carry the requisite disclosure. Disclosure may be in a form and manner consistent with the advertising or other media utilized. Television or radio advertisements which do not exceed 30 seconds in length need not contain disclosure. Disclosure in television advertisements may either be spoken or displayed. All disclosures must be prominent and clearly legible. Disclosure in opening account documents and periodic disclosure in customer statements or confirmations is only required for one year after the bank and its subsidiary/affiliate cease to jointly advertise, promote or solicit and for one year after advertisements, promotions, or solicitations are placed in bank communications with bank customers provided, however, that at least two semiannual disclosures must have been made during that one year period.

(4) It is considered an unsafe and unsound banking practice for an insured nonmember bank to:

(i) Share the same or a similar name or logo with a securities subsidiary that is required to be a bona fide subsidiary or an affiliate that is subject to the provisions contained in § 337.4(c);

(ii) Conduct business in the same location as any such subsidiary or affiliate;

(iii) Jointly advertise or promote its services in an advertisement, promotion, or solicitation concerning particular securities made by such a subsidiary or affiliate; or

(iv) Permit such a subsidiary or affiliate to place advertisements, promotions, or solicitions concerning particular securities in communications sent by the bank to the bank's customers, unless the disclosure requirements of paragraphs (h)(2) and (3) of this section, are met.

Failure to comply with paragraphs (h)(2) and (3) of this section, will subject the insured nonmember bank to appropriate administrative action including, but not necessarily limited to, an order to cease and desist use of the same or a similar name or logo as the subsidiary/affiliate, the conduct of business in the same location as the subsidiary/affiliate, the making of joint advertisements, or the placement of the subsidiary's/affiliate's promotions, advertisements, or solicitations in the bank's communications with its customers.

[49 FR 46723, Nov. 28, 1984, as amended at 51 FR 880, Jan. 9, 1986; 51 FR 45756, Dec. 22, 1986; 52 FR 47387, Dec. 14, 1987; 53 FR 597, Jan. 8, 1988; 53 FR 2223, Jan. 29, 1988]

§337.5 Exemption.

Check guaranty card programs, customer-sponsored credit card programs, and similar arrangements in which a bank undertakes to guarantee the obligations of individuals who are its retail banking deposit customers are exempted from §337.2: *Provided, however,* That the bank establishes the creditworthiness of the individual before undertaking to guarantee his/her obligations and that any such arrangement to which a bank's principal shareholders, directors, or executive officers are a party be in compliance with applicable provisions of Federal Reserve Regulation O (12 CFR part 215).

[50 FR 10495, Mar. 15, 1985]

§337.6 Brokered deposits.

(a) *Definitions.* For the purposes of this §337.6, the following definitions apply:

(1) *Appropriate Federal banking agency* has the same meaning as provided under section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(2) *Brokered deposit* means any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.

(3) *Capital categories.* (i) For purposes of section 29 of the Federal Deposit Insurance Act and this §337.6, the terms *well capitalized, adequately capitalized,* and *undercapitalized,*[11] shall have the same meaning as to each insured depository institution as provided under regulations implementing section 38 of the Federal Deposit Insurance Act issued by the appropriate federal banking agency for that institution.[12]

(ii) If the appropriate federal banking agency reclassifies a well capitalized insured depository institution as adequately capitalized pursuant to section 38 of the Federal Deposit Insurance Act, the institution so reclassified shall be subject to the provisions applicable to such lower capital category under this §337.6.

(iii) An insured depository institution shall be deemed to be within a given capital category for purposes of this §337.6 as of the date the institution is notified of, or is deemed to have notice of, its capital category, under regulations implementing section 38 of the Federal Deposit Insurance Act issued

[11] The term *undercapitalized* includes any institution that is *significantly undercapitalized* or *critically undercapitalized* under regulations implementing section 38 of the Federal Deposit Insurance Act and issued by the appropriate federal banking agency for that institution.

[12] For the most part, the capital measure terms are defined in the following regulations: FDIC—12 CFR part 325, subpart B; Board of Governors of the Federal Reserve System—12 CFR part 208; Office of the Comptroller of the Currency—12 CFR part 6; Office of Thrift Supervision—12 CFR part 565.

by the appropriate federal banking agency for that institution.[13]

(4) *Deposit* has the same meaning as provided under section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(1)).

(5) *Deposit broker.* (i) The term *deposit broker* means:

(A) Any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions, or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and

(B) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

(ii) The term *deposit broker* does not include:

(A) An insured depository institution, with respect to funds placed with that depository institution;

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust or other fiduciary relationship in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment adviser in connection with a pension plan or other employee benefit plan provided that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust (other than one described in paragraph (a)(5)(i)(B) of this section), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d) or 403(a));

(I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions; or

(J) An insured depository institution acting as an intermediary or agent of a U.S. government department or agency for a government sponsored minority or women-owned depository institution deposit program.

(iii) Notwithstanding paragraph (a)(5)(ii) of this section, the term *deposit broker* includes any insured depository institution, and any employee of any insured depository institution, which engages, directly or indirectly, in the solicitation of deposits by offering rates of interest (with respect to such deposits) which are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions having the same type of charter in such depository institution's normal market area.

(6) *Employee* means any employee: (i) Who is employed exclusively by the insured depository institution;

(ii) Whose compensation is primarily in the form of a salary;

(iii) Who does not share such employee's compensation with a deposit broker; and

(iv) Whose office space or place of business is used exclusively for the

[13] The regulations implementing section 38 of the Federal Deposit Insurance Act and issued by the federal banking agencies generally provide that an insured depository institution is deemed to have been notified of its capital levels and its capital category as of the most recent date: (1) A Consolidated Report of Condition and Income or Thrift Financial Report is required to be filed with the appropriate federal banking agency; (2) A final report of examination is delivered to the institution; or (3) Written notice is provided by the appropriate federal banking agency to the institution of its capital category for purposes of section 38 of the Federal Deposit Insurance Act and implementing regulations or that the institution's capital category has changed. Provisions specifying the effective date of determination of capital category are generally published in the following regulations: FDIC—12 CFR 325.102. Board of Governors of the Federal Reserve System—12 CFR 208.32. Office of the Comptroller of the Currency—12 CFR 6.3. Office of Thrift Supervision—12 CFR 565.3.

benefit of the insured depository institution which employs such individual.

(7) *FDIC* means the Federal Deposit Insurance Corporation.

(8) *Insured depository institution* means any bank, savings association, or branch of a foreign bank insured under the provisions of the Federal Deposit Insurance Act (12 U.S.C. 1811 et. seq.).

(b) *Solicitation and acceptance of brokered deposits by insured depository institutions.* (1) A well capitalized insured depository institution may solicit and accept, renew or roll over any brokered deposit without restriction by this section.

(2)(i) An adequately capitalized insured depository institution may not accept, renew or roll over any brokered deposit unless it has applied for and been granted a waiver of this prohibition by the FDIC in accordance with the provisions of this section.

(ii) Any adequately capitalized insured depository institution that has been granted a waiver to accept, renew or roll over a brokered deposit may not pay an effective yield on any such deposit which, at the time that such deposit is accepted, renewed or rolled over, exceeds by more than 75 basis points:

(A) The effective yield paid on deposits of comparable size and maturity in such institution's normal market area for deposits accepted from within its normal market area; or

(B) The national rate paid on deposits of comparable size and maturity for deposits accepted outside the institution's normal market area. For purposes of this paragraph (b)(2)(ii)(B), the national rate shall be:

(*1*) 120 percent of the current yield on similar maturity U.S. Treasury obligations; or

(*2*) In the case of any deposit at least half of which is uninsured, 130 percent of such applicable yield.

(3)(i) An undercapitalized insured depository institution may not accept, renew or roll over any brokered deposit.

(ii) An undercapitalized insured depository institution may not solicit deposits by offering an effective yield that exceeds by more than 75 basis points the prevailing effective yields on insured deposits of comparable maturity in such institution's normal market area or in the market area in which such deposits are being solicited.

(4) For purposes of the restriction contained in paragraphs (b)(2)(ii)(A) and (b)(3)(ii) of this section, the effective yields in the relevant markets are the average of effective yields offered by other insured depository institutions in the market area in which deposits are being solicited. An effective yield on a deposit with an odd maturity violates paragraphs (b)(2)(ii)(A) and (b)(3)(ii) of this section if it is more than 75 basis points higher than the yield calculated by interpolating between the yields offered by other insured depository institutions on deposits of the next longer and shorter maturities offered in the market. A market area is any readily defined geographical area in which the rates offered by any one insured depository institution soliciting deposits in that area may affect the rates offered by other insured depository institutions operating in the same area.

(c) *Waiver.* The FDIC may, on a case-by-case basis and upon application by an adequately capitalized insured depository institution, waive the prohibition on the acceptance, renewal or rollover of brokered deposits upon a finding that such acceptance, renewal or rollover does not constitute an unsafe or unsound practice with respect to such institution. The FDIC may conclude that it is not unsafe or unsound and may grant a waiver when the acceptance, renewal or rollover of brokered deposits is determined to pose no undue risk to the institution. Any waiver granted may be revoked at any time by written notice to the institution.

(d) *Application.* An adequately capitalized insured depository institution wishing to accept, renew or roll over brokered deposits may apply to the appropriate regional director for supervision for the region in which the main office of the institution is located. The application may be in letter form and shall include the following information:

(1) The time period for which a waiver may be needed;

(2) A statement of the policy governing the use of brokered deposits in the institution's overall funding and liquidity management program;

(3) The volume, rates and maturities associated with the brokered deposits held currently and anticipated during the waiver period sought, including any internal limits placed on the terms, solicitation and use of brokered deposits;

(4) A description of how brokered deposits are costed and compared to other funding alternatives and how such deposits are used in the institution's lending and investment activities, including a detailed discussion of any plans for asset growth;

(5) A description of the procedures and practices used to solicit brokered deposits, including an identification of the principal sources of such deposits;

(6) A description of the management systems in overseeing the solicitation, acceptance and use of brokered deposits;

(7) A recent consolidated financial statement with balance sheet and income statements; and

(8) Reasons the institution believes its acceptance, renewal or rollover of brokered deposits would pose no undue risk.

(e) *Decision*. (1) The Director of the Division of Supervision and, when confirmed in writing by the Director, an associate director or the appropriate regional director or deputy regional director, shall each have the authority to approve any waiver application properly filed. An application is properly filed when complete and accurate information addressing each of the informational elements stated in paragraph (d) of this section has been provided to the appropriate regional director. Any properly authorized FDIC official may grant a temporary waiver based upon a preliminary review for a short period in order to facilitate the orderly processing of an application for a waiver. Any waiver granted will be for a fixed period, generally no longer than two years, but may be extended upon reapplication. The FDIC will provide notice to the depository institution's appropriate Federal banking agency and any state regulatory agency, as appropriate, that a request for a waiver has been filed and will consult with such agency or agencies, prior to taking action on the institution's request for a waiver. Notwithstanding the foregoing, prior notice and/or consultation shall not be required in any particular case if the FDIC determines that the circumstances require it to take action without giving such notice and opportunity for consultation.

(2) Any application filed by an institution that is CAMEL- or MACRO-rated 1 or 2 by its appropriate Federal banking agency shall be deemed approved for the period requested (not to exceed 2 years) 21 days after filing unless the institution in the interim has been notified in writing that further review and consideration are required and that it will be specifically notified when its application has been decided.

(f) *60-Day transition period*. An adequately capitalized insured depository institution may accept, renew or roll over any brokered deposit for a period of 60 days following June 16, 1992, provided it has properly filed an application within 30 days after June 16, 1992, and the FDIC has not notified the institution that the application has been denied.

(g) *Exclusion for institutions in FDIC conservatorship*. No insured depository institution for which the FDIC has been appointed conservator shall be subject to the prohibition on the acceptance, renewal or rollover of brokered deposits contained in this § 337.6 or section 29 of the Federal Deposit Insurance Act for 90 days after the date on which the institution was placed in conservatorship. During this 90-day period, the institution shall, nevertheless, be subject to the restriction on the payment of interest contained in paragraph (b)(2)(ii) of the section. After such 90-day period, the institution may not accept, renew or roll over any brokered deposit.

(h) *Deposit brokers*. (1) A deposit broker shall not solicit or place any deposit with an insured depository institution unless it has provided the FDIC with written notice that it is acting as a deposit broker. The notice may be in letter form and shall describe generally the history, nature and volume of its deposit brokerage operations, including the sources and placement of such

funds. The notice should be submitted to the Federal Deposit Insurance Corporation, Office of Compliance and Special Activities, Division of Supervision, Washington, DC 20429. The notice shall be effective upon receipt.

(2) A deposit broker shall maintain sufficient records of the volume of brokered deposits placed with any insured depository institution over the preceding 12 months and the volume outstanding currently, including the maturities, rates and costs associated with such deposits.

(3) The Director of the Division of Supervision or designee may request, from time to time, quarterly written reports from any deposit broker regarding the volume of brokered deposits placed with a specified insured depository institution and the maturities, rates and costs associated with such deposits.

(4) When a deposit broker ceases to act as such, it shall notify the FDIC in writing at the address indicated in paragraph (h)(1) of this section that it is no longer acting as a deposit broker.

[57 FR 23941, June 5, 1992, as amended at 58 FR 54935, Oct. 25, 1993; 60 FR 31384, June 15, 1995]

§§ 337.7—337.9 [Reserved]

§ 337.10 Waiver.

An insured State nonmember bank has the right to petition the Board of Directors of the Corporation for a waiver of this part or any subpart thereof with respect to any particular transaction or series of similar transactions. A waiver may be granted at the discretion of the Board upon a showing of good cause. All such petitions should be filed with the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

§ 337.11 Effect on other banking practices.

Nothing in this part shall be construed as restricting in any manner the Corporation's authority to deal with any banking practice which is deemed to be unsafe or unsound or otherwise not in accordance with law, rule, or regulation; or which violates any condition imposed in writing by the Corporation in connection with the granting of any application or other request by an insured State nonmember bank, or any written agreement entered into by such bank with the Corporation. Compliance with the provisions of this part shall not relieve an insured State nonmember bank from its duty to conduct its operations in a safe and sound manner nor prevent the Corporation from taking whatever action it deems necessary and desirable to deal with specific acts or practices which, although they do not violate the provisions of this part, are considered detrimental to the safety and sound operation of the bank engaged therein.

PART 338—FAIR HOUSING

Subpart A—Advertising

Sec.
338.1 Purpose.
338.2 Definitions applicable to subpart A of this part.
338.3 Nondiscriminatory advertising.
338.4 Equal housing lender poster.

Subpart B—Recordkeeping Requirements

338.5 Purpose.
338.6 Definitions applicable to subpart B of this part.
338.7 Recordkeeping requirements.
338.8 Compilation of loan data in register format.
338.9 Mortgage lending of a controlled entity.

APPENDIX A TO SUBPART B OF PART 338—Loan Application Register
APPENDIX B TO SUBPART B OF PART 338—Instructions on Maintaining Loan Application Register

AUTHORITY: 12 U.S.C. 1817, 1818, 1819, 1820(b); 12 U.S.C. 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR part 202; 12 CFR part 203; 24 CFR part 110.

Subpart A—Advertising

§ 338.1 Purpose.

The purpose of this subpart A is to provide guidance on nondiscriminatory advertising, and, in addition, set forth the text of the Equal Housing Lender Poster that must be publicly displayed by insured State nonmember banks. This subpart A enforces provisions contained in section 805 of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–

19 (''Fair Housing Act''), as amended by the Fair Housing Amendments Act of 1988, and implemented by rules and regulations enacted by the United States Department of Housing and Urban Development, 24 CFR parts 109 and 110.

[56 FR 50038, Oct. 3, 1991]

§ 338.2 Definitions applicable to subpart A of this part.

For purposes of subpart A of this part:

(a) *Bank* means an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Dwelling* means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land wihch is offered for sale or lease for the construction or location thereon of any such building, structure, portion thereof.

(c) *Handicap* means, with respect to a person:

(1) A physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) A record of having such an impairment; or

(3) Being regarded as having such an impairment, but such term does not include current, illegal use of or addition to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

(d) *Familial status* means one or more individuals (who have not attained the age of 18 years) being domiciled with:

(1) A parent or another person having legal custody of such individual or individuals; or

(2) The designee of such parent or other person having such custody, with the written persmission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any indivdual who has not attained the age of 18 years.

[56 FR 50039, Oct. 3, 1991]

§ 338.3 Nondiscriminatory advertising.

(a) Any bank which directly or through third parties engages in any form of advertising of any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall prominently indicate in such advertisement, in a manner appropriate to the advertising medium and format utilized, that the bank makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.

(1) With respect to written and visual advertisement, this requirement may be satisfied by including in the advertisement a facsimile of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender Poster prescribed in § 338.4(b).

(2) With respect to oral advertisement, this requirement may be satisfied by a statement, in the spoken text of the advertisement, that the bank is an *Equal Housing Lender.*

(3) When an oral advertisement is used in conjunction with a written or visual advertisement, the use of either of the methods specified in paragraphs (a) (1) and (2) of this section will satisfy the requirements of this paragraph (a).

(b) No advertisement shall contain any words, symbols, models or other forms of communication which express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of the Fair Housing Act or the Equal Credit Opportunity Act.

[43 FR 11563, Mar. 20, 1978, as amended at 54 FR 52930, Dec. 26, 1989. Redesignated and amended at 56 FR 50039, Oct. 3, 1991]

§ 338.4 Equal housing lender poster.

(a) Each bank engaged in extending loans for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall conspicuously display an Equal Housing Lender Poster in any public lobby and area within the bank where deposits are received or where such loans are made in a manner clearly visible to the general public entering such areas.

(b) The Equal Housing Lender Poster shall be at least 11 by 14 inches in size and have the following text:

EQUAL HOUSING
LENDER

We Do Business in Accordance With Federal Fair Lending Laws

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18), TO:

- Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling, or deny any loan secured by a dwelling; or
- Discriminate in fixing the amount, interest rate, duration, application procedures or other terms or conditions of such a loan, or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing & Urban Development
Washington, DC 20410

For processing under the Federal Fair Housing Act

and to:

Division of Compliance and Consumer Affairs
Federal Deposit Insurance Corporation
Washington, DC 20429-9990

For processing under FDIC regulations

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

- On the basis of race, color, national origin, religion, sex, marital status, or age,
- Because income is from public assistance, or
- Because a right was exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Division of Compliance and Consumer Affairs
Federal Deposit Insurance Corporation
Washington, DC 20429-9990

(c) The Equal Housing Lender Poster specified in this section was adopted under § 110.25(b) of the United States Department of Housing and Urban Development's rules and regulations as an authorized substitution for the poster required in § 110.25(a) of those rules and regulations.

[54 FR 52930, Dec. 26, 1989. Redesignated at 56 FR 50039, Oct. 3, 1991, as amended by 59 FR 52667, Oct. 19, 1994]

Subpart B—Recordkeeping Requirements

§ 338.5 Purpose.

The purpose of this subpart B is twofold. First, this subpart B requires insured State nonmember banks to collect information about the applicant's race and other personal characteristics in applications for home loans. In some instances, additional information concerning the applicant, the loan, and the subject property must be collected. Such information is collected in order to monitor an institution's compliance with the Equal Credit Opportunity Act of 1974 (15 U.S.C. 1691–91f), and serves as a substitute monitoring program as permitted by Regulation B of the Federal Reserve System (12 CFR 202.13(d)). Second, this subpart B notifies banks of their duty to maintain a register of home loan applications pursuant to Regulation C of the Federal Reserve System (12 CFR part 203), requires that the register be updated on a timely basis, and requires covered institutions to record data as to race or national origin, sex, and income for all applicants. The register format required by Regulation C is shown in appendix A to subpart B of this part. Appendix B to subpart B of this part refers banks to the instructions contained in Regulation C for completion of the register.

[56 FR 50039, Oct. 3, 1991]

§ 338.6 Definitions applicable to subpart B of this part.

For purposes of subpart B of this part—

(a) *Application* means an oral or written request for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested.

(b) *Bank* means an insured State nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(c) *Dwelling* means a residential structure whether or not that structure is attached to real property. The term includes, but is not limited to, an individual condominum, cooperative unit, or mobile or manufactured home.

(d) *Home improvement loan* means any loan that:

(1) Is stated by the borrower (at the time of the loan application) to be for the purpose of repairing, rehabilitating, or remodeling a dwelling; and

(2) Is classified by the financial institution as a home improvement loan.

(e) *Home purchase loan* means any loan secured by and made for the purpose of purchasing or refinancing a dwelling.

[56 FR 50040, Oct. 3, 1991]

§ 338.7 Recordkeeping requirements.

(a) *Records to be retained.*[1] (1) A bank which has no office located in a primary metropolitan statistical area (''PMSA'') or a metropolitan statistical area (''MSA''), as defined by the Office of Management and Budget, or which has total assets as of December 31 of the preceding calendar year of $10 million or less, shall request and retain the following information on home purchase loan applications (excluding applications received by telephone) for dwellings, occupied or to be occupied by the application as a principal residence, and containing one to four units:

(i) *Data on home purchase loan applicants.*

(A) Date of application.

(B) Case identification.

(*1*) Name.

(*2*) Address.

(*3*) Location (street address, city, State, and zip code) of subject property.

(C) Sex.

(D) Race/national origin, using the categories American Indian or Alaskan Native; Asian or Pacific Islander;

[1] These records are to be retained for the purpose of monitoring compliance and may not be used for the purpose of extending or denying credit or fixing credit terms where prohibited by law.

Black; Hispanic; White; or other (specify).

(E) Age.

(F) Marital status, using the categories married, unmarried, and separated.

(ii) *Collection of data.* No bank shall engage in any activity which discourages an applicant from providing the information in paragraph (a)(1)(i) of this section. Each bank shall attempt to collect such information during the initial contact with the applicant. If the applicant refuses to furnish all or part of this information, the bank shall note the fact or have the applicant note the fact on the form used for recording the information. If the information regarding race and sex is not voluntarily furnished, the bank shall, on the basis of visual observations or surnames, separately note the information on the form or an attached document.

(2) A bank which has an office in a PMSA or MSA, and which had total assets exceeding $10 million as of December 31 of the preceding calendar year, shall request the following information on home purchase loan applications (excluding applications received by telephone) for dwellings, occupied or to be occupied by the applicant, and containing one to four units:

(i) *Data on home purchase loan applicants.*

(A) Date of application.

(B) Case identification:

(*1*) Name.

(*2*) Address.

(*3*) Location (street address, city, State, and zip code) of subject property.

(C) Sex.

(D) Race/national origin, using the categories American Indian or Alaskan Native; Asian or Pacific Islander; Black; Hispanic; White; or other (specify).

(E) Age.

(F) Marital status, using the categories married, unmarried, and separated.

(G) Loan type, using the following categories: purchase of existing dwelling; refinancing of existing home loan; construction loan only; construction-permanent; other (specify).

(H) Case disposition (e.g., accepted, rejected).

(ii) *Additional data on applications for home loans.*[2]

(A) Other characteristics of applicants.

(*1*) *Employment.* (*i*) Number of years employed in present line of work or profession.

(*ii*) Self-employed—Yes or No.

(*iii*) Years on Present Job—(Number of continuous years employed by the current employer. For self-employed persons, the number of continuous years self-employed. If a person is not employed, record as zero years.)

(*2*) *Income.* (*i*) Base Employment Income. (Enter only normal monthly base salary, wages and retirement income. For self-employed persons, enter average or normal monthly income.)

(*ii*) Other Income. (Average per month. If received on a regular basis include, by so stating, overtime pay bonuses, commissions, dividends, interest, rental income, and income from part-time employment. Include alimony, separate maintenance and child-support payment information only if the applicant has been advised that such information need not be provided and elects to have it considered.)

(*3*) *Number of dependents.* (Each dependent should be counted only once. The applicant and any co-applicant(s) should be excluded.)

(*4*) *Total assets. (i)* Liquid assets. (Include all cash and other items which are readily convertible to cash (e.g., checking, savings, and time deposit accounts at banks, savings and loan associations, credit unions, or similar institutions; stocks and bonds for which there is a ready market; and the cash surrender value of any life insurance policies).)

(*ii*) All other assets.

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[2] Except for census tract information in paragraph (a)(2)(ii)(B)(*5*), all information is listed on the Residential Loan Application Form contained in appendix B of Regulation B of the Board of Governors of the Federal Reserve System (12 CFR part 202, appendix B). The information may be recorded on the Regulation B model Residential Loan Application Form or on one or more existing form or forms used by the bank.

(*5*) *Total liabilities.* Exclude any liabilities which will result from the approval of the application and list the following:

(*i*) Liabilities which will be satisfied upon sale of real estate owned, or upon refinancing of property, associated with this application.

(*ii*) All other outstanding liabilities.

(*6*) *Total monthly payments on liabilities.* Exclude any payments on liabilities which will result from the approval of the application and list the following:

(*i*) Payments on liabilities which will be satisfied upon sale of real estate owned, or upon refinancing of property, associated with this application.

(*ii*) All other payments on outstanding liabilities.

(*7*) *Customer(s) of Bank—Yes or No.*

(B) Characteristics of subject property.

(*1*) Year Built.

(*2*) Purchase Price or Approximate Current Market Value.

(*3*) Value of Land (Construction Loan Only).

(*4*) Street Address, City, County, State, Zip Code.

(*5*) Census Tract.

(*6*) Number of Residential Units.

(C) Characteristics of loan request.

(*1*) Purpose of loan.

(*i*) Purchase of existing dwelling.

(*ii*) Refinancing of existing home loan.

(*iii*) Construction loan only.

(*iv*) Construction-Permanent.

(*v*) Other (specify).

(*2*) Type mortgage.

(*i*) Conventional.

(*ii*) VA.

(*iii*) FHA.

(*iv*) Other (specify).

(*3*) Amount of Loan.

(*4*) Interest Rate.

(*5*) Months to Maturity. (For short-term, renewable mortgages or those with some other provision for varying rates, a brief explanation of the provisions should be appended to the application form.)

(*6*) Monthly Payment, Principal and Interest.

(*7*) Estimated Total Closing Costs. (Excluding downpayment.)

(*8*) Estimated Closing Costs Paid by Seller.

(*9*) Estimated Real Estate Taxes and Insurance. (Indicate annual or monthly.)

(iii) *Collection of data.*

(A) Each bank shall attempt to collect that information in paragraph (a)(2)(i) of this section during the initial contact with the applicant. If the applicant refuses to furnish all or part of this information, the bank shall note the fact or have the applicant note the fact on the form used for recording the information. If the information regarding race and sex is not voluntarily furnished, the bank shall on the basis of visual observation or surnames, separately note the information on the form or an attached document.

(B) No bank shall engage in any activity which discourages an applicant from providing the information in paragraphs (a)(2)(i) and (ii) of this section. If the bank is unable to obtain any part of the information requested of the applicant under paragraph (a)(2)(ii) of this section, it shall note the reason in the application file. Also, if the bank rejects an application before it has had the opportunity to collect all of the information under paragraph (a)(2)(ii) of this section, it shall note the reason for the rejection in the application file and need not obtain the remaining information.

(b) *Disclosure to applicant.* The bank shall advise an applicant that:

(1) The information regarding race/national origin, marital status, age, and sex in paragraphs (a)(1) and (2) of this section is being requested to enable the Federal Deposit Insurance Corporation to monitor compliance with the Fair Housing and Equal Credit Opportunity Acts which prohibit creditors from discriminating against applicants on these bases;

(2) The Federal Deposit Insurance Corporation encourages the applicant to provide the information requested; and

(3) If the applicant refuses to provide the information concerning race/national origin or sex, the bank is required, where possible, to note the information on the basis of visual observations or surnames.

(c) *Record retention.* Each bank shall retain the records required by this section for a period of not less than 25 months after the bank notifies an applicant of action taken on an application. This requirement also applies to records of home purchase loans which are originated by the bank and subsequently sold. The Federal Deposit Insurance Corporation may by written notice extend the retention period.

(d) *Substitute system.* The recordkeeping provisions of §338.7 constitute a substitute monitoring program adopted under §202.13(d) of Regulation B of the Board of Governors of the Federal Reserve System (12 CFR 202.13(d)). A bank collecting the data in compliance with §338.7 will be in compliance with the recordkeeping requirements of §202.13 of Regulation B.

(e) *Review of records.* Each bank shall make all information collected under paragraph (a) of this section available to FDIC examiners for review upon request.

(Approved by the Office of Management and Budget under control number 3064–0085)

[43 FR 11563, Mar. 20, 1978, as amended at 49 FR 35763, Sept. 12, 1984; 50 FR 39990, Oct. 1, 1985; 53 FR 30838, Aug. 16, 1988. Redesignated and amended at 56 FR 50039, Oct. 3, 1991]

§338.8 Compilation of loan data in register format.

(a) A bank which has an office in a PMSA or MSA, and which had total assets exceeding $10 million as of December 31 of the preceding calendar year, shall collect data regarding applications for, and originations and purchases of, home purchase loans and home improvement loans for each calendar year. These data shall be presented on a register in the format prescribed in appendix A to subpart B of this part. Data shall be collected by the bank as to each of the items reflected on the sample form in appendix A (including race or national origin, sex, and income). The bank shall be able to:

(1) Trace each entry on the register to the relevant application file, using an identifying number or code that can be used to retrieve the loan or application file; and

(2) Identify the bank office where the application was accepted.

(b) Notwithstanding any other provision of this part 338, the Board of Directors may require any bank to collect data regarding applications for, and originations and purchases of, home purchase loans and home improvement loans for each calendar year. These data shall be presented on a register in the format prescribed in appendix A to subpart B of this part. Data shall be collected by the bank as to each of the items reflected on the sample form in appendix A (including race or national origin, sex, and income). The bank shall be able to:

(1) Trace each entry on the register to the relevant application file, using an identifying number or code that can be used to retrieve the loan or application file; and

(2) Identify the bank office where the application was accepted.

(c) All information required by this §338.8 must be entered on the register within 30 calendar days after the loan application is finally disposed of (that is, the application is denied or withdrawn, or the loan goes to closing).

(d) *Record retention.* Each bank shall retain a copy of the completed register required by this §338.8 for a period of not less than twenty-five months after submission of the completed register to the Federal Deposit Insurance Corporation pursuant to Regulation C of the Federal Reserve System (12 CFR part 203).

(e) *Review of records.* Each bank shall make all information collected pursuant to this §338.8 available to FDIC examiners for review upon request.

(Approved by the Office of Management and Budget under control number 3064–0046)

[56 FR 50040, Oct. 3, 1991]

§338.9 Mortgage lending of a controlled entity.

Any bank which refers any applicants to a controlled entity and which purchases any home loans originated by the controlled entity, as a condition to transacting any business with the controlled entity, shall require the controlled entity to enter into a written agreement with the bank. The written agreement shall provide that the controlled entity shall:

(a) Comply with the requirements of §§338.3, 338.4 and 338.7, and, if otherwise

subject to Regulation C of the Board of Governors of the Federal Reserve System (12 CFR part 203), § 338.8;

(b) Open its books and records to examination by the Federal Deposit Insurance Corporation; and

(c) Comply with all instructions and orders issued by the Federal Deposit Insurance Corporation with respect to its home loan practices.

[49 FR 35764, Sept. 12, 1984. Redesignated and amended at 56 FR 50039, Oct. 3, 1991]

Appendix A to Subpart B of Part 338—Loan Application Register

LOAN/APPLICATION REGISTER Page ____ of ____

Name of Reporting Institution _____ City and State _____

Form FR HMDA-LAR

Control number (agency use only) ☐☐☐☐☐☐☐☐☐☐-☐☐

Application or Loan Information						Action Taken		Property Location				Applicant Information A = Applicant CA = Co-Applicant						
												Race or National Origin		Sex				
Application or Loan Number	Date Application Received (mm/dd/yy)	Type	Purpose	Occupancy	Amount in thousands	Type	Date (mm/dd/yy)	MSA Number	State Code	County Code	Census Tract	A	CA	A	CA	Income in thousands	Type of Purchaser of Loan	Reason(s) for Denial (Optional)

APPENDIX B TO SUBPART B OF PART 338—INSTRUCTIONS ON MAINTAINING LOAN APPLICATION REGISTER

The format of the Loan Application Register is identical to that required by Regulation C of the Board of Governors of the Federal Reserve System. Instructions for completing the Loan Application Register are set forth at 12 CFR part 203, appendix A, section II, entitled ''Completion of Register.''

[56 FR 50042, Oct. 3, 1991]

PART 339—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
339.1 Authority, purpose, and scope.
339.2 Definitions.
339.3 Requirement to purchase flood insurance where available.
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APPENDIX A TO PART 339—SAMPLE FORM OF NOTICE OF SPECIAL FLOOD HAZARDS AND AVAILABILITY OF FEDERAL DISASTER RELIEF ASSISTANCE

AUTHORITY: 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

SOURCE: 61 FR 45706, Aug. 29, 1996, unless otherwise noted.

§ 339.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued pursuant to 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

(b) *Purpose.* The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) *Scope.* This part, except for §§ 339.6 and 339.8, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 339.6 and 339.8 apply to loans secured by buildings or mobile homes, regardless of location.

§ 339.2 Definitions.

(a) *Act* means the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001–4129).

(b) *Bank* means an insured state nonmember bank and an insured state branch of a foreign bank or any subsidiary of an insured state nonmember bank.

(c) *Building* means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) *Community* means a State or a political subdivision of a State that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) *Designated loan* means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) *Director of FEMA* means the Director of the Federal Emergency Management Agency.

(g) *Mobile home* means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term *mobile home* does not include a recreational vehicle. For purposes of this part, the term *mobile home* means a mobile home on a permanent foundation. The term *mobile home* includes a manufactured home as that term is used in the NFIP.

(h) *NFIP* means the National Flood Insurance Program authorized under the Act.

(i) *Residential improved real estate* means real estate upon which a home or other residential building is located or to be located.

(j) *Servicer* means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from

the amounts received from the borrower as may be required under the terms of the loan.

(k) *Special flood hazard area* means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) *Table funding* means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§339.3 Requirement to purchase flood insurance where available.

(a) *In general.* A bank shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) *Table funded loans.* A bank that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this part.

§339.4 Exemptions.

The flood insurance requirement prescribed by §339.3 does not apply with respect to:

(a) Any State-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of States falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§339.5 Escrow requirement.

If a bank requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by *residential* improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the bank shall also require the escrow of all premiums and fees for any flood insurance required under §339.3. The bank, or a servicer acting on behalf of the bank, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the bank, or a servicer acting on behalf of the bank, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

§339.6 Required use of standard flood hazard determination form.

(a) *Use of form.* A bank shall use the standard flood hazard determination form developed by the Director of FEMA (as set forth in Appendix A of 44 CFR part 65) when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner.

(b) *Retention of form.* A bank shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the bank owns the loan.

§339.7 Forced placement of flood insurance.

If a bank, or a servicer acting on behalf of the bank, determines, at any time during the term of a designated loan, that the building or mobile home and any personal property securing the designated loan is not covered by flood

insurance or is covered by flood insurance in an amount less than the amount required under § 339.3, then the bank or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under § 339.3, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the bank or its servicer shall purchase insurance on the borrower's behalf. The bank or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

§ 339.8 Determination fees.

(a) *General.* Notwithstanding any Federal or State law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any bank, or a servicer acting on behalf of the bank, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) *Borrower fee.* The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Director of FEMA's revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Director of FEMA's publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under § 339.7.

(c) *Purchaser or transferee fee.* The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 339.9 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) *Notice requirement.* When a bank makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the bank shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) *Contents of notice.* The written notice must include the following information:

(1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally-declared disaster.

(c) *Timing of notice.* The bank shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the bank provides notice to the borrower and in any event no later than the time the bank provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) *Record of receipt.* The bank shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the bank owns the loan.

(e) *Alternate method of notice.* Instead of providing the notice to the borrower required by paragraph (a) of this section, a bank may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The bank shall retain a record of the written assurance from the seller or lessor for the period of time the bank owns the loan.

(f) *Use of prescribed form of notice.* A bank will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

§ 339.10 Notice of servicer's identity.

(a) *Notice requirement.* When a bank makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the bank shall notify the Director of FEMA (or the Director of FEMA's designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the bank's notice of the servicer's identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee.

(b) *Transfer of servicing rights.* The bank shall notify the Director of FEMA (or the Director of FEMA's designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

APPENDIX A TO PART 339—SAMPLE FORM OF NOTICE OF SPECIAL FLOOD HAZARDS AND AVAILABILITY OF FEDERAL DISASTER RELIEF ASSISTANCE

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's *Flood Insurance Rate Map* or the *Flood Hazard Boundary Map* for the following community: _____. This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan, the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

_____ The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.
- At a minimum, flood insurance purchased must cover *the lesser of:*

(1) the outstanding principal balance of the loan; *or*

(2) the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

- Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

_____ Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the nonparticipating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

PART 340—[RESERVED]

PART 341—REGISTRATION OF SECURITIES TRANSFER AGENTS

Sec.
341.1 Scope.
341.2 Definitions.
341.3 Registration as securities transfer agent.
341.4 Amendments to registration.
341.5 Withdrawal from registration.
341.6 Reports.

AUTHORITY: Secs. 2, 3, 17, 17A and 23(a), Securities Exchange Act of 1934, as amended (15 U.S.C. 78b, 78c, 78q, 78q–1 and 78w(a)).

SOURCE: 47 FR 38106, Aug. 30, 1982, unless otherwise noted.

§ 341.1 Scope.

This part is issued by the Federal Deposit Insurance Corporation (the *FDIC*) under sections 2, 3(a)(34)(B), 17, 17A and 23(a) of the Securities Exchange Act of 1934 (the *Act*), as amended (15 U.S.C. 78b, 78c(a)(34)(B), 78q, 78q–1 and 78w(a)) and applies to all insured nonmember banks, or subsidiaries of such banks, that act as transfer agents for securities registered under section 12 of the Act (15 U.S.C. 78*l*), or for securities exempt from registration under subsections (g)(2)(B) or (g)(2)(G) of section 12 (15 U.S.C. 78*l*(g)(2)(B) and (G)) (securities of investment companies, including mutual funds, and insurance companies). Such securities are *qualifying securities* for purposes of this part.

§ 341.2 Definitions.

For the purpose of this part, including all forms and instructions promulgated for use in connection herewith, unless the context otherwise requires:

(a) The term *transfer agent* means any person who engages on behalf of an issuer of qualifying securities or on behalf of itself as an issuer of qualifying securities in: (1) Countersigning such securities upon issuance;

(2) Monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar;

(3) Registering the transfer of such securities;

(4) Exchanging or converting such securities; or

(5) Transferring record ownership of securities by bookkeeping entry without physical issuance of such securities certificates. The term *transfer agent* includes any person who performs these functions as a co-transfer agent with respect to equity or debt issues, and any person who performs these functions as registrar or co-registrar with respect to debt issued by corporations.

NOTE: The following examples are illustrative of the kinds of activities engaged in by transfer agents under this part.

1. A transfer agent of stock or shares in a mutual fund maintains the records of shareholders and transfers stock from one shareholder to another by cancellation of the surrendered certificates and issuance of new certificates in the name of the new shareholder. A co-transfer agent also performs these functions.

2. A registrar of stock or shares in a mutual fund monitors the issuance of such securities to prevent over-issuance of shares, affixing its signature of each stock certificate issued to signify its authorized issuance. A co-registrar also performs these functions.

3. A registrar of corporate debt securities maintains the records of ownership of registered bonds; makes changes in such records; issues, transfers, and exchanges such certificates; and monitors the securities to prevent over-issuance of certificates. A co-registrar also performs these functions.

(b) The term *Act* means the Securities Exchange Act of 1934.

(c) The acronym *ARA* means the appropriate regulatory agency, as defined in section 3(a)(34)(B) of the Act.

(d) The phrase *Federal bank regulators* means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

(e) The term *Form TA–1* means the form and any attachments to that form, whether filed as a registration or an amendment to a registration.

(f) The term *registrant* means the entity on whose behalf Form TA–1 is filed.

(g) The acronym *SEC* means the Securities and Exchange Commission.

(h) The term *insured nonmember bank* means a bank whose Deposits are insured by the Federal Deposit Insurance Corporation and that is not a member of the Federal Reserve System.

(i) The term *qualifying securities* means:

(1) Securities registered on a national securities exchange;

(2) Securities issued by a company or bank with 500 or more shareholders *and* $1 million or more in total assets, except for securities exempted from registration with the SEC by section 12(g)(2) (C, D, E, F and H) of the Act.

§341.3 Registration as securities transfer agent.

(a) *Requirement for registration.* Any insured nonmember bank which performs any of the functions of a transfer agent as described in §341.2(a) with respect to qualifying securities shall register with the FDIC in the manner indicated in this section.

(b) *Application to register as transfer agent.* An application for registration under section 17A(c) of the Act, of a transfer agent for which the FDIC is the appropriate regulatory agency, as defined in section 3(a)(34)(B)(iii) of the Act, shall be filed with the FDIC at its Washington, DC headquarters on Form TA–1, in accordance with the instructions contained therein.

(c) *Effective date of registration.* Registration shall become effective 30 days after the date an application on Form TA–1 is filed unless the FDIC accelerates, denies, or postpones such registration in accordance with section 17A(c) of the Act. The effective date of such registration may be postponed by order for a period not to exceed 15 days. Postponement of registration for more than 15 days shall be after notice and opportunity for hearing. Form TA–1 is available upon request from the Review Unit, Division of Supervision, FDIC, Washington, DC 20429.

[47 FR 38106, Aug. 30, 1982, as amended at 60 FR 31384, June 15, 1995]

§341.4 Amendments to registration.

(a) Within 60 calendar days following the date which any information reported on Form TA–1 becomes inaccurate, misleading, or incomplete, the registrant shall file an amendment on Form TA–1 correcting the inaccurate, misleading, or incomplete information.

(b) The filing of an amendment to an application for registration as a transfer agent under §341.3, which registration has not become effective, shall postpone the effective date of the registration for 30 days following the date on which the amendment is filed unless the FDIC accelerates, denies, or postpones the registration in accordance with section 17A(c) of the Act.

[47 FR 38106, Aug. 30, 1982, as amended at 52 FR 1182, Jan. 12, 1987]

§341.5 Withdrawal from registration.

(a) *Notice of withdrawal from registration.* Any transfer agent registered under this part that ceases to engage in the functions of a transfer agent as defined in §341.2(a) shall file a written notice of withdrawal from registration with the FDIC. A registered transfer agent that ceases to engage in one or more of the functions of transfer agent as defined in §341.2(a), but continues to engage in another such function, shall not withdraw from registration.

(b) A notice of withdrawal shall be filed with the FDIC at its Washington, DC headquarters. Deregistration shall be effective upon receipt of notice of withdrawal by the FDIC. A Request for Deregistration form is available from the Review Unit, Division of Supervision, FDIC, Washington, DC 20429.

(c) If the FDIC finds that any registered transfer agent for which it is the ARA, is no longer in existence or has ceased to do business as a transfer agent, FDIC shall cancel or deny the registration by order of the Board of Directors.

(d) Registration of a transfer agent with another ARA shall cancel registration of the transfer agent with FDIC.

[47 FR 38106, Aug. 30, 1982, as amended at 60 FR 31384, June 15, 1995]

§ 341.6 Reports.

Every registration or amendment filed under this section shall constitute a *report* or *application* within the meaning or sections 17, 17A(c), and 32(a) of the Act.

PART 342—[RESERVED]

PART 343—INSURED STATE NONMEMBER BANKS WHICH ARE MUNICIPAL SECURITIES DEALERS

Sec.
343.1 Scope of part.
343.2 Definitions.
343.3 Filing of Form MSD–4, Amending Statements, and Form MSD–5.

AUTHORITY: 15 U.S.C. 78*o*–4(c)(5), 78q, and 78w; 12 U.S.C. 1811 *et seq.*

§ 343.1 Scope of part.

(a) This part is issued by the Federal Deposit Insurance Corporation (the *Corporation*) pursuant to those provisions of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) which provide for the regulation of bank municipal securities dealers and their activities.

(b) This part shall apply to all State banks insured by the Federal Deposit Insurance Corporation and not a member of the Federal Reserve System, or separately identifiable departments or divisions of such banks, which act as municipal securities dealers.

[42 FR 40891, Aug. 12, 1977]

§ 343.2 Definitions.

For purposes of this paragraph, the terms herein have the meanings given them in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c (a)) and the rules of the Municipal Securities Rulemaking Board. The term *Act* shall mean the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

[42 FR 40891, Aug. 12, 1977]

§ 343.3 Filing of Form MSD–4, Amending Statements, and Form MSD–5.

(a) On and after September 15, 1977, an insured State nonmember bank, or a subsidiary or a department or a division thereof, which is a municipal securities dealer shall not permit a person to be associated with it as a municipal securities principal or municipal securities representative unless it has filed with the Corporation an original and two copies of Form MSD–4, ''Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer'', completed in accordance with the instructions contained therein, for that person. Form MSD–4 is prescribed by the Corporation for purposes of paragraph (b) of Municipal Securities Rulemaking Board Rule G–7, ''Information Concerning Associated Persons''.

(b) Whenever a bank municipal securities dealer receives a statement pursuant to paragraph (c) of Municipal Securities Rulemaking Board Rule G–7, ''Information Concerning Associated Persons'' (*amending statement*), from a person for whom it has filed a Form MSD–4 with the Corporation pursuant to paragraph (a) of this section, such dealer shall, within ten days thereafter, file three copies of the amending statement with the Corporation accompanied by an original and two copies of a transmittal letter which includes the name of the dealer and a reference to the material transmitted, identifying the person involved, and is signed by a municipal securities principal associated with the dealer.

(c) Within thirty days after the termination of the association of a municipal securities principal or municipal securities representative with a bank municipal securites dealer which has filed a Form MSD–4 with the Corporation for that person pursuant to paragraph (a) of this section, such dealer shall file an orignial and two copies of a notification of termination with the Corporation on Form MSD–5, ''Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer'', completed in accordance with the instructions contained therein.

(d) A bank municipal securities dealer which files a Form MSD–4, Form MSD–5, or an amending statement with the Corporation under this part shall retain for its own records a copy of each such Form MSD–4, Form MSD–5, or amending statement for at least

three years after termination of the associated person with respect to whom the filing was made.

(e) Forms MSD–4, Forms MSD–5 and amending statements are to be filed with Director, Division of Supervision, Federal Deposit Insurance Corporation, Washington, DC 20429. The date that the Corporation receives a Form MSD–4, Form MSD–5, or amending statement shall be the date of filing. A Form MSD–4, Form MSD–5, or amending statement which is not prepared and executed in accordance with the applicable requirements may be returned as unacceptable for filing. Acceptance for filing shall not constitute any finding that a Form MSD–4, Form MSD–5 or amending statement has been completed in accordance with the applicable requirements or that any information contained therein is true, current, complete or not misleading. Every Form MSD–4, Form MSD–5, or amending statement filed with the Corporation under this part shall constitute a filing with the Securities and Exchange Commission for purposes of section 17(c)(1) of the Act (15 U.S.C. 78q(c)(1)) and a *report*, *application*, or *document* within the meaning of section 32(a) of the Act (15 U.S.C. 78ff(a)). Forms MSD–4 and MSD–5 can be obtained from the FDIC regional office for the area in which the bank is located.

[42 FR 40891, Aug. 12, 1977, as amended at 45 FR 37179, June 2, 1980; 60 FR 31384, June 15, 1995]

PART 344—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

Sec.
344.1 Purpose and scope.
344.2 Definitions.
344.3 Recordkeeping.
344.4 Form of notification.
344.5 Time of notification.
344.6 Securities trading policies and procedures.
344.7 Exceptions.
344.8 Waiver.

AUTHORITY: 12 U.S.C. 1817, 1818, 1819.

SOURCE: 44 FR 43261, July 24, 1979, unless otherwise noted.

§344.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to ensure that purchasers of securities in transactions effected by an insured nonmember bank are provided adequate information concerning the transactions. This part is also designed to ensure that insured nonmember banks maintain adequate records and controls with respect to securities transactions they effect.

(b) *Scope.* This part is issued by the Federal Deposit Insurance Corporation (*FDIC*) and applies to insured banks which are not members of the Federal Reserve System (*bank*).

§344.2 Definitions.

For purposes of this part:

(a) *Collective investment fund* means funds held by a bank as fiduciary and, consistent with local law, invested collectively: (1) In a common trust fund maintained by such bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as trustee, executor, administrator, guardian, or custodian under the Uniform Gifts to Minors Act, or (2) in a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or similar trusts which are exempt from Federal income taxation under the Internal Revenue Code;

(b) *Customer* shall mean any person or account, including any agency, trust, estate, guardianship, committee or other fiduciary account, for which a bank effects or participates in effecting the purchase or sale of securities, but shall not include a broker, dealer, dealer bank or issuer of the securities which are the subject of the transactions;

(c) A bank shall be deemed to exercise *investment discretion* with respect to an account if, directly or indirectly, the bank: (1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account, or (2) makes recommendations as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions.

(d) *Periodic plan* means any written authorization for a bank acting as

agent to purchase or sell for a customer, a specific security or securities, in specific amounts (calculated in security units or dollars) or (to the extent of dividends and funds available) at specific time intervals, and setting forth the commission or charges to be paid by the customer in connection therewith, or the manner of calculating them;

(e) *Security* means any interest or instrument commonly known as a *security*, whether in the nature of debt or equity, including any stock, bond, note, debenture, evidence of indebtedness or any participation in or right to subscribe to or purchase any of the foregoing. The term *security* does not include:

(1) A deposit or share account in a federally insured depository institution,

(2) A loan participation,

(3) A letter of credit or other form of bank indebtedness incurred in the ordinary course of business,

(4) Currency,

(5) Any note, draft, bill of exchange, or bankers acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited,

(6) Units of a collective investment fund,

(7) Interests in a variable amount (master) note of a borrower of prime credit or

(8) U.S. Savings Bonds.

§ 344.3 Recordkeeping.

Every bank effecting securities transactions for customers shall maintain the following records of those transactions for at least three years:

(a) Chronological records of original entry containing an itemized daily record of all purchases and sales of securities. These shall include the account for which each such transaction was effected, the description of the securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the broker/dealer or other person from whom purchased or to whom sold;

(b) Account records for each customer which shall reflect all purchases and sales of securities, all receipts and deliveries of securities, and all other debits and credits pertaining to each account including all receipts and disbursements of cash;

(c) A separate memorandum (order ticket) of each order to purchase or sell securities (whether executed or cancelled), which shall include:

(1) The accounts for which the transaction was effected;

(2) Whether the transaction was a market order, limit offer, or subject to special instructions;

(3) The time the order was received by the trader or other bank employee responsible for effecting the transaction;

(4) The time the order was placed with the broker/dealer, or if there was no broker/dealer, the time the order was executed or cancelled;

(5) The price at which the order was executed; and

(6) The broker/dealer utilized;

(d) A record of all broker/dealers selected by the bank to effect securities transactions and the amount of commissions paid or allocated to each broker during the calendar year.

Nothing contained in paragraph (d) of this section shall require a bank to maintain the records required by this section in any given manner, *Provided*, That the information required to be shown is clearly and accurately reflected and provides an adequate basis for the audit of such information.

[44 FR 43261, July 24, 1979; 44 FR 45375, Aug. 2, 1979]

§ 344.4 Form of notification.

Every bank effecting a securities transaction for a customer shall maintain for at least three years and, *except* as provided in § 344.5, mail or otherwise furnish to such customer *either* of the following types of notifications:

(a) (1) A copy of the confirmation of a broker/dealer relating to the securities transaction; and

(2) If the bank is to receive remuneration from the customer or any other source in connection with the transaction, and the remuneration is not determined pursuant to a prior written agreement between the bank

and the customer, a statement of the source and the amount of any remuneration to be received; *or*

(b) A written notification disclosing:

(1) The name of the bank;

(2) The name of the customer;

(3) Whether the bank is acting as agent for the customer, as agent for both the customer and some other person, as principal for its own account, or in any other capacity;

(4) The date and time of execution (or the fact that the time of execution will be furnished, within a reasonable time, upon written request of the customer), and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security purchased or sold by the customer;

(5) The amount of any remuneration received or to be received, directly or indirectly, by any broker/dealer from the customer in connection with the transaction;

(6) The amount of any remuneration received or to be received by the bank from the customer and the source and amount of any other remuneration to be received by the bank in connection with the transaction, unless remuneration is determined pursuant to a written agreement between the bank and the customer, *provided, however,* In the case of U.S. Government securities, Federal agency obligations and municipal obligations, paragraph (b)(6) of this section shall apply only with respect to remuneration received by the bank in an agency transaction; and

(7) (i) The name of the broker/dealer utilized; or (ii) where no broker/dealer is utilized, the name of the person from whom the security was purchased or to whom it was sold, or the fact that such information will be furnished within a reasonable time upon written request.

§ 344.5 Time of notification.

The time for mailing or otherwise furnishing the written notification described in § 344.4 shall be five business days from the date of the transaction, or if a broker/dealer is utilized, within five business days from the receipt by the bank of the broker/dealer's confirmation, *but* the bank may elect to use the following alternative procedures if the transaction is effected for:

(a) Accounts (except periodic plans) where the bank does not exercise investment discretion and the bank and the customer agree in writing to a different arrangement as to the time and content of the notification; provided, however, that such agreement makes clear the customer's right to receive the written notification within the above prescribed time period at no additional cost to the customer;

(b) Accounts (except collective investment funds) where the bank exercises investment discretion in other than an agency capacity, in which instance the bank shall, upon request of the person having the power to terminate the account or, if there is no such person, upon the request of any person holding a vested beneficial interest in such account, mail or otherwise furnish to such person the written notification within a reasonable time. The bank may charge such person a reasonable fee for providing this information;

(c) Accounts where the bank exercises investment discretion in an agency capacity, in which instance:

(1) The bank shall mail or otherwise furnish to each customer, at least once every three months, an itemized statement that specifies the funds and securities in the custody or possession of the bank at the end of such period, and all debits, credits, and transactions in the customer's account during such period; and

(2) If requested by the customer, the bank shall mail or otherwise furnish to each such customer within a reasonable time the written notification described in § 344.4. The bank may charge a reasonable fee for providing the information described in § 344.4;

(d) A collective investment fund, in which instance the bank shall at least annually furnish to the customer a copy of the financial report of the fund, *or* provide notice that a copy of the report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered for each participating account. This report shall be based upon an audit;

(e) A periodic plan, in which instance the bank shall mail or otherwise furnish to the customer, as promptly as

possible after each transaction, a written statement showing: (1) The funds and securities in the custody or possession of the bank, (2) all service charges and commissions paid by the customer in connection with the transaction, and (3) all other debits and credits of the customer's account involved in the transaction; *provided* that upon the written request of the customer the bank shall furnish the information described in § 344.4, *except* that any such information relating to remuneration paid in connection with the transaction need not be provided to the customer when paid by a source other than the customer. The bank may charge a reasonable fee for providing the information described in § 344.4.

[44 FR 43261, July 24, 1979, as amended at 45 FR 12777, Feb. 27, 1980; 45 FR 16167, Mar. 13, 1980]

§ 344.6 Securities trading policies and procedures.

Every bank effecting securities transactions for customers shall establish written policies and procedures providing:

(a) Assignment of responsibility for supervision of all officers or employees who: (1) Transmit orders to, or place orders with broker/dealers, or (2) execute transactions in securities for customers;

(b) For the fair and equitable allocation of securities and prices to accounts when orders for the same security are received at approximately the same time and are placed for execution either individually or in combination;

(c) Where applicable, and where permissible under local law, for the crossing of buy and sell orders on a fair and equitable basis to the parties to the transaction; and

(d) That bank officers and employees who make investment recommendations or decisions for the account of customers, who participate in the determination of such recommendations or decisions, or who, in connection with their duties, obtain information concerning which securities are being purchased or sold or recommended for such action, must report to the bank, within ten days after the end of the calendar quarter, all securities transactions made by them or on their behalf, either at the bank or elsewhere, in which they have a beneficial interest. The report shall identify the securities purchased or sold and indicate the dates of the transactions and whether the transactions were purchases or sales. Excluded from this requirement are transactions for the benefit of the officer or employee over which the officer or employee has no direct or indirect influence or control, transactions in mutual fund shares or U.S. Government or Federal agency obligations, and all other transactions involving in the aggregate $10,000 or less during the calendar quarter.

[44 FR 43261, July 24, 1979, as amended at 45 FR 12777, Feb. 27, 1980]

§ 344.7 Exceptions.

(a) The requirements of §§ 344.3(b) through 344.3(d) and 344.6(a) through 344.6(c) shall not apply to banks having an average of less than 200 securities transactions per calendar year for customers over the prior three-calendar-year period, exclusive of transactions in U.S. Government and Federal agency obligations.

(b) Activities of a bank that are subject to regulations promulgated by the Municipal Securities Rulemaking Board shall not be subject to the requirements of this part; and

(c) Activities of foreign branches of a bank shall not be subject to the requirements of this part.

[44 FR 43261, July 24, 1979, as amended at 45 FR 12777, Feb. 27, 1980]

§ 344.8 Waiver.

The Board of Directors of the FDIC, in its discretion, may waive for good cause all or any part of this part 344.

[60 FR 7111, Feb. 7, 1995]

PART 345—COMMUNITY REINVESTMENT

Sec.

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APPENDIX A TO PART 345—RATINGS

APPENDIX B TO PART 345—CRA NOTICE

AUTHORITY: 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2907, 3103–3104, and 3108(a).

SOURCE: 43 FR 47151, Oct. 12, 1978, unless otherwise noted.

§345.3 Delineation of community.

(a) Each insured State nonmember bank shall prepare, and at least annually review, a delineation of the local community or communities that comprise its entire community, without excluding low- and moderate-income neighborhoods. Maps shall be used to portray community delineations. The reasonableness of the delineations will be reviewed by FDIC examiners.

(b) Except as provided in paragraph (c) of this section, a local community consists of contiguous areas surrounding each office or group of offices, including any low- and moderate-income neighborhoods in those areas. More than one office of a bank may be included in the same local community. Unless the FDIC determines otherwise, a community delineation need not take account of an off-premises electronic facility that receives deposits for more than one depository institution. In preparing its delineation, a bank may use any one of the three bases set forth below:

(1) Existing boundaries such as those of standard metropolitan statistical areas (SMSA's) or counties in which the bank's office or offices are located may be used to delineate a local community. Where appropriate, portions of adjacent areas should be included. The bank may make adjustments in the case of areas divided by State borders or significant geographic barriers, or areas that are extremely large or of unusual configuration. In addition, a small bank may delineate those portions of SMSA's or counties it reasonably may be expected to serve.

(2) A bank may use its effective lending territory, which is defined as that local area or areas around each office or group of offices where it makes a substantial portion of its loans and all other areas equidistant from its offices as those areas. Adjustments such as those indicated in paragraph (b)(1) of this section may be made.

(3) A bank may use any other reasonably delineated local area that meets the purposes of the Community Reinvestment Act (CRA) and does not exclude low- and moderate-income neighborhoods.

(c) An insured State nonmember bank whose business predominantly consists of serving persons who are active duty or retired military personnel or their dependents and who are located outside its local community or communities may delineate a *military community* for those customers in addition to its local community or communities. Provisions of this part concerning local communities shall also apply to military communities, except that military communities shall be delineated by a written description rather than a map.

(Sec. 803, Pub. L. 95–128, as amended by sec. 1502, Pub. L. 95–630, 92 Stat. 3713 (12 U.S.C. 2902))

[43 FR 47151, Oct. 12, 1978, as amended at 44 FR 18165, Mar. 27, 1979]

EFFECTIVE DATE NOTE: At 60 FR 22212, May 4, 1995, § 345.3 was removed, effective July 1, 1997.

§ 345.4 Community Reinvestment Act statement.

(a) Within 90 days after the effective date of this part, the board of directors of each insured State nonmember bank shall adopt a Community Reinvestment Act (CRA) statement for each delineated local community.

(b) Each CRA Statement shall include at least the following:

(1) The delineation of the local community;

(2) A list of specific types of credit within certain categories, such as residential loans for one to four dwelling units, residential loans for 5 dwelling units and over, housing rehabilitation loans, home improvement loans, small business loans, farm loans, community development loans, commercial loans, and consumer loans, that the bank is prepared to extend within the local community; and

(3) A copy of the Community Reinvestment Act notice provided for in § 345.6 of this part.

(c) Each bank is encouraged to include the following in each CRA statement:

(1) A description of how its current efforts, including special credit-related programs, help to meet community credit needs;

(2) A periodic report regarding its record of helping to meet community credit needs; and

(3) A description of its efforts to ascertain the credit needs of its community, including efforts to communicate with members of its community regarding credit services.

(d) Each bank's board of directors shall review each CRA statement at least annually and shall act upon any material change made in the interim at its first regular meeting after the change. Such actions shall be noted in its minutes.

(e) Each current CRA statement shall be readily available for public inspection:

(1) At the home office of the bank; and

(2) At each office of the bank in the local community delineated in the statement, except off-premises electronic deposit facilities.

(f) Copies of each current CRA statement shall be provided to the public upon request. A bank may charge a reasonable fee not to exceed the cost of reproduction and mailing (if applicable).

[43 FR 47151, Oct. 12, 1978, as amended at 55 FR 26627, June 28, 1990]

EFFECTIVE DATE NOTE: At 60 FR 22212, May 4, 1995, § 345.4 was removed, effective July 1, 1997.

§ 345.5 Files of public comments and recent CRA statements.

(a) Each insured State nonmember bank shall maintain files that are readily available for public inspection consisting of:

(1) Any signed, written comments received from the public within the past 2 years that specifically relate to any CRA statement or to the bank's performance in helping to meet the credit needs of its community or communities;

(2) A copy of the public section of the most recent CRA Performance Evaluation prepared by the Federal Deposit Insurance Corporation (the format and content of the bank's CRA Performance Evaluation, as prepared and transmitted to the bank by the Federal Deposit Insurance Corporation may not be altered or abridged in any manner). The bank must place this copy in the public file within 30 business days after its receipt from the Federal Deposit Insurance Corporation;

(3) Any response to the comments under paragraph (a)(1) of this section that the bank wishes to make; and

(4) Any CRA statements in effect during the past 2 years.

(b) These files shall not contain any comments or responses that reflect adversely upon the good name or reputation of any person other than the bank, or publication of which would violate specific provisions of law.

(c) These files shall be maintained by each bank as follows:

(1) All materials at the home office;

(2) Materials relating to each local community, at a designated office in that community; and

(3) The most recent CRA Performance Evaluation shall, at a minimum,

be available at the home office and at the office in each local community so designated under paragraph (c)(2) of this section. The bank may respond to the CRA Performance Evaluation and may make the response available in the same manner as the CRA Performance Evaluation.

(d) Insured State nonmember banks shall provide copies of the public section of their most recent CRA Performance Evaluation to the public upon request. A bank may charge a reasonable fee not to exceed the cost of reproduction and mailing (if applicable).

(Approved by the Office of Management and Budget under control number 3064–0092)

[43 FR 47151, Oct. 12, 1978, as amended at 55 FR 26627, June 28, 1990; 56 FR 26904, June 12, 1991]

EFFECTIVE DATE NOTE: At 60 FR 22212, May 4, 1995, §345.5 was removed, effective July 1, 1997.

§345.6 Public notice.

(a) Each insured State nonmember bank shall provide, in the public lobby of each of its offices other than off-premises electronic deposit facilities, the public notice set forth below. Bracketed material shall be used only by banks having more than one local community. The last item in this notice shall be included only if the bank is a subsidiary of a holding company that is not prevented by statute from acquiring additional banks.

COMMUNITY REINVESTMENT ACT NOTICE

The Federal Community Reinvestment Act (CRA) requires the FDIC to evaluate our performance in helping to meet the credit needs of this community, and to take this evaluation into account when the FDIC decides on certain applications submitted by us. Your involvement is encouraged.

You should know that:

You may obtain our current CRA statements for this community in this office. [Current CRA statements for other communities served by us are available at our head office, located at ————.]

You may send signed, written comments about our CRA statements[s] or our performance in helping to meet community credit needs to (title and address of bank official) and to (title and address of the FDIC's regional office). Your letter, together with any responses by us, may be made public.

You may look at a file of all signed, written comments received by us within the past 2 years, any responses we have made to the comments, and all CRA statements in effect during the past 2 years at our office located at (address). [You also may look at the file about this community at (name and address of designated office).]

You may ask to look at any comments received by (the FDIC's regional office) at (address).

You also may request from the Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429, an announcement of applications covered by the CRA filed with the FDIC.

We are a subsidiary of (name of holding company), a bank holding company. You may request from the Federal Reserve bank of ———— (address) an announcement of applications covered by the CRA filed by bank holding companies.

(b) Within 30 business days of receipt of its first publicly available, written CRA Performance Evaluation, each insured State nonmember bank shall add language to the public CRA Notice as follows:

You may obtain the public section of our most recent CRA Performance Evaluation, which was prepared by the Federal Deposit Insurance Corporation at (address of home office) [if the bank has more than one local community, each office (other than off-premises electronic deposit facilities) in that community shall include the address of the designated office for that community].

[43 FR 47151, Oct. 12, 1978, as amended at 55 FR 26627, June 28, 1990]

EFFECTIVE DATE NOTE: At 60 FR 22212, May 4, 1995, §345.6 was removed, effective July 1, 1997.

§345.7 Assessing the record of performance.

In connection with its examination of a bank, the FDIC shall assess the record of performance of the bank in helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with safe and sound operation of the bank. The FDIC will review the bank's CRA statement(s) and any signed, written comments retained by the bank or the FDIC. In addition, the FDIC will consider the following factors in assessing a bank's record of performance:

(a) Activities conducted by the bank to ascertain the credit needs of its community, including the extent of the bank's efforts to communicate with

members of its community regarding the credit services being provided by the bank;

(b) The extent of the bank's marketing and special credit-related programs to make members of the community aware of the credit services offered by the bank;

(c) The extent of participation by the bank's board of directors in formulating the bank's policies and reviewing its performance with respect to the purposes of the Community Reinvestment Act;

(d) Any practices intended to discourage applications for types of credit set forth in the bank's CRA statement(s);

(e) The geographic distribution of the bank's credit extensions, credit applications, and credit denials;

(f) Evidence of prohibited discriminatory or other illegal credit practices;

(g) The bank's record of opening and closing offices and providing services at offices;

(h) The bank's participation, including investments, in local community development and redevelopment projects or programs;

(i) The bank's origination of residential mortgage loans, housing rehabilitation loans, home improvement loans, and small business or small farm loans within its community, or the purchase of such loans originated in its community;

(j) The bank's participation in governmentally-insured, guarantee, or subsidized loan programs for housing, small businesses, or small farms;

(k) The bank's ability to meet various community credit needs based on its financial condition and size, and legal impediments, local economic conditions and other factors; and

(l) Other factors that, in the FDIC's judgment, reasonably bear upon the extent to which a bank is helping to meet the credit needs of its entire community.

EFFECTIVE DATE NOTE: At 60 FR 22212, May 4, 1995, § 345.7 was removed, effective July 1, 1997.

Subpart A—General

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.

§ 345.11 Authority, purposes, and scope.

(a) *Authority and OMB control number*—(1) *Authority.* The authority for this part is 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2907, 3103–3104, and 3108(a).

(2) *OMB control number.* The information collection requirements contained in this part were approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 3064–0092.

(b) *Purposes.* In enacting the Community Reinvestment Act (CRA), the Congress required each appropriate Federal financial supervisory agency to assess an institution's record of helping to meet the credit needs of the local communities in which the institution is chartered, consistent with the safe and sound operation of the institution, and to take this record into account in the agency's evaluation of an application for a deposit facility by the institution. This part is intended to carry out the purposes of the CRA by:

(1) Establishing the framework and criteria by which the Federal Deposit Insurance Corporation (FDIC) assesses a bank's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the bank; and

(2) Providing that the FDIC takes that record into account in considering certain applications.

(c) *Scope*—(1) *General.* Except for certain special purpose banks described in paragraph (c)(3) of this section, this part applies to all insured State nonmember banks, including insured State branches as described in paragraph (c)(2) and any uninsured State branch that results from an acquisition described in section 5(a)(8) of the International Banking Act of 1978 (12 U.S.C. 3103(a)(8)).

(2) *Insured State branches.* Insured State branches are branches of a foreign bank established and operating under the laws of any State, the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act. In the case of insured State branches, references in this part to *main office* mean the principal

branch within the United States and the term *branch* or *branches* refers to any insured State branch or branches located within the United States. The *assessment area* of an insured State branch is the community or communities located within the United States served by the branch as described in § 345.41.

(3) *Certain special purpose banks.* This part does not apply to special purpose banks that do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incident to their specialized operations. These banks include banker's banks, as defined in 12 U.S.C. 24 (Seventh), and banks that engage only in one or more of the following activities: providing cash management controlled disbursement services or serving as correspondent banks, trust companies, or clearing agents.

§ 345.12 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company. The term *control* has the meaning given to that term in 12 U.S.C. 1841(a)(2), and a company is under common control with another company if both companies are directly or indirectly controlled by the same company.

(b) *Area median income* means:

(1) The median family income for the MSA, if a person or geography is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a person or geography is located outside an MSA.

(c) *Assessment area* means a geographic area delineated in accordance with § 345.41.

(d) *Remote Service Facility (RSF)* means an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the bank, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispersed, or money lent.

(e) *Bank* means a State nonmember bank, as that term is defined in section 3(e)(2) of the Federal Deposit Insurance Act, as amended (FDIA) (12 U.S.C. 1813(e)(2)), with Federally insured deposits, except as provided in § 345.11(c). The term bank also includes an insured State branch as defined in § 345.11(c).

(f) *Branch* means a staffed banking facility authorized as a branch, whether shared or unshared, including, for example, a mini-branch in a grocery store or a branch operated in conjunction with any other local business or nonprofit organization. The term ''branch'' only includes a ''domestic branch'' as that term is defined in section 3(o) of the FDIA (12 U.S.C. 1813(o)).

(g) *CMSA* means a consolidated metropolitan statistical area as defined by the Director of the Office of Management and Budget.

(h) *Community development* means:

(1) Affordable housing (including multifamily rental housing) for low- or moderate-income individuals;

(2) Community services targeted to low- or moderate-income individuals;

(3) Activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs (13 CFR 121.301) or have gross annual revenues of $1 million or less; or

(4) Activities that revitalize or stabilize low- or moderate-income geographies.

(i) *Community development loan* means a loan that:

(1) Has as its primary purpose community development; and

(2) Except in the case of a wholesale or limited purpose bank:

(i) Has not been reported or collected by the bank or an affiliate for consideration in the bank's assessment as a home mortgage, small business, small farm, or consumer loan, unless it is a multifamily dwelling loan (as described in Appendix A to Part 203 of this title); and

(ii) Benefits the bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(j) *Community development service* means a service that:

(1) Has as its primary purpose community development;

(2) Is related to the provision of financial services; and

(3) Has not been considered in the evaluation of the bank's retail banking services under § 345.24(d).

(k) *Consumer loan* means a loan to one or more individuals for household, family, or other personal expenditures. A consumer loan does not include a home mortgage, small business, or small farm loan. Consumer loans include the following categories of loans:

(1) *Motor vehicle loan,* which is a consumer loan extended for the purchase of and secured by a motor vehicle;

(2) *Credit card loan,* which is a line of credit for household, family, or other personal expenditures that is accessed by a borrower's use of a ''credit card,'' as this term is defined in § 226.2 of this title;

(3) *Home equity loan,* which is a consumer loan secured by a residence of the borrower;

(4) *Other secured consumer loan,* which is a secured consumer loan that is not included in one of the other categories of consumer loans; and

(5) *Other unsecured consumer loan,* which is an unsecured consumer loan that is not included in one of the other categories of consumer loans.

(l) *Geography* means a census tract or a block numbering area delineated by the United States Bureau of the Census in the most recent decennial census.

(m) *Home mortgage loan* means a ''home improvement loan'' or a ''home purchase loan'' as defined in § 203.2 of this title.

(n) *Income level* includes:

(1) *Low-income,* which means an individual income that is less than 50 percent of the area median income or a median family income that is less than 50 percent in the case of a geography.

(2) *Moderate-income,* which means an individual income that is at least 50 percent and less than 80 percent of the area median income or a median family income that is at least 50 and less than 80 percent in the case of a geography.

(3) *Middle-income,* which means an individual income that is at least 80 percent and less than 120 percent of the area median income or a median family income that is at least 80 and less than 120 percent in the case of a geography.

(4) *Upper-income,* which means an individual income that is 120 percent or more of the area median income or a median family income that is 120 percent or more in the case of a geography.

(o) *Limited purpose bank* means a bank that offers only a narrow product line (such as credit card or motor vehicle loans) to a regional or broader market and for which a designation as a limited purpose bank is in effect, in accordance with § 345.25(b).

(p) *Loan location.* A loan is located as follows:

(1) A consumer loan is located in the geography where the borrower resides;

(2) A home mortgage loan is located in the geography where the property to which the loan relates is located; and

(3) A small business or small farm loan is located in the geography where the main business facility or farm is located or where the loan proceeds otherwise will be applied, as indicated by the borrower.

(q) *Loan production office* means a staffed facility, other than a branch, that is open to the public and that provides lending-related services, such as loan information and applications.

(r) *MSA* means a metropolitan statistical area or a primary metropolitan statistical area as defined by the Director of the Office of Management and Budget.

(s) *Qualified investment* means a lawful investment, deposit, membership share, or grant that has as its primary purpose community development.

(t) *Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had total assets of less than $250 million and was independent or an affiliate of a holding company that, as of December 31 of either of the prior two calendar years, had total banking and thrift assets of less than $1 billion.

(u) *Small business loan* means a loan included in ''loans to small businesses'' as defined in the instructions for preparation of the Consolidated Report of Condition and Income.

(v) *Small farm loan* means a loan included in ''loans to small farms'' as defined in the instructions for preparation of the Consolidated Report of Condition and Income.

(w) *Wholesale bank* means a bank that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which a designation as a wholesale bank is in effect, in accordance with §345.25(b).

[60 FR 22201, May 4, 1995, as amended at 60 FR 66050, Dec. 20, 1995; 61 FR 21364, May 10, 1996]

Subpart B—Standards for Assessing Performance

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.

§345.21 Performance tests, standards, and ratings, in general.

(a) *Performance tests and standards.* The FDIC assesses the CRA performance of a bank in an examination as follows:

(1) *Lending, investment, and service tests.* The FDIC applies the lending, investment, and service tests, as provided in §§345.22 through 345.24, in evaluating the performance of a bank, except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section.

(2) *Community development test for wholesale or limited purpose banks.* The FDIC applies the community development test for a wholesale or limited purpose bank, as provided in §345.25, except as provided in paragraph (a)(4) of this section.

(3) *Small bank performance standards.* The FDIC applies the small bank performance standards as provided in §345.26 in evaluating the performance of a small bank or a bank that was a small bank during the prior calendar year, unless the bank elects to be assessed as provided in paragraphs (a)(1), (a)(2), or (a)(4) of this section. The bank may elect to be assessed as provided in paragraph (a)(1) of this section only if it collects and reports the data required for other banks under §345.42.

(4) *Strategic plan.* The FDIC evaluates the performance of a bank under a strategic plan if the bank submits, and the FDIC approves, a strategic plan as provided in §345.27.

(b) *Performance context.* The FDIC applies the tests and standards in paragraph (a) of this section and also considers whether to approve a proposed strategic plan in the context of:

(1) Demographic data on median income levels, distribution of household income, nature of housing stock, housing costs, and other relevant data pertaining to a bank's assessment area(s);

(2) Any information about lending, investment, and service opportunities in the bank's assessment area(s) maintained by the bank or obtained from community organizations, state, local, and tribal governments, economic development agencies, or other sources;

(3) The bank's product offerings and business strategy as determined from data provided by the bank;

(4) Institutional capacity and constraints, including the size and financial condition of the bank, the economic climate (national, regional, and local), safety and soundness limitations, and any other factors that significantly affect the bank's ability to provide lending, investments, or services in its assessment area(s);

(5) The bank's past performance and the performance of similarly situated lenders;

(6) The bank's public file, as described in §345.43, and any written comments about the bank's CRA performance submitted to the bank or the FDIC; and

(7) Any other information deemed relevant by the FDIC.

(c) *Assigned ratings.* The FDIC assigns to a bank one of the following four ratings pursuant to §345.28 and Appendix A of this part: ''outstanding''; ''satisfactory''; ''needs to improve''; or ''substantial noncompliance'' as provided in 12 U.S.C. 2906(b)(2). The rating assigned by the FDIC reflects the bank's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the bank.

(d) *Safe and sound operations.* This part and the CRA do not require a bank to make loans or investments or to provide services that are inconsistent with safe and sound operations. To the

contrary, the FDIC anticipates banks can meet the standards of this part with safe and sound loans, investments, and services on which the banks expect to make a profit. Banks are permitted and encouraged to develop and apply flexible underwriting standards for loans that benefit low- or moderate-income geographies or individuals, only if consistent with safe and sound operations.

§ 345.22 Lending test.

(a) *Scope of test.* (1) The lending test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through its lending activities by considering a bank's home mortgage, small business, small farm, and community development lending. If consumer lending constitutes a substantial majority of a bank's business, the FDIC will evaluate the bank's consumer lending in one or more of the following categories: motor vehicle, credit card, home equity, other secured, and other unsecured loans. In addition, at a bank's option, the FDIC will evaluate one or more categories of consumer lending, if the bank has collected and maintained, as required in § 345.42(c)(1), the data for each category that the bank elects to have the FDIC evaluate.

(2) The FDIC considers originations and purchases of loans. The FDIC will also consider any other loan data the bank may choose to provide, including data on loans outstanding, commitments and letters of credit.

(3) A bank may ask the FDIC to consider loans originated or purchased by consortia in which the bank participates or by third parties in which the bank has invested only if the loans meet the definition of community development loans and only in accordance with paragraph (d) of this section. The FDIC will not consider these loans under any criterion of the lending test except the community development lending criterion.

(b) *Performance criteria.* The FDIC evaluates a bank's lending performance pursuant to the following criteria:

(1) *Lending activity.* The number and amount of the bank's home mortgage, small business, small farm, and consumer loans, if applicable, in the bank's assessment area(s);

(2) *Geographic distribution.* The geographic distribution of the bank's home mortgage, small business, small farm, and consumer loans, if applicable, based on the loan location, including:

(i) The proportion of the bank's lending in the bank's assessment area(s);

(ii) The dispersion of lending in the bank's assessment area(s); and

(iii) The number and amount of loans in low-, moderate-, middle-, and upper-income geographies in the bank's assessment area(s);

(3) *Borrower characteristics.* The distribution, particularly in the bank's assessment area(s), of the bank's home mortgage, small business, small farm, and consumer loans, if applicable, based on borrower characteristics, including the number and amount of:

(i) Home mortgage loans to low-, moderate-, middle-, and upper-income individuals;

(ii) Small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(iii) Small business and small farm loans by loan amount at origination; and

(iv) Consumer loans, if applicable, to low-, moderate-, middle-, and upper-income individuals;

(4) *Community development lending.* The bank's community development lending, including the number and amount of community development loans, and their complexity and innovativeness; and

(5) *Innovative or flexible lending practices.* The bank's use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies.

(c) *Affiliate lending.* (1) At a bank's option, the FDIC will consider loans by an affiliate of the bank, if the bank provides data on the affiliate's loans pursuant to § 345.42.

(2) The FDIC considers affiliate lending subject to the following constraints:

(i) No affiliate may claim a loan origination or loan purchase if another

institution claims the same loan origination or purchase; and

(ii) If a bank elects to have the FDIC consider loans within a particular lending category made by one or more of the bank's affiliates in a particular assessment area, the bank shall elect to have the FDIC consider, in accordance with paragraph (c)(1) of this section, all the loans within that lending category in that particular assessment area made by all of the bank's affiliates.

(3) The FDIC does not consider affiliate lending in assessing a bank's performance under paragraph (b)(2)(i) of this section.

(d) *Lending by a consortium or a third party.* Community development loans originated or purchased by a consortium in which the bank participates or by a third party in which the bank has invested:

(1) Will be considered, at the bank's option, if the bank reports the data pertaining to these loans under §345.42(b)(2); and

(2) May be allocated among participants or investors, as they choose, for purposes of the lending test, except that no participant or investor:

(i) May claim a loan origination or loan purchase if another participant or investor claims the same loan origination or purchase; or

(ii) May claim loans accounting for more than its percentage share (based on the level of its participation or investment) of the total loans originated by the consortium or third party.

(e) *Lending performance rating.* The FDIC rates a bank's lending performance as provided in Appendix A of this part.

§345.23 Investment test.

(a) *Scope of test.* The investment test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through qualified investments that benefit its assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(b) *Exclusion.* Activities considered under the lending or service tests may not be considered under the investment test.

(c) *Affiliate investment.* At a bank's option, the FDIC will consider, in its assessment of a bank's investment performance, a qualified investment made by an affiliate of the bank, if the qualified investment is not claimed by any other institution.

(d) *Disposition of branch premises.* Donating, selling on favorable terms, or making available on a rent-free basis a branch of the bank that is located in a predominantly minority neighborhood to a minority depository institution or women's depository institution (as these terms are defined in 12 U.S.C. 2907(b)) will be considered as a qualified investment.

(e) *Performance criteria.* The FDIC evaluates the investment performance of a bank pursuant to the following criteria:

(1) The dollar amount of qualified investments;

(2) The innovativeness or complexity of qualified investments;

(3) The responsiveness of qualified investments to credit and community development needs; and

(4) The degree to which the qualified investments are not routinely provided by private investors.

(f) *Investment performance rating.* The FDIC rates a bank's investment performance as provided in Appendix A of this part.

§345.24 Service test.

(a) *Scope of test.* The service test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) by analyzing both the availability and effectiveness of a bank's systems for delivering retail banking services and the extent and innovativeness of its community development services.

(b) *Area(s) benefited.* Community development services must benefit a bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(c) *Affiliate service.* At a bank's option, the FDIC will consider, in its assessment of a bank's service performance, a community development service provided by an affiliate of the bank, if the community development service is not claimed by any other institution.

(d) *Performance criteria—retail banking services.* The FDIC evaluates the availability and effectiveness of a bank's

systems for delivering retail banking services, pursuant to the following criteria:

(1) The current distribution of the bank's branches among low-, moderate-, middle-, and upper-income geographies;

(2) In the context of its current distribution of the bank's branches, the bank's record of opening and closing branches, particularly branches located in low- or moderate-income geographies or primarily serving low- or moderate-income individuals;

(3) The availability and effectiveness of alternative systems for delivering retail banking services (*e.g.*, RSFs, RSFs not owned or operated by or exclusively for the bank, banking by telephone or computer, loan production offices, and bank-at-work or bank-by-mail programs) in low- and moderate-income geographies and to low- and moderate-income individuals; and

(4) The range of services provided in low-, moderate-, middle-, and upper-income geographies and the degree to which the services are tailored to meet the needs of those geographies.

(e) *Performance criteria—community development services.* The FDIC evaluates community development services pursuant to the following criteria:

(1) The extent to which the bank provides community development services; and

(2) The innovativeness and responsiveness of community development services.

(f) *Service performance rating.* The FDIC rates a bank's service performance as provided in Appendix A of this part.

§ 345.25 Community development test for wholesale or limited purpose banks.

(a) *Scope of test.* The FDIC assesses a wholesale or limited purpose bank's record of helping to meet the credit needs of its assessment area(s) under the community development test through its community development lending, qualified investments, or community development services.

(b) *Designation as a wholesale or limited purpose bank.* In order to receive a designation as a wholesale or limited purpose bank, a bank shall file a request, in writing, with the FDIC, at least three months prior to the proposed effective date of the designation. If the FDIC approves the designation, it remains in effect until the bank requests revocation of the designation or until one year after the FDIC notifies the bank that the FDIC has revoked the designation on its own initiative.

(c) *Performance criteria.* The FDIC evaluates the community development performance of a wholesale or limited purpose bank pursuant to the following criteria:

(1) The number and amount of community development loans (including originations and purchases of loans and other community development loan data provided by the bank, such as data on loans outstanding, commitments, and letters of credit), qualified investments, or community development services;

(2) The use of innovative or complex qualified investments, community development loans, or community development services and the extent to which the investments are not routinely provided by private investors; and

(3) The bank's responsiveness to credit and community development needs.

(d) *Indirect activities.* At a bank's option, the FDIC will consider in its community development performance assessment:

(1) Qualified investments or community development services provided by an affiliate of the bank, if the investments or services are not claimed by any other institution; and

(2) Community development lending by affiliates, consortia and third parties, subject to the requirements and limitations in § 345.22 (c) and (d).

(e) *Benefit to assessment area(s)*—(1) *Benefit inside assessment area(s).* The FDIC considers all qualified investments, community development loans, and community development services that benefit areas within the bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area(s).

(2) *Benefit outside assessment area(s).* The FDIC considers the qualified investments, community development loans, and community development services that benefit areas outside the

bank's assessment area(s), if the bank has adequately addressed the needs of its assessment area(s).

(f) *Community development performance rating.* The FDIC rates a bank's community development performance as provided in Appendix A of this part.

§345.26 Small bank performance standards.

(a) *Performance criteria.* The FDIC evaluates the record of a small bank, or a bank that was a small bank during the prior calendar year, of helping to meet the credit needs of its assessment area(s) pursuant to the following criteria:

(1) The bank's loan-to-deposit ratio, adjusted for seasonal variation and, as appropriate, other lending-related activities, such as loan originations for sale to the secondary markets, community development loans, or qualified investments;

(2) The percentage of loans and, as appropriate, other lending-related activities located in the bank's assessment area(s);

(3) The bank's record of lending to and, as appropriate, engaging in other lending-related activities for borrowers of different income levels and businesses and farms of different sizes;

(4) The geographic distribution of the bank's loans; and

(5) The bank's record of taking action, if warranted, in response to written complaints about its performance in helping to meet credit needs in its assessment area(s).

(b) *Small bank performance rating.* The FDIC rates the performance of a bank evaluated under this section as provided in Appendix A of this part.

§345.27 Strategic plan.

(a) *Alternative election.* The FDIC will assess a bank's record of helping to meet the credit needs of its assessment area(s) under a strategic plan if:

(1) The bank has submitted the plan to the FDIC as provided for in this section;

(2) The FDIC has approved the plan;

(3) The plan is in effect; and

(4) The bank has been operating under an approved plan for at least one year.

(b) *Data reporting.* The FDIC's approval of a plan does not affect the bank's obligation, if any, to report data as required by §345.42.

(c) *Plans in general*—(1) *Term.* A plan may have a term of no more than five years, and any multi-year plan must include annual interim measurable goals under which the FDIC will evaluate the bank's performance.

(2) *Multiple assessment areas.* A bank with more than one assessment area may prepare a single plan for all of its assessment areas or one or more plans for one or more of its assessment areas.

(3) *Treatment of affiliates.* Affiliated institutions may prepare a joint plan if the plan provides measurable goals for each institution. Activities may be allocated among institutions at the institutions' option, provided that the same activities are not considered for more than one institution.

(d) *Public participation in plan development.* Before submitting a plan to the FDIC for approval, a bank shall:

(1) Informally seek suggestions from members of the public in its assessment area(s) covered by the plan while developing the plan;

(2) Once the bank has developed a plan, formally solicit public comment on the plan for at least 30 days by publishing notice in at least one newspaper of general circulation in each assessment area covered by the plan; and

(3) During the period of formal public comment, make copies of the plan available for review by the public at no cost at all offices of the bank in any assessment area covered by the plan and provide copies of the plan upon request for a reasonable fee to cover copying and mailing, if applicable.

(e) *Submission of plan.* The bank shall submit its plan to the FDIC at least three months prior to the proposed effective date of the plan. The bank shall also submit with its plan a description of its informal efforts to seek suggestions from members of the public, any written public comment received, and, if the plan was revised in light of the comment received, the initial plan as released for public comment.

(f) *Plan content*—(1) *Measurable goals.* (i) A bank shall specify in its plan measurable goals for helping to meet the credit needs of each assessment

area covered by the plan, particularly the needs of low- and moderate-income geographies and low- and moderate-income individuals, through lending, investment, and services, as appropriate.

(ii) A bank shall address in its plan all three performance categories and, unless the bank has been designated as a wholesale or limited purpose bank, shall emphasize lending and lending-related activities. Nevertheless, a different emphasis, including a focus on one or more performance categories, may be appropriate if responsive to the characteristics and credit needs of its assessment area(s), considering public comment and the bank's capacity and constraints, product offerings, and business strategy.

(2) *Confidential information.* A bank may submit additional information to the FDIC on a confidential basis, but the goals stated in the plan must be sufficiently specific to enable the public and the FDIC to judge the merits of the plan.

(3) *Satisfactory and outstanding goals.* A bank shall specify in its plan measurable goals that constitute ''satisfactory'' performance. A plan may specify measurable goals that constitute ''outstanding'' performance. If a bank submits, and the FDIC approves, both ''satisfactory'' and ''outstanding'' performance goals, the FDIC will consider the bank eligible for an ''outstanding'' performance rating.

(4) *Election if satisfactory goals not substantially met.* A bank may elect in its plan that, if the bank fails to meet substantially its plan goals for a satisfactory rating, the FDIC will evaluate the bank's performance under the lending, investment, and service tests, the community development test, or the small bank performance standards, as appropriate.

(g) *Plan approval*—(1) *Timing.* The FDIC will act upon a plan within 60 calendar days after the FDIC receives the complete plan and other material required under paragraph (d) of this section. If the FDIC fails to act within this time period, the plan shall be deemed approved unless the FDIC extends the review period for good cause.

(2) *Public participation.* In evaluating the plan's goals, the FDIC considers the public's involvement in formulating the plan, written public comment on the plan, and any response by the bank to public comment on the plan.

(3) *Criteria for evaluating plan.* The FDIC evaluates a plan's measurable goals using the following criteria, as appropriate:

(i) The extent and breadth of lending or lending-related activities, including, as appropriate, the distribution of loans among different geographies, businesses and farms of different sizes, and individuals of different income levels, the extent of community development lending, and the use of innovative or flexible lending practices to address credit needs;

(ii) The amount and innovativeness, complexity, and responsiveness of the bank's qualified investments; and

(iii) The availability and effectiveness of the bank's systems for delivering retail banking services and the extent and innovativeness of the bank's community development services.

(h) *Plan amendment.* During the term of a plan, a bank may request the FDIC to approve an amendment to the plan on grounds that there has been a material change in circumstances. The bank shall develop an amendment to a previously approved plan in accordance with the public participation requirements of paragraph (d) of this section.

(i) *Plan assessment.* The FDIC approves the goals and assesses performance under a plan as provided for in Appendix A of this part.

[60 FR 22201, May 4, 1995, as amended at 60 FR 66050, Dec. 20, 1995]

§ 345.28 Assigned ratings.

(a) *Ratings in general.* Subject to paragraphs (b) and (c) of this section, the FDIC assigns to a bank a rating of ''outstanding,'' ''satisfactory,'' ''needs to improve,'' or ''substantial noncompliance'' based on the bank's performance under the lending, investment and service tests, the community development test, the small bank performance standards, or an approved strategic plan, as applicable.

(b) *Lending, investment, and service tests.* The FDIC assigns a rating for a bank assessed under the lending, investment, and service tests in accordance with the following principles:

(1) A bank that receives an ''outstanding'' rating on the lending test receives an assigned rating of at least ''satisfactory'';

(2) A bank that receives an ''outstanding'' rating on both the service test and the investment test and a rating of at least ''high satisfactory'' on the lending test receives an assigned rating of ''outstanding''; and

(3) No bank may receive an assigned rating of ''satisfactory'' or higher unless it receives a rating of at least ''low satisfactory'' on the lending test.

(c) *Effect of evidence of discriminatory or other illegal credit practices.* Evidence of discriminatory or other illegal credit practices adversely affects the FDIC's evaluation of a bank's performance. In determining the effect on the bank's assigned rating, the FDIC considers the nature and extent of the evidence, the policies and procedures that the bank has in place to prevent discriminatory or other illegal credit practices, any corrective action that the bank has taken or has committed to take, particularly voluntary corrective action resulting from self-assessment, and other relevant information.

§345.29 Effect of CRA performance on applications.

(a) *CRA performance.* Among other factors, the FDIC takes into account the record of performance under the CRA of each applicant bank in considering an application for approval of:

(1) The establishment of a domestic branch or other facility with the ability to accept deposits;

(2) The relocation of the bank's main office or a branch;

(3) The merger, consolidation, acquisition of assets, or assumption of liabilities; and

(4) Deposit insurance for a newly chartered financial institution.

(b) *New financial institutions.* A newly chartered financial institution shall submit with its application for deposit insurance a description of how it will meet its CRA objectives. The FDIC takes the description into account in considering the application and may deny or condition approval on that basis.

(c) *Interested parties.* The FDIC takes into account any views expressed by interested parties that are submitted in accordance with the FDIC's procedures set forth in part 303 of this chapter in considering CRA performance in an application listed in paragraphs (a) and (b) of this section.

(d) *Denial or conditional approval of application.* A bank's record of performance may be the basis for denying or conditioning approval of an application listed in paragraph (a) of this section.

Subpart C—Records, Reporting, and Disclosure Requirements

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.

§345.41 Assessment area delineation.

(a) *In general.* A bank shall delineate one or more assessment areas within which the FDIC evaluates the bank's record of helping to meet the credit needs of its community. The FDIC does not evaluate the bank's delineation of its assessment area(s) as a separate performance criterion, but the FDIC reviews the delineation for compliance with the requirements of this section.

(b) *Geographic area(s) for wholesale or limited purpose banks.* The assessment area(s) for a wholesale or limited purpose bank must consist generally of one or more MSAs (using the MSA boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns, in which the bank has its main office, branches, and deposit-taking RSFs.

(c) *Geographic area(s) for other banks.* The assessment area(s) for a bank other than a wholesale or limited purpose bank must:

(1) Consist generally of one or more MSAs (using the MSA boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns; and

(2) Include the geographies in which the bank has its main office, its branches, and its deposit-taking RSFs, as well as the surrounding geographies in which the bank has originated or

purchased a substantial portion of its loans (including home mortgage loans, small business and small farm loans, and any other loans the bank chooses, such as those consumer loans on which the bank elects to have its performance assessed).

(d) *Adjustments to geographic area(s).* A bank may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve. An adjustment is particularly appropriate in the case of an assessment area that otherwise would be extremely large, of unusual configuration, or divided by significant geographic barriers.

(e) *Limitations on the delineation of an assessment area.* Each bank's assessment area(s):

(1) Must consist only of whole geographies;

(2) May not reflect illegal discrimination;

(3) May not arbitrarily exclude low- or moderate-income geographies, taking into account the bank's size and financial condition; and

(4) May not extend substantially beyond a CMSA boundary or beyond a state boundary unless the assessment area is located in a multistate MSA. If a bank serves a geographic area that extends substantially beyond a state boundary, the bank shall delineate separate assessment areas for the areas in each state. If a bank serves a geographic area that extends substantially beyond a CMSA boundary, the bank shall delineate separate assessment areas for the areas inside and outside the CMSA.

(f) *Banks serving military personnel.* Notwithstanding the requirements of this section, a bank whose business predominantly consists of serving the needs of military personnel or their dependents who are not located within a defined geographic area may delineate its entire deposit customer base as its assessment area.

(g) *Use of assessment area(s).* The FDIC uses the assessment area(s) delineated by a bank in its evaluation of the bank's CRA performance unless the FDIC determines that the assessment area(s) do not comply with the requirements of this section.

§ 345.42 Data collection, reporting, and disclosure.

(a) *Loan information required to be collected and maintained.* A bank, except a small bank, shall collect, and maintain in machine readable form (as prescribed by the FDIC) until the completion of its next CRA examination, the following data for each small business or small farm loan originated or purchased by the bank:

(1) A unique number or alphanumeric symbol that can be used to identify the relevant loan file;

(2) The loan amount at origination;

(3) The loan location; and

(4) An indicator whether the loan was to a business or farm with gross annual revenues of $1 million or less.

(b) *Loan information required to be reported.* A bank, except a small bank or a bank that was a small bank during the prior calendar year, shall report annually by March 1 to the FDIC in machine readable form (as prescribed by the FDIC) the following data for the prior calendar year:

(1) *Small business and small farm loan data.* For each geography in which the bank originated or purchased a small business or small farm loan, the aggregate number and amount of loans:

(i) With an amount at origination of $100,000 or less;

(ii) With an amount at origination of more than $100,000 but less than or equal to $250,000;

(iii) With an amount at origination of more than $250,000; and

(iv) To businesses and farms with gross annual revenues of $1 million or less (using the revenues that the bank considered in making its credit decision);

(2) *Community development loan data.* The aggregate number and aggregate amount of community development loans originated or purchased; and

(3) *Home mortgage loans.* If the bank is subject to reporting under part 203 of this title, the location of each home mortgage loan application, origination, or purchase outside the MSAs in which the bank has a home or branch office (or outside any MSA) in accordance with the requirements of part 203 of this title.

(c) *Optional data collection and maintenance*—(1) *Consumer loans.* A bank may

collect and maintain in machine readable form (as prescribed by the FDIC) data for consumer loans originated or purchased by the bank for consideration under the lending test. A bank may maintain data for one or more of the following categories of consumer loans: motor vehicle, credit card, home equity, other secured, and other unsecured. If the bank maintains data for loans in a certain category, it shall maintain data for all loans originated or purchased within that category. The bank shall maintain data separately for each category, including for each loan:

(i) A unique number or alphanumeric symbol that can be used to identify the relevant loan file;

(ii) The loan amount at origination or purchase;

(iii) The loan location; and

(iv) The gross annual income of the borrower that the bank considered in making its credit decision.

(2) *Other loan data.* At its option, a bank may provide other information concerning its lending performance, including additional loan distribution data.

(d) *Data on affiliate lending.* A bank that elects to have the FDIC consider loans by an affiliate, for purposes of the lending or community development test or an approved strategic plan, shall collect, maintain, and report for those loans the data that the bank would have collected, maintained, and reported pursuant to paragraphs (a), (b), and (c) of this section had the loans been originated or purchased by the bank. For home mortgage loans, the bank shall also be prepared to identify the home mortgage loans reported under part 203 of this title by the affiliate.

(e) *Data on lending by a consortium or a third party.* A bank that elects to have the FDIC consider community development loans by a consortium or third party, for purposes of the lending or community development tests or an approved strategic plan, shall report for those loans the data that the bank would have reported under paragraph (b)(2) of this section had the loans been originated or purchased by the bank.

(f) *Small banks electing evaluation under the lending, investment, and service tests.* A bank that qualifies for evaluation under the small bank performance standards but elects evaluation under the lending, investment, and service tests shall collect, maintain, and report the data required for other banks pursuant to paragraphs (a) and (b) of this section.

(g) *Assessment area data.* A bank, except a small bank or a bank that was a small bank during the prior calendar year, shall collect and report to the FDIC by March 1 of each year a list for each assessment area showing the geographies within the area.

(h) *CRA Disclosure Statement.* The FDIC prepares annually for each bank that reports data pursuant to this section a CRA Disclosure Statement that contains, on a state-by-state basis:

(1) For each county (and for each assessment area smaller than a county) with a population of 500,000 persons or fewer in which the bank reported a small business or small farm loan:

(i) The number and amount of small business and small farm loans reported as originated or purchased located in low-, moderate-, middle-, and upper-income geographies;

(ii) A list grouping each geography according to whether the geography is low-, moderate-, middle-, or upper-income;

(iii) A list showing each geography in which the bank reported a small business or small farm loan; and

(iv) The number and amount of small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(2) For each county (and for each assessment area smaller than a county) with a population in excess of 500,000 persons in which the bank reported a small business or small farm loan:

(i) The number and amount of small business and small farm loans reported as originated or purchased located in geographies with median income relative to the area median income of less than 10 percent, 10 or more but less than 20 percent, 20 or more but less than 30 percent, 30 or more but less than 40 percent, 40 or more but less than 50 percent, 50 or more but less than 60 percent, 60 or more but less than 70 percent, 70 or more but less than 80 percent, 80 or more but less

than 90 percent, 90 or more but less than 100 percent, 100 or more but less than 110 percent, 110 or more but less than 120 percent, and 120 percent or more;

(ii) A list grouping each geography in the county or assessment area according to whether the median income in the geography relative to the area median income is less than 10 percent, 10 or more but less than 20 percent, 20 or more but less than 30 percent, 30 or more but less than 40 percent, 40 or more but less than 50 percent, 50 or more but less than 60 percent, 60 or more but less than 70 percent, 70 or more but less than 80 percent, 80 or more but less than 90 percent, 90 or more but less than 100 percent, 100 or more but less than 110 percent, 110 or more but less than 120 percent, and 120 percent or more;

(iii) A list showing each geography in which the bank reported a small business or small farm loan; and

(iv) The number and amount of small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(3) The number and amount of small business and small farm loans located inside each assessment area reported by the bank and the number and amount of small business and small farm loans located outside the assessment area(s) reported by the bank; and

(4) The number and amount of community development loans reported as originated or purchased.

(i) *Aggregate disclosure statements.* The FDIC, in conjunction with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, prepares annually, for each MSA (including an MSA that crosses a state boundary) and the non-MSA portion of each state, an aggregate disclosure statement of small business and small farm lending by all institutions subject to reporting under this part or parts 25, 228, or 563e of this title. These disclosure statements indicate, for each geography, the number and amount of all small business and small farm loans originated or purchased by reporting institutions, except that the FDIC may adjust the form of the disclosure if necessary, because of special circumstances, to protect the privacy of a borrower or the competitive position of an institution.

(j) *Central data depositories.* The FDIC makes the aggregate disclosure statements, described in paragraph (i) of this section, and the individual bank CRA Disclosure Statements, described in paragraph (h) of this section, available to the public at central data depositories. The FDIC publishes a list of the depositories at which the statements are available.

§ 345.43 Content and availability of public file.

(a) *Information available to the public.* A bank shall maintain a public file that includes the following information:

(1) All written comments received from the public for the current year and each of the prior two calendar years that specifically relate to the bank's performance in helping to meet community credit needs, and any response to the comments by the bank, if neither the comments nor the responses contain statements that reflect adversely on the good name or reputation of any persons other than the bank or publication of which would violate specific provisions of law;

(2) A copy of the public section of the bank's most recent CRA Performance Evaluation prepared by the FDIC. The bank shall place this copy in the public file within 30 business days after its receipt from the FDIC;

(3) A list of the bank's branches, their street addresses, and geographies;

(4) A list of branches opened or closed by the bank during the current year and each of the prior two calendar years, their street addresses, and geographies;

(5) A list of services (including hours of operation, available loan and deposit products, and transaction fees) generally offered at the bank's branches and descriptions of material differences in the availability or cost of services at particular branches, if any. At its option, a bank may include information regarding the availability of alternative systems for delivering retail banking services (*e.g.*, RSFs, RSFs not owned or operated by or exclusively for the bank, banking by telephone or

computer, loan production offices, and bank-at-work or bank-by-mail programs);

(6) A map of each assessment area showing the boundaries of the area and identifying the geographies contained within the area, either on the map or in a separate list; and

(7) Any other information the bank chooses.

(b) *Additional information available to the public*—(1) *Banks other than small banks.* A bank, except a small bank or a bank that was a small bank during the prior calendar year, shall include in its public file the following information pertaining to the bank and its affiliates, if applicable, for each of the prior two calendar years:

(i) If the bank has elected to have one or more categories of its consumer loans considered under the lending test, for each of these categories, the number and amount of loans:

(A) To low-, moderate-, middle-, and upper-income individuals;

(B) Located in low-, moderate-, middle-, and upper-income census tracts; and

(C) Located inside the bank's assessment area(s) and outside the bank's assessment area(s); and

(ii) The bank's CRA Disclosure Statement. The bank shall place the statement in the public file within three business days of its receipt from the FDIC.

(2) *Banks required to report Home Mortgage Disclosure Act (HMDA) data.* A bank required to report home mortgage loan data pursuant part 203 of this title shall include in its public file a copy of the HMDA Disclosure Statement provided by the Federal Financial Institutions Examination Council pertaining to the bank for each of the prior two calendar years. In addition, a bank that elected to have the FDIC consider the mortgage lending of an affiliate for any of these years shall include in its public file the affiliate's HMDA Disclosure Statement for those years. The bank shall place the statement(s) in the public file within three business days after receipt.

(3) *Small banks.* A small bank or a bank that was a small bank during the prior calendar year shall include in its public file:

(i) The bank's loan-to-deposit ratio for each quarter of the prior calendar year and, at its option, additional data on its loan-to-deposit ratio; and

(ii) The information required for other banks by paragraph (b)(1) of this section, if the bank has elected to be evaluated under the lending, investment, and service tests.

(4) *Banks with strategic plans.* A bank that has been approved to be assessed under a strategic plan shall include in its public file a copy of that plan. A bank need not include information submitted to the FDIC on a confidential basis in conjunction with the plan.

(5) *Banks with less than satisfactory ratings.* A bank that received a less than satisfactory rating during its most recent examination shall include in its public file a description of its current efforts to improve its performance in helping to meet the credit needs of its entire community. The bank shall update the description quarterly.

(c) *Location of public information.* A bank shall make available to the public for inspection upon request and at no cost the information required in this section as follows:

(1) At the main office and, if an interstate bank, at one branch office in each state, all information in the public file; and

(2) At each branch:

(i) A copy of the public section of the bank's most recent CRA Performance Evaluation and a list of services provided by the branch; and

(ii) Within five calendar days of the request, all the information in the public file relating to the assessment area in which the branch is located.

(d) *Copies.* Upon request, a bank shall provide copies, either on paper or in another form acceptable to the person making the request, of the information in its public file. The bank may charge a reasonable fee not to exceed the cost of copying and mailing (if applicable).

(e) *Updating.* Except as otherwise provided in this section, a bank shall ensure that the information required by this section is current as of April 1 of each year.

§ 345.44 Public notice by banks.

A bank shall provide in the public lobby of its main office and each of its branches the appropriate public notice set forth in Appendix B of this part. Only a branch of a bank having more than one assessment area shall include the bracketed material in the notice for branch offices. Only a bank that is an affiliate of a holding company shall include the next to the last sentence of the notices. A bank shall include the last sentence of the notices only if it is an affiliate of a holding company that is not prevented by statute from acquiring additional banks.

§ 345.45 Publication of planned examination schedule.

The FDIC publishes at least 30 days in advance of the beginning of each calendar quarter a list of banks scheduled for CRA examinations in that quarter.

Subpart D—Transition Rules

EFFECTIVE DATE NOTE: At 60 FR 22209, May 4, 1995, Subpart D was temporarily added, effective July 1, 1995 through July 1, 1997.

§ 345.51 Transition rules.

(a) *Effective date.* Sections of this part become applicable over a period of time in accordance with the schedule set forth in paragraph (c) of this section. Notwithstanding paragraph (c) of this section, when a bank, either voluntarily or mandatorily, becomes subject to the performance tests and standards of §§ 345.21 through 345.27, the bank must comply with all the pertinent requirements of §§ 345.11 through 345.44, and no longer must comply with the requirements of §§ 345.3 through 345.7.

(b) *Data collection and reporting; strategic plan; performance tests and standards*—(1) *Data collection and reporting.* (i) On January 1, 1996, the data collection requirements set forth in § 345.42 (except § 345.42(b) and (g)) become applicable.

(ii) On January 1, 1997, the data reporting requirements set forth in § 345.42(b) and (g) become applicable.

(2) *Small banks.* Beginning January 1, 1996, the FDIC evaluates banks that qualify for the small bank performance standards described in § 345.26 under that section.

(3) *Strategic plan.* Beginning January 1, 1996, a bank that elects to be evaluated under an approved strategic plan pursuant to § 345.27 may submit its strategic plan to the FDIC for approval.

(4) *Other performance tests.* (i) Beginning January 1, 1996, a bank may elect to be evaluated under the pertinent revised performance tests described in §§ 345.22, 345.23, 345.24, and 345.25, if the bank provides the necessary data to permit evaluation.

(ii) Beginning July 1, 1997, the FDIC evaluates all banks under the pertinent revised performance tests.

(c) *Schedule.* (1) On July 1, 1995, §§ 345.11, 345.12, 345.29, and 345.51 become applicable, and §§ 345.1, 345.2, 345.8, 345.101 and 345.102 expire.

(2) On January 1, 1996, § 345.41 and the pertinent provisions of Subpart B of this part will apply to banks that elect to be evaluated under §§ 345.22 through 345.25, banks that submit for approval strategic plans under § 345.27, and banks that qualify for the small bank performance standards described in § 345.26.

(3) On January 1, 1996, §§ 345.42 (except § 345.42(b) and (g)) and 345.45 become applicable.

(4) On January 1, 1997, §§ 345.41 and 345.42(b) and (g) become applicable.

(5) On July 1, 1997, §§ 345.21 through 345.28, 345.43, and 345.44 become applicable, and §§ 345.3 through 345.7, and 345.51 expire.

[60 FR 22209, May 4, 1995, as amended at 60 FR 66050, Dec. 20, 1995]

APPENDIX A TO PART 345—RATINGS

(a) *Ratings in general.*—(1) In assigning a rating, the FDIC evaluates a bank's performance under the applicable performance criteria in this part, in accordance with § 345.21, and § 345.28, which provides for adjustments on the basis of evidence of discriminatory or other illegal credit practices.

(2) A bank's performance need not fit each aspect of a particular rating profile in order to receive that rating, and exceptionally strong performance with respect to some aspects may compensate for weak performance in others. The bank's overall performance, however, must be consistent with safe and sound banking practices and generally with the appropriate rating profile as follows.

(b) *Banks evaluated under the lending, investment, and service tests.*—(1) *Lending performance rating.* The FDIC assigns each bank's lending performance one of the five following ratings.

(i) *Outstanding.* The FDIC rates a bank's lending performance ''outstanding'' if, in general, it demonstrates:

(A) Excellent responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A substantial majority of its loans are made in its assessment area(s);

(C) An excellent geographic distribution of loans in its assessment area(s);

(D) An excellent distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) An excellent record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Extensive use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It is a leader in making community development loans.

(ii) *High satisfactory.* The FDIC rates a bank's lending performance ''high satisfactory'' if, in general, it demonstrates:

(A) Good responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A high percentage of its loans are made in its assessment area(s);

(C) A good geographic distribution of loans in its assessment area(s);

(D) A good distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) A good record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made a relatively high level of community development loans.

(iii) *Low satisfactory.* The FDIC rates a bank's lending performance ''low satisfactory'' if, in general, it demonstrates:

(A) Adequate responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) An adequate percentage of its loans are made in its assessment area(s);

(C) An adequate geographic distribution of loans in its assessment area(s);

(D) An adequate distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) An adequate record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Limited use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made an adequate level of community development loans.

(iv) *Needs to improve.* The FDIC rates a bank's lending performance ''needs to improve'' if, in general, it demonstrates:

(A) Poor responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A small percentage of its loans are made in its assessment area(s);

(C) A poor geographic distribution of loans, particularly to low- or moderate-income geographies, in its assessment area(s);

(D) A poor distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) A poor record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Little use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made a low level of community development loans.

(v) *Substantial noncompliance.* The FDIC rates a bank's lending performance as being in ''substantial noncompliance'' if, in general, it demonstrates:

(A) A very poor responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A very small percentage of its loans are made in its assessment area(s);

(C) A very poor geographic distribution of loans, particularly to low- or moderate-income geographies, in its assessment area(s);

(D) A very poor distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the bank;

(E) A very poor record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) No use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made few, if any, community development loans.

(2) *Investment performance rating.* The FDIC assigns each bank's investment performance one of the five following ratings.

(i) *Outstanding.* The FDIC rates a bank's investment performance ''outstanding'' if, in general, it demonstrates:

(A) An excellent level of qualified investments, particularly those that are not routinely provided by private investors, often in a leadership position;

(B) Extensive use of innovative or complex qualified investments; and

(C) Excellent responsiveness to credit and community development needs.

(ii) *High satisfactory.* The FDIC rates a bank's investment performance ''high satisfactory'' if, in general, it demonstrates:

(A) A significant level of qualified investments, particularly those that are not routinely provided by private investors, occasionally in a leadership position;

(B) Significant use of innovative or complex qualified investments; and

(C) Good responsiveness to credit and community development needs.

(iii) *Low satisfactory.* The FDIC rates a bank's investment performance ''low satisfactory'' if, in general, it demonstrates:

(A) An adequate level of qualified investments, particularly those that are not routinely provided by private investors, although rarely in a leadership position;

(B) Occasional use of innovative or complex qualified investments; and

(C) Adequate responsiveness to credit and community development needs.

(iv) *Needs to improve.* The FDIC rates a bank's investment performance ''needs to improve'' if, in general, it demonstrates:

(A) A poor level of qualified investments, particularly those that are not routinely provided by private investors;

(B) Rare use of innovative or complex qualified investments; and

(C) Poor responsiveness to credit and community development needs.

(v) *Substantial noncompliance.* The FDIC rates a bank's investment performance as being in ''substantial noncompliance'' if, in general, it demonstrates:

(A) Few, if any, qualified investments, particularly those that are not routinely provided by private investors;

(B) No use of innovative or complex qualified investments; and

(C) Very poor responsiveness to credit and community development needs.

(3) *Service performance rating.* The FDIC assigns each bank's service performance one of the five following ratings.

(i) *Outstanding.* The FDIC rates a bank's service performance ''outstanding'' if, in general, the bank demonstrates:

(A) Its service delivery systems are readily accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has improved the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) are tailored to the convenience and needs of its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It is a leader in providing community development services.

(ii) *High satisfactory.* The FDIC rates a bank's service performance ''high satisfactory'' if, in general, the bank demonstrates:

(A) Its service delivery systems are accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has not adversely affected the accessibility of its delivery systems, particularly in low- and moderate-income geographies and to low- and moderate-income individuals;

(C) Its services (including, where appropriate, business hours) do not vary in a way that inconveniences its assessment area(s), particularly low- and moderate-income geographies and low- and moderate-income individuals; and

(D) It provides a relatively high level of community development services.

(iii) *Low satisfactory*. The FDIC rates a bank's service performance ''low satisfactory'' if, in general, the bank demonstrates:

(A) Its service delivery systems are reasonably accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has generally not adversely affected the accessibility of its delivery systems, particularly in low- and moderate-income geographies and to low- and moderate-income individuals;

(C) Its services (including, where appropriate, business hours) do not vary in a way that inconveniences its assessment area(s), particularly low- and moderate-income geographies and low- and moderate-income individuals; and

(D) It provides an adequate level of community development services.

(iv) *Needs to improve*. The FDIC rates a bank's service performance ''needs to improve'' if, in general, the bank demonstrates:

(A) Its service delivery systems are unreasonably inaccessible to portions of its assessment area(s), particularly to low- or moderate-income geographies or to low- or moderate-income individuals;

(B) To the extent changes have been made, its record of opening and closing branches has adversely affected the accessibility its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) vary in a way that inconveniences its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It provides a limited level of community development services.

(v) *Substantial noncompliance*. The FDIC rates a bank's service performance as being in ''substantial noncompliance'' if, in general, the bank demonstrates:

(A) Its service delivery systems are unreasonably inaccessible to significant portions of its assessment area(s), particularly to low- or moderate-income geographies or to low- or moderate-income individuals;

(B) To the extent changes have been made, its record of opening and closing branches has significantly adversely affected the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) vary in a way that significantly inconveniences its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It provides few, if any, community development services.

(c) *Wholesale or limited purpose banks*. The FDIC assigns each wholesale or limited purpose bank's community development performance one of the four following ratings.

(1) *Outstanding*. The FDIC rates a wholesale or limited purpose bank's community development performance ''outstanding'' if, in general, it demonstrates:

(i) A high level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Extensive use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Excellent responsiveness to credit and community development needs in its assessment area(s).

(2) *Satisfactory*. The FDIC rates a wholesale or limited purpose bank's community development performance ''satisfactory'' if, in general, it demonstrates:

(i) An adequate level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Occasional use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Adequate responsiveness to credit and community development needs in its assessment area(s).

(3) *Needs to improve*. The FDIC rates a wholesale or limited purpose bank's community development performance as ''needs to improve'' if, in general, it demonstrates:

(i) A poor level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Rare use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Poor responsiveness to credit and community development needs in its assessment area(s).

(4) *Substantial noncompliance*. The FDIC rates a wholesale or limited purpose bank's community development performance in ''substantial noncompliance'' if, in general, it demonstrates:

(i) Few, if any, community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) No use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Very poor responsiveness to credit and community development needs in its assessment area(s).

(d) *Banks evaluated under the small bank performance standards.* The FDIC rates the performance of each bank evaluated under the small bank performance standards as follows.

(1) *Eligibility for a satisfactory rating.* The FDIC rates a bank's performance ''satisfactory'' if, in general, the bank demonstrates:

(i) A reasonable loan-to-deposit ratio (considering seasonal variations) given the bank's size, financial condition, the credit needs of its assessment area(s), and taking into account, as appropriate, lending-related activities such as loan originations for sale to the secondary markets and community development loans and qualified investments;

(ii) A majority of its loans and, as appropriate, other lending-related activities are in its assessment area(s);

(iii) A distribution of loans to and, as appropriate, other lending related-activities for individuals of different income levels (including low- and moderate-income individuals) and businesses and farms of different sizes that is reasonable given the demographics of the bank's assessment area(s);

(iv) A record of taking appropriate action, as warranted, in response to written complaints, if any, about the bank's performance in helping to meet the credit needs of its assessment area(s); and

(v) A reasonable geographic distribution of loans given the bank's assessment area(s).

(2) *Eligibility for an outstanding rating.* A bank that meets each of the standards for a ''satisfactory'' rating under this paragraph and exceeds some or all of those standards may warrant consideration for an overall rating of ''outstanding.'' In assessing whether a bank's performance is ''outstanding,'' the FDIC considers the extent to which the bank exceeds each of the performance standards for a ''satisfactory'' rating and its performance in making qualified investments and its performance in providing branches and other services and delivery systems that enhance credit availability in its assessment area(s).

(3) *Needs to improve or substantial noncompliance ratings.* A bank also may receive a rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standards for a ''satisfactory'' rating.

(e) *Strategic plan assessment and rating.* (1) *Satisfactory goals.* The FDIC approves as ''satisfactory'' measurable goals that adequately help to meet the credit needs of the bank's assessment area(s).

(2) *Outstanding goals.* If the plan identifies a separate group of measurable goals that substantially exceed the levels approved as ''satisfactory,'' the FDIC will approve those goals as ''outstanding.''

(3) *Rating.* The FDIC assesses the performance of a bank operating under an approved plan to determine if the bank has met its plan goals:

(i) If the bank substantially achieves its plan goals for a satisfactory rating, the FDIC will rate the bank's performance under the plan as ''satisfactory.''

(ii) If the bank exceeds its plan goals for a satisfactory rating and substantially achieves its plan goals for an outstanding rating, the FDIC will rate the bank's performance under the plan as ''outstanding.''

(iii) If the bank fails to meet substantially its plan goals for a satisfactory rating, the FDIC will rate the bank as either ''needs to improve'' or ''substantial noncompliance,'' depending on the extent to which it falls short of its plan goals, unless the bank elected in its plan to be rated otherwise, as provided in § 345.27(f)(4).

APPENDIX B TO PART 345—CRA NOTICE

(a) *Notice for main offices and, if an interstate bank, one branch office in each state.*

COMMUNITY REINVESTMENT ACT NOTICE

Under the Federal Community Reinvestment Act (CRA), the Federal Deposit Insurance Corporation (FDIC) evaluates our record of helping to meet the credit needs of this community consistent with safe and sound operations. The FDIC also takes this record into account when deciding on certain applications submitted by us.

Your involvement is encouraged.

You are entitled to certain information about our operations and our performance under the CRA, including, for example, information about our branches, such as their location and services provided at them; the public section of our most recent CRA Performance Evaluation, prepared by the FDIC; and comments received from the public relating to our performance in helping to meet community credit needs, as well as our responses to those comments. You may review this information today.

At least 30 days before the beginning of each quarter, the FDIC publishes a nationwide list of the banks that are scheduled for CRA examination in that quarter. This list is available from the Regional Manager, Division of Compliance and Consumer Affairs, FDIC (address). You may send written comments about our performance in helping to meet community credit needs to (name and address of official at bank) and FDIC Regional Manager. Your letter, together with any response by us, will be considered by the FDIC in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the FDIC Regional Manager. You

may also request from the FDIC Regional Manager an announcement of our applications covered by the CRA filed with the FDIC. We are an affiliate of (name of holding company), a bank holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____ (address) an announcement of applications covered by the CRA filed by bank holding companies.

(b) *Notice for branch offices.*

COMMUNITY REINVESTMENT ACT NOTICE

Under the Federal Community Reinvestment Act (CRA), the Federal Deposit Insurance Corporation (FDIC) evaluates our record of helping to meet the credit needs of this community consistent with safe and sound operations. The FDIC also takes this record into account when deciding on certain applications submitted by us.

Your involvement is encouraged.

You are entitled to certain information about our operations and our performance under the CRA. You may review today the public section of our most recent CRA evaluation, prepared by the FDIC, and a list of services provided at this branch. You may also have access to the following additional information, which we will make available to you at this branch within five calendar days after you make a request to us: (1) a map showing the assessment area containing this branch, which is the area in which the FDIC evaluates our CRA performance in this community; (2) information about our branches in this assessment area; (3) a list of services we provide at those locations; (4) data on our lending performance in this assessment area; and (5) copies of all written comments received by us that specifically relate to our CRA performance in this assessment area, and any responses we have made to those comments. If we are operating under an approved strategic plan, you may also have access to a copy of the plan.

[If you would like to review information about our CRA performance in other communities served by us, the public file for our entire bank is available at (name of office located in state), located at (address).]

At least 30 days before the beginning of each quarter, the FDIC publishes a nationwide list of the banks that are scheduled for CRA examination in that quarter. This list is available from the Regional Manager, Division of Compliance and Consumer Affairs, FDIC (address). You may send written comments about our performance in helping to meet community credit needs to (name and address of official at bank) and the FDIC Regional Manager. Your letter, together with any response by us, will be considered by the FDIC in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the FDIC Regional Manager. You may also request from the FDIC Regional Manager an announcement of our applications covered by the CRA filed with the FDIC. We are an affiliate of (name of holding company), a bank holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____ (address) an announcement of applications covered by the CRA filed by bank holding companies.

PART 346—FOREIGN BANKS

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346.101 Applications.
APPENDIX A to Part 346—[RESERVED]

AUTHORITY: 12 U.S.C. 1813, 1815, 1817, 1819, 1820, 3103, 3104, 3105, 3108.

SOURCE: 44 FR 40060, July 9, 1979, unless otherwise noted.

Subpart A—Definitions

§346.1 Definitions.

For the purposes of this part:

(a) *Foreign bank* means any company organized under the laws of a foreign country, any Territory of the United States, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands or the Virgin Islands which engages in the business of banking. The term includes foreign commercial banks, foreign merchant banks, and other foreign institutions that engage in banking activities usual in connection with the business of banking in the countries where such foreign institutions are organized and operating. Except as otherwise specifically provided by the Federal Deposit Insurance Corporation, banks organized under the laws of a foreign country, any Territory of the United States, Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands which are insured banks other than by reason of having an insured branch are not considered to be foreign banks for purposes of §§ 346.17, 346.18, 346.19, and 346.20. For purposes of § 346.6, the term foreign bank does not include any bank organized under the laws of any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands the deposits of which are insured by the Corporation pursuant to the Federal Deposit Insurance Act.

(b) *Foreign country* means any country other than the United States and includes any colony, dependency or possession of any such country.

(c) *State* means any State of the United States or the District of Columbia.

(d) *Branch* means any office or place of business of a foreign bank located in any State of the United States at which deposits are received. The term does not include any office or place of business deemed by the State licensing authority or the Comptroller of the Currency to be an agency.

(e) *Federal branch* means a branch of a foreign bank established and operating under the provisions of section 4 of the International Banking Act of 1978 (12 U.S.C. 3102).

(f) *State branch* means a branch of a foreign bank established and operating under the laws of any State.

(g) *Insured branch* means a branch of a foreign bank any deposits of which branch are insured in accordance with the provisions of the Federal Deposit Insurance Act.

(h) *Noninsured branch* means a branch of a foreign bank deposits of which branch are not insured in accordance with the provisions of the Federal Deposit Insurance Act.

(i) *Insured bank* means any bank, including a foreign bank having an insured branch, deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act.

(j) *Home State* of a foreign bank means the State so determined by the election of the foreign bank, or in default of such election, by the Board of Governors of the Federal Reserve System.

(k) *Initial deposit* means the first deposit transaction between a depositor and the branch. The initial deposit may be placed into different deposit accounts or into different kinds of deposit accounts, such as demand, savings, or time. Deposit accounts that are held by a depositor in the same right and capacity may be added together for the purposes of determining the dollar amount of the initial deposit. *First deposit* means any deposit made when there is no current deposit relationship between the depositor and the branch.

(l) *Domestic retail deposit activity* means the acceptance by a State branch of any initial deposit of less than $100,000.

(m) A *majority owned subsidiary* means a company the voting stock of which is more than 50 percent owned or controlled by another company.

(n) A *wholly owned subsidiary* means a company the voting stock of which is 100 percent owned or controlled by another company except for a nominal number of directors' shares.

(o) *Affiliate* means any entity that controls, is controlled by, or is under common control with another entity. An entity shall be deemed to ''control'' another entity if the entity directly or indirectly owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity or controls in any manner the election of a majority of the directors or trustees of the other entity.

(p) *Depository* means any insured state bank, national bank, or insured

branch. A depository may not be an affiliate of the foreign bank whose insured branch is seeking to use the depository.

(q) *Deposit* means the same as in section 3(*l*) of the Federal Deposit Insurance Act (12 U.S.C. 1813(*l*)).

(r) *Significant risk to the deposit insurance fund* shall be understood to be present whenever there is a high probability that the Bank Insurance Fund administered by the FDIC may suffer a loss.

(s) *Foreign business* means any entity, including but not limited to a corporation, partnership, sole proprietorship, association, foundation or trust, which is organized under the laws of a country other than the United States or any United States entity which is owned or controlled by an entity which is organized under the laws of a country other than the United States or a foreign national.

(t) *Large United States business* means any entity including but not limited to a corporation, partnership, sole proprietorship, association, foundation or trust which is organized under the laws of the United States or any state thereof, and:

(1) Whose securities are registered on a national securities exchange or quoted on the National Association of Securities Dealers Automated Quotation System; or

(2) Has annual gross revenues in excess of $1,000,000 for the fiscal year immediately preceding the initial deposit.

(u) *Person* means an individual, bank, corporation, partnership, trust, association, foundation, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(v) *Immediate family member of a natural person* means the spouse, father, mother, brother, sister, son or daughter of that natural person.

[44 FR 40060, July 9, 1979, as amended at 49 FR 49620, Dec. 21, 1984; 54 FR 14066, Apr. 7, 1989; 59 FR 60706, Nov. 28, 1994; 61 FR 5674, Feb. 14, 1996]

Subpart B—Insurance of Deposits

§346.2 Scope.

(a) This subpart B implements the insurance provisions of section 6 of the International Banking Act of 1978 (12 U.S.C. 3104). It sets out the FDIC's rules regarding deposit activities requiring a State branch to be an insured branch; deposit activities not requiring a State branch to be an insured branch; procedures for a State branch to apply for an exemption from the insurance requirement; and, depositor notification requirements.[1] It sets out the FDIC's policy regarding the operation of insured and noninsured branches, whether State or Federal, by a foreign bank and it provides that any branch has the option of applying for insurance.

(b) Any application for insurance under this subpart should be filed in accordance with part 303 of the FDIC's Rules and Regulations.

§346.3 Restriction on operation of insured and noninsured branches.

The FDIC will not insure deposits in any branch of a foreign bank unless the foreign bank agrees that every branch established or operated by the foreign bank in the same State will be an insured branch; *Provided,* That this restriction does not apply to any branch which accepts only initial deposits in an amount of $100,000 or greater.

§346.4 Insurance requirement.

General rule. Except as provided in §346.5 or §346.6, a foreign bank shall not establish or operate any State branch which is not an insured branch whenever:

(a) The branch is engaged in a domestic retail deposit activity; and

(b) The branch is located in a State which requires a bank organized and existing under State law to have deposit insurance whenever the bank accepts deposits from the general public. A State requirement is one imposed by statute or by State banking department regulation or policy.

[44 FR 40060, July 9, 1979, as amended at 54 FR 14067, Apr. 7, 1989]

[1] Sections 346.4, 346.5, 346.6 and 346.7 do not apply to a Federal branch; the Comptroller of the Currency's regulations establish such rules for Federal branches. Federal branches deemed by the Comptroller to require insurance must apply to the FDIC for insurance.

§ 346.5 Branches established under section 5 of the International Banking Act.

A foreign bank may operate any State branch as a noninsured branch whenever the foreign bank has entered into an agreement with the Board of Governors of the Federal Reserve System to accept at that branch only those deposits as would be permissible for a corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611 *et seq.*) and implementing rules and regulations administered by the Board of Governors (12 CFR part 211).

§ 346.6 Exemptions from the insurance requirement.

(a) *Deposit activities not requiring insurance.* A state branch will not be deemed to be engaged in a domestic retail deposit activity which requires the branch to be an insured branch under § 346.4 if initial deposits in an amount of less than $100,000 are derived solely from the following:

(1) Individuals who are not citizens or residents of the United States at the time of the initial deposit;

(2) Individuals who:

(i) Are not citizens of the United States;

(ii) Are residents of the United States; and

(iii) Are employed by a foreign bank, foreign business, foreign government, or recognized international organization;

(3) Persons (including immediate family members of natural persons) to whom the branch or foreign bank (including any affiliate thereof) has extended credit or provided other nondeposit banking services within the past twelve months or has entered into a written agreement to provide such services within the next twelve months;

(4) Foreign businesses, large United States businesses, and persons from whom an Edge Corporation may accept deposits under § 211.4(e)(1) of Regulation K of the Board of Governors of the Federal Reserve System, 12 CFR 211.4(e)(1);

(5) Any governmental unit, including the United States government, any state government, any foreign government and any political subdivision or agency of any of the foregoing, and recognized international organizations;

(6) Persons who are depositing funds in connection with the issuance of a financial instrument by the branch for the transmission of funds or the transmission of such funds by any electronic means; and

(7) Any other depositor but only if the amount of deposits under this paragraph (a)(7) does not exceed on an average daily basis one percent of the average of the branch's deposits for the last 30 days of the most recent calendar quarter, excluding deposits in the branch of other offices, branches, agencies or wholly owned subsidiaries of the bank and the branch does not solicit deposits from the general public by advertising, display of signs, or similar activity designed to attract the attention of the general public. A foreign bank which has more than one state branch in the same state may aggregate deposits in such branches (excluding deposits of other branches, agencies or wholly owned subsidiaries of the bank) for the purpose of this paragraph (a)(7). The average shall be computed by using the sum of the close of business figures for the last 30 calendar days ending with and including the last day of the calendar quarter divided by 30. For days on which the branch is closed, balances from the last previous business day are to be used.

(b) *Application for an exemption.* (1) Whenever a foreign bank proposes to accept at a state branch initial deposits of less than $100,000 and such deposits are not otherwise excepted under paragraph (a) of this section, the foreign bank may apply to the FDIC for consent to operate the branch as a noninsured branch. The Board of Directors may exempt the branch from the insurance requirement if the branch is not engaged in domestic retail deposit activities requiring insurance protection. The Board of Directors will consider the size and nature of depositors and deposit accounts, the importance of maintaining and improving the availability of credit to all sectors of the United States economy, including the international trade finance sector of the United State economy, whether the exemption would give the foreign bank

an unfair competitive advantage over United States banking organizations, and any other relevant factors in making this determination.

(2) Any request for an exemption under this paragraph should be in writing and authorized by the board of directors of the foreign bank. If a resolution is not required pursuant to the applicant's organizational documents, the request shall include evidence of approval by the bank's senior management. The request should be filed with the Regional Director of the Division of Supervision for the region where the state branch is located.

(3) The request should detail the kinds of deposit activities in which the branch proposes to engage, the expected source of deposits, the manner in which deposits will be solicited, how this activity will maintain or improve the availability of credit to all sectors of the United States economy, including the international trade finance sector, that the activity will not give the foreign bank an unfair competitive advantage over United States banking organizations and any other relevant information.

(c) *Transition period.* An uninsured state branch may maintain a retail deposit lawfully accepted pursuant to this section prior to April 1, 1996:

(1) If the deposit qualifies pursuant to paragraph (a) or (b) of this section; or

(2) If the deposit does not qualify pursuant to paragraph (a) or (b) of this section, no later than:

(i) In the case of a non-time deposit, five years from April 1, 1996; or

(ii) In the case of a time deposit, the first maturity date of the time deposit after April 1, 1996 or the date that is 90 days after April 1, 1996, whichever is later.

[61 FR 5674, Feb. 14, 1996]

§346.7 Notification to depositors.

Any State branch that is exempt from the insurance requirement pursuant to §346.6 shall—

(a) Display conspicuously at each window or place where deposits are usually accepted a sign stating that deposits are not insured by the FDIC; and

(b) Include in bold face conspicuous type on each signature card, passbook, and instrument evidencing a deposit the statement ''This deposit is *not* insured by the FDIC''; or require each depositor to execute a statement which acknowledges that the initial deposit and all future deposits at the branch are not insured by the FDIC. This acknowledgment shall be retained by the branch so long as the depositor maintains any deposit with the branch. This provision applies to any negotiable certificates of deposit made in a branch on or after July 6, 1989, as well as to any renewals of such deposits which become effective on or after July 6, 1989.

[54 FR 14067, Apr. 7, 1989]

§346.8 Optional insurance.

A foreign bank may apply to the FDIC for deposit insurance for any State branch that is not otherwise required to be insured under §346.4 or for any Federal branch that is not otherwise required to be insured under the rules and regulations of the Comptroller of the Currency.

§§346.9—346.15 [Reserved]

Subpart C—Foreign Banks Having Insured Branches

§346.16 Scope.

This subpart C sets out the rules that apply only to a foreign bank that operates or proposes to establish an insured State or Federal branch. These rules relate to the following matters: an agreement to provide information and to be examined and provisions concerning recordkeeping, pledge of assets, asset maintenance, and deductions from the assessment base.

[44 FR 40060, July 9, 1979, as amended at 54 FR 14067, Apr. 7, 1989]

§346.17 Agreement to provide information and to be examined.

(a) A foreign bank that applies for insurance for any branch shall agree in writing to the following terms:

(1) The foreign bank will provide the FDIC with information regarding the affairs of the bank and its affiliates which are located outside of the United States as the FDIC from time to time may request to:

(i) Determine the relations between the insured branch and the bank and its affiliates and

(ii) Assess the financial condition of the bank as it relates to the insured branch.

If the laws of the country of the bank's domicile or the policy of the Central Bank or other banking authority prohibit or restrict the foreign bank from entering into this agreement, the foreign bank shall agree to provide information to the extent permitted by such law or policy. Information provided shall be in the form requested by the FDIC and shall be made available in the United States. The Board of Directors will consider the existence and extent of this prohibition or restriction in determining whether to grant insurance and may deny the application if the information available is so limited in extent that an unacceptable risk to the insurance fund is presented.

(2) The FDIC may examine the affairs of any office, agency, branch or affiliate of the foreign bank located in the United States as the FDIC deems necessary to: (i) Determine the relations between the insured branch and such offices, agencies, branches or affiliates and (ii) assess the financial condition of the bank as it relates to the insured branch. The foreign bank shall also agree to provide the FDIC with information regarding the affairs of such offices, agencies, branches or affiliates as the FDIC deems necessary. The Board of Directors will not grant insurance to any branch if the foreign bank fails to enter into an agreement as required under paragraph (a)(2) of this section.

(b) The agreement shall be signed by an officer of the bank who has been so authorized by the foreign bank's board of directors. The agreement and the authorization shall be included with the foreign bank's application for insurance. Any agreement not in English shall be accompanied by an English translation.

[44 FR 40060, July 9, 1979, as amended at 54 FR 14067, Apr. 7, 1989]

§ 346.18 Records.

(a) Each insured branch shall keep a set of accounts and records in the words and figures of the English language which accurately reflect the business transactions of the branch on a daily basis.

(b) The records of each insured branch shall be kept as though it were a separate entity, with its assets and liabilities separate from the other operations of the head office, other branches or agencies of the foreign bank and its subsidiaries or affiliates. A foreign bank which has more than one insured branch in a State may treat such branches as one entity for record keeping purposes and may designate a branch to maintain records for all the branches in the State.

§ 346.19 Pledge of assets.

(a) *Purpose.* A foreign bank that has an insured branch shall pledge assets for the benefit of the FDIC or its designee(s). Whenever the FDIC is obligated under section 11(f) of the Federal Deposit Insurance Act (12 U.S.C 1821(f)) to pay the insured deposits of an insured branch, the assets pledged under this section shall become the property of the FDIC to be used to the extent necessary to protect the deposit insurance fund.

(b) *Amount of assets to be pledged.* (1) A foreign bank shall pledge assets equal to five percent of the average of the insured branch's liabilities for the last 30 days of the second and fourth calendar quarters, respectively. This average shall be computed by using the sum of the close of business figures for the 30 calendar days of the second and fourth calendar quarters, respectively, ending with and including the last date of the respective calendar quarter, divided by 30.[3] In determining its average liabilities, the branch may exclude liabilities to other offices, agencies, branches, and wholly owned subsidiaries of the foreign bank. The value of the pledged assets shall be computed based on the lesser of the principal amount (par value) or market value of such assets at the time of the original pledge and thereafter as of the last date of the second and fourth calendar quarters, respectively.

(2) The initial five-percent deposit for a newly established insured branch

[3] For days on which the branch is closed, balances from the last previous business day are to be used.

shall be based on the branch's projection of liabilities at the end of the first year of its operation.

(3) The FDIC may require a foreign bank to pledge additional assets or to compute its pledge on a daily basis whenever the FDIC determines that the foreign bank's or any branch's condition is such that the assets pledged under § 346.19(b) (1) and (2) will not adequately protect the deposit insurance fund. In requiring a foreign bank to pledge additional assets, the FDIC will consult with the branch's primary regulator. Among the factors to be considered in imposing these requirements are the concentration of risk to any one borrower or group of related borrowers, or the concentration of transfer risk to any one country, including the country in which the foreign bank's head office is located.

(4) Each insured branch shall separately comply with the requirements of this section. A foreign bank which has more than one insured branch in a state may treat all of its insured branches in the same state as one entity and shall designate one branch to be responsible for compliance with this section.

(c) *Depository*. A foreign bank shall place pledged assets for safekeeping at any depository which is located in any state. A foreign bank must obtain the FDIC's prior written approval of the depository selected, and such approval may be revoked and dismissal of the depository required whenever the depository does not fulfill any one of its obligations under the agreement. A foreign bank shall appoint and constitute the depository as its attorney in fact for the sole purpose of transferring title to pledged assets to the FDIC as may be required to effectuate the provisions of § 346.19(a).

(d) *Assets that may be pledged*. Subject to the right of the FDIC to require substitution, a foreign bank may pledge any of the kinds of assets listed below; such assets must be denominated in United States dollars. A foreign bank shall be deemed to have pledged any such assets for the benefit of the FDIC or its designees at such time as any such asset is placed with the depository.

(1) Certificates of deposit that are payable in the United States and that are issued by any state bank, national bank, or branch of a foreign bank which has executed a valid waiver of offset agreement or similar debt instruments that are payable in the United States and that are issued by any agency of a foreign bank which has executed a valid waiver of offset agreement; *Provided,* That the maturity of any certificate or issuance is not greater than one year; and *Provided further,* That the issuing branch or agency of a foreign bank is not an affiliate of the pledging bank or from the same country as the pledging bank's domicile.

(2) Interest bearing bonds, notes, debentures, or other direct obligations of or obligations fully guaranteed as to principal and interest by the United States or any agency or instrumentality thereof;

(3) Commercial paper that is rated P–1 or P–2, or their equivalent, by a nationally recognized rating service: *Provided,* That any conflict in a rating shall be resolved in favor of the lowest rating.

(4) Banker's acceptances that are payable in the United States and that are issued by any state bank, national bank, or branch or agency of a foreign bank; *Provided,* That the maturity of any acceptance is not greater than 180 days; and *Provided further,* That the branch or agency issuing the acceptance is not an affiliate of the pledging bank or from the same country as the pledging bank's domicile;

(5) General obligations of any state of the United States, or any county or municipality of any state of the United States, or any agency, instrumentality, or political subdivision of the foregoing or any obligation guaranteed by a state of the United States or any county or municipality of any state of the United States; *Provided,* That such obligations have a credit rating within the top two rating bands of a national-recognized rating service (with any conflict in a rating resolved in favor of the lowest rating).

(6) Obligations of the African Development Bank, Asian Development Bank, Inter–American Development Bank, and the International Bank for Reconstruction and Development; or

(7) Notes issued by bank holding companies or banks organized under the laws of the United States or any state thereof or notes issued by United States branches or agencies of foreign banks, *Provided,* That the notes have a credit rating within the top two rating bands of a nationally-recognized rating service (with any conflict in a rating resolved in favor of the lowest rating) and that they are payable in the United States, and *Provided further,* That the issuer is not an affiliate of the foreign bank pledging the note.

(8) Any asset determined by the FDIC to be acceptable.

(e) *Pledge agreement.* A foreign bank shall not pledge any assets unless a pledge agreement in form and substance satisfactory to the FDIC has been executed by the foreign bank and the depository. The agreement, in addition to other terms not inconsistent with this paragraph (e), shall give effect to the following terms:

(1) *Original pledge.* The foreign bank shall place with the depository assets of the kind described in § 346.19(d), having an aggregate value in the amount as required pursuant to § 346.19(b).

(2) *Additional assets required to be pledged.* Whenever the foreign bank is required to pledge additional assets for the benefit of the FDIC or its designees pursuant to § 346.19(b)(1), it shall place (within two (2) business days after the last day of the immediately preceding second or fourth calendar quarter, respectively, unless otherwise ordered) additional assets of the kind described in § 346.19(d), having an aggregate value in the amount required by the FDIC.

(3) *Substitution of assets.* The foreign bank, at any time, may substitute any assets for pledged assets, and, upon such substitution, the depository shall promptly release any such assets to the foreign bank. *Provided,* That (i) the foreign bank pledges assets of the kind described in § 346.19(d) having an aggregate value not less than the value of the pledged assets for which they are substituted and certified as such by the foreign bank and (ii) the FDIC has not by written notification to the foreign bank, a copy of which shall be provided to the depository, suspended or terminated the foreign bank's right of substitution.

(4) *Delivery of other documents.* Concurrently with the pledge of any assets, the foreign bank shall deliver to the depository all documents and instruments necessary or advisable to effectuate the transfer of title to any such assets and thereafter, from time to time, at the request of the FDIC, deliver to the depository any such additional documents or instruments.

(5) *Acceptance and safekeeping responsibilities of the depository.* (i) The depository shall accept and hold any assets pledged by the foreign bank pursuant to the pledge agreement for safekeeping free and clear of any lien, charge, right of offset, credit, or preference in connection with any claim the depository may assert against the foreign bank and shall designate any such assets as a special pledge for the benefit of the FDIC or its designees. The depository shall not accept the pledge of any such assets unless concurrently with such pledge the foreign bank delivers to the depository the documents and instruments necessary for the transfer of title thereto as provided in this part.

(ii) The depository shall hold any such assets separate from all other assets of the foreign bank or the depository. Such asssets may be held in book-entry form but must at all times be segregated on the records of the depository and clearly identified as assets subject to the pledge agreement.

(6) *Reporting requirements of the branch and the depository*—(i) *Initial reports.* Upon the original pledge of assets as provided in § 346.19(e)(1),

(A) The depository shall provide to the foreign bank and to the regional director of the FDIC region in which the branch is located a written report in the form of a receipt identifying each asset pledged and specifying in reasonable detail with respect to each such asset the complete title, interest rate, series, serial number (if any), principal amount (par value), maturity date and call date; and

(B) The foreign bank shall provide to the regional director of the FDIC region in which the branch is located a written report certified as correct by the foreign bank which sets forth the value of each pledged asset and the aggregate value of all such assets, and which states that the aggregate value

of all such assets is the amount required pursuant to § 346.19(b) and that all such assets are of the kind described in § 346.19(d).

(ii) *Semiannual reports.* Within ten (10) calendar days after the end of the second and fourth calendar quarters:

(A) The depository shall provide to the regional director of the FDIC region in which the branch is located a written report specifying in reasonable detail with respect to each asset currently pledged (including any asset pledged to satisfy the requirements of § 346.19(b)(3) and identified as such), as of two business days after the end of each of the specified calendar quarters, the complete title, interest rate, series, serial number (if any), principal amount (par value), maturity date, and call date, *Provided,* That if no substitution of any asset has occurred during the reporting period, the report need only specify that no substitution of assets has occurred; and

(B) The foreign bank shall provide as of two business days after the end of each of the specified calendar quarters to the regional director of the FDIC region in which the branch is located a written report certified as correct by the foreign bank which sets forth the value of each pledged asset and the aggregate value of all such assets, which states that the aggregate value of all such assets is the amount required pursuant to § 346.19(b) and that all such assets are of the kind described in § 346.19(d), and which states the average of the liabilities of each branch of the foreign bank computed in the manner and for the period prescribed in § 346.19(b).

(iii) *Additional reports.* The foreign bank shall, from time to time, as may be required, provide to the regional director of the FDIC region in which the branch is located a written report in the form specified containing the information requested with respect to any asset then currently pledged.

(7) *Access to assets.* With respect to any asset pledged pursuant to the pledge agreement, the depository will provide representatives of the FDIC or the foreign bank access (during regular business hours of the depository and at the location where any such asset is held, without other limitation or qualification) to all original instruments, documents, books, and records evidencing or pertaining to any such asset.

(8) *Release upon the order of the FDIC.* The depository shall release to the foreign bank any pledged assets, as specified in a written notification of the regional director of the FDIC region in which the branch is located, upon the terms and conditions provided in such notification, including without limitation the waiver of any requirement that any assets be pledged by the foreign bank in substitution of any released assets.

(9) *Release to the FDIC.* Whenever the FDIC is obligatged under section 11(f) of the Federal Deposit Insurance Act (12 U.S.C. 1821(f)) to pay insured deposits of an insured branch, the FDIC by written certification shall so inform the depository; and the depository, upon receipt of such certification, shall thereupon promptly release and transfer title to any pledged assets to the FDIC or release such assets to the foreign bank, as specified in the certification. Upon release and transfer of title to all pledged assets specified in the certification, the depository shall be discharged from any further obligation under the pledge agreement.

(10) *Interest earned on assets.* The foreign bank may regain any interest earned with respect to the assets currently pledged unless the FDIC by written notice prohibits retention of interest by the foreign bank, in which case the notice shall specify the disposition of any such interest.

(11) *Expenses of agreement.* The FDIC shall not be required to pay any fees, costs, or expenses for services provided by the depository to the foreign bank pursuant to, or in connection with, the pledge agreement.

(12) *Substitution of depository.* The depository may resign, or the foreign bank may discharge the depository, from its duties and obligations under the pledge agreement by giving at least sixty (60) days' written notice thereof to the other party and to the regional director of the FDIC region in which the branch is located. The FDIC, upon thirty (30) days' written notice to the foreign bank and the depository, may require the foreign bank to dismiss the depository if the FDIC in its discretion

determines that the depository is in breach of the pledge agreement. The depository shall continue to function as such until the appointment of a successor depository becomes effective and the depository has released to the successor depository the pledged assets and documents and instruments to effectuate transfer of title in accordance with the written instructions of the foreign bank as approved by the FDIC. The appointment by the foreign bank of a successor depository shall not be effective until—

(i) The FDIC has approved in writing the successor depository and

(ii) A pledge agreement in form and substance satisfactory to the FDIC has been executed.

(13) *Waiver of terms.* The FDIC may by written order waive compliance by the foreign bank or the depository with any term or condition of the pledge agreement.

(Reporting and recordkeeping requirements in paragraph (e)(6) approved by the Office of Management and Budget under control number 3064–0010)

[49 FR 49620, Dec. 21, 1984, as amended at 52 FR 34210, Sept. 10, 1987; 54 FR 14067, Apr. 7, 1989]

§ 346.20 Asset maintenance.

(a) An insured branch of a foreign bank shall maintain on a daily basis eligible assets in an amount not less than 106% of the preceding quarter's average book value of the branch's liabilities or, in the case of a newly-established branch, the estimated book value of its liabilities at the end of the first full quarter of operation, exclusive of liabilities due to the foreign bank's head office, other branches, agencies, offices, or wholly owned subsidiaries. The Director of the Division of Supervision or his designee may impose a computation of total liabilities on a daily basis in those instances where it is found necessary for supervisory purposes. The Board of Directors, after consulting with the branch's primary regulator, may require that a higher ratio of eligible assets be maintained if the financial condition of the branch warrants such action. Among the factors which will be considered in requiring a higher ratio of eligible assets are the concentration of risk to any one borrower or group of related borrowers or the concentration of transfer risk to any one country, including the country in which the foreign bank's head office is located. Eligible assets shall be payable in United States dollars or in a currency freely convertible into United States dollars.

(b) In determining eligible assets for the purposes of compliance with paragraph (a) of this section, the branch shall exclude the following:

(1) Any asset due from the foreign bank's head office, other branches, agencies, offices or affiliates;

(2) Any asset classified *Value Impaired*, to the extend of the required Allocated Transfer Risk Reserves or equivalent write down, or *Loss* in the most recent state or federal examination report;

(3) Any deposit of the branch in a bank unless the bank has executed a valid waiver of offset agreement:

(4) Any asset not supported by sufficient credit information to allow a review of the asset's credit quality, as determined at the most recent state or federal examination;[4]

[4] Whether an asset has sufficient credit information will be a function of the size of the borrower and the location within the foreign bank of the responsibility for authorizing and monitoring extensions of credit to the borrower. For large, well known companies, when credit responsibility is located in an office of the foreign bank outside the insured branch, the branch must have adequate documentation to show that the asset is of good quality and is being supervised adequately by the bank. In such cases, copies of periodic memoranda that include an analysis of the borrower's recent financial statements and a report on recent developments in the borrower's operations and borrowing relationships with the bank generally would constitute sufficient information. For other borrowers, periodic memoranda must be supplemented by information such as copies of recent financial statements, recent correspondence concerning the borrower's financial condition and repayment history, credit terms and collateral, data on any guarantors, and where necessary, the status of any corrective measures being employed.

Subsequent to the determination that an asset lacks sufficient credit information, an insured branch may not include the amount of that asset among eligible assets until the FDIC determines that sufficient documentation exists. Such a determination may be made either at the next federal examination,

(5) Any asset not in the branch's actual possession unless the branch holds title to such asset and the branch maintains records sufficient to enable independent verification of the branch's ownership of the asset, as determined at the most recent state or federal examination;

(6) Any intangible asset.

(c) A foreign bank which has more than one insured branch in a state may treat all of its insured branches in the same state as one entity for purposes of compliance with paragraph (a) of this section, and shall designate one branch to be responsible for maintaining the records of the branches' compliance with this section.

(d) The average book value of the branch's liabilities for a quarter shall be, at the branch's option, either an average of the balances as of the close of business for each day of the quarter or an average of the balances as of the close of business on each Wednesday during the quarter. Quarters end on March 31, June 30, September 30, and December 31 of any given year. For days on which the branch is closed, balances from the previous business day are to be used. Calculations of the average book value of the branch's liabilities for a quarter shall be retained by the branch until the next Federal examination.

[54 FR 14069, Apr. 7, 1989, as amended at 60 FR 31384, June 15, 1995]

§ 346.21 [Reserved]

§ 346.22 Deductions from the assessment base.

An insured branch may deduct from its assessment base deposits in the insured branch to the credit of the foreign bank or any office, branch or agency of and any wholly owned subsidiary of the foreign bank.

§§ 346.23—346.100 [Reserved]

Subpart D—Applications Seeking Approval for Insured State Branches To Conduct Activities Not Permissible for Federal Branches

§ 346.101 Applications.

(a) *Scope.* A foreign bank operating an insured state branch which desires to engage in or continue to engage in any type of activity that is not permissible for a federal branch, pursuant to the National Bank Act (12 U.S.C. 21 *et seq.*) or any other federal statute, regulation, official bulletin or circular, or order or interpretation issued in writing by the Office of the Comptroller of the Currency, or which is rendered impermissible due to a subsequent change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction (each an impermissible activity), shall file a written application for permission to conduct such activity with the FDIC pursuant to this section. An applicant may submit to the FDIC a copy of its application to the Board of Governors of the Federal Reserve System (Board of Governors), provided that such application contains the information described in paragraph (d) of this section.

(b) *Exceptions.* A foreign bank operating an insured state branch which would otherwise be required to submit an application pursuant to paragraph (a) of this section will not be required to submit such an application if the activity it desires to engage in or continue to engage in has been determined by the FDIC not to present a significant risk to the affected deposit insurance fund pursuant to 12 CFR Part 362, ''Activities and Investments of Insured State Banks''.

(c) *Agency activities.* A foreign bank operating an insured state branch which would otherwise be required to submit an application pursuant to paragraph (a) of this section will not be required to submit such an application

or upon request of the branch, by the regional director of the FDIC region in which the branch is located.

if it desires to engage in or continue to engage in an activity conducted as agent which would be a permissible agency activity for a state-chartered bank located in the state in which the state-licensed insured branch of the foreign bank is located and is also permissible for a state-licensed branch of a foreign bank located in that state; provided, however, that the agency activity must be permissible pursuant to any other applicable federal law or regulation.

(d) *Content of application.* An application submitted pursuant to paragraph (a) of this section shall be in letter form and shall contain the following information:

(1) A brief description of the activity, including the manner in which it will be conducted and an estimate of the expected dollar volume associated with the activity;

(2) An analysis of the impact of the proposed activity on the condition of the United States operations of the foreign bank in general and of the branch in particular, including a copy, if available, of any feasibility study, management plan, financial projections, business plan, or similar document concerning the conduct of the activity;

(3) A resolution by the applicant's board of directors or, if a resolution is not required pursuant to the applicant's organizational documents, evidence of approval by senior management authorizing the conduct of such activity and the filing of this application;

(4) A statement by the applicant of whether or not it is in compliance with §§ 346.19 and 346.20, Pledge of Assets and Asset Maintenance, respectively;

(5) A statement by the applicant that it has complied with all requirements of the Board of Governors concerning applications to conduct the activity in question and the status of such application, including a copy of the Board of Governors' disposition of such application, if applicable;

(6) A statement of why the activity will pose no significant risk to the deposit insurance fund; and

(7) Any other information which the regional director deems appropriate.

(e) *Application procedures.* Applications pursuant to this section shall be filed with the Regional Director of the Division of Supervision for the region in which the insured state branch is located. An application shall not be deemed complete until it contains all the information requested by the Regional Director and has been accepted. Approval of such an application may be conditioned on the applicant's agreement to conduct the activity subject to specific limitations, such as but not limited to the pledging of assets in excess of the requirements of § 346.19 and/or the maintenance of eligible assets in excess of the requirements of § 346.20. In the case of an application to conduct an activity, as opposed to an application to continue to conduct an activity, the insured branch shall not commence the activity until it has been approved in writing by the FDIC pursuant to this part and the Board of Governors, and any and all conditions imposed in such approvals have been satisfied.

(f) *Divestiture or cessation.* (1) If an application for permission to continue to conduct an activity is not approved by the FDIC or the Board of Governors, the applicant shall submit a detailed written plan of divestiture or cessation of the activity to the Regional Director of the Division of Supervision for the region where the insured branch is located within 60 days of the disapproval. The divestiture or cessation plan shall describe in detail the manner in which the applicant will divest itself of or cease the activity in question and shall include a projected timetable describing how long the divestiture or cessation is expected to take. Divestitures or cessations shall be completed within one year from the date of the disapproval, or within such shorter period of time as the Corporation shall direct.

(2) A foreign bank operating an insured state branch which elects not to apply to the FDIC for permission to continue to conduct an impermissible activity shall submit a written plan of divestiture or cessation, in conformance with paragraph (f)(1) of this section, within 60 days of January 1, 1995, or of any change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction rendering such activity impermissible.

(g) *Delegation of authority.* Authority is hereby delegated to the Director of the Division of Supervision and, when confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to approve plans of divestiture and cessation submitted pursuant to paragraph (f) of this section.

[59 FR 60706, Nov. 28, 1994, as amended at 60 FR 31384, June 15, 1995]

APPENDIX A TO PART 346—[RESERVED]

PART 347—FOREIGN ACTIVITIES OF INSURED STATE NONMEMBER BANKS

Sec.
347.1 Authority and scope.
347.2 Definitions.
347.3 Foreign branches.
347.4 Acquisition and holding of stock in foreign banks or other financial entities.
347.5 Loans or extensions of credit to foreign banks or other financial entities.
347.6 Conditions.

AUTHORITY: Secs. 3(o), 18(d), and (18)(*l*), Federal Deposit Insurance Act, as amended by sec. 301, Pub. L. 95–630, 92 Stat. 3641 (12 U.S.C. 1813(o), 1828(d), 1828(*l*)).

SOURCE: 44 FR 25195, Apr. 30, 1979, unless otherwise noted.

§347.1 Authority and scope.

Under sections 3(o), 18(d) and 18(*l*) of the Federal Deposit Insurance Act, as amended by section 301, Pub. L. No. 95–630, 92 Stat. 3641 (12 U.S.C. 1813(o), 1828(d), 1828(*l*)), the Federal Deposit Insurance Corporation (the *Corporation*) prescribes the following regulation relating to: (a) Foreign branches of insured State nonmember banks, (b) the acquisition and holding of stock in foreign banks and other financial entities, and (c) loans or extensions of credit to or for the account of such foreign banks or other financial entities.

§347.2 Definitions.

For the purposes of this part:

(a) *Foreign branch* means any office or place of business of an insured State nonmember bank located outside the United States, its territories, Puerto Rico, Guam, American Samoa, or the Virgin Islands, at which banking operations (excluding representative offices solely concerned with new business development or public relations) are conducted.

(b) *Foreign country* means any foreign nation or colony, dependency, or possession thereof.

(c) *Foreign bank* means a bank organized under the law of a foreign country or any dependency or insular possession of the United States which is principally engaged in a commercial banking business and not engaged, directly or indirectly, in any activity in the United States except as in the judgment of the Federal Deposit Insurance Corporation, shall be incidental to the international or foreign business of such foreign bank.

(d) *Other financial entity* means a foreign institution other than a foreign bank which is: (1) Organized under the law of a foreign country or any dependency or insular possession of the United States, (2) not engaged, directly or indirectly, in any activity in the United States except as is incidental to its foreign business, and (3) engaged solely in the business of holding the shares of foreign banks, performing nominee, fiduciary, or other banking services incidental to the activities of a foreign branch or banking affiliate of an insured State nonmember bank, or performing other financial activities approved by the Corporation as being consistent with this part.

§347.3 Foreign branches.

(a) *Establishing, moving, or closing foreign branches.* A foreign branch may not be established, operated, or relocated by an insured State nonmember bank without the prior written consent of the Corporation. This consent may be obtained through the application procedures set forth under part 303. For all foreign branches and relocations thereof, the application shall contain information on the exact location of the facility and on the involvement of insiders as such involvement is specified in §303.2, as well as the name and address of the newspaper in which the notice required by §303.14(b)(1) is published and the date of that publication. At the time of the closing of a foreign branch, the insured State nonmember bank shall by letter advise the regional

director of the name, the location, and the date of the closing of the branch.

(b) *Existing foreign branches.* The Corporation hereby grants its general consent for any insured State nonmember bank with a foreign branch that was established prior to March 10, 1979 to continue operating such branch without application for specific approval, provided the activity does not conflict with the provisions of this part and the following information regarding the branch is submitted (unless already submitted) within 90 days from April 30, 1979: Name and location; statement of condition; earnings statement, with year-to-date and last two full years' data; estimated time when branch will be profitable if it is not; description of policies and management procedures designed to ensure safe and sound operation; and description of services offered.

(c) *Powers of foreign branches.* In addition to its general banking powers and to the extent consistent with its charter, the banking practices in the country where it does business, and the provisions of this part, a Branch may:

(1) Guarantee customer's debts or otherwise agree for their benefit to make payments on the occurrence of readily ascertainable events[1] if the guarantee or agreement specifies its maximum monetary liability thereunder. The guarantee or agreement shall be combined with all standby letters of credit and loans for purposes of applying any legal limitation on loans of the bank: *Provided,* That if the guarantee or agreement is subject to separate limitation under State or Federal law, the separate limitation shall apply in lieu of the loan limitation.

(2) Accept drafts or bills of exchange drawn upon it;

(3) Acquire and hold securities (including certificates or other evidences of ownership or participation) of the central bank, clearinghouses, governmental entities, and development banks of the country in which it is located, but the total investment in such securities (exclusive of securities held as required by the law of that country or as authorized for national banks under 12 U.S.C. 24) shall not exceed 1 percent of its total deposits on the preceding year-end call report date (or on the date of such acquisition in the case of a newly approved branch which has never reported);

(4) Underwrite, distribute, buy, and sell obligations of the national government of the country in which it is located;[2] but no bank may hold, or be under commitment with respect to, obligations of such a government as a result of underwriting, dealing in, or purchasing for its own account, in an aggregate amount exceeding 10 percent of its capital and surplus;

(5) Take liens or other encumbrances on foreign real estate in connection with its extensions of credit, whether or not of first priority and whether or not such real estate is improved or has been appraised;

(6) Pay to any officer or employee of the branch a greater rate of interest on deposits than that paid to other depositors on similar deposits with the branch;

(7) Act as insurance agent or broker. An insured State nonmember bank that is of the opinion that other activities are usual in connection with the transaction of the business of banking in the places where its branches transact business, may apply to the Corporation for permission to engage in such activities.

(d) *Limitations.* Nothing in paragraph (c) of this section shall authorize a foreign branch to engage in the general business of producing, distributing, buying, or selling goods, wares, or merchandise, or, except as permitted by paragraph (c)(4) of this section, to engage or participate, directly, or indirectly, in the business of underwriting, selling, or distributing securities.

(e) *Suspending operations during disturbed conditions.* The officer in charge of a foreign branch may suspend its operations during disturbed conditions which make conduct of operations impracticable; but every effort shall be

[1] Including, but not limited to, events such as nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents.

[2] Including obligations issued by an agency or instrumentality, and supported by the full faith and credit, of such government.

made before and during such suspension to serve its customers. Full information concerning any suspension shall be promptly reported to the branch's main office, which shall immediately send a copy thereof to the Regional Director of the region in which the main office exists.

[44 FR 25195, Apr. 30, 1979, as amended at 48 FR 28078, June 20, 1983; 51 FR 47209, Dec. 31, 1986]

§347.4 Acquisition and holding of stock in foreign banks or other financial entities.

(a) *General.* No insured State nonmember bank may acquire or hold, directly or indirectly, ownership interest in a foreign bank or other entity except as provided in this section. When authorized by State law, an insured State nonmember bank may, with the prior written consent of the Corporation and subject to the provisions of this part, acquire and hold, directly or indirectly, the stock or other evidences of ownership in one or more foreign banks or other financial entities without regard to the provisions of 12 U.S.C. 1828(j):

Provided, That the aggregate amount invested directly or indirectly (other than through a corporation organized under section 25(a) of the Federal Reserve Act) in the stock or other evidences of ownership of all foreign banks and other financial entities, taken together with investments by the bank in the shares of corporations organized under section 25(a) of the Federal Reserve Act, shall not exceed 25 percent of the bank's capital and surplus.

(b) *Acquisitions to prevent loss.* Nothing contained in this part shall prevent the acquisition and holding of stock or other evidences of ownership in a foreign bank or other financial entity where such acquisition is necessary to prevent a loss upon a debt previously contracted in good faith; but such stock or other evidences of ownership shall be disposed of within 12 months from the date of acquisition unless the time is extended by the Corporation.

(c) *Limitations.* Stock or other evidences of ownership in a foreign bank or other financial entity shall be disposed of as promptly as practicable if: (1) Such bank or other financial entity should engage in the business of underwriting, selling, or distributing securities in the United States or (2) the insured State nonmember bank is advised by the Corporation that its holding is inappropriate under this part. The terms *stock, shares,* and *evidences of ownership* in this section include any right to acquire stock, shares, or evidences of ownership, except that prior Corporation consent is not required for the acquisition and exercise of stock rights in lieu of dividends which are declared on shares already held by an insured State nonmember bank and which do not result in an increase in percentage ownership of the foreign bank or other financial entity.

(d) *Required information.* An insured State nonmember bank may apply for the consent of the Corporation to acquire and hold, directly or indirectly, the stock or other evidences of ownership in a foreign bank or other financial entity by filing the information specified in §303.5(c). The Corporation hereby grants its general consent for any insured State nonmember bank having stock or other evidence of ownership in a foreign bank or other financial entity that was acquired prior to March 10, 1979 to continue holding such stock or evidence without application for specific approval provided it does not conflict with the provisions of this part and the following information is submitted (unless already submitted) within 90 days from April 30, 1979: Name and location of bank or other financial entity; number, type and par value of shares held, percentage of total voting shares outstanding, and, if different, percentage of total equity, historical cost, current carrying value and any premium paid that has not been amortized; description of the company activities, principal locations, subsidiaries and affiliates (including company locations, subsidiaries and affiliates in the United States), and any activity that is not of a banking or financial nature; recent balance sheets and income statements; and amount of any credit extended to the subsidiary or affiliate and description of any contracts with company (including management or service contracts).

(e) *Reports.* An insured State nonmember bank shall immediately inform the Corporation, through the Regional Director of the region in which the bank is located, of any acquisition or disposition of stock in a foreign bank or other financial entity, including the cost and number of shares acquired pursuant to this section.

[44 FR 25195, Apr. 30, 1979, as amended at 50 FR 22985, May 30, 1985]

§ 347.5 Loans or extensions of credit to foreign banks or other financial entities.

An insured State nonmember bank which holds directly or indirectly[3] stock or other evidences of ownership in a foreign bank or other financial entity may make loans or extensions of credit to or for the account of such foreign bank or other financial entity without regard to the provisions of 12 U.S.C. 1828(j).

§ 347.6 Conditions.

(a) *Records, controls and reports.* An insured State nonmember bank exercising any powers under this part shall maintain a system of records, controls and reports that, at minimum, provide for the following:

(1) *Risk assets.* To permit assessment of exposure to loss, information furnished or available to the main office should be sufficient to permit periodic and systematic appraisals of the quality of loans and other extensions of credit. Coverage should extend to a substantial proportion of the risk assets in the branch or subsidiary, and include the status of all large credit lines and of credits to customers also borrowing from other offices of the bank. Information on credit extensions should include:

(i) A recent financial statement of the borrower and current information on the borrower's financial condition;

(ii) Credit terms, conditions, and collateral;

(iii) Data on any guarantors;

(iv) Payment history; and

(v) Status of corrective measures employed.

(2) *Liquidity.* To enable assessment of local management's ability to meet its obligations from available resources, reports should identify the general sources and character of the deposits, borrowing, etc., employed in the branch or subsidiary with special reference to their terms and volatility. Information should be available on sources of liquidity—cash, balances with banks, marketable securities, and repayment flows—such as will reveal their accessibility in time and any risk elements involved.

(3) *Contingencies.* Data on the volume and nature of contingent items such as loan commitments and guaranties or their equivalents that permit analysis of potential risk exposure and liquidity requirements.

(4) *Controls.* Reports on the internal and external audits of the branch or subsidiary in sufficient detail to permit determination of conformance to auditing guidelines. Such reports should cover:

(i) Verification and identification of entries on financial statements;

(ii) Income and expense accounts, including descriptions of significant chargeoffs and recoveries;

(iii) Operations and dual-control procedures and other internal controls;

(iv) Conformance to head office guidelines on loans, deposits, foreign exchange activities, proper accounting procedures, and discretionary authority of local management;

(v) Compliance with local laws and regulations; and

(vi) Compliance with applicable U.S. laws and regulations.

(b) The bank shall submit an annual report of condition for each foreign branch pursuant to instructions provided by the Corporation.

(c) The Corporation may from time to time require an insured State nonmember bank to make and submit such reports and information as may be necessary to implement and enforce the provisions of this part.

PART 348—MANAGEMENT OFFICIAL INTERLOCKS

Sec.

348.1 Authority, purpose, and scope.
348.2 Definitions.

[3] Whether through a corporation organized under section 25(a) of the Federal Reserve Act, or otherwise.

348.3 Prohibitions.
348.4 Interlocking relationships permitted by statute.
348.5 Regulatory Standards exemption.
348.6 Management Consignment exemption.
348.7 Change in circumstances.
348.8 Enforcement.

AUTHORITY: 12 U.S.C. 3207, 12 U.S.C. 1823(k).

SOURCE: 61 FR 40305, Aug. 2, 1996, unless otherwise noted.

§348.1 Authority, purpose, and scope.

(a) *Authority.* This part 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 part 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 part applies to management officials of insured nonmember banks and their affiliates.

§348.2 Definitions.

For purposes of this part, 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 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 an insured nonmember bank based on common ownership does not exist if the FDIC 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 FDIC 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) *Anticompetitive effect* means a monopoly or substantial lessening of competition.

(c) *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.

(d) *Community* means a city, town, or village, and contiguous or adjacent cities, towns, or villages.

(e) *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.

(f) *Critical* means important to restoring or maintaining a depository organization's safe and sound operations.

(g) *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.

(h) *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.

(i) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(j) *Depository organization* means a depository institution or a depository holding company.

(k) *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.

(l) *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 12 CFR 303.14(a)(3);

(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 (l)(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).

(m) *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.

(n) *Person* means a natural person, corporation, or other business entity.

(o) *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.

(p) *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 FDIC 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 FDIC will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(q) *Total assets.* (1) The term *total assets* includes 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 are 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.

(r) *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.

§ 348.3 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 $20 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $1 billion (or any affiliate thereof) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $500 million (or any affiliate thereof), regardless of the location of the two depository organizations.

§348.4 Interlocking relationships permitted by statute.

The prohibitions of §348.3 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) A savings association whose acquisition has been authorized on an emergency basis in accordance with section 13(k) of the Federal Deposit Insurance Act (12 U.S.C. 1823(k)) with resulting dual service by a management official that would otherwise be prohibited under the Interlocks Act which may continue for up to 10 years from the date of the acquisition provided that the FDIC has given its approval for the continuation of such service; and

(i)(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 is also 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 FDIC 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 FDIC.

(3) The FDIC 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.

§ 348.5 Regulatory Standards exemption.

(a) *Criteria.* The FDIC may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 348.3 if:

(1) The board of directors of the depository organization (or the organizers of a depository organization being formed) that seeks the exemption provides a resolution to the FDIC certifying that the organization, after the exercise of reasonable efforts, is unable to locate any other candidate from the community or RMSA, as appropriate, who:

(i) Possesses the level of expertise required by the depository organization and who is not prohibited from service by the Interlocks Act; and

(ii) Is willing to serve as a management official; and

(2) The FDIC, after reviewing an application submitted by the depository organization seeking the exemption, determines that:

(i) The management official is critical to the safe and sound operations of the affected depository organization; and

(ii) Service by the management official will not produce an anticompetitive effect with respect to the depository organization.

(b) *Presumptions.* The FDIC applies the following presumptions when reviewing any application for a Regulatory Standards exemption:

(1) An interlock will not have an anticompetitive effect if it involves depository organizations that, if merged, would not cause the post-merger Herfindahl-Hirschman Index (HHI) to exceed 1800 and would not cause the HHI to increase by more than 200 points. This presumption shall not apply to depository organizations subject to the Major Assets prohibition of § 348.3(c).

(2) A proposed management official is critical to the safe and sound operations of a depository institution if:

(i) That official is approved by the FDIC to serve as a director or a senior executive officer of that institution pursuant to 12 CFR 303.14; and

(ii) The institution had operated for less than two years, was not in compliance with minimum capital requirements, or otherwise was in a ''troubled condition'' as defined by 12 CFR 303.14(a)(4) at the time the service under that section was approved.

(c) *Duration of interlock.* An interlock permitted under this section may continue until the FDIC notifies the affected depository organizations otherwise. The FDIC may require termination of any interlock permitted under this section if the FDIC concludes, after giving the affected persons the opportunity to respond, that the determinations under paragraph (a)(2) of this section no longer may be made. A management official may continue serving the depository organization involved in the interlock for a period of 15 months following the date of the order to terminate the interlock. The FDIC may shorten this period under appropriate circumstances.

§ 348.6 Management Consignment exemption.

(a) *Criteria.* The FDIC may permit an interlock that otherwise would be prohibited by the Interlocks Act and § 348.3 if the FDIC, after reviewing an application submitted by the depository organization seeking an exemption, determines that the interlock would:

(1) Improve the provision of credit to low- and moderate-income areas;

(2) Increase the competitive position of a minority- or women-owned depository organization;

(3) Strengthen the management of a depository institution that has been chartered for less than two years at the time an application is filed under this part; or

(4) Strengthen the management of a depository institution that is in an unsafe or unsound condition as determined by the FDIC on a case-by-case basis.

(b) *Presumptions.* The FDIC applies the following presumptions when reviewing any application for a Management Consignment exemption:

(1) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(3) of this section if that official is approved by the FDIC to serve as a director or a senior executive officer of that institution

pursuant to 12 CFR 303.14 and the institution had operated for less than two years at the time the service under 12 CFR 303.14 was approved; and

(2) A proposed management official is capable of strengthening the management of a depository institution described in paragraph (a)(4) of this section if that official is approved by the FDIC to serve as a director or a senior executive officer of that institution pursuant to 12 CFR 303.14 and the institution was not in compliance with minimum capital requirements or otherwise was in a ''troubled condition'' as defined under 12 CFR 303.14 at the time service under that section was approved.

(c) *Duration of interlock*. An interlock granted under this section may continue for a period of two years from the date of approval. The FDIC may extend this period for one additional two-year period if the depository organization applies for an extension at least 30 days before the current exemption expires and satisfies one of the criteria specified in paragraph (a) of this section. The provisions set forth in paragraph (b) of this section also apply to applications for extensions.

§348.7 Change in circumstances.

(a) *Termination*. A management official shall terminate his or her service or apply for an exemption to the Interlocks Act if a change in circumstances causes the service to become prohibited under that Act. A change in circumstances may include, but is not limited to, an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an acquisition, a merger, a consolidation, or any 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 insured nonmember bank involved in the interlock for 15 months following the date of the change in circumstances. The FDIC may shorten this period under appropriate circumstances.

§348.8 Enforcement.

Except as provided in this section, the FDIC administers and enforces the Interlocks Act with respect to insured nonmember banks and their 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 an insured nonmember bank is subject to the primary regulation of another federal depository organization supervisory agency, then the FDIC does not administer and enforce the Interlocks Act with respect to that affiliate.

PART 349—REPORTS AND PUBLIC DISCLOSURE OF INDEBTEDNESS OF EXECUTIVE OFFICERS AND PRINCIPAL SHAREHOLDERS TO A STATE NONMEMBER BANK AND ITS CORRESPONDENT BANKS

Sec.

349.1 Purpose and scope.
349.2 Definitions.
349.3 Reports by executive officers and principal shareholders.
349.4 Disclosure of indebtedness of executive officers and principal shareholders.

AUTHORITY: Sec. 2 (9 ''Seventh'' and ''Tenth''), Pub. L. 797, 64 State. 881, as amended by sec. 309, Pub. L. 95–630, 92 Stat. 3677 (12 U.S.C. 1819 ''Seventh'' and ''Tenth''); secs. 428(b) and 429, Pub. L. 97–320, 96 Stat. 1526, 1527.

SOURCE: 48 FR 57114, Dec. 28, 1983, unless otherwise noted.

§349.1 Purpose and scope.

Section 106(b)(2) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972(2)) (*BHCA Amendments*) prohibits—(1) preferential lending by a bank to executive officers, directors, and principal shareholders of another bank when there is a correspondent account relationship between the banks, or (2) the opening of a correspondent account relationship between banks when there is a preferential extension of credit by one of the banks to an executive officer, director, or principal shareholder of the other bank. Section 106(b)(2) also imposes requirements on

executive officers and principal shareholders to submit reports on their indebtedness to correspondent banks to the board of directors of their bank. Section 7(k) of the Federal Deposit Insurance Act (12 U.S.C. 1817(k)) and section 106(b)(2)(G)(ii) of the BHCA Amendments (12 U.S.C. 1972(2)(G)(ii)) authorize the Federal banking agencies to issue rules and regulations, including definitions of terms, to require the reporting and public disclosure of information by a bank or an executive officer or principal shareholder thereof concerning extensions of credit by the bank or its correspondent banks to any of the reporting bank's executive officers or principal shareholders, or the related interests of such persons. This part 349 implements the authorization of the latter sections to require such reporting and disclosure by insured State nonmember banks and their executive officers and principal shareholders.

§ 349.2 Definitions.

For the purposes of the reporting and disclosure requirements of this part 349, the following definitions apply:

(a) *Bank* has the meanings provided in (1) 12 U.S.C. 1841(c), and includes a branch or agency of a foreign bank, or a commercial lending company controlled by a foreign bank or by a company that controls a foreign bank, where the branch or agency is maintained in a State of the United States or in the District of Columbia or the commercial lending company is organized under State law, and (2) 12 U.S.C. 1972(2)(H)(i). Notwithstanding the foregoing, with respect to disclosures made pursuant to paragraph (a)(1) of § 349.4 and with respect to copies of requests maintained pursuant to paragraph (c) of § 349.4, *bank* shall mean *State nonmember bank* as defined in 12 U.S.C. 1813(b), including a *mutual savings bank* as defined in 12 U.S.C. 1813(f).

(b) *Capital stock and unimpaired surplus* shall have the meaning provided in § 215.2(f) of Federal Reserve Board Regulation O, subpart A (12 CFR 215.2(f)). Notwithstanding the foregoing, with respect to *mutual savings banks*, the term *total equity capital* found in 12 CFR 215.2(f) shall mean *total surplus accounts*.

(c) *Company, control of a company or bank, executive officer,*[1] *extension of credit, immediate family,* and *person* have the meanings provided in §§ 215.2 and 215.3 of subpart A of Federal Reserve Board Regulation O (12 CFR 215.2 and 215.3). All references to the term *member bank* in §§ 215.2 and 215.3 shall be deemed to refer to an insured State nonmember bank for the purposes of this part 349.

(d) *Correspondent account* is an account that is maintained by an insured State nonmember bank with another bank for the deposit or placement of funds. A correspondent account does not include:

(1) Time deposits at prevailing market rates; or

(2) An account maintained in the ordinary course of business solely for the purpose of effecting Federal funds transactions at prevailing market rates or making Eurodollar placements at prevailing market rates.

(e) *Correspondent bank* means a bank that maintains one or more correspondent accounts for an insured State nonmember bank during a calendar year that in the aggregate exceed an average daily balance during that year of $100,000 or one-half of one percent of the insured State nonmember bank's total deposits (as reported in its first Consolidated Report of Condition during that calendar year), whichever amount is smaller.

(f) *Indebtedness* means an extension of credit, but does not include:

(1) Commercial paper, bonds, debentures and other types of marketable securities issued in the ordinary course of business; or

(2) Consumer credit (as defined in 12 CFR 226.2(p)), in an aggregate amount of $5,000 or less from each of the insured State nonmember bank's correspondent banks, provided the indebtedness is incurred under terms that are not more favorable than those offered to the general public.

[1] For the purposes of this part 349, executive officers of an insured State nonmember bank do not include an executive officer of a bank holding company of which such bank is a subsidiary or of any other subsidiary of the bank holding company, unless the executive officer is also an executive officer of the insured State nonmember bank.

(g) *Maximum amount of indebtedness* means, at the option of the reporting person, either (1) the highest outstanding indebtedness during the calendar year for which the report is made, or (2) the highest end of the month indebtedness outstanding during the calendar year for which the report is made.

(h) For the purpose of this part 349, *principal shareholder* and *related interest* have the meanings provided in §215.10(a) of Federal Reserve Board Regulation O, subpart A (12 CFR 215.10(a)), except that the term *principal shareholder* is synonymous with the term *stockholder of record* as that term is used in the reporting provisions of 12 U.S.C. 1972(2)(G)(i). All references to the term *member bank* in §215.10(a) shall be deemed to refer to an insured State nonmember bank for the purposes of this part 349.

§349.3 Reports by executive officers and principal shareholders.

(a) *Annual report.* If during any calendar year an executive officer or principal shareholder of an insured State nonmember bank or a related interest of such a person has outstanding an extension of credit from a correspondent bank, the executive officer or principal shareholder must make a written report to the board of directors of the insured State nonmember bank on or before January 31 of the following year.[2]

(b) *Contents of report.* The report required by this section shall include the following information:

(1) The maximum amount of indebtedness of the executive officer or principal shareholder and of each of that person's related interests to each of the insured State nonmember bank's correspondent banks during the calendar year; and

(2) The amount of indebtedness of the executive officer or principal shareholder and of each of that person's related interests outstanding to each of the insured State nonmember bank's correspondent banks not more than ten business days before the report required by this section is filed;[3] and

(3) A description of the terms and conditions (including the range of interest rates, the original amount and date, maturity date, payment terms, security, if any, and any other unusual terms or conditions) of each extension of credit included in the indebtedness reported under paragraph (b)(1) of this section.

(c) *Retention of reports.* The reports required by this section must ordinarily be retained at the insured State nonmember bank for a period of three years, but the Federal Deposit Insurance Corporation may require that they be retained by the bank for an additional period of time. The reports filed under this section are not required by this regulation to be made available to the public and shall not be filed with the Federal Deposit Insurance Corporation unless specifically requested.

(d) *Bank's responsibility.* Each insured State nonmember bank shall advise each of its executive officers and each of its principal shareholders (to the extent known by the bank) of the reports required by this section and make available to each of these persons a list with the name and address of each of the insured State nonmember bank's correspondent banks.

§349.4 Disclosure of indebtedness of executive officers and principal shareholders.

(a) Upon receipt of a written request, an insured State nonmember bank shall disclose to the requester the name of each executive officer or principal shareholder of the bank whose aggregate indebtedness, including the indebtedness of related interests of such person.

(1) At the bank itself as of the end of the latest calendar quarter; or

[2] Persons reporting under this section are not required to include information on extensions of credit that are fully described in a report by a person they control or a person that controls them, provided they identify their relationship with such other person.

[3] If the amount of indebtedness outstanding to a correspondent bank ten days before the filing of the report is not available or cannot be readily ascertained, an estimate of the amount of indebtedness may be filed with the report, provided that the report is supplemented within the next 30 days with the actual amount of indebtedness.

(2) At the correspondent banks of the disclosing bank at any time during the previous calendar year

equals or exceeds the lesser of five percent (5%) of the disclosing bank's capital stock and unimpaired surplus or $500,000, but in no event shall an insured State nonmember bank be required to make such disclosure where the aggregate indebtedness of an executive officer or principal shareholder is less than $25,000.

(b) *Contents of disclosure.* (1) An insured State nonmember bank is not required to disclose any additional information concerning the indebtedness referred to in paragraph (a) of this section, except that it must observe the requirement of paragraph (b)(2) of this section.

(2) Disclosures made pursuant to paragraph (a) of this section shall specify whether the individual or individuals named in the disclosure, who are indebted in the amount specified in paragraph (a) of this section, are indebted solely to the bank itself or to one or more correspondent banks of the reporting bank or to both.

(c) An insured State nonmember bank shall maintain a copy of any request for information made under paragraph (a) of this section and a record of the bank's disposition of such request for a period of two years.

(d) *OMB review.* The Office of Management and Budget has reviewed and approved the collection of information requirements contained in this part 349 under OMB Control Number 3064–0023.

[48 FR 57114, Dec. 28, 1983, as amended at 49 FR 1176, Jan. 10, 1984]

PART 350—DISCLOSURE OF FINANCIAL AND OTHER INFORMATION BY FDIC–INSURED STATE NONMEMBER BANKS

Sec.

350.1 Scope.
350.2 Definitions.
350.3 Requirement for annual disclosure statement.
350.4 Contents of annual disclosure statement.
350.5 Alternative annual disclosure statements.
350.6 Signature and attestation.
350.7 Notice and availability.
350.8 Delivery.
350.9 Disclosure of examination reports.
350.10 Prohibited conduct and penalties.
350.11 Safe harbor provision.
350.12 Disclosure required by applicable securities law or regulations.

AUTHORITY: 12 U.S.C. 1817(a)(1), 1819 ''Seventh'' and ''Tenth''.

SOURCE: 52 FR 49379, Dec. 31, 1987, unless otherwise noted.

§ 350.1 Scope.

This part applies to FDIC-insured state-chartered banks that are not members of the Federal Reserve System, and to FDIC-Insured state-licensed branches of foreign banks.

§ 350.2 Definitions.

(a) *Bank.* For purposes of this part, the term *bank* means an FDIC-insured state-chartered organization that is not a member of the Federal Reserve System, and an FDIC-insured state-licensed branch of a foreign bank.

(b) *Call Report.* For purposes of this part, the term *Call Report* means the report filed by a bank pursuant to 12 U.S.C. 1817(a)(1).

§ 350.3 Requirement for annual disclosure statement.

(a) *Contents.* Each bank shall prepare and make available on request an annual disclosure statement, beginning with the year 1987. The statement shall contain information required by § 350.4(a) and § 350.4(b) of this part and may include other information that bank management believes appropriate, as provided in § 350.4(c).

(b) *Availability.* A bank shall make its annual disclosure statement available to requesters beginning not later than the following March 31 or, if the bank mails an annual report to its shareholders, beginning not later than five days after the mailing of such reports, whichever occurs first. A bank shall continually make a disclosure statement available until the disclosure statement for the succeeding year becomes available.

§ 350.4 Contents of annual disclosure statement.

(a) *Financial reports.* The annual disclosure statement for any year shall reflect a fair presentation of the bank's

financial condition at the end of that year and the preceding year and, except for state-licensed branches of foreign banks, the results of operations for each such year. The annual disclosure statement may, at the option of bank management, consist of the bank's entire Call Report, or applicable portions thereof, for the relevant dates and periods. At a minimum, the statement must contain information comparable to that provided in the following Call Report schedules:

(1) For insured state-chartered organizations that are not members of the Federal Reserve System:

(i) Schedule RC (Balance Sheet);

(ii) Schedule RC–N (Past Due and Nonaccrual Loans and Leases—column A covering loans and leases past due 30 through 89 days and still accruing and Memorandum item 1 need not be included);

(iii) Schedule RI (Income Statement);

(iv) Schedule RI–A (Changes in Equity Capital—commercial banks, or Changes in Net Worth—savings banks); and

(v) Schedule RI–B (Charge-Offs and Recoveries and Changes in Allowance for Loan and Lease Losses—commercial banks, or Charge-Offs, Recoveries, and Changes in Allowance for Loan and Lease Losses—savings banks). (Part I of the commercial bank Schedule RI–B covering specified types of loans and breakdowns by types of loans by savings banks may be omitted).

(2) For insured state-licensed branches of foreign banks:

(i) Schedule RAL (Assets and Liabilities);

(ii) Schedule E (Deposit Liabilities and Credit Balances); and

(iii) Schedule P (Other Borrowed Money).

(b) *Other required information.* The annual disclosure statement shall include such other information as the FDIC may require of a particular bank. This could include disclosure of enforcement actions where the FDIC deems it in the public interest to do so.

(c) *Optional information.* The bank may, at its option, provide additional information. Such disclosures could include information which bank management deems important to an evaluation of the overall condition of the bank. Information which management might consider adding includes, but is not limited to, a discussion of the financial data; pertinent information relating to mergers and acquisitions; the existence of and facts relating to regulatory enforcement actions; business plans; and material changes in balance sheet and income statement items.

(d) *Disclaimer.* The following legend shall be included in the annual disclosure statement to assure the public that the FDIC has not reviewed the information contained therein: ''This statement has not been reviewed, or confirmed for accuracy or relevance, by the Federal Deposit Insurance Corporation.''

§350.5 Alternative annual disclosure statements.

The requirements of §350.4(a) may be satisfied:

(a) *In the case of a bank having a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934,* by the bank's annual report to security holders for meetings at which directors are to be elected (see 12 CFR 335.203) or the bank's annual report on Form F–2 (see 12 CFR 335.312);

(b) *In the case of a bank with independently audited financial statements,* by copies of the audited financial statements and the certificate or report of the independent accountant to the extent that such statements contain information comparable to that specified in §350.4(a); and

(c) *In the case of a bank subsidiary of a one-bank holding company,* by an annual report of the one-bank holding company prepared in conformity with the regulations of the Securities and Exchange Commission or by sections in the holding company's consolidated financial statements on Form FR Y–9C pursuant to Regulation Y of the Federal Reserve Board (12 CFR part 225) that are comparable to the Call Report schedules enumerated in §350.4(a)(1) of this part, provided that in either case not less than 95 percent of the holding company's consolidated total assets and total liabilities are assets and liabilities of the bank and the bank's consolidated subsidiaries.

§ 350.6 Signature and attestation.

A duly authorized officer of the bank shall sign the annual disclosure statement and shall attest to the correctness of the information contained in the statement if the financial reports are not accompanied by a certificate or report of an independent accountant.

§ 350.7 Notice and availability.

(a) *Shareholders.* If the bank provides written notice of the annual meeting of shareholders, the bank shall include with, or as part of, that notice an announcement that the bank's annual disclosure statement will be sent to the shareholder either automatically or upon request. For disclosure statements available on request, the announcement shall indicate at a minimum an address and telephone number to which requests may be directed. The first copy of the annual disclosure statement shall be provided to a shareholder without charge.

(b) *Customers and the general public.* In the lobby of its main office and each branch, the bank shall at all times display a notice that the annual disclosure statement may be obtained from the bank. The notice shall include at a minimum an address and telephone number of which requests should be directed. The first copy of the annual disclosure statement shall be provided to a requester free of charge.

§ 350.8 Delivery.

Each bank shall, after receiving a request for an annual disclosure statement, promptly mail or otherwise furnish a statement to the requester.

§ 350.9 Disclosure of examination reports.

Except as permitted under specific provisions of the FDIC's regulations (12 CFR part 309), a bank may not disclose any report of examination or report of supervisory activity or any portion thereof prepared by the FDIC. The bank also shall not make any representation concerning such report or the findings therein.

§ 350.10 Prohibited conduct and penalties.

(a) *Misrepresentations.* No officer, director, employee, agent, or other person participating in the affairs of a bank, shall, directly or indirectly:

(1) Disclose or cause to be disclosed false or misleading information in the annual disclosure statement, or omit or cause the omission of pertinent or required information in the annual disclosure statement; or

(2) Represent that the FDIC, or any employee thereof, has reviewed, or confirmed the accuracy or relevance of the disclosure statement.

(b) *Participating persons.* For purposes of this part, a person *participating in the affairs of a bank* shall include (but not be limited to) any person who provides information contained in, or directly or indirectly assists in the preparation of, the annual disclosure statement.

(c) *Enforcement actions.* Conduct that violates paragraph (a) of this section may constitute an unsafe or unsound banking practice or otherwise serve as a basis for an enforcement action by the FDIC.

§ 350.11 Safe harbor provision.

The provisions of § 350.10 shall not apply unless it is shown that the information disclosed was included without a reasonable basis or other than in good faith.

§ 350.12 Disclosure required by applicable securities law or regulations.

The requirements of this part are not intended to replace or relieve any disclosure required to be made under applicable securities law or regulations.

(Approved by the Office of Management and Budget under control number 3064–0090)

PART 351—INTERNATIONAL OPERATIONS

Sec.
351.1 Allocated transfer risk reserve.
351.2 Accounting for fees on international loans.
351.3 Reporting and disclosure of international assets.

AUTHORITY: Title IX, Pub. L. 98–181, 97 Stat. 1153.

§ 351.1 Allocated transfer risk reserve.

(a) *Definitions.* For the purposes of this subpart:

(1) *Banking institution* means an insured state nonmember bank.

(2) *Federal banking agencies* means the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

(3) *International assets* means those assets required to be included in banking institutions' ''Country Exposure Report'' forms (FFIEC No. 009).

(4) *Transfer risk* means the possibility that an asset cannot be serviced in the currency of payment because of a lack of, or restraints on the availability of, needed foreign exchange in the country of the obligor.

(b) *Allocated Transfer Risk Reserve*—(1) *Establishment of Allocated Transfer Risk Reserve.* A banking institution shall establish an allocated transfer risk reserve (ATRR) for specified international assets when required by the FDIC in accordance with this section.

(2) *Procedures and Standards*—(i) *Joint agency determination.* At least annually, the Federal banking agencies shall determine jointly, based on the standards set forth in paragraph (b)(2)(ii) of this section, the following:

(A) Which international assets subject to transfer risk warrant establishment of an ATRR;

(B) The amount of the ATRR for the specified assets; and

(C) Whether an ATRR established for specified assets may be reduced.

(ii) *Standards for requiring ATRR*—(A) *Evaluation of assets.* The Federal banking agencies shall apply the following criteria in determining whether an ATRR is required for particular international assets:

(*1*) Whether the quality of a banking institution's assets has been impaired by a protracted inability of public or private obligors in a foreign country to make payments on their external indebtedness as indicated by such factors, among others, as whether:

(*i*) Such obligors have failed to make full interest payments on external indebtedness;

(*ii*) Such obligors have failed to comply with the terms of any restructured indebtedness; or

(*iii*) A foreign country has failed to comply with any International Monetary Fund or other suitable adjustment program; or

(*2*) Whether no definite prospects exist for the orderly restoration of debt service.

(B) *Determination of amount of ATRR.* *(1)* In determining the amount of the ATRR, the Federal banking agencies shall consider:

(*i*) The length of time the quality of the asset has been impaired;

(*ii*) Recent actions taken to restore debt service capability;

(*iii*) Prospects for restored asset quality; and

(*iv*) Such other factors as the Federal banking agencies may consider relevant to the quality of the asset.

(*2*) The initial year's provision for the ATRR shall be ten percent of the principal amount of each specified international asset, or such greater or lesser percentage determined by the Federal banking agencies. Additional provision, if any, for the ATRR in subsequent years shall be fifteen percent of the principal amount of each specified international asset, or such greater or lesser percentage determinined by the Federal banking agencies.

(iii) *FDIC notification.* Based on the joint agency determinations under paragraph (b)(2)(i) of this section, the FDIC shall notify each banking institution holding assets subject to an ATRR:

(A) Of the amount of the ATRR to be established by the institution for specified international assets; and

(B) That an ATRR established for specified assets may be reduced.

(3) *Accounting treatment of ATRR*—(i) *Charge to current income.* A banking institution shall establish an ATRR by a charge to current income and the amounts so charged shall not be included in the banking institution's capital or surplus.

(ii) *Separate accounting.* A banking institution shall account for an ATRR separately from the Allowance for Possible Loan Losses, and shall deduct the ATRR from *gross loans and leases* to arrive at *net loans and leases.* The ATRR must be established for each asset subject to the ATRR in the pertcentage amount specified.

(iii) *Consolidation.* A banking institution shall establish an ATRR, as required, on a consolidated basis. For banks, consolidation should be in accordance with the procedures and tests of significance set forth in the instructions for preparation of *Consolidated Reports of Condition and Income* (FFIEC Nos. 031, 032, 033 and 034).

(iv) *Alternative accounting treatment.* A banking institution need not establish an ATRR if it writes down in the period in which the ATRR is required, or has written down in prior periods, the value of the specified international assets in the requisite amount for each such asset. For purposes of this paragraph, international assets may be written down by a charge to the allowance for Possible Loan Losses or a reduction in the principal amount of the asset by application of interest payments or other collections on the asset. However, the Allowance for Possible Loan Losses must be replenished in such amount necessary to restore it to a level which adequately provides for the estimated losses inherent in the banking institution's loan portfolio.

(v) *Reduction of ATRR.* A banking institution may reduce an ATRR when notified by the FDIC or, at any time, by writing down such amount of the international asset for which the ATRR was established.

[49 FR 5593, Feb. 13, 1984]

§ 351.2 Accounting for fees on international loans.

(a) *Definitions.* For the purpose of this subpart:

(1) *International loan* means a loan as defined in the instructions to the ''Report of Condition and Income'' for the respective banking institution (FFIEC Nos. 031, 032, 033 and 034) and made to a foreign government, or to an individual, a corporation, or other entity not a citizen of, resident in, or organized or incorporated in the United States.

(2) *International syndicated loan* means a loan characterized by the formation of a group of *managing* banking institutions and, in the usual case, assumption by them of underwriting commitments and participation in the loan by other banking institutions.

(3) *Loan agreement* means the documents signed by all of the parties to a loan, containing the amount, terms and conditions of the loan, and the interest and fees to be paid by the borrower.

(4) *Restructured international loan* means a loan that meets the following criteria: (i) The borrower is unable to service the existing loan according to its terms and is a resident of a foreign country in which there is a generalized inability of public and private sector obligors to meet their external debt obligations on a timely basis because of a lack of, or restraints on the availability of, needed foreign exchange in the country; and either (ii) the terms of the existing loan are amended to reduce stated interest or extend the schedule of payments; or (iii) a new loan is made to, or for the benefit of, the borrower, enabling the borrower to service or refinance the existing debt.

(b) *Restrictions on fees for restructured international loans.* No banking institution shall charge any fee in connection with a restructured loan unless all fees exceeding the banking institution's administrative costs, as described in paragraph (d)(2) of this section, are deferred and recognized over the term of the loan as an interest yield adjustment.

(c) *Amortizing fees.* Except as otherwise provided by this section, fees received on international loans shall be deferred and amortized over the term of the loan. The interest method should be used during the loan period to recognize the deferred fee revenue in relation to the outstanding loan balance. If it is not practicable to apply the interest method during the loan period, the straight-line method shall be used.

(d) *Accounting treatment of international loan or syndication administrative costs and corresponding fees.* (1) Administrative costs of originating, restructuring, or syndicating an international loan shall be expensed as incurred. A portion of the fee income equal to the banking institution's administrative costs may be recognized as income in the same period such costs are expensed.

(2) The administrative costs of originating, restructuring, or syndicating an international loan include those costs which are specifically identified

with negotiating, processing and consummating the loan. These costs include, but are not necessarily limited to: legal fees; costs of preparing and processing loan documents; and an allocable portion of salaries and related benefits of employees engaged in the international lending function and, where applicable, the syndication function. No portion of supervisory and administrative expenses or other indirect expenses such as occupancy and other similar overhead costs shall be included.

(e) *Fees received by managing banking institutions.* Fees received on international syndicated loans representing an adjustment of the yield on the loan shall be recognized over the loan period using the interest method. If the interest yield portion of a fee received on an international syndicated loan by a managing banking institution is unstated or differs materially from the pro rata portion of fees paid other participants in the syndication, an amount necessary for an interest yield adjustment shall be recognized. This amount shall at least be equivalent (on a pro rata basis) to the largest fee received by a loan participant in the syndication that is not a managing banking institution. The remaining portion of the syndication fee may be recognized as income at the loan closing date to the extent that it is identified and documented as compensation for services in arranging the loan. Such documentations shall include the loan agreement. Otherwise, the fee shall be deemed an adjustment of yield.

(f) *Loan commitment fees.* (1) Fees which are based upon the unfunded portion of a credit for the period until it is drawn and represent compensation for a binding commitment to provide funds or for rendering a service in issuing the commitment shall be recognized as income over the term of the commitment period using the straight-line method of amortization. Such fees for revolving credit arrangements, where the fees are received periodically in arrears and are based on the amount of the unused loan commitment, may be recognized as income when received provided the income result would not be materially different.

(2) If it is not practicable to separate the commitment portion from other components of the fee, the entire fee shall be amortized over the term of the combined commitment and expected loan period. The straight-line method of amortization should be used during the commitment period to recognize the fee revenue. The interest method should be used during the loan period to recognize the remaining fee revenue in relation to the outstanding loan balance. If the loan is funded before the end of the commitment period, any unamortized commitment fees shall be recognized as revenue at that time.

(g) *Agency fees.* Fees paid to an agent banking institution for administrative services in an international syndicated loan shall be recognized at the time of the loan closing or as the service is performed, if later.

[49 FR 12198, Mar. 29, 1984]

§351.3 Reporting and disclosure of international assets.

(a) *Requirements.* (1) Pursuant to section 907(a) of the International Lending Supervision Act of 1983 (Title IX, Pub. L. 98–181, 97 Stat. 1153) (ILSA), a banking institution shall submit to the FDIC, at least quarterly, information regarding the amounts and composition of its holdings of international assets.

(2) Pursuant to section 907(b) of ILSA, a banking institution shall submit to the FDIC information regarding concentrations in its holdings of international assets that are material in relation to total assets and to capital of the institution, such information to be made publicly available by the FDIC on request.

(b) *Procedures.* The format, content and reporting and filing dates of the reports required under paragraph (a) of this section shall be determined jointly by the Federal banking agencies. The requirements to be prescribed by the Federal banking agencies may include changes to existing forms (such as revisions to the Country Exposure Report, Form FFIEC No. 009) or such other requirements as the Federal banking agencies deem appropriate. The Federal banking agencies also may determine to exempt from the requirements of paragraph (a) of this section banking

institutions that, in the Federal banking agencies' judgment, have *de minimis* holdings of international assets.

(c) *Reservation of Authority.* Nothing contained in this rule shall preclude the FDIC from requiring from a banking institution such additional or more frequent information on the institution's holdings of international assets as the agency may consider necessary.

[49 FR 5587, Feb. 13, 1984]

PART 352—NONDISCRIMINATION ON THE BASIS OF HANDICAP

Sec.
352.1 Purpose.
352.2 Application.
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AUTHORITY: 12 U.S.C. 1819.

SOURCE: 51 FR 9643, Mar. 20, 1986, unless otherwise noted.

§ 352.1 Purpose.

The purpose of this part is to implement the spirit of section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by various Executive agencies. Although the FDIC does not believe that Congress contemplated coverage of non-appropriated, independent regulatory agencies such as the FDIC, it has chosen to promulgate this final regulation to ensure that, to the extent practicable, handicapped persons are provided with equal access to FDIC programs and activities.

§ 352.2 Application.

(a) This part applies to all programs and activities conducted by the FDIC. The following programs and activities involve the direct provision of benefits and services to, or participation by, members of the public:

(1) Attending Board of Directors meetings open to the public and all other public meetings;

(2) Making inquiries or filing complaints at the FDIC Office of Congressional Relations and Corporate Communications;

(3) Using the FDIC library in Washington, DC;

(4) Visiting an insured bank at which they conducted business (or an alternative liquidation site selected by the FDIC) and which has become insolvent, or been purchased by another bank under FDIC supervision, for the purpose of:

(i) Collecting FDIC checks for the insured amount of their deposits previously held in such bank; and/or

(ii) Discussing with FDIC representatives matters related to the repayment of debts which they previously owed to such bank, prior to its failure or purchase by another bank under FDIC supervision;

(5) Seeking employment with the FDIC;

(6) Conducting regular banking business at a Deposit Insurance National Bank formed by the FDIC pursuant to the authority in 12 U.S.C. 1821(h).

(b) This regulation governs the conduct of FDIC personnel in their interaction with employees of insured banks and employees of other state or federal agencies while discharging the FDIC's statutory obligations as insurer and/or receiver of financial institutions. It does not apply to financial institutions insured by the FDIC.

(c) Although application for employment and employment with the FDIC are programs and activities of the FDIC for purposes of this regulation, they shall be governed only by the standards set forth in § 352.6 of this part.

§ 352.3 Definitions.

For purposes of this part, the term—

(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, the FDIC programs or activities set forth in § 352.2.

(b) *Complete complaint* means, with respect to any FDIC program or activity other than employment, a written statement that contains the complainant's name and address and describes the FDIC's action in sufficient detail to inform the FDIC of the nature and date of the alleged violation of these regulations. 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 and other real or personal property. As used in this definition, *personal property* means only furniture, carpeting and similar features not considered to be real property.

(d) *Handicapped person* 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) A physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or 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) A mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) *Major life activities* including functions such as caring for oneself, 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 FDIC 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 definition but is treated by the FDIC as having such an impairment.

(e) *Qualified handicapped person* means—

(1) With respect to any FDIC program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and can achieve the purpose of the program or activity without modifications in the program or activity that the FDIC can determine on the basis of a written record would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity;

(3) With respect to employment, a handicapped person as defined in 29 CFR 1613.702(f), which is made applicable to this part by § 352.6.

(f) *Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this regulation, section 504 shall be applied only to the programs and activities conducted by the FDIC as set forth in § 352.2 of this regulation.

§ 352.4 Self-evaluation.

(a) Within one year of the effective date of this regulation, the FDIC shall conduct a self-evaluation of its program implementing the spirit of section 504.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representating handicapped persons, to participate in the self-evaluation process by submitting written comments. Comments on the program made by such persons or organizations, while not binding on the FDIC for adoption, will be received and considered as part of the FDIC's self-evaluation process.

(c) The FDIC shall, for a period of three years from the date of completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified in the program implementing the spirit of section 504; and

(2) A description of any modifications made in the program.

§ 352.5 General requirements.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under the programs and activities conducted by the FDIC and set forth in § 352.2 of this regulation.

(b) The FDIC, in providing any services under the programs and activities set forth in § 352.2 of this part, shall ensure that qualified handicapped persons are provided with an equal opportunity to benefit from or to reach the same level of achievement from such services as that provided to non-handicapped persons.

(c) The FDIC, in providing any services under the programs and activities set forth in § 352.2 of this part, shall give priority to those methods of administration which will not segregate participation by qualified handicapped persons in FDIC-conducted programs and activities from participation by non-handicapped individuals.

§ 352.6 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the FDIC. The definitions, requirements, and procedures (including those pertaining to employment discrimination complaints) of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established in 29 CFR part 1613, shall apply to employment in the FDIC.

§ 352.7 Program accessibility: Existing facilities.

(a) *General.* The FDIC shall operate each of the programs or activities set forth in § 352.2 of this part so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the FDIC to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the FDIC to take any action that the FDIC can determine on the basis of a written record would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If it is determined that an action would result in such an alteration or such burdens, the FDIC shall take other reasonable actions that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The FDIC may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The FDIC is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.

(c) *Time period for compliance.* The FDIC shall comply with the obligations established under this section within ninety days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within

three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to existing facilities will be undertaken to achieve program accessibility, the FDIC shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed after consultation with representatives of the General Services Administration and the Architectural and Transportation Barriers Compliance Board. The plan shall—

(1) Identify physical obstacles in the FDIC's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe the methods that will be used to make the facilities accessible;

(3) Specify the proposed schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify proposed steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

§352.8 Program accessibility: New construction and alterations.

Each building or part of a building in which the programs or activities set forth in §352.2 will be carried on, and which is newly constructed, or substantially altered by, on behalf of, or for the use of the FDIC, shall be designed, constructed or altered so as to be readily accessible to, and usable by, handicapped persons.

§352.9 Communications.

(a) The FDIC shall take appropriate steps to ensure effective communication with participants in the FDIC programs and activities set forth in §352.2.

(1) The FDIC shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, the FDIC programs or activities set forth in §352.2 of this part.

(i) In determining what type of auxiliary aid is necessary, the FDIC shall give primary consideration to any reasonable requests of the handicapped person.

(ii) The FDIC need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the FDIC communicates by telephone, it shall use telecommunications devices for deaf persons (TDD's) or equally effective telecommunication systems with hearing impaired participants and beneficiaries.

(b) The FDIC 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. Interested persons may obtain such information by calling, writing or visiting the FDIC Office of Equal Employment Opportunity, located at 550 17th Street, NW., Washington, DC 20429. The Office of Equal Employment Opportunity telephone number is (202) 898–6745 (District of Columbia area) and (800) 424–5488 (all others) (TDD).

(c) The FDIC shall provide information at a primary entrance to each of its accessible and inaccessible facilities where programs or activities as set forth in §352.2 are conducted, 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 FDIC to take any action that the FDIC can determine on the basis of a written record would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action that is required to comply with this section would result in such an alteration or such burdens, the FDIC shall take other reasonable actions that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§ 352.10 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in the FDIC programs or activities set forth in § 352.2 of this part.

(b) The FDIC shall process complaints alleging employment discrimination on the basis of handicap according to the procedures established in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The FDIC's Office of Equal Employment Opportunity shall be responsible for coordinating implementation of this section. All complaints should be sent to the FDIC's Office of Equal Employment Opportunity, 550 17th Street, NW., Washington, DC 20429.

(d) The FDIC shall accept and investigate all complete complaints over which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The FDIC may extend this time period for good cause.

(e) If the FDIC receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complainant to the appropriate government entity.

(f) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the FDIC shall notify the complainant of the results of the investigation in a letter containing—

(1) Finding regarding the alleged violations;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(g) Appeals of the findings or remedies must be filed by the complainant within 90 days of receipt from the FDIC of the letter required by § 352.10(f). The FDIC may extend this time for good cause.

(h) Timely appeals shall be accepted and processed by the Chairman of the FDIC or designee.

(i) The Chairman of the FDIC or designee shall notify the complainant of the results of the appeal within 90 days of the receipt of the request. If the Chairman of the FDIC or designee determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make a determination on the appeal.

(j) The time limits set forth in paragraphs (f) and (i) of this section, may be extended for an individual case when the Chairman of the FDIC or designee determines that there is good cause, based on the particular circumstances of that case, for the extension.

(k) The FDIC may delegate its authority for conducting complaint investigations to other federal agencies, except that the authority for making the final determination may not be delegated.

§ 352.11 Notice.

The FDIC shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program or activities conducted by the agency, and make such information available to them in such manner as the Chairman or his designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

PART 353—SUSPICIOUS ACTIVITY REPORTS

Sec.
353.1 Purpose and scope.
353.2 Definitions.
353.3 Reports and records.

AUTHORITY: 12 U.S.C. 1818, 1819; 31 U.S.C. 5318.

SOURCE: 61 FR 6099, Feb. 16, 1996, unless otherwise noted.

§ 353.1 Purpose and scope.

The purpose of this part is to ensure that an insured state nonmember bank files a Suspicious Activity Report when it detects a known or suspected criminal violation of federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act. This part applies to all insured state nonmember banks as well as any insured, state-licensed branches of foreign banks.

§353.2 Definitions.

For the purposes of this part:

(a) *FinCEN* means the Financial Crimes Enforcement Network of the Department of the Treasury.

(b) *Institution-affiliated party* means any institution-affiliated party as that term is defined in sections 3(u) and 8(b)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u) and 1818(b)(5)).

§353.3 Reports and records.

(a) *Suspicious activity reports required.* A bank shall file a suspicious activity report with the appropriate federal law enforcement agencies and the Department of the Treasury, in accordance with the form's instructions, by sending a completed suspicious activity report to FinCEN in the following circumstances:

(1) *Insider abuse involving any amount.* Whenever the bank detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the bank or involving a transaction or transactions conducted through the bank, where the bank believes it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the bank was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying one of the bank's directors, officers, employees, agents, or other institution-affiliated parties as having committed or aided in the commission of the criminal violation, regardless of the amount involved in the violation;

(2) *Transactions aggregating $5,000 or more where a suspect can be identified.* Whenever the bank detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the bank or involving a transaction or transactions conducted through the bank, and involving or aggregating $5,000 or more in funds or other assets, where the bank believes it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the bank was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an ''alias'', then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as driver's license or social security numbers, addresses and telephone numbers, must be reported;

(3) *Transactions aggregating $25,000 or more regardless of potential suspects.* Whenever the bank detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the bank or involving a transaction or transactions conducted through the bank, involving or aggregating $25,000 or more in funds or other assets, where the bank believes it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the bank was used to facilitate a criminal transaction, even though the bank has no substantial basis for identifying a possible suspect or group of suspects; or

(4) *Transactions aggregating $5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.* Any transaction (which for purposes of this paragraph (a)(4) means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected) conducted or attempted by, at or through the bank and involving or aggregating $5,000 or more in funds or other assets, if the bank knows, suspects, or has reason to suspect that:

(i) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law;

(ii) The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or

(iii) The transaction has no business or apparent lawful purpose or is not the sort of transaction in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

(b) *Time for reporting.* (1) A bank shall file the suspicious activity report no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a suspicious activity report. If no suspect was identified on the date of detection of the incident requiring the filing, a bank may delay filing a suspicious activity report for an additional 30 calendar days to identify a suspect. In no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction.

(2) In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the bank shall immediately notify, by telephone, an appropriate law enforcement authority and the appropriate FDIC regional office (Division of Supervision) in addition to filing a timely report.

(c) *Reports to state and local authorities.* A bank is encouraged to file a copy of the suspicious activity report with state and local law enforcement agencies where appropriate.

(d) *Exemptions.* (1) A bank need not file a suspicious activity report for a robbery or burglary committed or attempted, that is reported to appropriate law enforcement authorities.

(2) A bank need not file a suspicious activity report for lost, missing, counterfeit, or stolen securities if it files a report pursuant to the reporting requirements of 17 CFR 240.17f–1.

(e) *Retention of records.* A bank shall maintain a copy of any suspicious activity report filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the suspicious activity report. Supporting documentation shall be identified and maintained by the bank as such, and shall be deemed to have been filed with the suspicious activity report. A bank must make all supporting documentation available to appropriate law enforcement authorities upon request.

(f) *Notification to board of directors.* The management of a bank shall promptly notify its board of directors, or a committee thereof, of any report filed pursuant to this section. The term ''board of directors'' includes the managing official of an insured state-licensed branch of a foreign bank for purposes of this part.

(g) *Confidentiality of suspicious activity reports.* Suspicious activity reports are confidential. Any bank subpoenaed or otherwise requested to disclose a suspicious activity report or the information contained in a suspicious activity report shall decline to produce the suspicious activity report or to provide any information that would disclose that a suspicious activity report has been prepared or filed citing this part, applicable law (*e.g.*, 31 U.S.C. 5318(g)), or both, and notify the appropriate FDIC regional office (Division of Supervision).

(h) *Safe Harbor.* The safe harbor provisions of 31 U.S.C. 5318(g), which exempts any bank that makes a disclosure of any possible violation of law or regulation from liability under any law or regulation of the United States, or any constitution, law or regulation of any state or political subdivision, cover all reports of suspected or known criminal violations and suspicious activities to law enforcement and financial institution supervisory authorities, including supporting documentation, regardless of whether such reports are filed pursuant to this part or are filed on a voluntary basis.

PART 357—DETERMINATION OF ECONOMICALLY DEPRESSED REGIONS

AUTHORITY: 12 U.S.C. 1823(k)(5); 12 U.S.C. 1819.

§ 357.1 Economically depressed regions.

(a) *Purpose.* Section 13(k)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1823(k)(5)) provides that the FDIC shall consider proposals for financial assistance for eligible Savings

Association Insurance Fund members before grounds exist for appointment of a conservator or receiver for such member. One of the criteria for eligibility is that an institution's offices are located in an economically depressed region as determined by the FDIC.

(b) *Economically depressed regions.* The FDIC has determined that the following geographical regions are *economically depressed regions* for purposes of section 13(k)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1823(k)(5)): Alaska, Arizona, Arkansas, Colorado, Louisiana, New Mexico, Oklahoma and Texas.

[55 FR 11161, Mar. 27, 1990]

PART 359—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.
359.0 Scope.
359.1 Definitions.
359.2 Golden parachute payments prohibited.
359.3 Prohibited indemnification payments.
359.4 Permissible golden parachute payments.
359.5 Permissible indemnification payments.
359.6 Filing instructions.
359.7 Applicability in the event of receivership.

AUTHORITY: 12 U.S.C. 1828(k).

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

§359.0 Scope.

(a) This part limits and/or prohibits, in certain circumstances, the ability of insured depository institutions, their subsidiaries and affiliated depository institution holding companies to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties (IAPs).

(b) The limitations on golden parachute payments apply to troubled insured depository institutions which seek to enter into contracts to pay or to make golden parachute payments to their IAPs. The limitations also apply to depository institution holding companies which are troubled and seek to enter into contracts to pay or to make golden parachute payments to their IAPs as well as healthy holding companies which seek to enter into contracts to pay or to make golden parachute payments to IAPs of a troubled insured depository institution subsidiary. A ''golden parachute payment'' is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the insured depository institution making the payment is troubled or, if the payment is being made by an affiliated holding company, either the holding company itself or the insured depository institution employing the IAP, is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, nonqualified *bona fide* deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefit plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving the hiring of a white knight and unassisted changes in control. A procedure is also set forth whereby an institution or IAP can request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all insured depository institutions, their subsidiaries and affiliated depository institution holding companies regardless of their financial health. Generally, this part prohibits insured depository institutions, their subsidiaries and affiliated holding companies from indemnifying an IAP for that portion of the costs sustained with regard to an administrative or civil enforcement action commenced by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of an insured depository institution or required to cease and desist from or take an affirmative action described in section 8(b) (12 U.S.C. 1818(b)) of the Federal Deposit Insurance Act (FDI Act). However, there are exceptions to this general prohibition. First, an institution or holding company may purchase

commercial insurance to cover such expenses, except judgments and penalties. Second, the institution or holding company may advance legal and other professional expenses to an IAP directly (except for judgments and penalties) if its board of directors makes certain specific findings and the IAP agrees in writing to reimburse the institution if it is ultimately determined that the IAP violated a law, regulation or other fiduciary duty.

§ 359.1 Definitions.

(a) *Act* means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, *et seq.*).

(b) *Appropriate federal banking agency, bank holding company, depository institution holding company* and *savings and loan holding company* have the meanings given to such terms in section 3 of the Act.

(c) *Benefit plan* means any plan, contract, agreement or other arrangement which is an ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2) (iii) and (v) of this section.

(d) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the insured depository institution or depository institution holding company either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (e)(1) of this section:

(i) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in § 359.4); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d) (1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(iii) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made

for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The insured depository institution or depository institution holding company has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) *Corporation* means the Federal Deposit Insurance Corporation, in its corporate capacity.

(f) *Golden parachute payment.* (1) The term *golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency (or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.14(a)(4) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii) (A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

(2) *Exceptions.* The term *golden parachute payment* shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country; or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a *bona fide* deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of death or by reason of termination caused by the disability of an institution-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; *provided, however,* that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Corporation shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the appropriate federal banking agency; or

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vii) Any other payment which the Corporation determines to be permissible in accordance with § 359.4.

(g) *Insured depository institution* means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(h) *Institution-affiliated party (IAP)* means:

(1) Any director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j));

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(i) *Liability or legal expense* means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(j) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of an insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate

basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(k) *Payment* means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) *Prohibited indemnification payment.* (1) The term *prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any insured depository institution or an affiliated depository institution holding company for the benefit of any person who is or was an IAP of such insured depository institution or holding company, to pay or reimburse such person for any civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or any other liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) *Exceptions.* (i) The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by any federal banking agency, but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the insured depository institution, depository institution holding company or receiver.

(ii) The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain banking laws or regulations or has not engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

§359.2 Golden parachute payments prohibited.

No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part.

§359.3 Prohibited indemnification payments.

No insured depository institution or depository institution holding company shall make or agree to make any prohibited indemnification payment, except as provided in this part.

§ 359.4 Permissible golden parachute payments.

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IAP either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § 359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; *provided, however,* that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a) (1) through (3) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents

a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

§359.5 Permissible indemnification payments.

(a) An insured depository institution or depository institution holding company may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by any federal banking agency if:

(1) The insured depository institution's or depository institution holding company's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(2) The insured depository institution's or depository institution holding company's board of directors, respectively, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(3) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in §359.1(l); and

(4) The IAP agrees in writing to reimburse the insured depository institution or depository institution holding company, to the extent not covered by payments from insurance or bonds purchased pursuant to §359.1(l)(2), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in §359.1(l)

(b) An IAP requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; *provided, however*, that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(c) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(d) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board shall authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

§359.6 Filing instructions.

Requests to make excess nondiscriminatory severance plan payments pursuant to §359.1(f)(2)(v) and golden parachute payments permitted by §359.4 shall be submitted in writing to the FDIC regional director (Supervision) for the region in which the institution is located. The request shall be in letter form and shall contain all relevant factual information as well as the reasons why such approval should be granted. In the event that the consent of the institution's primary federal regulator is required in addition to that of the FDIC, the requesting party shall submit a copy of its letter to the FDIC to the institution's primary federal regulator. In the case of national banks, such written requests shall be submitted to the OCC. In the case of state member banks and bank holding

companies, such written requests shall be submitted to the Federal Reserve district bank where the institution or holding company, respectively, is located. In the case of savings associations and savings association holding companies, such written requests shall be submitted to the OTS regional office where the institution or holding company, respectively, is located. In cases where the prior consent of only the institution's primary federal regulator is required and that agency is not the FDIC, a written request satisfying the requirements of this section shall be submitted to the primary federal regulator as described in this section.

§ 359.7 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted under the provisions of this part by the FDIC (in its corporate capacity), shall not in any way bind any receiver of a failed insured depository institution. Any consent or approval granted under the provisions of this part by the FDIC or any other federal banking agency shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the FDIC is appointed as receiver for any depository institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1828(k)(3).

PART 360—RESOLUTION AND RECEIVERSHIP RULES

Sec.

360.1 Least-cost resolution.
360.2 Federal Home Loan banks as secured creditors.
360.3 Priorities.
360.4 Administrative expenses.
360.5 Definition of qualified financial contracts.

AUTHORITY: 12 U.S.C. 1821(d)(11), 1821(e)(8)(D)(i), 1823(c)(4); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

§ 360.1 Least-cost resolution.

(a) *General rule.* Except as provided in section 13(c)(4)(G) of the FDI Act (12 U.S.C. 1823 (c)(4)(G)), the FDIC shall not take any action, directly or indirectly, under sections 13(c), 13(d), 13(f), 13(h) or 13(k) of the FDI Act (12 U.S.C. 1823 (c), (d), (f), (h) or (k)) with respect to any insured depository institution that would have the effect of increasing losses to any insurance fund by protecting:

(1) Depositors for more than the insured portion of their deposits (determined without regard to whether such institution is liquidated); or

(2) Creditors other than depositors.

(b) *Purchase and assumption transactions.* Subject to the requirement of section 13(c)(4)(A) of the FDI Act (12 U.S.C. 13(c)(4)(A)), paragraph (a) of this section shall not be construed as prohibiting the FDIC from allowing any person who acquires any assets or assumes any liabilities of any insured depository institution, for which the FDIC has been appointed conservator or receiver, to acquire uninsured deposit liabilities of such institution as long as the applicable insurance fund does not incur any loss with respect to such uninsured deposit liabilities in an amount greater than the loss which would have been incurred with respect to such liabilities if the institution had been liquidated.

[58 FR 67664, Dec. 22, 1993]

§ 360.2 Federal Home Loan banks as secured creditors.

(a) Notwithstanding any other provisions of federal or state law or any other provisions of these regulations, the receiver of a borrower from a Federal Home Loan Bank shall recognize the priority of any security interest granted to a Federal Home Loan Bank by any member of any Federal Home Loan Bank or any affiliate of any such member, whether such security interest is in specifically designated assets or a blanket interest in all assets or categories of assets, over the claims

and rights of any other party (including any receiver, conservator, trustee or similar party having rights of a lien creditor) other than claims and rights that

(1) Would be entitled to priority under otherwise applicable law; and

(2) Are held by actual bona fide purchasers for value or by actual secured parties that are secured by actual perfected security interests.

(b) If the receiver rather than the Bank shall have possession of any collateral consisting of notes, securities, other instruments, chattel paper or cash securing advances of the Bank, the receiver shall, upon request by the Bank, promptly deliver possession of such collateral to the Bank or its designee.

(c) In the event that a receiver is appointed for any member of a Federal Home Loan Bank, the following procedures shall apply:

(1) The receiver and the Bank shall immediately seek and develop a mutually agreeable plan for the payment of any advances made by the Bank to such borrower or for the servicing, foreclosure upon and liquidation of the collateral securing any such advances, taking into account the nature and amount of such collateral, the markets in which such collateral is normally traded or sold and other relevant factors.

(2) In the event that the receiver and the Bank shall not, in good faith, be able to develop such a mutually agreeable plan, or, in the interim, the Bank in good faith reasonably concludes that the value of such collateral is decreasing, because of interest rate or other market changes, at such a rate that to delay liquidation or other exercise of the Bank's rights as a secured party for the development of a mutually agreeable plan could reasonably cause the value of such collateral to decrease to an amount that is insufficient to satisfy the Bank's claim in full, the Bank may, at any time thereafter if permitted to do so by the terms of the advances or other security agreement with such borrower or otherwise by applicable law, proceed to foreclose upon, sell, lease or otherwise dispose of such collateral (or any portion thereof), or otherwise exercise its rights as a secured party, provided that the Bank acts in good faith and in a commercially reasonable manner and otherwise in accordance with applicable law.

(3) The foregoing provisions of this paragraph (c) shall not apply in the event that a purchase and assumption transaction is entered into regarding any such member.

(d) The Bank's rights pursuant to the second sentence of section 10(d) of the Federal Home Loan Bank Act shall not be affected or diminished by any provisions of state law that may be applicable to a security interest in property of the member.

(e) The receiver for a borrower from a Federal Home Loan Bank shall allow a claim for a prepayment fee by the Bank if, and only if:

(1) Made pursuant to a written contract that provides for a prepayment fee, provided, however, that such prepayment fee allowed by the receiver shall not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate then available to the Bank; and

(2) The indebtedness owed to the Bank by such borrower is secured by sufficient collateral in which a perfected security interest in favor of the Bank exists or as to which the Bank's security interest is entitled to priority under the Competitive Equality Banking Act of 1987, Pub. L. 100–86, section 306(d), 101 Stat. 552, 601–02, or otherwise so that the aggregate of the outstanding principal on the advances secured by such collateral, the accrued by unpaid interest thereon and the prepayment fee applicable to such advances can be paid in full from the amounts realized from such collateral. For purposes of this paragraph (e)(2), the adequacy of such collateral shall be determined as of the date such prepayment fees shall be due and payable under the terms of the written contract providing therefor.

[54 FR 19156, May 4, 1989. Redesignated at 54 FR 42801, Oct. 18, 1989, and further redesignated at 55 FR 46496, Nov. 5, 1990. Redesignated at 58 FR 67664, Dec. 22, 1993]

§360.3 Priorities.

(a) Unsecured claims against an association or the receiver that are proved

to the satisfaction of the receiver shall have priority in the following order:

(1) Administrative expenses of the receiver, including the costs, expenses, and debts of the receiver;

(2) Administrative expenses of the association, *provided* that such expenses were incurred within thirty (30) days prior to the receiver's taking possession, and that such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, examiners, or management companies, or reasonable expenses incurred by employees which were authorized and reimbursable under a pre-existing expense reimbursement policy, that, in the opinion of the receiver, are of benefit to the receivership, and shall not include wages or salaries of employees of the association;

(3) Claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefit plans, earned prior to the appointment of the receiver by an employee of the association whom the receiver determines it is in the best interests of the receivership to engage or retain for a reasonable period of time;

(4) If authorized by the receiver, claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefits plans, earned prior to the appointment of the receiver, up to a maximum of three thousand dollars ($3,000) per person, by an employee of the association not engaged or retained pursuant to a determination by the receiver pursuant to the third category above;

(5) Claims of governmental units for unpaid taxes, other than Federal income taxes, except to the extent subordinated pursuant to applicable law; but no other claim of a governmental unit shall have a priority higher than that of a general creditor under paragraph (a)(6) of this section;

(6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section, provided, however, that if the association is chartered and was operated under the laws of a state that provided a priority for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph (a)(6) shall be observed by the receiver; and provided further, that if deposits of a Federal association are booked or registered at an office of such association that is located in a State that provides such priority with respect to State-chartered associations, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver;

(7) Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims under paragraph (a)(6) of this section, *Provided* that any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;

(8) Claims of the United States for unpaid Federal income taxes;

(9) Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims; and

(10) Claims by holders of nonwithdrawable accounts, including stock, which shall have priority within this paragraph (a)(10) in accordance with the terms of the written instruments that evidence such claims.

(b) Interest after the date of default on claims under paragraph (a)(6) of this section shall be at a rate or rates adjusted monthly to reflect the average rate for U.S. Treasury bills with maturities of not more than ninety-one (91) days during the preceding three (3) months.

(c) [Reserved]

(d) All unsecured claims of any category or class or priority described in paragraphs (a)(1) through (a)(10) of this section shall be paid in full, or provision made for such payment, before any claims of lesser priority are paid.

If there are insufficient funds to pay all claims of a category or class in full, distribution to claimants in such category or class shall be made pro rata. Notwithstanding anything to the contrary herein, the receiver may, at any time, and from time to time, prior to the payment in full of all claims of a category or class with higher priority, make such distributions to claimants in priority classes outlined in paragraphs (a)(1) through (a)(6) of this section as the receiver believes are reasonably necessary to conduct the receivership,

Provided that the receiver determines that adequate funds exist or will be recovered during the receivership to pay in full all claims of any higher priority.

(e) If the association is in mutual form, and a surplus remains after making distribution in full of allowed claims as set forth in paragraphs (a) and (b) of this section, such surplus shall be distributed to the depositors in proportion to their accounts as of the date of default.

(f) Under the provisions of section 11(d)(11) of the Act (12 U.S.C. 1821(d)(11)), the provisions of this §360.3 do not apply to any receivership established and liquidation or other resolution occurring after August 10, 1993.

[53 FR 25132, July 5, 1988, as amended at 53 FR 30667, Aug. 15, 1988. Redesignated and amended at 54 FR 42801, Oct. 18, 1989, and further redesignated and amended at 55 FR 46496, Nov. 5, 1990; 58 FR 43070, Aug. 13, 1993. Redesignated at 58 FR 67664, Dec. 22, 1993; 60 FR 35488, July 10, 1995]

§360.4 Administrative expenses.

The priority for *administrative expenses of the receiver,* as that term is used in section 11(d)(11) of the Act (12 U.S.C. 1821(d)(11), shall include those necessary expenses incurred by the receiver in liquidating or otherwise resolving the affairs of a failed insured depository institution. Such expenses shall include pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the institution.

[60 FR 35488, July 10, 1995]

§360.5 Definition of qualified financial contracts.

(a) *Authority and purpose.* Sections 11(e) (8) through (10) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e) (8) through (10), provide special rules for the treatment of qualified financial contracts of an insured depository institution for which the FDIC is appointed conservator or receiver, including rules describing the manner in which qualified financial contracts may be transferred or closed out. Section 11(e)(8)(D)(i) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e)(8)(D)(i), grants the Corporation authority to determine by regulation whether any agreement, other than those identified within section 11(e)(8)(D), should be recognized as qualified financial contracts under the statute. The purpose of this section is to identify additional agreements which the Corporation has determined to be qualified financial contracts.

(b) *Repurchase agreements.* The following agreements shall be deemed ''repurchase agreements'' under section 11(e)(8)(D)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(e)(8)(D)(v)): A repurchase agreement on qualified foreign government securities is an agreement or combination of agreements (including master agreements) which provides for the transfer of securities that are direct obligations of, or that are fully guaranteed by, the central governments (as set forth at 12 CFR part 325, appendix A, section II.C, n. 17, as may be amended from time to time) of the OECD-based group of countries (as set forth at 12 CFR part 325, appendix A, section II.B.2., note 12 as may be amended from time to time) against the transfer of funds by the transferee of such securities with a simultaneous agreement by such transferee to transfer to the transferor thereof securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds.

(c) *Swap agreements.* The following agreements shall be deemed ''swap agreements'' under section 11(e)(8)(D)(vi) of the Federal Deposit Insurance Act, as amended (12 U.S.C.

1821(e)(8)(D)(vi)): A spot foreign exchange agreement is any agreement providing for or effecting the purchase or sale of one currency in exchange for another currency (or a unit of account established by an intergovernmental organization such as the European Currency Unit) with a maturity date of two days or less after the agreement has been entered into, and includes short-dated transactions such as tomorrow/next day and same day/tomorrow transactions.

(d) Nothing in this section shall be construed as limiting or changing a party's obligation to comply with all reasonable trading practices and requirements, non-insolvency law requirements and any other requirements imposed by other provisions of the FDI Act. This section in no way limits the authority of the Corporation to take supervisory or enforcement actions, or to otherwise manage the affairs of a financial institution for which the Corporation has been appointed conservator or receiver.

[60 FR 66865, Dec. 27, 1995]

PART 361—MINORITY AND WOMEN OUTREACH PROGRAM—CONTRACTING

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AUTHORITY: 12 U.S.C. 1833e.

SOURCE: 57 FR 15004, Apr. 24, 1992, unless otherwise noted.

§ 361.1 Purpose.

(a) The purpose of the FDIC Minority and Women Outreach program, (''MWOP'' or ''Program'') is to ensure that firms owned by minorities and women are given the opportunity to participate fully in all contracts entered into by the FDIC.

(b) This part is issued by the Office of Equal Opportunity (''OEO''). Authority is derived from the Financial Institutions Reform, Recovery, and Enforcement Act (''FIRREA'') of 1989, title XII, section 1216(c), which requires the FDIC to prescribe regulations establishing and overseeing a minority outreach program ensuring inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the FDIC with public or private sector contractors.

§ 361.2 Policy.

It is the policy of the FDIC that minorities and women and entities owned by minorities and women shall have the maximum practicable opportunity to participate in contracts awarded by the FDIC.

§ 361.3 Definitions.

For the purposes of this part:

(a) *Minority and/or women-owned business* (''MWOB'') means firms at least fifty-one (51) percent owned and controlled by one or more minorities and/or women. In the case of publicly owned companies, at least fifty-one (51) percent of its voting stock must be owned and controlled by minorities and/or women. Additionally, the management and daily business operations must be controlled by one or more such individuals.

(b) *Joint venture (non-legal services)* means an arrangement in which twenty-five (25) percent or more of the duties are performed by the MWOB and the MWOB is compensated proportionally to its duties. Additionally, twenty-five (25) percent or more of the management and daily business operations must be controlled by such individuals.

(c) *Co-counseling (legal services)* means an association between two or more attorneys or law firms for the joint provision of legal services.

(d) *Legal services* means all services provided by attorneys or law firms (including services of support staff).

(e) *Minority* means any Black American, Native American Indian, Hispanic American, or Asian American.

§361.4 Scope.

The MWOP applies to all contracts entered into by the FDIC, whether public or private. The MWOP is incorporated into FDIC policies and guidelines governing contracting and the retention of outside services.

§361.5 Oversight and monitoring.

(a) The FDIC Office of Equal Opportunity has overall responsibility for nationwide MWOP oversight, which includes, but is not limited to, the monitoring, review and interpretation of MWOP regulation. In addition, the OEO is responsible for providing the FDIC with technical assistance and guidance to facilitate the identification, registration, and solicitation of minority and women-owned businesses.

(b) Each FDIC office and division that performs contracting or outreach activities shall submit information to the OEO on a quarterly basis, or upon request. Quarterly submissions will include, at a minimum, statistical information on contract awards and solicitations by designated demographic categories and related outreach activities. Additionally, for contracts requiring a subcontracting plan, the prime contractor is required to maintain statistical and outreach data and information regarding the implementation of the subcontracting plan.

§361.6 Outreach.

(a) Each regional office and consolidated site including the Legal Division, involved in contracting with the private sector will designate one or more MWOP coordinators. The coordinators will perform outreach activities for the Program and act as liaison between the FDIC and the public on MWOP issues. On a quarterly basis, or as requested by the OEO, the coordinators will report to the OEO on their implementation of the Program.

(b) Outreach includes the identification and registration of MWOBs who can provide goods and services utilized by the FDIC. This includes distributing information concerning the MWOP and providing appropriate registration materials for use by vendors and/or contractors. The identification of MWOBs will primarily be accomplished by:

(1) Obtaining various lists and directories of minority and women-owned firms maintained by other federal, state and local governmental agencies;

(2) Participating in conventions, seminars and professional meetings comprised of, or attended predominately by, MWOBs;

(3) Conducting seminars, meetings, workshops and other various functions to promote the identification and registration of MWOBs;

(4) Placing MWOP promotional advertisements indicating opportunities with FDIC in minority and women-owned media and,

(5) Monitoring to assure that FDIC staff interfacing with the contracting community are knowledgeable of, and actively promoting, the MWOP.

§361.7 Certification.

(a) In order to qualify as MWOB, each vendor or contractor must either:

(1) Self-certify ownership status by completing the appropriate section of the applicable registration form; *or*

(2) Submit a valid MWOB certification received from a federal agency, designated state or authorized local agency.

(b) Questions regarding minority and/or women ownership status will be resolved by the Division of Administration or, with respect to outside counsel, the FDIC Office of Inspector General, both located at 550 17th Street, NW., Washington, DC 20429.

[57 FR 15004, Apr. 24, 1992, as amended at 60 FR 31384, June 15, 1995]

§361.8 Solicitation of non-legal services.

(a) As part of the solicitation process, vendors and contractors, for non-legal services who submit a completed FDIC ''Vendor Application,'' Form #3700/13, will be registered in the National Contractor System (NCS), an automated database. The NCS will be available to all FDIC offices involved in contracting activities. The NCS will be utilized to identify qualified MWOBs for inclusion on bid lists.

(b) To ensure that minority and women-owned firms are being included

in each solicitation, the solicitation process will include:

(1) Disseminating procedures and information governing FDIC's solicitation rules and policies to MWOBs;

(2) Providing MWOBs technical guidance in the preparation of proposals;

(3) Allowing qualified MWOBs a 3% price advantage and additional technical consideration for competitively bid services; and

(4) Providing post-award technical guidance to unsuccessful MWOBs.

§ 361.9 MWOB joint ventures.

The FDIC encourages the formation of bona fide joint ventures to assist MWOBs in gaining access to FDIC contracting opportunities.

§ 361.10 Subcontracting.

Consistent with § 361.2 of this part, the contractor is required to carry out the FDIC minority and women-owned business contracting policy in the awarding of subcontracts to the fullest extent, consistent with the efficient performance of the awarded contract.

§ 361.11 Solicitation and awards for legal services.

(a) The Legal Division engages outside counsel primarily to provide legal services for liquidation, conservatorship and receivership activities. Outside counsel is selected on a competitive basis, as defined in the FDIC ''Guide for Outside Counsel'', P–2100–002–91 (''Guide''), as amended from time to time.

(b) To be retained as outside counsel, law firms must be free of conflicting interests, unless the Legal Division waives those conflicts in writing. Outside counsel must also enter into a Legal Services Agreement with the FDIC and agree to comply with the provisions of the ''Guide''.

(c) The Legal Division actively seeks to engage firms owned by minorities and women, both directly and in association with other firms. The Legal Division's Minority and Outreach Office provides assistance to minority and women-owned firms, and to minority and women attorneys within other firms, with respect to registration or other matters relating to the retention of outside counsel.

PART 362—ACTIVITIES AND INVESTMENTS OF INSURED STATE BANKS

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AUTHORITY: 12 U.S.C. 1816, 1818, 1819(tenth), 1831a.

SOURCE: 57 FR 53234, Nov. 9, 1992, unless otherwise noted.

§ 362.1 Purpose and scope.

The purpose of this part is to implement the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) which sets forth certain restrictions and prohibitions on the activities and investments of insured state banks and their subsidiaries. In addition, consistent with the overall purpose of section 24, it is the intent of this part to ensure that activities and investments undertaken by insured state banks or their subsidiaries do not present a risk to either of the deposit insurance funds, are safe and sound, are consistent with the purposes of federal deposit insurance, and are otherwise consistent with law.

[57 FR 53234, Nov. 9, 1992, as amended at 58 FR 64483, Dec. 8, 1993]

§ 362.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Activity* refers to the authorized conduct of business by an insured state bank. *Activity* as used in connection with the direct conduct of business by an insured state bank includes acquiring or retaining any investment other than an equity investment. *Activity* as used in connection with the conduct of business by a subsidiary of an insured state bank includes acquiring or retaining any investment.

(b) The phrase *activity permissible for a national bank* shall be understood to refer to any activity authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute. Activities expressly authorized by statute or recognized as permissible

in regulations, official circulars or bulletins issued by the Office of the Comptroller of the Currency or in any order or interpretation issued in writing by the Office of the Comptroller of the Currency will be accepted as permissible for state banks.

(c) An activity is considered to be conducted *as principal* if it is conducted other than as agent for a customer, is conducted other than in a brokerage, custodial, advisory or administrative capacity, or is conducted other than as trustee.

(d) *Bona fide subsidiary* means a subsidiary of an insured state bank that at a minimum:

(1) Is adequately capitalized;

(2) Is physically separate and distinct in its operations from the operations of the bank, however, this requirement shall not be construed to prohibit the bank and its subsidiary from sharing the same facility provided that the area in which the subsidiary conducts business with the public is clearly distinct from the area in which customers of the bank conduct business with the bank;

(3) Maintains separate accounting and other corporate records;

(4) Observes separate formalities such as separate board of directors' meetings;

(5) Maintains separate employees who are compensated by the subsidiary, however, this requirement shall not be construed to prohibit the use by the subsidiary of bank employees to perform functions which do not directly involve customer contact such as accounting, data processing and recordkeeping, so long as the bank and the subsidiary contract for such services on terms and conditions comparable to those agreed to by independent entities;

(6) Has no less than a majority of its executive officers who are neither executive officers nor directors of the bank;

(7) Has as a majority of its board of directors persons who are neither directors nor executive officers of the bank; and

(8) Conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the bank.

(e) *Company* shall mean any corporation, partnership, business trust, association, joint venture, pool, syndicate or other similar business organization.

(f) *Control* shall mean the power to vote, directly or indirectly, 25 per centum or more of any class of the voting stock of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.

(g) *An insured state bank will be considered to convert its charter* if the bank undergoes any transaction which causes the bank to operate under a different form of charter than that under which it operated as of December 19, 1991, however, a change from mutual to stock form shall not be considered to constitute a charter conversion.

(h) *Department* means a division of an insured state bank that:

(1) Is physically distinct from the remainder of the bank;

(2) Maintains separate accounting and other records;

(3) Has assets, liabilities, obligations and expenses that are separate and distinct from those of the remainder of the bank; and

(4) As a matter of state statute, the obligations, liabilities and expenses of which can only be satisfied with the assets of the division.

(i) *Depository institution* means any bank or savings association.

(j) *Equity interest in real estate* means any form of direct or indirect ownership of any interest in real property, whether in the form of an equity interest, partnership, joint venture or other form, which is accounted for as an investment in real estate or real estate joint venture under generally accepted accounting principles or is otherwise determined to be an investment in a real estate venture under Federal Financial Institutions Examination Council Call Report Instructions. The phrase equity interest in real estate does not include the following:

(1) An interest in real property that is used or intended to be used by the insured state bank or its subsidiaries as offices or related facilities for the

conduct of its business or future expansion of its business;

(2) An interest in real property that is acquired in satisfaction of debts previously contracted for in good faith or acquired in sales under judgments, decrees or mortgages held by the insured state bank or acquired under deed in lieu of foreclosure provided that the property is not intended to be held for real estate investment purposes and is not held longer than the shorter of any time limit on holding such property set by applicable state law or regulation or the time limit on holding such property that is applicable by statute or regulation for a national bank; and

(3) Interests in real property that are primarily in the nature of charitable contributions to community development corporations provided that the contribution to any one community development corporation does not exceed 2 percent of the bank's tier one capital and the bank's total contribution to all such corporations does not exceed 5 percent of the bank's tier one capital, provided however, that the bank's aggregate investment in such interest may be as great as 10 percent of the bank's tier one capital if its appropriate Federal banking agency has determined that making such investments does not pose a significant risk to the deposit insurance fund. In the case of an insured state nonmember bank, making an aggregate investment in interests in real property that are primarily in the nature of charitable contributions up to a maximum of 10 percent of tier one capital shall not be considered to present a significant risk to the deposit insurance fund.

(k) *Equity investment* means any equity security as defined in § 362.2(g); any partnership interest; any equity interest in real estate as defined in § 362.2(e); and any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction, however, the term *equity investment* shall not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(l) *Equity security* means any stock (other than adjustable rate preferred stock and money market (auction rate) preferred stock), certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-trust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing. The term *equity security* does not include any of the foregoing if it is acquired through foreclosure or settlement in lieu of foreclosure.

(m) The phrase *equity investment permissible for a national bank* shall be understood to refer to any equity investment authorized for national banks under the National Bank Act (12 U.S.C. 21 et seq.) or any other statute. Investments expressly authorized by statute or recognized as permissible in regulations, official bulletins or circulars issued by the Office of the Comptroller of the Currency or in any order or interpretation issued in writing by the Office of the Comptroller of the Currency will be accepted as permissible for state banks.

(n) *Executive officer, director, principal shareholder, related interest,* and *extension of credit* shall have the same meaning as is relevant for the purpose of section 22(h) of the Federal Reserve Act (12 U.S.C. 375) and § 337.3 of this chapter.

(o) *Insured state bank* shall mean any state bank insured by the Federal Deposit Insurance Corporation (FDIC) whether or not a member of the Federal Reserve System.

(p) *Investment in a department* by an insured state bank means any transfer of funds by an insured state bank to one of its departments which is represented on the department's accounts and records as an accounts payable, a liability, or equity of the department except that transfers of funds to the department in payment of services rendered by that department shall not be considered an investment in the department.

(q) *Investment in a subsidiary* by an insured state bank shall mean the total of any equity investment in a subsidiary by an insured state bank, any debt issued by the subsidiary that is held by the insured state bank, and any extensions of credit from the insured state bank to the subsidiary.

(r) *Lower income* means income that is less than or equal to the median income for the area in which the qualified housing project is located as determined by state or federal statistics. The ''area'' in which a housing project is located shall be understood to refer to the relevant Metropolitan Statistical Area (MSA) in which the project is located if the project is located within an MSA. If the project is not located in a MSA, the median income of the ''area'' in which the project is located shall be understood to refer to the median income of the state or territory in which the project is located exclusive of the designated MSA's if no state statistics for the local area are available.

(s) *National securities exchange* means a securities exchange that is registered as a national securities exchange by the Securities and Exchange Commission pursuant to section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) and the National Market System, i.e., the top tier of the National Association of Securities Dealers Automated Quotation System (NASDAQ).

(t) *Residents of the state* shall be understood to include companies or partnerships incorporated in, organized under the laws of, licensed to do business in, or having an office in the state.

(u) *Significant risk to the deposit insurance fund* shall be understood to be present whenever there is a high probability that any insurance fund administered by the FDIC may suffer a loss.

(v) *Subsidiary* means any company directly or indirectly controlled by an insured state bank.

(w) *Tier one capital* shall have the same meaning as set forth in Part 325 of this chapter in the case of an insured state nonmember bank and, in the case of an insured state member bank, shall have the same meaning as set forth in regulations defining the term tier one capital as adopted by the bank's appropriate federal banking agency.

(x) *Well-capitalized* shall have the same meaning as is found in § 325.103(b)(1) of this chapter, however, for the purposes of applying this definition, the terms *risk-weighted assets, total capital,* and *total book assets* shall have the respective meaning prescribed in regulations issued by the appropriate federal banking agency. In order to be considered well-capitalized for the purposes of § 362.3(b)(7) and 362.4(c)(2)(i), an insured state bank must meet the above requirements before excluding the bank's investment in its insurance underwriting department and/or its insurance underwriting subsidiary and the bank must be adequately capitalized after such investment is excluded from the bank's capital. The term *adequately capitalized* shall have the same meaning as is found in § 325.103(b)(2) of this chapter.

[57 FR 53234, Nov. 9, 1992, as amended at 58 FR 64483, Dec. 8, 1993]

§ 362.3 Equity investments.

(a) *Prohibited investments.* No insured state bank may directly or indirectly acquire or retain any equity investment of a type, or in an amount, that is not permissible for a national bank.

(b) *Exceptions*—(1) *Majority owned subsidiaries.* An insured state bank is not prohibited from acquiring or retaining a majority interest in a subsidiary. If the FDIC denied an application by a Savings Association Insurance Fund (SAIF) member state bank for permission to acquire or retain the majority interest in a subsidiary pursuant to § 333.3 of this chapter, this exception does not apply. If the denial concerned an application for permission to retain the investment, the SAIF member state bank must divest its interest in the subsidiary in accordance with whatever conditions and restrictions are set forth in the FDIC's order denying the application.

(2) *Qualified housing projects.* (i) Subject to the limitation contained in paragraph (b)(2)(ii) of this section, an insured state bank is not prohibited from investing as a limited partner in a partnership the sole purpose of which is direct or indirect investment in the acquisition, rehabilitation, or new construction of a qualified housing project. A qualified housing project

shall be understood to mean residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment including but not necessarily limited to any project eligible for the low income housing tax credit under section 42 of the Internal Revenue Code (26 U.S.C. 42). A residential real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code may be considered primarily for the benefit of lower income persons if 50 percent or more of the housing units are to be occupied by lower income persons. A real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code will be considered residential despite the fact that some portion of the total square footage of the project is utilized for commercial purposes provided that such commercial use is not the primary purpose of the project.

(ii) Investments described in paragraph (b)(2)(i) of this section may only be made if the bank's investment in the partnership, when aggregated with any existing investment in such a partnership or partnerships, does not exceed 2 percent of the bank's total assets as reported on the bank's most recent consolidated report of condition. For the purposes of this section, legally binding commitments are included as part of the bank's investment.

(3) *Savings bank life insurance.* Unless it is otherwise found to pose a significant risk to the insurance fund of which the bank is a member, an insured state bank located in Massachusetts, New York, or Connecticut is not prohibited from owning stock in a savings bank life insurance company provided that the savings bank life insurance company discloses to purchasers of life insurance policies, annuities, and other insurance products that the policies offered to the public are not insured by the FDIC, are not obligations of, and are not guaranteed by, any insured state bank. The following or similar statement will satisfy this requirement: ''This [policy, annuity, insurance product] is not a federally insured deposit and is not an obligation of, nor is it guaranteed by, any federally insured bank.'' The disclosure must be made prior to the time of purchase, must be prominent, and must be in a separate document clearly labeled ''consumer disclosure'' if the disclosure does not appear on the face of the policy, annuity or other insurance product. If state law or regulation provides for substantially similar disclosure requirements, compliance with the state imposed disclosure requirements will satisfy the requirements of this paragraph (b)(3).

(4) *Common or preferred stock; shares of investment companies.* (i) To the extent permitted by the FDIC, and subject to the requirements of paragraph (d) of this section, an insured state bank that is located in a state which as of September 30, 1991 authorized investment in:

(A) (*1*) Common or preferred stock listed on a national securities exchange (listed stock); or

(*2*) Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, et seq.) (registered shares); and

(B) Which during any time in the period beginning on September 30, 1990 and ending on November 26, 1991 made or maintained an investment in such listed stock or registered shares, may retain whatever listed stock or registered shares that were lawfully acquired or held prior to December 19, 1991, and continue to acquire listed stock and/or registered shares.

(ii) The exception provided for by paragraph (b)(4)(i) of this section shall cease to apply to any insured state bank if the bank converts its charter, the bank undergoes any transaction for which notice is required to be filed under section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)) except a transaction that is presumed to be an acquisition of control under § 303.4(a) of this chapter, the bank undergoes any transaction subject to section 3 of the Bank Holding Company Act (12 U.S.C. 1842) other than a one bank holding company formation in which all or substantially all of the shares of the holding company will be owned by persons who were shareholders of the bank, the bank is acquired by or merged into a depository institution other than a depository institution described in paragraph (b)(4)(i) of this

section, or control of the bank's parent company changes. In such event the insured state bank may not make any additional investments pursuant to the exception provided for by paragraph (b)(4)(i) of this section. The bank is not prohibited under this section from retaining its existing investments provided that the FDIC does not order a divestiture under paragraph (d)(3) of this section, section 8 of the Federal Deposit Insurance Act (FDI Act, 12 U.S.C. 1818) or some other provision of the FDI Act or FDIC's regulations, or some other provision of law.

(5) *Stock of company that provides director and officer liability insurance.* An insured state bank is not prohibited from acquiring up to 10 percent of the voting stock of a company that solely provides or reinsures directors', trustees', and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions.

(6) *Shares of depository institutions.* An insured state bank is not prohibited from acquiring or retaining the voting shares of a depository institution if the institution engages only in activities permissible for national banks; the institution is subject to examination and regulation by a state bank supervisor; 20 or more depository institutions own voting shares of the institution but no one institution owns more than 15 percent of the shares; and the institution's voting shares (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees) are owned only by depository institutions.

(7) *Interests in insurance subsidiaries.* (i) A well-capitalized insured state bank is not prohibited from retaining after December 19, 1992 its equity investment in a majority owned subsidiary that was lawfully providing insurance as principal in a state on November 21, 1991 of a sort that could not be so provided by a national bank provided that the activities of the subsidiary continue to be limited to underwriting insurance of the same type provided by the subsidiary as of November 21, 1991 to residents of the state, individuals employed in the state, and any other person to whom the subsidiary provided insurance as principal without interruption since such person resided in or was employed in the state. In the case of resident companies or partnerships, the subsidiary's activities must be limited to providing insurance to the company's or partnership's employees residing in the state and/or to providing insurance to cover the company's or partnership's property located in the state.

(ii) A bank that does not meet the requirements necessary to be considered well-capitalized for the purposes of paragraph (b)(7)(i) of this section may file an application with the regional director for the Division of Supervision for the region in which the bank's principal office is located requesting permission to retain its insurance underwriting department and/or subsidiary. Such application will be granted solely in the FDIC's discretion but in no event will it be granted unless the FDIC determines that the bank is expected to satisfy the definition of well-capitalized for the purposes of paragraph (b)(7) no later than three years from December 9, 1992, and it is determined that retention of the department and/or subsidiary until the bank meets the definition of well-capitalized will not pose a significant risk to the insurance fund. The application may be in letter form and should contain the bank's plan for meeting the well-capitalized definition before three years from December 9, 1992, taking into consideration the gradual deduction of the bank's investment over that period.

(iii) An insured state bank is not prohibited from retaining after December 19, 1992 its equity investment in a majority owned title insurance underwriting subsidiary provided that the bank was required before June 1, 1991 to provide title insurance as a condition of the bank's initial chartering under state law and none of the transactions described in paragraph (b)(4)(ii) of this section (other than a charter conversion) has occurred since June 1, 1991.

(c) *Divestiture of prohibited equity investments*—(1) *Requirement to divest.* Any equity investment acquired prior to December 19, 1991 that is not of a type, or in an amount, that is permissible for a national bank, and which does not fall within one of the exceptions in

paragraph (b) of this section, must be divested as quickly as prudently possible but in no event later than December 19, 1996. If a SAIF member state bank holds an equity investment that was subject to divestiture pursuant to § 333.3 of this chapter, and the equity investment is subject to divestiture under this paragraph (c)(1) the equity investment must be divested as quickly as prudently possible but in no event later than July 1, 1994 or any earlier date established by a divestiture plan that was filed by the bank under, and approved by the FDIC pursuant to, § 333.3 of this chapter.

(2) *Requirement to file divestiture plan.* Any insured state bank that is required by paragraph (c)(1) of this section to divest an equity investment must submit a divestiture plan with the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from December 9, 1992. An insured state bank that has submitted a plan pursuant to this section may proceed to act in accordance with that plan unless and until it is informed in writing by the FDIC that the plan is unacceptable.

(3) *Content of divestiture plan.* The divestiture plan shall:

(i) Describe the obligor, type, amount, book and market values (estimated or known) of the equity investments subject to divestiture as of the bank's most recent consolidated report of condition prior to the filing;

(ii) Set forth the bank's plan to comply with paragraph (c)(1) of this section;

(iii) Describe the anticipated gain or loss (anticipated or realized) if any from the divestiture of the investment and the impact thereof on the bank's capital (including capital ratios before and after the sale);

(iv) Include a copy of a resolution by the bank's board of directors or board of trustees authorizing the filing of the divestiture plan; and

(v) Provide such other information as requested by the regional director.

(4) *Retention of equity investments during divestiture period.* Upon review of the divestiture plan and such additional information as requested by the regional director, and at any time during the divestiture period, the FDIC may impose such conditions and restrictions on the retention of the equity investments as the FDIC deems appropriate including requiring divestiture in advance of December 19, 1996.

(d) *Notice and approval of intent to invest in common or preferred stock or shares of an investment company; divestiture of excess investments*—(1) *Notice and required FDIC determination.* No insured state bank may acquire or retain any listed stock or registered shares pursuant to paragraph (b)(4) of this section unless the bank files a one-time notice with the FDIC setting forth the bank's intention to acquire and retain the listed stock or registered shares and the FDIC has determined that acquiring or retaining listed stock or registered shares will not pose a significant risk to the deposit insurance fund of which the bank is a member. The notice must be filed with the regional director for the Division of Supervision for the region in which the bank's principal office is located.

(2) *Content of notice.* The notice shall contain:

(i) A statement indicating whether the bank made or maintained investments in listed stock and/or registered shares during the period between September 30, 1990 and November 26, 1991;

(ii) The aggregate dollar book value amount of the bank's investment in listed stock and registered shares held as of December 19, 1991 expressed as a percentage of the bank's tier one capital as measured on December 19, 1991 (tier one capital as reported on the bank's December 31, 1991 consolidated report of condition may be used in lieu of calculating tier one capital as of December 19, 1991);

(iii) The aggregate highest dollar book value amount of the bank's investments in listed stock and registered shares between September 30, 1990 and November 26, 1991 expressed as a percentage of tier one capital as reported in the consolidated report of condition for the quarter in which the aggregate high dollar amount of investment occurred;

(iv) A description of the bank's funds management policies and how the bank's investments (planned or existing) in listed stock and/or registered

shares relate to the objectives set out in the bank's funds management policies;

(v) A description of the bank's investment policies and a discussion of to what extent those policies:

(A) Limit concentrations in listed stock and/or registered shares both by issue and by industry;

(B) Set an aggregate limit on investment in listed stock and/or registered shares; and

(C) Deal with the sale of listed stock and/or registered shares in light of market conditions;

(vi) A discussion of the parameters used to determine the quality of the bank's outstanding and proposed investments in listed stock and/or registered shares as well as future investments;

(vii) A copy of a resolution by the board of directors or board of trustees authorizing the filing of the notice; and

(viii) Such additional information as deemed appropriate by the regional director.

(3) *FDIC determination.* Approval of a notice filed under paragraph (d)(1) of this section will not be granted unless the FDIC determines that acquiring and retaining the listed stock and/or registered shares does not pose a significant risk to the insurance fund of which the bank is a member. Approval may be made subject to whatever conditions or restrictions the FDIC determines is necessary or appropriate. The FDIC may require divestiture of some or all of the investments in listed stock or registered shares made during the period from September 30, 1990 to December 19, 1991, as well as any investments in listed stock or registered shares made subsequent to that period if it is determined that retention of the investments in question will have an adverse effect on the safety and soundness of the bank.

(4) *Maximum permissible investment.* (i) The maximum permissible investment in listed stock and registered shares an insured state bank may make pursuant to paragraph (b)(4) of this section may in no event exceed one hundred percent of the bank's tier one capital as measured in its most recent consolidated report of condition. Book value of the investment shall be used for the purposes of compliance with this limit. Generally, it will be presumed that it does not pose a significant risk to the fund for a well-capitalized bank to acquire and retain listed stock and/or registered shares pursuant to paragraph (b)(4) of this section up to a maximum of one hundred percent of the bank's tier one capital, and absent some mitigating factors, it will also be presumed that it does not present a significant risk to the fund for an adequately capitalized bank to acquire and retain such stock and/or shares up to a maximum of one hundred percent of the bank's tier one capital. It will also be presumed, absent some mitigating factors, that it does present a significant risk to the fund for a bank that is under capitalized to acquire or retain listed stock and/or registered shares in excess of the highest aggregate level of investment made by the bank in such listed stock and/or registered shares during the period from September 30, 1990 to November 26, 1991 expressed as a percentage of the bank's tier one capital as reported by the bank in its consolidated report of condition for the quarter in which the high aggregate investment occurred. ''Adequately capitalized'' and ''under capitalized'' shall have the same meaning as is found in § 325.103 of this chapter.

(ii) The FDIC, in response to a notice filed under paragraph (d)(1) of this section, may set a percentage as the maximum permissible investment for any insured state bank that is lower than that which would otherwise be applicable under paragraph (d)(4)(i) of this section.

(iii) Any acquisition of listed stock or registered shares by an insured state bank made after December 19, 1991 pursuant to approval of a notice filed under paragraph (d)(1) of this section may not, when made, exceed the maximum permissible investment percentage (as set out in the FDIC's approval of such notice) of the bank's tier one capital as reported on the bank's consolidated report of condition for the period immediately preceding the acquisition.

(5) *Divestiture of excess stock and/or shares.* (i) An insured state bank that held as of December 19, 1991 investments in listed stock and/or registered

shares in an aggregate amount in excess of 100 percent of the bank's tier one capital as measured on December 19, 1991 is prohibited from retaining the excess listed stock and/or registered shares. (Tier one capital as reported on the bank's December 31, 1991 consolidated report of condition may be used in lieu of calculating tier one capital as of December 19, 1991.) Such bank's outstanding investment in listed stock or registered shares must comply by no later than December 19, 1994 with the maximum permissible investment set for the bank by the FDIC in connection with the notice filed pursuant to § 362.3(d)(1) if the bank's maximum permissible investment is 100 percent of tier one capital. In such event, the bank shall divest the excess investment by not less than ⅓ in each of the three years beginning on December 19, 1991, provided however, that the bank shall be relieved of the obligation to divest at least ⅓ of its excess investment each year if divesting a lesser amount will reduce the bank's outstanding investment to 100 percent of its current tier one capital. If the bank's maximum permissible investment set by the FDIC is lower than 100 percent of tier one capital, paragraph (d)(5)(ii) of this section shall apply.

(ii) If an insured state bank does not receive approval in connection with a notice filed pursuant to paragraph (d)(1) of this section to retain its outstanding investment in listed stock and/or registered shares, the bank must, as quickly as prudently possible but in no event later than December 19, 1996, divest the listed stock and/or registered shares for which approval to retain was denied. The bank must file a divestiture plan with the regional director for the Division of Supervision for the region in which the bank's principal office is located no later than 60 days after the bank receives notice that approval to retain the investment(s) was denied. The divestiture plan shall contain the information specified in paragraph (c)(3) of this section.

[57 FR 53234, Nov. 9, 1992; 58 FR 59787, Nov. 10, 1993]

§ 362.4 Activities of insured state banks and their subsidiaries.

(a) *General prohibitions.* (1) Except as otherwise provided in this part, after December 19, 1992, an insured state bank may not directly engage as principal in any activity that is not permissible for a national bank, and a majority-owned subsidiary of an insured state bank may not engage as principal in any activity that is not permissible for a subsidiary of a national bank, unless the bank meets and continues to meet the applicable minimum capital standards prescribed by the appropriate federal banking agency and the FDIC determines that the conduct of the activity by the bank and/or its majority-owned subsidiary will not pose a significant risk to the affected deposit insurance fund. Applications for consent to directly, or indirectly through a majority-owned subsidiary, engage as principal in activities that are not permissible for a national bank or a subsidiary of a national bank should be filed in accordance with § 362.4(d). An insured state bank must file an application for each subsidiary regardless of whether the bank previously obtained consent for a subsidiary to engage as principal in the same activity. An insured state bank that obtained the FDIC's consent pursuant to § 333.3 of this chapter prior to that section's repeal to directly or indirectly through a subsidiary engage as principal in an activity that was otherwise impermissible under § 333.3 of this chapter and which is impermissible under this part without the FDIC's consent, does not need to obtain the FDIC's consent pursuant to this part in order to continue the activity.

(2) Except as otherwise provided in this part, no insured state bank may directly or indirectly through a subsidiary, engage in insurance underwriting except to the extent such activities are permissible for a national bank.

(b) *Phase-out for banks that do not meet capital standard.* (1) Any insured state bank which does not meet the applicable minimum capital requirements set out in paragraph (a)(1) of this section and which as of December 19, 1992, directly, or indirectly through a subsidiary, engaged as principal in any activity that is not permissible for

a national bank or a subsidiary of a national bank, must cease the impermissible activity as soon as practicable but in no event later than June 8, 1994, unless an extension is granted by the FDIC for good cause.

(2) In no event shall any extension granted pursuant to this paragraph exceed one year from December 8, 1993. If the insured state bank is expected to meet the requisite capital level prior to June 8, 1994, the bank may apply for permission to continue the activity. An insured state bank that does not meet the requisite capital requirements, and which has a majority-owned subsidiary that has equity investments in real estate which are not permissible for a subsidiary of a national bank, must divest the subsidiary or the equity investments in the real estate as soon as practicable but in no event later than December 19, 1996.

(c) *Exceptions*—(1) *Savings bank life insurance.* Any insured state bank that is located in Massachusetts, New York or Connecticut that is otherwise authorized to do so is not prohibited from engaging in the underwriting of savings bank life insurance *provided that:*

(i) The FDIC does not alter its determination made pursuant to section 24(e)(2) of the FDI Act (12 U.S.C. 1831a(e)) that such activities do not pose a significant risk to the insurance fund of which the bank is a member;

(ii) The insurance underwriting is conducted through a division of the bank that meets the definition of ''department'' contained in § 362.2(h); and

(iii) The bank discloses to purchasers of life insurance policies, other insurance products and annuities which are offered to the public that the policies, other insurance products and annuities are not insured by the FDIC and that only the assets of the insurance department may be used to satisfy the obligations of the insurance department. The disclosure must be made prior to the time of purchase of the insurance policy, other insurance product, or annuity; must be prominent; and must be in a separate document clearly labeled ''consumer disclosure'' if the disclosure does not appear on the face of the policy, other insurance product, or annuity. The following or a similar statement will satisfy the disclosure obligation: ''This [insurance policy, other insurance product, annuity] is not a federally insured deposit and only the assets of the bank's insurance department may legally be used to satisfy any obligation of that department.'' If state law or regulation provides for substantially similar disclosure requirements, compliance with the state imposed disclosure requirements will satisfy the requirements of this paragraph.

(2) *Insurance underwriting.* (i) A well-capitalized insured state bank that was lawfully providing insurance as principal on November 21, 1991 may continue to provide insurance as principal in the state or states in which the bank did so on November 21, 1991 so long as the insurance that is provided is of the same type which the bank provided as of November 21, 1991 and the insurance is only offered to residents of that state, individuals employed in that state, and any other person to whom the bank provided insurance as principal without interruption since such person resided in, or was employed in, that state. In the case of resident companies or partnerships, the bank's as principal activities must be limited to providing insurance to the company's or partnership's employees residing in the state and/or to providing insurance to cover the company's or partnership's property located in the state.

(ii) Any insured state bank or any subsidiary thereof that engaged in the underwriting of insurance on or before September 30, 1991 which was reinsured in whole or in part by the Federal Crop Insurance Corporation may continue to do so.

(iii) Any title insurance subsidiary of an insured state bank described in § 362.3(b)(7)(iii) may continue to provide title insurance provided that none of the transactions described in § 362.3(b)(4)(ii) (other than a charter conversion) has occurred to the parent insured state bank since June 1, 1991.

(3) *Activities that do not present a significant risk.* The FDIC has determined that the following as principal activities do not represent a significant risk to the deposit insurance funds and that the listed activities may therefore be conducted by an insured state bank or its majority-owned subsidiary (as the

case may be) without first obtaining the FDIC's prior consent provided that the bank is otherwise authorized to engage in the activity under state law, the conduct of the activity by the bank and/or its subsidiary is otherwise permitted under federal law and regulation, and the bank meets and continues to meet the applicable minimum capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this part does not preclude the FDIC from taking any appropriate action within its authority with respect to the activities if the facts and circumstances warrant such action.

(i) *Guarantee activities.* An insured state bank may:

(A) Directly guarantee the obligations of others as provided for in § 347.3(c)(1) of this chapter; and

(B) Directly offer customer-sponsored credit card programs, and similar arrangements, in which the insured state bank undertakes to guarantee the obligations of individuals who are its retail banking deposit customers, *provided, however,* that the bank must establish the creditworthiness of the individual before undertaking to guarantee his/her obligations.

(ii) *Activities that are closely related to banking.* An insured state bank may:

(A) Engage as principal in any activity that is not permissible for a national bank provided that the Federal Reserve Board by regulation or order has found the activity to be closely related to banking for the purposes of section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)), *provided, further however,* That this exception shall not be construed to permit the bank to directly hold equity securities that a national bank may not hold and which are not otherwise permissible investments for insured state banks pursuant to § 362.3(b); and

(B) Establish or acquire a majority-owned subsidiary which solely engages as principal in any activity that the Federal Reserve Board by regulation or order has found to be closely related to banking for the purposes of section 4(c)(8) of the Bank Holding Company Act.

(iii) *Securities activities conducted through a subsidiary of an insured nonmember bank.* An insured nonmember bank may conduct securities activities through a subsidiary of the bank in accordance with the requirements and restrictions of § 337.4 of this chapter in lieu of any requirement or restriction contained in this part.

(iv) *Equity securities held by a majority-owned subsidiary of an insured state bank*—(A) *Grandfathered investments in common or preferred stock and shares of investment companies.* Any insured state bank that has received approval to invest in common or preferred stock or shares of an investment company pursuant to § 362.3(d) may conduct the approved investment activities through a majority-owned subsidiary of the bank without any additional approval from the FDIC provided that any conditions or restrictions imposed with regard to the approval granted under § 362.3(d) are met.

(B) *Bank stock.* An insured state bank may indirectly through a majority-owned subsidiary organized for such purpose invest in up to ten percent of the outstanding stock of another insured bank.

(C) *Stock of a corporation that engages in activities permissible for a bank service corporation.* An insured state bank may indirectly through a majority-owned subsidiary organized for such purpose invest in 50% or less of the stock of a corporation which engages solely in any activity that is permissible for a bank service corporation. (The term ''bank service corporation'' shall have the same meaning as is relevant for the purposes of the Bank Service Corporation Act (12 U.S.C. 1861 et seq.).) This exception shall not be construed to override any other limitation imposed by this part as to the amount of stock which may be held in a subsidiary without obtaining the FDIC's consent.

(D) *Stock of a corporation which engages in activities which are not ''as principal''.* An insured state bank may indirectly through a majority-owned subsidiary invest in 50% or less of the stock of a corporation which engages solely in activities which are not considered to be ''as principal'' as that term is defined in § 362.2(c).

(v) *Investments in adjustable rate and money market preferred stock.* An insured state bank may invest up to 15 percent

of the bank's total capital (as that term is defined by the appropriate federal banking agency) in adjustable rate preferred stock and money market (auction rate) preferred stock.

(d) *Application for consent to directly, or indirectly through a majority-owned subsidiary, engage as principal in an activity that is not permissible for a national bank*—(1) *Timing and place of filing application*. All applications for consent pursuant to paragraph (d) of this section should be filed with the regional director for the Division of Supervision for the FDIC regional office in which the insured state bank's principal office is located. Applications for consent to continue an activity in which an insured state bank and/or its majority-owned subsidiary was engaged as of December 19, 1992, must be filed with the appropriate regional office no later than February 7, 1994.

(2) *Continuation of activity while application is pending.* Any insured state bank which has filed an application in accordance with paragraph (d)(1) of this section requesting consent to directly or indirectly continue any ongoing activity may continue to engage in the activity while the application is pending provided, however, in no event may such an insured state bank or its subsidiary continue the activity for more than six months from the receipt of the application by the appropriate FDIC regional office unless the FDIC grants an extension or approval of the application has been granted.

(3) *Copy of application filed with another agency*. Unless the FDIC requests additional information, in a case in which an insured state bank has sought the approval of another federal or state regulatory authority to directly or indirectly engage in an activity for which consent is required under this part, the application filing requirements of paragraph (d) of this section may be satisfied by submitting to the FDIC a copy of the request as filed with such other regulatory authority provided that the request as filed with such authority substantially satisfies all of the information requirements of paragraph (d) of this section.

(4) *Form and content of application*—(i) *Form*. Applications filed pursuant to § 362.4(d) may be in letter form.

(ii) *Applications for consent to directly engage as principal in activities that are not permissible for a national bank*. Applications for consent to begin for the first time to directly engage as principal in any activity that is not permissible for a national bank, as well as applications for consent to continue to conduct as principal an activity in which a bank was engaged as of December 19, 1992 which is not permissible for a national bank, shall contain the following:

(A) A brief description of the activity, the manner in which it is or will be conducted, and the present and expected volume or level of the activity;

(B) A copy, if any, of the bank's feasibility study, financial projections and/or business plan regarding the conduct of the activity;

(C) A citation to the state statutory or regulatory authority for the conduct of the activity;

(D) A copy of the order or other document from the appropriate regulatory authority granting approval for the bank to conduct the activity if such approval is necessary and has already been granted;

(E) A copy of a resolution by the bank's board of directors or trustees authorizing the filing of the application;

(F) A brief description of the bank's policy and practice with regard to any present or anticipated involvement in the activity by a director, executive officer or principal shareholder of the bank or any related interest of such a person;

(G) A description of the bank's expertise in the activity; and

(H) Such other information as requested by the FDIC.

(iii) *Applications for consent to engage as principal through a majority-owned subsidiary in activities that are not permissible for a subsidiary of a national bank*. Applications for consent to begin for the first time to conduct, as principal, through a majority-owned subsidiary activities that are not permissible for a subsidiary of a national bank, as well as applications for consent for the bank's majority-owned subsidiary to continue to conduct, as principal, activities in which the bank's subsidiary was engaged as of

December 19, 1992 that are not permissible for a subsidiary of a national bank, shall contain the following information:

(A) The information described in paragraph (d)(4)(ii) of this section;

(B) The amount of the bank's existing and proposed investment in the subsidiary; and

(C) The bank's investment in other subsidiaries conducting the same type of activity.

(iv) If an insured state bank previously obtained consent for a majority-owned subsidiary to engage as principal in a particular activity, any subsequent request for consent for another subsidiary of the bank to engage as principal in the same activity may omit the information described in paragraph (d)(4)(ii) of this section.

(5) *Phase-out of activities for which consent to continue has been denied*—(i) *Direct activity*. If a request filed pursuant to paragraph (d) of this section for consent to continue the direct conduct of an activity is denied, the bank must cease the activity as soon as practicable but in no event later than one year from the denial unless the FDIC specifically sets a different time which may in the FDIC's sole discretion be longer than one year. The FDIC may condition or restrict the conduct of the activity during the phase-out period as is deemed necessary in order to protect the affected deposit insurance fund.

(ii) *Activity in a majority-owned subsidiary*. If a request filed pursuant to paragraph (d) of this section for consent to continue the conduct of an activity through a majority-owned subsidiary of the bank is denied, the bank must divest its equity investment in the subsidiary as quickly as prudently possible but in no event later than December 19, 1996. The bank shall file a divestiture plan in accordance with § 362.3(c)(3) no later than 60 days after the bank receives notice that consent was denied. In the alternative, the bank may choose to discontinue the activity rather than divest its equity investment in the subsidiary in which case the activity must be discontinued as soon as practicable but in no event later than one year from the denial unless the FDIC specifically sets a different time period which may, in the FDIC's sole discretion, be longer than one year. If the bank elects to discontinue the activity rather than to divest the subsidiary, the bank must notify the FDIC of that decision no later than 60 days after the bank receives notice that consent was denied. The notice must be in writing and should be filed with the appropriate FDIC regional office. If an insured state bank is denied consent to continue impermissible equity investments in real estate through a majority-owned subsidiary and the bank elects to discontinue those investments rather than divest the subsidiary, the period of time which the subsidiary shall have to divest the equity investments in real estate shall not extend beyond December 19, 1996. The FDIC may condition or restrict the conduct of any activity during the phase-out period as it deems necessary in order to protect the affected deposit insurance fund.

(e) *Disclosures.* Except as otherwise provided herein, any approval of an application filed pursuant to § 362.4(d) shall be subject to the condition that the bank and/or subsidiary shall provide any persons doing or about to do business with the bank and/or subsidiary written disclosure that the products, goods or services offered by the bank and/or subsidiary are not insured by the FDIC. If the products, goods or services are offered by a subsidiary of the bank, the disclosure must also indicate that the products, goods or services are not guaranteed by the bank and that only the assets of the subsidiary are available to satisfy the obligations of, or any contractual claims arising in connection with, the operation of the subsidiary. If the products, goods or services are offered by a department of the bank, the disclosure must indicate that only the assets of the department are available to satisfy the obligations of the department. Disclosures must occur prior to the time any contractual obligation to purchase any product, good or service arises; must be prominent; and must be clearly labeled ''customer disclosure''. If any communications from the bank to its depositors contain advertisements, promotions, or solicitations pertaining to the activities of the bank or its subsidiary which were approved pursuant

to §362.4(d) those communications must contain a disclosure that the products, goods or services are not insured by the FDIC. Disclosures will not be imposed under this part if state law or regulation establishes disclosure requirements which are substantially similar to those contained in this paragraph. Disclosure that the product, good or service is not an insured deposit will not be required if it is determined by the FDIC that the likelihood of confusing the product, good, or service with an insured deposit is minimal.

(f) *Conditions.* Approvals granted pursuant to §362.4(d) may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the bank and/or the deposit insurance funds from risk, to prevent unsafe or unsound banking practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance.

(g) *Conditions and restrictions applicable to insured state banks and/or their subsidiaries that engage in insurance underwriting activities excepted under §362.3(b)(7) or §362.4(c)(2)(i).* (1) No insured state bank may directly or indirectly through a subsidiary underwrite insurance pursuant to the exception contained in §362.3(b)(7) or §362.4(c)(2)(i) unless the following conditions and restrictions are met:

(i) Any insurance underwriting directly conducted by the bank must be done through a division of the bank that meets the definition of ''department'' contained in §362.2(h);

(ii) Any subsidiary that underwrites insurance must meet the definition of a ''bona fide subsidiary'' contained in §362.2(d); and

(iii) The disclosure requirements of §362.3(b)(3) and/or §362.4(c)(1)(iii) are met to the same extent as they would be applicable if the bank and/or its subsidiary were conducting savings bank life insurance activities.

(2) Any insured state bank or a subsidiary of an insured state bank that would be eligible for the exception in §362.3(b)(7) or §362.4(c)(2) but for the requirements of paragraphs (g)(1)(i) or (g)(1)(ii) of this section may continue to conduct the insurance underwriting activities provided that the requirements of paragraph (g)(1)(iii) of this section are met and provided that the requirements of paragraphs (g)(1)(i) and (g)(1)(ii) of this section are met no later than one year from December 8, 1993.

[58 FR 64484, Dec. 8, 1993]

§362.5 Notification of exempt insurance activities.

Any insured state bank that was lawfully underwriting insurance in a state on November 21, 1991, and any insured state bank that has a subsidiary that was lawfully underwriting insurance in a state on November 21, 1991, shall submit a notice to the regional director for the Division of Supervision for the region in which the bank's principal office is located not later than 60 days from December 9, 1992, if those insurance underwriting activities would not be permissible for a national bank or a subsidiary of a national bank. The notice requirement does not apply in the case of an insured state bank described in §362.3(b)(7)(ii). The notice shall contain the following information:

(a) The name of the bank and/or subsidiary:

(b) The state or states in which the bank and/or its subsidiary was underwriting insurance on November 21, 1991:

(c) A recitation of the authority for the bank or subsidiary to conduct insurance underwriting activities;

(d) A list of the types of insurance that the bank and/or subsidiary provided to the public as of November 21, 1991 in the state(s) identified in paragraph (b) of this section. For purposes of this list, various lines of insurance are considered to be distinct types of insurance.

[57 FR 53234, Nov. 9, 1992. Redesignated at 58 FR 64483, Dec. 8, 1993]

§362.6 Delegation of authority.

The authority to review and act upon divestiture plans submitted pursuant to §362.3(c)(2); the authority to approve or deny notices filed pursuant to §362.3(d); the authority to approve or deny applications pursuant to §362.3(b)(7)(ii); and the authority to approve or deny requests for consent pursuant to §362.4(d) as well as to take any other action authorized by §362.4(d) is

delegated to the Director of the Division of Supervision or the Director's designee.

[60 FR 31384, June 15, 1995]

PART 363—ANNUAL INDEPENDENT AUDITS AND REPORTING REQUIREMENTS

Sec.

363.0 OMB control number.
363.1 Scope.
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363.3 Independent public accountant.
363.4 Filing and notice requirements.
363.5 Audit committees.
APPENDIX A TO PART 363—GUIDELINES AND INTERPRETATIONS

AUTHORITY: 12 U.S.C. 1831m.

SOURCE: 58 FR 31335, June 2, 1993, unless otherwise noted.

§ 363.0 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget under OMB control number 3064–0113.

§ 363.1 Scope.

(a) *Applicability*. This part applies with respect to fiscal years of insured depository institutions which begin after December 31, 1992. This part does not apply with respect to any fiscal year of any insured depository institution, the total assets of which, at the beginning of such fiscal year, are less than $500 million.

(b) *Compliance by subsidiaries of holding companies.* (1) The audited financial statements requirement of §363.2(a) may be satisfied for an insured depository institution that is a subsidiary of a holding company by audited financial statements of the consolidated holding company.

(2) The other requirements of this part for an insured depository institution that is a subsidiary of a holding company may be satisfied by the holding company if:

(i) The services and functions comparable to those required of the insured depository institution by this part are provided at the holding company level; and

(ii) The insured depository institution has as of the beginning of its fiscal year:

(A) Total assets of less than $5 billion; or

(B) Total assets of $5 billion or more and a composite CAMEL rating of 1 or 2.

(3) The appropriate federal banking agency may revoke the exception in paragraph (b)(2) of this section for any institution with total assets in excess of $9 billion for any period of time during which the appropriate federal banking agency determines that the institution's exemption would create a significant risk to the affected deposit insurance fund.

[58 FR 31335, June 2, 1993, as amended at 61 FR 6493, Feb. 21, 1996]

§ 363.2 Annual reporting requirements.

(a) *Audited financial statements.* Each insured depository institution shall prepare annual financial statements in accordance with generally accepted accounting principles which shall be audited by an independent public accountant.

(b) *Management report.* Each insured depository institution annually shall prepare, as of the end of the institution's most recent fiscal year, a management report signed by its chief executive officer and chief accounting or chief financial officer which contains:

(1) A statement of management's responsibilities for preparing the institution's annual financial statements, for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and for complying with laws and regulations relating to safety and soundness which are designated by the FDIC and the appropriate federal banking agency; and

(2) Assessments by management of the effectiveness of such internal control structure and procedures as of the end of such fiscal year and the institution's compliance with such laws and regulations during such fiscal year.

§ 363.3 Independent public accountant.

(a) *Annual audit of financial statements.* Each insured depository institution shall engage an independent public accountant to audit and report on its

annual financial statements in accordance with generally accepted auditing standards and section 37 of the Federal Deposit Insurance Act (12 U.S.C. 1831n). The scope of the audit engagement shall be sufficient to permit such accountant to determine and report whether the financial statements are presented fairly and in accordance with generally accepted accounting principles.

(b) *Additional reports.* Such independent public accountant shall examine, attest to, and report separately on, the assertions of management concerning the institution's internal control structure and procedures for financial reporting. The accountant shall apply procedures agreed upon by the FDIC objectively to determine compliance by an insured depository institution with designated laws and regulations. The attestations shall be made in accordance with generally accepted standards for attestation engagements.

(c) *Notice by accountant of termination of services.* An independent public accountant performing an audit under this part who ceases to be the accountant for an insured depository institution shall notify the FDIC and the appropriate federal banking agency in writing of such termination within 15 days after the occurrence of such event, and set forth in reasonable detail the reasons for such termination.

§363.4 Filing and notice requirements.

(a) *Annual reporting.* Within 90 days after the end of its fiscal year, each insured depository institution shall file with each of the FDIC, the appropriate federal banking agency, and any appropriate state bank supervisor, two copies of:

(1) An annual report containing audited annual financial statements, the independent public accountant's report thereon, management's statements and assessments, and the independent public accountant's attestation report concerning the institution's internal control structure and procedures for financial reporting as required by §§363.2(a) and 363.3(a), 363.2(b), and 363.3(b) respectively; and

(2) The accountant's attestation concerning compliance with laws and regulations pursuant to § 363.3(b).

(b) *Public availability.* The annual report in paragraph (a)(1) of this section shall be available for public inspection.

(c) *Independent accountant's reports.* Each insured depository institution shall file with the FDIC, the appropriate federal banking agency, and any appropriate state bank supervisor, a copy of any management letter, qualification, or other report issued by its independent public accountant with respect to such institution and the services provided by such accountant pursuant to this part within 15 days after receipt.

(d) *Notice of engagement or change of accountants.* Each insured depository institution shall provide, within 15 days after the occurrence of any such event, written notice to the FDIC, the appropriate federal banking agency, and any appropriate state bank supervisor of the engagement of an independent public accountant, or the resignation or dismissal of the independent public accountant previously engaged. The notice shall include a statement of the reasons for any such event in reasonable detail.

[58 FR 31335, June 2, 1993, as amended at 61 FR 6493, Feb. 21, 1996]

§363.5 Audit committees.

(a) *Composition and duties.* Each insured depository institution shall establish an independent audit committee of its board of directors, the members of which shall be outside directors who are independent of management of the institution, and the duties of which shall include reviewing with management and the independent public accountant the basis for the reports issued under this part.

(b) *Committees of large institutions.* The audit committee of any insured depository institution that has total assets of more than $3 billion, measured as of the beginning of each fiscal year, shall include members with banking or related financial management expertise, have access to its own outside counsel, and not include any large customers of the institution. If a large institution is a subsidiary of a holding company and relies on the audit committee of the holding company to comply with this rule, the holding company audit committee shall not include any members

who are large customers of the subsidiary institution.

[58 FR 31335, June 2, 1993, as amended at 61 FR 6493, Feb. 21, 1996]

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INTRODUCTION

Congress added section 36, ''Early Identification of Needed Improvements in Financial Management'' (section 36), to the Federal Deposit Insurance Act (FDI Act) as part of the Federal Deposit Insurance Improvement Act of 1991, which became law on December 19, 1991.

The FDIC adopted 12 CFR part 363 of its rules and regulations (this part), effective July 2, 1993, to implement those provisions of section 36 that require rulemaking. Simultaneously, the FDIC Board of Directors approved these ''Guidelines and Interpretations'' (the Guidelines) and directed that they be published as an appendix to this part to facilitate a better understanding of, and full compliance with, the provisions of section 36.

The Guidelines were developed by the FDIC, in consultation with the other appropriate federal banking agencies, after careful consideration of the comments received on the proposed rule.

Although not contained in this part, some of the guidance offered restates or refers to statutory requirements of section 36 and is therefore mandatory. If that is the case, the statutory provision is cited. The FDIC continues to believe, as stated in its ''Statement of Policy Regarding Independent External Auditing Programs of State Nonmember Banks'' (Nov. 16, 1988), that every insured depository institution, regardless of its size or charter, should have an annual audit of its financial statements performed by an independent public accountant, and should establish an audit committee comprised entirely of outside directors.

The following Guidelines reflect the views of the FDIC concerning the interpretation of section 36. The Guidelines are intended to assist insured depository institutions (institutions), their boards of directors, and their advisors, including their independent public accountants and legal counsel, and to clarify section 36 and this part. It is recognized that reliance on the Guidelines may result in compliance with section 36 and this part which may vary from institution to institution. Terms which are not explained in the Guidelines have the meanings given them in this part, the FDI Act or professional accounting and auditing literature.

Scope of Rule (§363.1)

1. *Measuring Total Assets.* To determine whether this part applies, an institution should use total assets as reported on its

most recent Report of Condition (Call Report) or Thrift Financial Report (TFR), the date of which coincides with the end of its preceding fiscal year. If its fiscal year ends on a date other than the end of a calendar quarter, it should use its Call Report or TFR for the quarter end immediately preceding the end of its fiscal year.

2. *Insured Branches of Foreign Banks.* Unlike other institutions, insured branches of foreign banks are not separately incorporated or capitalized. To determine whether this part applies, an insured branch should measure claims on non-related parties reported on its Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (form FFIEC 002).

3. *Compliance by Holding Company Subsidiaries.* Audited consolidated financial statements and other reports or notices required by this part which are submitted by a holding company for any subsidiary institution, should be accompanied by a cover letter identifying all subsidiary institutions to which they pertain. An institution filing holding company consolidated financial statements as permitted by §363.1(b) also may report on changes in its independent public accountant on a holding company basis. An institution that does not meet the criteria in section 36(i) must satisfy the remaining provisions of the statute and this part on an individual institution basis, and maintain its own audit committee. Multi-tiered holding companies may satisfy all requirements of this part at any level.

4. *Comparable Services and Functions.* Services and functions will be considered ''comparable'' to those required by this part if the holding company:

(a) Prepares reports used by the subsidiary institution to meet the requirements of this part;

(b) Has an audit committee that meets the requirements of this part appropriate to its largest subsidiary institution; and

(c) Prepares and submits the management assessments of the effectiveness of the internal control structure and procedures for financial reporting (internal controls), and compliance with the Designated Laws defined in guideline 12 based on information concerning the relevant activities and operations of those subsidiary institutions within the scope of the rule.

ANNUAL REPORTING REQUIREMENTS (§363.2)

5. *Annual Financial Statements.* Each institution should prepare comparative annual consolidated financial statements (balance sheets, statements of income, changes in equity capital, and cash flows, with accompanying footnote disclosures) in accordance with generally accepted accounting principles (GAAP) for each of its two most recent fiscal years. Statements for the earlier year may be presented on an unaudited basis if the institution was not subject to this part for that year and audited statements were not prepared.

6. *Holding Company Statements.* Subsidiary institutions may file copies of their holding company's audited financial statements filed with the Securities and Exchange Commission (SEC) or prepared for their FR Y–6 Annual Report under the Bank Holding Company Act of 1956.

7. *Insured Branches of Foreign Banks.* An insured branch of a foreign bank should satisfy the financial statements requirement by filing one of the following for the two preceding fiscal years:

(a) Audited balance sheets, disclosing information about financial instruments with off-balance-sheet risk;

(b) Schedules RAL and L of form FFIEC 002, prepared and audited on the basis of the instructions for its preparation; or

(c) With written approval of the appropriate federal banking agency, consolidated financial statements of the parent bank.

8. *Management Report.* Management should perform its own investigation and review of the effectiveness of internal controls and compliance with the Designated Laws defined in guideline 12. Management also should maintain records of its determinations and assessments until the next federal safety and soundness examination, or such later date as specified by the FDIC or appropriate federal banking agency. Management should provide in its assessment of the effectiveness of internal controls and compliance with the Designated Laws, or supplementally, sufficient information to enable the accountant to report on its assertions. The management report of an insured branch of a foreign bank should be signed by the branch's managing official if the branch does not have a chief executive or financial officer.

9. *Safeguarding of Assets.* ''Safeguarding of assets'', as the term relates to internal control policies and procedures regarding financial reporting, and which has precedent in accounting literature, should be encompassed in the management report and the independent public accountant's attestation discussed in guideline 18. Testing the existence of and compliance with internal controls on the management of assets, including loan underwriting and documentation, represents a reasonable implementation of section 36. The FDIC expects such internal controls to be encompassed by the assertion in the management report, but the term ''safeguarding of assets'' need not be specifically stated. The FDIC does not require the accountant to attest to the adequacy of safeguards, but does require the accountant to

determine whether safeguarding policies exist.[1]

10. *Standards for Internal Controls.* Each institution should determine its own standards for establishing, maintaining and assessing the effectiveness of its internal controls.[2]

11. *Service Organizations.* Although service organizations should be considered in determining if internal controls are adequate, an institution's independent public accountant, its management, and its audit committee should exercise independent judgment concerning that determination. On-site reviews of service organizations may not be necessary to prepare the reports required by the Rule, and the FDIC does not intend that the Rule establish any such requirement.

12. *Compliance with Laws and Regulations.* The designated laws and regulations are the federal laws and regulations concerning loans to insiders and the federal and state laws and regulations concerning dividend restrictions, which are more specifically identified in Section I of the Agreed Upon Procedures referred to in guideline 19 (the Designated Laws).

ROLE OF INDEPENDENT PUBLIC ACCOUNTANT (§ 363.3)

13. *General Qualifications.* To provide audit and attest services to insured depository institutions, an independent public accountant should be registered or licensed to practice as a public accountant, and be in good standing, under the laws of the state or other political subdivision of the United States in which the home office of the institution (or the insured branch of a foreign bank) is located. As required by section 36(g)(3)(A)(i), the accountant must agree to provide copies of any workpapers, policies, and procedures relating to services performed under this part.

14. *Independence.* The independent public accountant also should be in compliance with the AICPA's *Code of Professional Conduct* and meet the independence requirements and interpretations of the SEC and its staff.

15. *Peer Reviews.* As required by section 36(g)(3)(A)(ii), the independent public accountant must have received, or be enrolled in, a peer review that meets acceptable guidelines. The following peer review guidelines are acceptable:

(a) The external peer review should be conducted by an organization independent of the accountant or firm being reviewed, as frequently as is consistent with professional accounting practices;

(b) The peer review should be generally consistent with AICPA standards[3]; and

(c) The review should include, if available, at least one audit of an insured depository institution or consolidated financial holding company. Peer review working papers are to be retained for 120 days after the peer review report is filed with the FDIC, and be made available to the FDIC upon request, in a form consistent with the SEC's agreement with the accounting profession.

16. *Filing Peer Review Reports.* Within 15 days of receiving notification that the peer review has been accepted, or before commencing any audit under this part, whichever is earlier, two copies of the peer review report, accompanied by any letter of comments and letter of response, should be filed by the independent public accountant with the FDIC, Registration and Disclosure Section, 550 17th Street NW., Washington, DC 20429, where they will be available for public

[1] It is management's responsibility to establish policies concerning underwriting and asset management and to make credit decisions. The auditor's role is to test compliance with management's policies relating to financial reporting.

[2] In considering what information is needed on safeguarding of assets and standards for internal controls, management may review guidelines provided by its primary federal regulator; the Federal Financial Institutions Examination Council's ''Supervisory Policy Statement on Securities Activities''; the FDIC's ''Statement of Policy Providing Guidance on External Auditing Procedures for State Nonmember Banks'' (Jan. 16, 1990), ''Statement of Policy Regarding Independent External Auditing Programs of State Nonmember Banks'' (Nov. 16, 1988), and Division of Supervision Manual of Examination Policies; the Federal Reserve Board's Commercial Bank Examination Manual and other relevant regulations; the Office of Thrift Supervision's Thrift Activities Handbook; the Comptroller of the Currency's Handbook for National Bank Examiners; standards published by professional accounting organizations, such as the American Institute of Certified Public Accountants' (AICPA) Statement on Auditing Standards No. 55, ''Consideration of the Internal Control Structure in a Financial Statement Audit''; the Committee of Sponsoring Organizations (COSO) of the Treadway Commission's *Internal Control—Integrated Framework*, including its addendum on safeguarding of assets; and other internal control standards published by the AICPA, other accounting or auditing professional associations, and financial institution trade associations.

[3] These would include Standards for Performing and Reporting on Peer Reviews, codified in the *SEC Practice Section Reference Manual*, and Standards for Performing and Reporting on Peer Reviews, contained in Volume 2 of the AICPA's *Professional Standards*.

inspection. Accountants may elect to file an annual list of their insured depository institution and holding company (identifying any subsidiary institutions subject to this part) audit clients in lieu of copies of peer review reports for each institution they have been engaged to audit. The FDIC has determined that such client lists are exempt from public disclosure. All corrective action required under any qualified peer review report should have been taken prior to commencing services under this part.

17. *Information to Independent Public Accountant.* Attention is directed to section 36(h) which requires institutions to provide specified information to their accountants. An institution also should provide its accountant with copies of any notice that the institution's capital category is being changed or reclassified under section 38 of the FDI Act, and any correspondence from the appropriate federal banking agency concerning compliance with this part.

18. *Attestation Reports.* The independent public accountant should provide the institution with an internal controls attestation report, a compliance with Designated Laws attestation report, and any management letter, at the conclusion of the audit as required by section 36(c)(1). If a holding company subsidiary relies on its holding company management report, the accountant may attest to and report on the management's assertions in one report, without reporting separately on each subsidiary covered by this part. One attestation report for compliance with the Designated Laws also may be filed, if all exceptions are listed and the respective institutions to which the exceptions apply are identified. The FDIC has determined that management letters and the Designated Laws attestation report are exempt from public disclosure.

19. *Procedures for Determining Compliance with Designated Laws.* In order to permit the independent public accountant to determine the extent of compliance with the Designated Laws defined in guideline 12 and the related assessment by management, the procedures set forth in schedule A (the Agreed Upon Procedures) to these Guidelines in this appendix should be applied. The accountant should require all management representations to be in writing, and take appropriate steps to determine that any sampling is reasonably representative. Attestation reports generally should identify all findings from application of the Agreed Upon Procedures which establish any items of non-compliance, note any absence of written policies, and disclose the reasons why any Agreed Upon Procedures were not performed.

20. *Reviews with Audit Committee and Management.* The independent public accountant should meet with the institution's audit committee to review the accountant's reports required by this part before they are filed. It also may be appropriate for the accountant to review its findings with the institution's board of directors and management.

21. *Notice of Termination.* The notice required by §363.3(c) should state whether the independent public accountant agrees with the assertions contained in any notice filed by the institution under §363.4(d), and whether the institution's notice discloses all relevant reasons.

22. *Reliance on Internal Auditors.* Nothing in this part or this appendix is intended to preclude the ability of the independent public accountant to rely on the work of an institution's internal auditor.

FILING AND NOTICE REQUIREMENTS (§363.4)

23. *Place for Filing.* Except for peer review reports filed pursuant to Guideline 16, all reports and notices required by, and other communications or requests made pursuant to, this part should be filed as follows:

(a) FDIC: Regional Director (Supervision) of the FDIC Regional Office in which the institution is headquartered;

(b) Office of the Comptroller of the Currency (OCC): appropriate OCC Supervisory Office;

(c) Federal Reserve: appropriate Federal Reserve Bank;

(d) Office of Thrift Supervision (OTS): appropriate OTS District Office; and

(e) State bank supervisor: the filing office of the appropriate state bank supervisor.

24. *Relief from Filing Deadlines.* Although the reasonable deadlines for filings and other notices established by this part are specified, some institutions may occasionally be confronted with extraordinary circumstances beyond their reasonable control that may justify extensions of a deadline. In that event, upon written application from an insured depository institution, setting forth the reasons for a requested extension, the FDIC or appropriate federal banking agency may, for good cause, extend a deadline in this part for a period not to exceed 30 days.

25. *Public Availability.* Each institution's annual report should be available for public inspection at its main and branch offices no later than 15 days after it is filed with the FDIC. Alternatively, an institution may elect to mail one copy of its annual report to any person who requests it. The annual report should remain available to the public until the annual report for the next year is available. An institution may use its annual report under this part to meet the annual disclosure statement required by 12 CFR 350.3, if the institution satisfies all other requirements of 12 CFR part 350.

26. *Independent Public Accountant's Reports.* Section 36(h)(2)(A) requires that, within 15 days of receipt by an institution of any management letter or other report, such letter or other report shall be filed with the FDIC, any appropriate federal banking agency, and any appropriate state bank supervisor. Institutions and their accountants are encouraged to coordinate preparation and delivery of audit and attestation reports and filing the annual report, to avoid duplicate filings.

27. *Notices Concerning Accountants.* Institutions should review and satisfy themselves as to compliance with the required qualifications set forth in guidelines 13–15 before engaging an independent public accountant. With respect to any selection, change or termination of an accountant, institutions should be familiar with the notice requirements in guideline 21, and should send a copy of any notice under §363.4(d) to the accountant when it is filed with the FDIC. An institution which files reports with its appropriate federal banking agency under, or is a subsidiary of a holding company which files reports with the SEC pursuant to, the Securities Exchange Act of 1934 may use its current report (*e.g.* SEC Form 8–K) concerning a change in accountant to satisfy the similar notice requirements of this part.

AUDIT COMMITTEES (§363.5)

28. *Composition.* The board of directors of each institution should determine if outside directors meet the requirements of section 36 and this part. At least annually, it should determine whether all existing and potential audit committee members are ''independent of management of the institution.'' If the institution has total assets in excess of $3 billion, the board also should determine whether members of the committee satisfy the additional requirements of this part. Because an insured branch of a foreign bank does not have a separate board of directors, the FDIC will not apply the audit committee requirements to such branch. However, any such branch is encouraged to make a reasonable good faith effort to see that similar duties are performed by persons whose experience is generally consistent with the Rule's requirements for an institution the size of the insured branch.

29. *''Independent of Management'' Considerations.* In determining whether an outside director is independent of management, the board should consider all relevant information. This would include considering whether the director:

(a) Is or has been an officer or employee of the institution or its affiliates;

(b) Serves or served as a consultant, advisor, promoter, underwriter, legal counsel, or trustee of or to the institution or its affiliates;

(c) Is a relative of an officer or other employee of the institution or its affiliates;

(d) Holds or controls, or has held or controlled, a direct or indirect financial interest in the institution or its affiliates; and

(e) Has outstanding extensions of credit from the institution or its affiliates.

30. *Lack of Independence.* An outside director should not be considered independent of management if such director is, or has been within the preceding year, an officer or employee of the institution or any affiliate, or owns or controls, or has owned or controlled within the preceding year, assets representing 10 percent or more of any outstanding class of voting securities of the institution.

31. *Holding Company Audit Committees.* When an insured depository institution subsidiary fails to meet the requirements for the holding company exception in §363.1(b)(2) or maintains its own separate audit committee to satisfy the requirements of this part, members of the independent audit committee of the holding company may serve as the audit committee of the subsidiary institution if they are otherwise independent of management of the subsidiary, and, if applicable, meet any other requirements for a large subsidiary institution covered by this part. However, this does not permit officers or employees of a holding company to serve on the audit committee of its subsidiary institutions. When the subsidiary institution satisfies the requirements for the holding company exception in §363.1(b)(2), members of the audit committee of the holding company should meet all the membership requirements applicable to the largest subsidiary depository institution and may perform all the duties of the audit committee of a subsidiary institution, even though such holding company directors are not directors of the institution.

32. *Duties.* The audit committee should perform all duties determined by the institution's board of directors. The duties should be appropriate to the size of the institution and the complexity of its operations, and include reviewing with management and the independent public accountant the basis for their respective reports issued under §§363.2(a) and (b) and 363.3(a) and (b). Appropriate additional duties could include:

(a) Reviewing with management and the independent public accountant the scope of services required by the audit, significant

accounting policies, and audit conclusions regarding significant accounting estimates;

(b) Reviewing with management and the accountant their assessments of the adequacy of internal controls, and the resolution of identified material weaknesses and reportable conditions in internal controls, including the prevention or detection of management override or compromise of the internal control system;

(c) Reviewing with management and the accountant the institution's compliance with laws and regulations;

(d) Discussing with management the selection and termination of the accountant and any significant disagreements between the accountant and management; and

(e) Overseeing the internal audit function.

It is recommended that audit committees maintain minutes and other relevant records of their meetings and decisions.

33. *Banking or Related Financial Management Expertise.* At least two members of the audit committee of a large institution shall have ''banking or related financial management expertise'' as required by section 36(g)(1)(C)(i). This determination is to be made by the board of directors of the insured depository institution. A person will be considered to have such required expertise if the person has significant executive, professional, educational, or regulatory experience in financial, auditing, accounting, or banking matters as determined by the board of directors. Significant experience as an officer or member of the board of directors or audit committee of a financial services company would satisfy these criteria.

34. *Large Customers.* Any individual or entity (including a controlling person of any such entity) which, in the determination of the board of directors, has such significant direct or indirect credit or other relationships with the institution, the termination of which likely would materially and adversely affect the institution's financial condition or results of operations, should be considered a ''large customer'' for purposes of §363.5(b).

35. *Access to Counsel.* The audit committee should be able to retain counsel at its discretion without prior permission of the institution's board of directors or its management. Section 36 does not preclude advice from the institution's internal counsel or regular outside counsel. It also does not require retaining or consulting counsel, but if the committee elects to do either, it also may elect to consider issues affecting the counsel's independence. Such issues would include whether to retain or consult only counsel not concurrently representing the institution or any affiliate, and whether to place limitations on any counsel representing the institution concerning matters in which such counsel previously participated personally and substantially as outside counsel to the committee.

36. *Forming and Restructuring Audit Committees.* Audit committees should be formed within four months of the effective date of this part. Some institutions may have to restructure existing audit committees to comply with this part. No regulatory action will be taken if institutions restructure their audit committees by the earlier of their next annual meeting of stockholders, or one year from the effective date of this part.

OTHER

37. *Modifications of Guidelines.* The FDIC Board of Directors has delegated to the Director of the FDIC's Division of Supervision authority to make and publish in the FEDERAL REGISTER minor technical amendments to the Guidelines in this appendix (including the attached Agreed Upon Procedures in Schedule A to this appendix), in consultation with the other appropriate federal banking agencies, to reflect the practical experience gained from implementation of this part. It is not anticipated any such modification would be effective until affected institutions have been given reasonable advance notice of the modification. Any material modification or amendment will be subject to review and approval of the FDIC Board of Directors.

SCHEDULE A TO APPENDIX A—AGREED UPON PROCEDURES FOR DETERMINING COMPLIANCE WITH DESIGNATED LAWS

1. The Agreed Upon Procedures set forth in this schedule are referred to in guideline 19. They should be followed by the institution's independent public accountant (or, with respect to the procedures set forth in section I of this schedule, by the institution's internal auditor if the accountant is to perform the procedures set forth in section II) in order to permit the accountant to report on the extent of compliance with the Designated Laws (defined in guideline 12) as required by sections 36(e)(1) and (2). Unless otherwise stated, the date of any required representation should be the same as the date of the attestation report and the representation should provide information to the extent available as of that date.

2. For purposes of this Schedule A, ''insiders'' means directors, executive officers, and principal shareholders, and includes their related interests. All terms not defined in this schedule have the meanings given them in this part, the Guidelines, and professional accounting and auditing literature.

3. Additional guidance concerning the role of the institution, its internal auditor, and its independent public accountant in assessing the institution's compliance with the Designated Laws is set forth in the Guidelines.

Section I—Procedures for Individual Institutions

The following procedures should be performed by the institution's independent public accountant in accordance with generally accepted standards for attestation engagements, or by the institution's internal auditor if the procedures set forth in section II of this schedule are to be performed by the independent public accountant. (See section II.B.3. for information concerning testing by the independent public accountant when the institution's internal auditor is performing the procedures in Section I.)

A. *Loans to Insiders.* To the extent permitted by §363.1(b)(2), these procedures may be performed on a holding company basis rather than at each covered subsidiary insured depository institution.

1. *Designated Laws.* The following federal laws and regulations (Designated Insider Laws), to the extent that they are applicable to the institution,[1] should be read:

a. Laws: 12 U.S.C. 375a, 375b, 1468(b), 1828(j)(2), and 1828(j)(3)(B); and

b. Regulations: 12 CFR 23.5, 31, 215, 337.3, 349.3, and 563.43.

2. *General.*

a. *Information.* Obtain from management of the institution the following information for the institution's fiscal year:[2]

(1) Management's assessment of compliance with the Designated Insider Laws;

(2) All minutes (including minutes drafted, but not approved) of the meetings of the board and of those committees of the board which management represents have been delegated authority pertaining to insider lending;

(3) The relevant portions of reports of examination, supervisory agreements, and enforcement actions issued by the institution's primary federal and state regulators, if applicable, which management represents contain information pertaining to insider lending;

(4) The annual survey which identifies all insiders of the institution (pursuant to 12 CFR 215.8(b)) or other records maintained on insiders of the institution's affiliates (pursuant to 12 CFR 215.8(c));

(5) The relevant portions of the following Securities Exchange Act of 1934 filings, which management represents contain information pertaining to insider lending:

(a) Forms 10–K, 10–Q, and 8–K and proxy statements (or information statements) filed with the SEC, Federal Reserve Board, OCC, or OTS, or

(b) Forms F–2, F–3, and F–4 and proxy statements (or information statements), filed with the FDIC;

(6) A list of loans, including overdrafts of executive officers and directors,[3] and other extensions of credit to insiders (including their related interests) outstanding at any time during the fiscal year (and which identifies those extensions granted during the year). This list should also include the amount outstanding of each extension

[1] The laws and regulations applicable to each type of institution are listed in Table 1 of this Schedule A to Appendix A.

[2] If the institution chooses to have these procedures performed using its most recently filed Call Report rather than its year end Call Report, all references to ''fiscal year'' in these procedures shall mean the period beginning with the latest Call Report date for which these procedures were performed in the prior year and ending with the date of the most recently filed Call Report. If these procedures were not previously performed, the 12 month period immediately preceding the date of the most recently filed Call Report (or such shorter period during which the institution was covered by this Part 363) should be used.

[3] Management may exclude from this list overdrafts of an executive officer or director in an aggregate amount of $1,000 or less without overdraft protection and those of $5,000 or less with overdraft protection as specified in 12 CFR 215.3(b)(6) if management provides the independent accountant with a representation that policies and procedures are in effect to report as extensions of credit all overdrafts that do not meet the criteria listed in paragraphs A.8.a.(2)(a) through (c) of this section.

of credit as of the date of the most recently filed Call Report or TFR (Insider Extensions List); and

(7) Management's representation concerning:

(a) The completeness of the Insider Extensions List;[4] and

(b) The inclusion of all required insiders on the annual survey obtained in paragraph A.2.a.(4) of this section including persons who have been designated as executive officers by resolution of the board or a committee of the board or in the by-laws of the institution.

b. *Procedures:*

(1) Read the foregoing information.

(2) Trace and agree a sample of insider loans and other extensions of credit disclosed in the documents listed in paragraphs A.2.a.(2) through (5) of this section to see that they are included on the Insider Extensions List.

3. *Policies and Procedures.*

a. *Information.* Obtain the institution's written policies and procedures concerning its compliance with the Designated Insider Laws, including any written ''Code of Ethics'' or ''Conflict of Interest'' policy statements. If the institution has no written policies and procedures, obtain a narrative from management that describes the methods for complying with such laws and regulations, and includes provisions similar to those listed in paragraph A.3.b. of this section.

b. *Procedures.* Ascertain that the policies and procedures include, or incorporate by reference, provisions consistent with the Designated Insider Laws for:

(1) Defining terms;

(2) Restricting loans to insiders;

(3) Maintaining records of insider loans;

(4) Requiring reports and/or disclosures by the institution and by executive officers, directors, and principal shareholders (and their related interests);

(5) Disseminating policy information to employees and insiders; and

(6) Prior approval of the board of directors.

4. *Calculations of Lending Limits.*

a. *Information.* Obtain management's calculation of the following items as of the date of the institution's most recently filed Call Report or TFR and as of a Call Report or TFR date six or nine months earlier:

(1) The institution's unimpaired capital and surplus (the aggregate lending limit for all insiders); and

(2) The institution's individual lending limit (12 CFR 215.2(i)).

b. *Procedures.* Recalculate the amounts in paragraph A.4.a. of this section for mathematical accuracy, and trace the amounts used in management's calculations to the Call Reports or TFRs for the two dates used in paragraph A.4.a. of this section.

5. *Insider Extensions of Credit Granted.*

a. *Information.* Obtain management's representation regarding whether the terms and creditworthiness of insider extensions of credit granted during the fiscal year are comparable to those that would have been available to unaffiliated third parties.

b. *Procedures.* Select a sample of insiders who were granted or had outstanding extensions of credit during the fiscal year from the Insider Extensions List. For each extension of credit granted during the fiscal year to each insider in the sample selected:

(1) If the amount of a credit granted during the year (when aggregated with all other extensions of credit to that person and to all related interests of that person) exceeds $500,000, determine whether the minutes of the meetings of the board of directors indicate that:

(a) The credit was approved in advance by the board, and

(b) The insider, if a director, abstained from participating directly or indirectly in voting on the transaction;

(2) Obtain management's calculation of the institution's individual lending limit for insiders pursuant to 12 CFR 215.2(i) as of the date of the Call Report or TFR filed immediately prior to the date when the extension of credit was granted, and if not already done under paragraph A.4.b. of this section, recalculate the lending limits for mathematical accuracy, and trace the amounts used in management's calculations to the Call Report or TFR for that date. Ascertain whether the amount of the extension of credit being

[4] See footnote 3 of this schedule.

granted to the insider, when combined with all other extensions of credit to that insider, exceeds such limit; and

(3) For one transaction involving each insider in the sample selected in paragraph A.5.b. of this section, perform the procedures in either paragraph (a) or (b) as follows:

(a) Select three (or such smaller number that exists) similar extensions of credit (e.g., commercial real estate loans, floor plan loans, residential mortgage loans, consumer loans) granted to unaffiliated borrowers (i.e., persons who are not insiders or employees of the institution or its affiliates) within 90 days before or after the granting of the insider extension of credit. Compare the terms of the transactions with unaffiliated borrowers (i.e., rate or range of interest rates, maturity, payment terms, collateral, and any unusual provisions or conditions) to those with the insiders, and note in the findings any differences in the terms favorable to the insiders compared to the terms of the transactions with unaffiliated borrowers.

(b) Alternatively, compare the terms of each insider transaction in the sample to approved policies delineating the interest rate and other terms and conditions then in effect for similar extensions of credit to unaffiliated borrowers. Note in the findings any differences in the terms favorable to the insiders compared to the terms of the approved policies for an extension of credit to persons not affiliated with the institution or its affiliates.

6. *Limitation on Extensions of Credit to Executive Officers.*

a. *Information.* From the sample selected in paragraph A.5.b. of this section, select the executive officers who were granted extensions of credit during the fiscal year.

b. *Procedures.*

(1) For each executive officer selected, obtain management's calculation as of the two dates used in paragraph A.4.a. of this section of:

(a) The aggregate amount of extensions of credit to the executive officer, and

(b) 2.5 percent of the institution's unimpaired capital and surplus.

(2) Recalculate management's computations from paragraph A.6.b.(1) of this section for mathematical accuracy. Trace amounts used in management's computations from paragraph A.6.b.(1) to the Call Reports or TFRs for the two dates used in paragraph A.4.a. of this section.

(3) Ascertain whether the aggregate amount of the extensions of credit to the executive officer does not exceed the greater of $25,000 or 2.5 percent of the institution's unimpaired capital and surplus, but in no event more than $100,000. The aggregate amount should exclude the types of extensions of credit set forth in 12 CFR 215.5(c)(1) through (3).

(4)(a) Obtain documentation for any credits for which management represents that:

(i) The purpose is for the purchase, construction, maintenance, or improvement of the executive officer's residence;

(ii) The credit is secured by a first lien on the residence; and

(iii) The executive officer owns or expects to own the residence after the extension of credit.

(b) Note whether the documentation contains similar representations.

(5) For each executive officer selected, ascertain that each extension of credit granted during the fiscal year was:

(a) Preceded by submission of financial statements;

(b) Approved by, or, when appropriate, promptly reported to, the board of directors no later than the next board meeting; and

(c) Made subject to the written condition that the extension of credit will become, at the option of the institution, due and payable at any time that the executive officer is indebted to other insured institutions in an aggregate amount greater than the executive officer would be able to borrow from the institution.

7. *Aggregate Insider Extensions of Credit Outstanding.*

a. *Information.* Obtain management's calculation of the aggregate extensions of credit to executive officers, directors, and principal shareholders of the institution and to their related interests, excluding the types of extensions of credit set forth in 12 CFR 215.4(d)(3),

as of the two dates selected in paragraph A.4.a. of this section.

b. *Procedures.*

(1) Recalculate the amounts obtained in paragraph A.7.a. of this section for mathematical accuracy and ascertain that this total, excluding the types of extensions of credit set forth in 12 CFR 215.4(d)(3), is less than or equal to 100 percent of the institution's unimpaired capital and surplus calculated in paragraph A.4.a.(1) of this section.

(2) Using the sample of insiders selected in paragraph A.5.b. of this section, trace and agree amounts outstanding from insiders in the sample to the supporting documents, as applicable, for the line item aggregating indebtedness of all insiders on the institution's most recently filed Call Report or TFR.

8. *Overdrafts.*

a. *Information.* Select a sample of executive officers and directors who had overdrafts outstanding during the fiscal year as shown on the Insider Extensions List.

(1) For all overdrafts in the sample except those which are covered by an overdraft protection line of credit with the same terms as available to unaffiliated borrowers and meet the terms of that overdraft protection line, obtain management's representation of the history of the insider's overdrafts for the year and the completeness of that history.

(2) If the institution's management has *not* provided a representation as specified by footnote 3 to paragraph A.2.a.(6) of this section, for each overdraft in the sample in an aggregate amount of $1,000 or less for an executive officer or director who did not have the overdraft covered by an overdraft protection line of credit, obtain management's representation that:

(a) It believes the overdraft was inadvertent;

(b) The account was overdrawn in each case for no more than 5 business days; and

(c) The institution charged the executive officer or director the same fee that it would charge any other customer in similar circumstances.

b. *Procedures.* For each overdraft in the sample selected and used in paragraph A.8.a.(1) of this section for which management did not provide the representation in paragraph A.8.a.(2) of this section:

(1) Inquire whether cash items for the insider were being held by the institution during the time that the overdraft was outstanding to prevent additional overdrafts;

(2) Trace and agree subsequent payment by the insider of the insider's overdrafts to records of the account at the institution; and

(3) For overdrafts of executive officers and directors that were paid by the institution for the executive officer or director from an account at the institution:

(a) Trace and agree to a written, preauthorized, interest-bearing extension of credit plan that specifies a method of repayment; or

(b) Trace and agree to a written, preauthorized transfer of funds from another account of the insider at the institution.

9. *Reports on Indebtedness to Correspondent Banks.*

a. *Information.* Obtain from management:

(1) A list of executive officers and principal shareholders and related interests thereof that filed reports of indebtedness to a correspondent bank. This list should be prepared by management from reports of indebtedness submitted for the calendar year for which the management assessment and independent public accountant's attestation are being filed or, if the institution is on a calendar year fiscal year, at management's option, for the immediately preceding year. If the institution is not on a calendar year fiscal year, the list should be prepared for the calendar year that ended during its fiscal year; and

(2) Its representation concerning the completeness of the list prepared for paragraph A.9.a.(1) of this section.

b. *Procedures.* Select a sample of executive officers, principal shareholders, and related interests thereof from the list obtained in paragraph A.9.a.(1) of this section. For each executive officer and principal shareholder (or related interest thereof) included in the sample, ascertain that the report(s) of indebtedness was (were) filed with the board of directors (on or before the

January 31 following the calendar year in paragraph A.9.a.(1) of this section) and that such report(s) state(s):

(1) The maximum amount of indebtedness during that calendar year;

(2) The amount of indebtedness outstanding 10 days prior to report filing; and

(3) A description of the loan terms and conditions, including the rate or range of interest rates, original amount and date, maturity date, payment terms, collateral, and any unusual terms or conditions.

B. *Dividend Restrictions.* If the institution has declared any dividends during the fiscal year, the following procedures should be performed for each dividend declared. (These procedures are not applicable to mutual institutions and insured branches of foreign banks.) For an institution that is a subsidiary of a holding company, the procedures that follow should be applied to each subsidiary institution subject to this part (covered subsidiary) because the laws and regulations restricting dividends apply to individual institutions and not holding companies. However, if the annual report under Part 363 is being prepared on a holding company basis and the holding company has more than five covered subsidiaries, the following procedures may be applied to a sample of dividend declarations to the extent permitted by §363.1(b) and Section II.B.3. of this schedule.

1. *Designated Laws.* The following federal laws and regulations (Designated Dividend Laws), to the extent that they are applicable to the institution (see paragraph B.2 of this section),[5] should be read:

a. Laws: 12 U.S.C. 56, 60, 1467a(f), 1831o; and

b. Regulations: 12 CFR 5.61, 5.62, 6.6, 7.6120, 208.19, 208.35, 325.105, 563.134, and 565.

2. *General.* The information requirements and procedures in paragraphs B.2. through B.5. of this section are applicable to all institutions. Paragraphs B.6. and B.7. of this section were designed to be applicable to member banks (i.e., national banks and state member banks) and federally-chartered savings associations, respectively. However, the requirements in paragraphs B.6. and B.7. of this section should be applied to a state nonmember bank or state savings association if management represents that the state has dividend restrictions substantially identical to those for a national bank or a federally-chartered savings association.

a. *Information.* Obtain from management of the institution the following information for the institution's most recent fiscal year:

(1) Its assessment of the institution's compliance with the Designated Dividend Laws and any applicable state laws and regulations cited in its assessment;

(2) A copy of any supervisory agreements with, orders by, or resolutions of any regulatory agency (including a description of the nature of any such agreements, orders, or resolutions) containing restrictions on dividend payments by the institution; and

(3) Its representation whether dividends declared comply with any restrictions on dividend payments under any supervisory agreements with, orders by, or resolutions of any regulatory agency (including a description of the nature of any such agreements, orders, or resolutions).

b. *Procedures.*

(1) Read the foregoing information.

(2) If any restrictions on dividend payments exist in any documents obtained in paragraph B.2.a.(2) of this section, test and agree dividends declared with any such quantitative restrictions.

3. *Policies and Procedures.*

a. *Information.* Obtain the institution's written policies and procedures concerning its compliance with the Designated Dividend Laws. If the institution has no written policies and procedures, obtain from the institution a narrative that describes the institution's methods for complying with the Designated Dividend Laws, and includes provisions similar to those in paragraph B.3.b of this section.

b. *Procedures.* Ascertain whether the policies and procedures include, or incorporate by reference, provisions

[5] The laws and regulations applicable to each type of institution are listed in Table 2 of this Schedule A to Appendix A.

which are consistent with the Designated Dividend Laws. These would include capital limitation tests, including section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o), earnings limitation tests, transfers from surplus to undivided profits, and restrictions imposed under any supervisory agreements, resolutions, or orders of any federal or state depository institution regulatory agency. In addition, for savings associations, this would include prior notification to the OTS.

4. *Board Minutes.*

a. *Information.* Obtain the minutes of the meetings of the board of directors for the most recent fiscal year to ascertain whether dividends (either paid or unpaid) have been declared.

b. *Procedures.* Trace and agree total dividend amounts to the general ledger records and the institution's most recently filed Call Report or TFR.

5. *Calculation of Undercapitalization.*

a. *Information.* Obtain management's computation of the amount at which declaration of a dividend would cause the institution to be undercapitalized as of the quarter end (or more recent month end, if available from management) immediately prior to the date on which each dividend was declared during the fiscal year.

b. *Procedures.* Recalculate management's computation (for mathematical accuracy) and compare management's calculations to the amount of any dividend declared to determine whether it exceeded the amount.

6. *Dividends Declared by Banks.*

a. *Information.* If the institution is a national bank or state member bank, obtain management's computations concerning the bank's compliance with 12 U.S.C. 56, ''Capital Limitation Test'', 12 U.S.C. 60, ''The Earnings Limitation Test'', and transfers from surplus to undivided profits after declaration of the dividends referenced in paragraph B.4.a. of this section. If the institution is a state nonmember bank and management represents that the bank is subject to state laws that are similar to 12 U.S.C. 56 and 12 U.S.C. 60, obtain management's corresponding computations.

b. *Procedures.* Recalculate management's computations (for mathematical accuracy) and compare management's calculations to the standards defined in the tests set forth in paragraph B.6.a. of this section to ascertain whether the dividends declared fall within the permissible levels under these standards. If dividends are not permissible in the amounts declared under such standards, the independent public accountant should ascertain that the dividends were declared with the approval of the appropriate federal banking agency or under any other exception to the standards.

7. *Dividends Declared by Savings Associations.*

a. *Information.* Obtain management's documentation of the OTS determination whether the institution is a Tier 1, Tier 2, or Tier 3 savings association and management's computations of its capital ratio after declarations of dividends under the Tier determined by the OTS. For dividends declared, obtain copies of the savings association's notifications to the OTS to ascertain whether notifications were made at least 30 days before payment of any dividends.

b. *Procedures.* Recalculate management's computations (for mathematical accuracy) and trace amounts used by management in its calculations to the institution's TFRs.

Section II—Procedures for the Independent Public Accountant

If the internal auditor has performed the procedures set forth in section I for either or both Designated Laws, the following procedures may be performed by the independent public accountant if neither the FDIC nor the appropriate federal banking agency has objected in writing. The report of procedures performed and list of exceptions found by the internal auditor, identifying the institution with respect to which any exception was found, should be submitted to the audit committee of the board of directors. Management should file a summary of the internal auditor's findings and management's response to those findings with the FDIC and the appropriate federal banking agency at

the same time as the independent public accountant's attestation report is filed.[6]

A. *Review of Section I Procedures.* Read the portion(s) of Section I of this schedule that set forth the procedures performed by the internal auditors.

B. *Information and Procedures.* Perform the following procedures:

1. *Designated Laws.* Read the Designated Laws referred to in Section I of this schedule for the agreed-upon procedures performed by the internal auditor. Obtain management's assessment contained in its management report on the institution's or holding company's compliance with the Designated Laws.

2. *Internal Auditor's Workpapers.*

a. *Information.* If an internal auditor performed the procedures in Section I, obtain the internal auditor's workpapers documenting the performance of those procedures on the institution and the chief internal auditor's representation that:

(1) The internal auditor or audit staff, if applicable, performed the procedures listed in section I on the institution;

(2) The internal auditor tested a sufficient number of transactions governed by the Designated Laws so that the testing was representative of the institution's volume of transactions;

(3) The workpapers accurately reflect the work performed by the internal auditor and, if applicable, the internal audit staff;

(4) The workpapers obtained are complete; and

(5) The internal auditor's report, which describes the procedures performed for the fiscal year as well as the internal auditor's findings and exceptions noted, has been presented to the institution's audit committee.

b. *Procedures.*

(1) Compare the workpapers to the procedures that are required to be performed under section I. Report as an exception any procedures not documented and any procedures for which the sample size is not sufficient.

(2) Compare the exceptions and errors listed by the internal auditor in its report to the audit committee to those found in the workpapers, and report as an exception any exception or error found in the internal auditor's workpapers and not listed in the internal auditor's list of exceptions.

3. *Testing.*

a. The independent public accountant should perform the procedures listed in Section I on representative samples of the insiders and/or transactions of the institution to which the Designated Law applies. If the institution's internal auditor performs the procedures in Section I, the samples tested by the independent public accountant should be at least 25 percent of the size of the samples tested by the internal auditor although samples selected by the accountant should be from the population at large. However, if there are so few transactions in any area that the internal auditor cannot use sampling, but must test all transactions, the independent public accountant should also test all transactions.

b. If testing under this Schedule A to Appendix A is being performed on a holding company with more than one subsidiary institution that is subject to this Part 363, the samples tested should include a combination of insiders and transactions from each covered subsidiary with total assets (after deductions of intercompany amounts that would be eliminated in consolidation) in excess of 25 percent of the holding company's total assets every fiscal year. Samples should be tested for each smaller covered subsidiary at least every other fiscal year unless the holding company has more than eight covered subsidiaries, in which case the samples to be tested for each Designated Law should be drawn from each smaller covered subsidiary at least every third fiscal year.

4. *Reports Concerning Holding Companies.* Only one report of any exceptions noted from application of the procedures in section II performed by the independent public accountant should be filed as required by guideline 3 in Appendix A to this Part 363, but the report should identify, for each exception

[6] Since this summary provides information similar to that provided in the independent public accountant's report, the FDIC has determined that the summary is exempt from public disclosure consistent with the guidance in Guideline 18 in Appendix A to this Part 363.

or error noted, the identity of the covered subsidiary to which it relates.

TABLES TO SCHEDULE A TO APPENDIX A

TABLE 1

	Loans to insiders	For engagements involving management assertions about compliance by:			
		National banks	State member banks	State nonmember banks	Savings associations
Read the following parts and/or sections of Title 12 of the United States Code:					
375a	Loans to Executive Officers of Banks	√	√	√—Subsections (g) and (h) only	
375b	Prohibitions Respecting Loans and Extensions of Credit to Executive Officers and Directors of Banks, Political Campaign, Committees, etc.	√	√		
1468(b)	Extensions of Credit to Executive Officers, Directors, and Principal Shareholders.				√
1828(j)(2)	Provisions Relating to Loans, Extensions of Credit, and Other Dealings Between Member Banks and Their Affiliates, Executive Officers, Directors, etc.			√	
1828(j)(3)(B)	Extensions of Credit Applicability of Provisions Relating to Loans, Extensions of Credit, and Other Dealings Between Insured Branches of Foreign Banks and Their Insiders.	√ Applies only to insured federal branches of foreign banks.		√ Applies only to insured state branches of foreign banks.	
Read the following parts and/or sections of Title 12 of the Code of Federal Regulations:					
23.5	Application of Legal Lending Limits; Restrictions on Transactions With Affiliates.	√			
31	Extensions of Credit to National Bank Insiders	√			
215	Subpart A—Loans by Member Banks to Their Executive Officers, Directors, and Principal Shareholders.	√	√	(See 12 CFR Parts 337.3 and 349.3).	(See 12 CFR Parts 563.43)
	Subpart B—Reports of Indebtedness of Executive Officers and Principal Shareholders of Insured Nonmember Banks.	√	√		
337.3	Limits on Extensions of Credit to Executive Officers, Directors, and Principal Shareholders of Insured Nonmember Banks.			√	
349.3	Reports by Executive Officers and Principal Shareholders			√	
563.43	Loans by Savings Associations to Their Executive Officers, Directors, and Principal Shareholders.				√

TABLE 2

	Dividend restrictions	For engagements involving management assertions about compliance by:			
		National banks	State member banks	State nonmember banks	Savings associations
Read the following parts and/or sections of Title 12 of the United States Code:					
56	Prohibition of Withdrawal of Capital and Unearned Dividends	√	√		
60	Dividends and Surplus Funds	√	√		
1467a(f)	Declaration of Dividends				√
1831o	Prompt Corrective Action—Dividend Restrictions	√	√	√	√

Read the following parts and/or sections of Title 12 of the Code of Federal Regulations:					
5.61	Payment of dividends; capital limitation	√			
5.62	Payment of dividends; earnings limitation	√			
6.6	Prompt Corrective Action—Dividend Restrictions	√			
7.6120	Dividends Payable in Property Other Than Cash	√			
208.19	Payments of Dividends		√		
208.35	Prompt Corrective Action		√		
325.105	Prompt Corrective Action			√	
563.134	Capital Distributions				√
565	Prompt Corrective Action				√

[58 FR 31335, June 2, 1993, as amended at 61 FR 6494, Feb. 21, 1996]

PART 364—STANDARDS FOR SAFETY AND SOUNDNESS

Sec.
364.100 Purpose.
364.101 Standards for safety and soundness.
APPENDIX A TO PART 364—Interagency Guidelines Establishing Standards for Safety and Soundness

AUTHORITY: 12 U.S.C. 1819 (Tenth), 1831p–1.

SOURCE: 60 FR 35685, July 10, 1995, unless outherwise noted.

§ 364.100 Purpose.

Section 39 of the Federal Deposit Insurance Act requires the Federal Deposit Insurance Corporation to establish safety and soundness standards. Pursuant to section 39, this part establishes safety and soundness standards by guideline.

§ 364.101 Standards for safety and soundness.

The Interagency Guidelines Establishing Standards for Safety and Soundness prescribed pursuant to section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p-1), as set forth as appendix A to this part apply to all insured state nonmember banks and to state-licensed insured branches of foreign banks, that are subject to the provisions of section 39 of the Federal Deposit Insurance Act.

APPENDIX A TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING STANDARDS FOR SAFETY AND SOUNDNESS

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I. Introduction

i. Section 39 of the Federal Deposit Insurance Act[1] (FDI Act) requires each Federal banking agency (collectively, the agencies) to establish certain safety and soundness standards by regulation or by guideline for all insured depository institutions. Under section 39, the agencies must establish three types of standards: (1) Operational and managerial standards; (2) compensation standards; and (3) such standards relating to asset quality, earnings, and stock valuation as they determine to be appropriate.

ii. Section 39(a) requires the agencies to establish operational and managerial standards relating to: (1) Internal controls, information systems and internal audit systems, in accordance with section 36 of the FDI Act (12 U.S.C. 1831m); (2) loan documentation; (3) credit underwriting; (4) interest rate exposure; (5) asset growth; and (6) compensation, fees, and benefits, in accordance with subsection (c) of section 39. Section 39(b) requires the agencies to establish standards relating to asset quality, earnings, and stock valuation that the agencies determine to be appropriate.

iii. Section 39(c) requires the agencies to establish standards prohibiting as an unsafe and unsound practice any compensatory arrangement that would provide any executive officer, employee, director, or principal shareholder of the institution with excessive compensation, fees or benefits and any compensatory arrangement that could lead to material financial loss to an institution. Section 39(c) also requires that the agencies establish standards that specify when compensation is excessive.

iv. If an agency determines that an institution fails to meet any standard established by guideline under subsection (a) or (b) of section 39, the agency may require the institution to submit to the agency an acceptable plan to achieve compliance with the standard. In the event that an institution fails to submit an acceptable plan within the time

[1] Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) was added by section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, 105 Stat. 2236 (1991), and amended by section 956 of the Housing and Community Development Act of 1992, Pub. L. 102–550, 106 Stat. 3895 (1992) and section 318 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325, 108 Stat. 2160 (1994).

allowed by the agency or fails in any material respect to implement an accepted plan, the agency must, by order, require the institution to correct the deficiency. The agency may, and in some cases must, take other supervisory actions until the deficiency has been corrected.

v. The agencies have adopted amendments to their rules and regulations to establish deadlines for submission and review of compliance plans.[2]

vi. The following Guidelines set out the safety and soundness standards that the agencies use to identify and address problems at insured depository institutions before capital becomes impaired. The agencies believe that the standards adopted in these Guidelines serve this end without dictating how institutions must be managed and operated. These standards are designed to identify potential safety and soundness concerns and ensure that action is taken to address those concerns before they pose a risk to the deposit insurance funds.

A. *Preservation of Existing Authority*

Neither section 39 nor these Guidelines in any way limits the authority of the agencies to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. Action under section 39 and these Guidelines may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the agencies. Nothing in these Guidelines limits the authority of the FDIC pursuant to section 38(i)(2)(F) of the FDI Act (12 U.S.C. 1831(o)) and Part 325 of Title 12 of the Code of Federal Regulations.

B. *Definitions*

1. *In general.* For purposes of these Guidelines, except as modified in the Guidelines or unless the context otherwise requires, the terms used have the same meanings as set forth in sections 3 and 39 of the FDI Act (12 U.S.C. 1813 and 1831p–1).

2. *Board of directors,* in the case of a state-licensed insured branch of a foreign bank and in the case of a federal branch of a foreign bank, means the managing official in charge of the insured foreign branch.

3. *Compensation* means all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

4. *Director* shall have the meaning described in 12 CFR 215.2(c).[3]

5. *Executive officer* shall have the meaning described in 12 CFR 215.2(d).[4]

6. *Principal shareholder* shall have the meaning described in 12 CFR 215.2(*l*).[5]

II. Operational and Managerial Standards

A. *Internal controls and information systems.* An institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities and that provide for:

1. An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies;

2. Effective risk assessment;

3. Timely and accurate financial, operational and regulatory reports;

4. Adequate procedures to safeguard and manage assets; and

5. Compliance with applicable laws and regulations.

B. *Internal audit system.* An institution should have an internal audit system that is appropriate to the size of the institution and the nature and scope of its activities and that provides for:

1. Adequate monitoring of the system of internal controls through an internal audit function. For an institution whose size, complexity or scope of operations does not warrant a full scale internal audit function, a system of independent reviews of key internal controls may be used;

2. Independence and objectivity;

3. Qualified persons;

4. Adequate testing and review of information systems;

5. Adequate documentation of tests and findings and any corrective actions;

6. Verification and review of management actions to address material weaknesses; and

7. Review by the institution's audit committee or board of directors of the effectiveness of the internal audit systems.

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[2] For the Office of the Comptroller of the Currency, these regulations appear at 12 CFR Part 30; for the Board of Governors of the Federal Reserve System, these regulations appear at 12 CFR Part 263; for the Federal Deposit Insurance Corporation, these regulations appear at 12 CFR Part 308, subpart R, and for the Office of Thrift Supervision, these regulations appear at 12 CFR Part 570.

[3] In applying these definitions for savings associations, pursuant to 12 U.S.C. 1464, savings associations shall use the terms ''savings association'' and ''insured savings association'' in place of the terms ''member bank'' and ''insured bank''.

[4] See footnote 3 in section I.B.4. of this appendix.

[5] See footnote 3 in section I.B.4. of this appendix.

C. *Loan documentation.* An institution should establish and maintain loan documentation practices that:

1. Enable the institution to make an informed lending decision and to assess risk, as necessary, on an ongoing basis;

2. Identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner;

3. Ensure that any claim against a borrower is legally enforceable;

4. Demonstrate appropriate administration and monitoring of a loan; and

5. Take account of the size and complexity of a loan.

D. *Credit underwriting.* An institution should establish and maintain prudent credit underwriting practices that:

1. Are commensurate with the types of loans the institution will make and consider the terms and conditions under which they will be made;

2. Consider the nature of the markets in which loans will be made;

3. Provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed;

4. Establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors;

5. Take adequate account of concentration of credit risk; and

6. Are appropriate to the size of the institution and the nature and scope of its activities.

E. *Interest rate exposure.* An institution should:

1. Manage interest rate risk in a manner that is appropriate to the size of the institution and the complexity of its assets and liabilities; and

2. Provide for periodic reporting to management and the board of directors regarding interest rate risk with adequate information for management and the board of directors to assess the level of risk.

F. *Asset growth.* An institution's asset growth should be prudent and consider:

1. The source, volatility and use of the funds that support asset growth;

2. Any increase in credit risk or interest rate risk as a result of growth; and

3. The effect of growth on the institution's capital.

G. *Asset quality.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration in those assets. The institution should:

1. Conduct periodic asset quality reviews to identify problem assets;

2. Estimate the inherent losses in those assets and establish reserves that are sufficient to absorb estimated losses;

3. Compare problem asset totals to capital;

4. Take appropriate corrective action to resolve problem assets;

5. Consider the size and potential risks of material asset concentrations; and

6. Provide periodic asset reports with adequate information for management and the board of directors to assess the level of asset risk.

H. *Earnings.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to evaluate and monitor earnings and ensure that earnings are sufficient to maintain adequate capital and reserves. The institution should:

1. Compare recent earnings trends relative to equity, assets, or other commonly used benchmarks to the institution's historical results and those of its peers;

2. Evaluate the adequacy of earnings given the size, complexity, and risk profile of the institution's assets and operations;

3. Assess the source, volatility, and sustainability of earnings, including the effect of nonrecurring or extraordinary income or expense;

4. Take steps to ensure that earnings are sufficient to maintain adequate capital and reserves after considering the institution's asset quality and growth rate; and

5. Provide periodic earnings reports with adequate information for management and the board of directors to assess earnings performance.

I. *Compensation, fees and benefits.* An institution should maintain safeguards to prevent the payment of compensation, fees, and benefits that are excessive or that could lead to material financial loss to the institution.

III. Prohibition on Compensation That Constitutes an Unsafe and Unsound Practice

A. Excessive Compensation

Excessive compensation is prohibited as an unsafe and unsound practice. Compensation shall be considered excessive when amounts paid are unreasonable or disproportionate to the services performed by an executive officer, employee, director, or principal shareholder, considering the following:

1. The combined value of all cash and noncash benefits provided to the individual;

2. The compensation history of the individual and other individuals with comparable expertise at the institution;

3. The financial condition of the institution;

4. Comparable compensation practices at comparable institutions, based upon such

factors as asset size, geographic location, and the complexity of the loan portfolio or other assets;

5. For postemployment benefits, the projected total cost and benefit to the institution;

6. Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the institution; and

7. Any other factors the agencies determines to be relevant.

B. Compensation Leading to Material Financial Loss

Compensation that could lead to material financial loss to an institution is prohibited as an unsafe and unsound practice.

[60 FR 35678, 35685, July 10, 1995; 61 FR 43951, Aug. 27, 1996]

PART 365—REAL ESTATE LENDING STANDARDS

Sec.
365.1 Purpose and scope.
365.2 Real estate lending standards.
APPENDIX A TO PART 365—INTERAGENCY GUIDELINES FOR REAL ESTATE LENDING POLICIES

AUTHORITY: 12 U.S.C. 1828(o).

SOURCE: 57 FR 62896, 62900, Dec. 31, 1992, unless otherwise noted.

§ 365.1 Purpose and scope.

This part, issued pursuant to section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribes standards for real estate lending to be used by insured state nonmember banks (including state-licensed insured branches of foreign banks) in adopting internal real estate lending policies.

§ 365.2 Real estate lending standards.

(a) Each insured state nonmember bank shall adopt and maintain written policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing permanent improvements to real estate.

(b)(1) Real estate lending policies adopted pursuant to this section must:

(i) Be consistent with safe and sound banking practices;

(ii) Be appropriate to the size of the institution and the nature and scope of its operations; and

(iii) Be reviewed and approved by the bank's board of directors at least annually.

(2) The lending policies must establish:

(i) Loan portfolio diversification standards;

(ii) Prudent underwriting standards, including loan-to-value limits, that are clear and measurable;

(iii) Loan administration procedures for the bank's real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the bank's real estate lending policies.

(c) Each insured state nonmember bank must monitor conditions in the real estate market in its lending area to ensure that its real estate lending policies continue to be appropriate for current market conditions.

(d) The real estate lending policies adopted pursuant to this section should reflect consideration of the Interagency Guidelines for Real Estate Lending Policies established by the Federal bank and thrift supervisory agencies.

APPENDIX A TO PART 365—INTERAGENCY GUIDELINES FOR REAL ESTATE LENDING POLICIES

The agencies' regulations require that each insured depository institution adopt and maintain a written policy that establishes appropriate limits and standards for all extensions of credit that are secured by liens on or interests in real estate or made for the purpose of financing the construction of a building or other improvements.[5] These guidelines are intended to assist institutions in the formulation and maintenance of a real estate lending policy that is appropriate to the size of the institution and the nature and scope of its individual operations, as well as satisfies the requirements of the regulation.

Each institution's policies must be comprehensive, and consistent with safe and sound lending practices, and must ensure that the institution operates within limits and according to standards that are reviewed

[5] The agencies have adopted a uniform rule on real estate lending. See 12 CFR part 365 (FDIC); 12 CFR part 208, subpart C (FRB); 12 CFR part 34, subpart D (OCC); and 12 CFR 563.100–101 (OTS).

and approved at least annually by the board of directors. Real estate lending is an integral part of many institutions' business plans and, when undertaken in a prudent manner, will not be subject to examiner criticism.

LOAN PORTFOLIO MANAGEMENT CONSIDERATIONS

The lending policy should contain a general outline of the scope and distribution of the institution's credit facilities and the manner in which real estate loans are made, serviced, and collected. In particular, the institution's policies on real estate lending should:

- Identify the geographic areas in which the institution will consider lending.
- Establish a loan portfolio diversification policy and set limits for real estate loans by type and geographic market (e.g., limits on higher risk loans).
- Identify appropriate terms and conditions by type of real estate loan.
- Establish loan origination and approval procedures, both generally and by size and type of loan.
- Establish prudent underwriting standards that are clear and measurable, including loan-to-value limits, that are consistent with these supervisory guidelines.
- Establish review and approval procedures for exception loans, including loans with loan-to-value percentages in excess of supervisory limits.
- Establish loan administration procedures, including documentation, disbursement, collateral inspection, collection, and loan review.
- Establish real estate appraisal and evaluation programs.
- Require that management monitor the loan portfolio and provide timely and adequate reports to the board of directors.

The institution should consider both internal and external factors in the formulation of its loan policies and strategic plan. Factors that should be considered include:

- The size and financial condition of the institution.
- The expertise and size of the lending staff.
- The need to avoid undue concentrations of risk.
- Compliance with all real estate related laws and regulations, including the Community Reinvestment Act, anti-discrimination laws, and for savings associations, the Qualified Thrift Lender test.
- Market conditions.

The institution should monitor conditions in the real estate markets in its lending area so that it can react quickly to changes in market conditions that are relevant to its lending decisions. Market supply and demand factors that should be considered include:

- Demographic indicators, including population and employment trends.
- Zoning requirements.
- Current and projected vacancy, construction, and absorption rates.
- Current and projected lease terms, rental rates, and sales prices, including concessions.
- Current and projected operating expenses for different types of projects.
- Economic indicators, including trends and diversification of the lending area.
- Valuation trends, including discount and direct capitalization rates.

UNDERWRITING STANDARDS

Prudently underwritten real estate loans should reflect all relevant credit factors, including:

- The capacity of the borrower, or income from the underlying property, to adequately service the debt.
- The value of the mortgaged property.
- The overall creditworthiness of the borrower.
- The level of equity invested in the property.
- Any secondary sources of repayment.
- Any additional collateral or credit enhancements (such as guarantees, mortgage insurance or takeout commitments).

The lending policies should reflect the level of risk that is acceptable to the board of directors and provide clear and measurable underwriting standards that enable the institution's lending staff to evaluate these credit factors. The underwriting standards should address:

- The maximum loan amount by type of property.
- Maximum loan maturities by type of property.
- Amortization schedules.
- Pricing structure for different types of real estate loans.
- Loan-to-value limits by type of property.

For development and construction projects, and completed commercial properties, the policy should also establish, commensurate with the size and type of the project or property:

- Requirements for feasibility studies and sensitivity and risk analyses (*e.g.*, sensitivity of income projections to changes in economic variables such as interest rates, vacancy rates, or operating expenses).
- Minimum requirements for initial investment and maintenance of hard equity by the borrower (*e.g.*, cash or unencumbered investment in the underlying property).
- Minimum standards for net worth, cash flow, and debt service coverage of the borrower or underlying property.

- Standards for the acceptability of and limits on non-amortizing loans.
- Standards for the acceptability of and limits on the use of interest reserves.
- Pre-leasing and pre-sale requirements for income-producing property.
- Pre-sale and minimum unit release requirements for non-income-producing property loans.
- Limits on partial recourse or non-recourse loans and requirements for guarantor support.
- Requirements for takeout commitments.
- Minimum covenants for loan agreements.

LOAN ADMINISTRATION

The institution should also establish loan administration procedures for its real estate portfolio that address:

- Documentation, including:
  - Type and frequency of financial statements, including requirements for verification of information provided by the borrower;
  - Type and frequency of collateral evaluations (appraisals and other estimates of value).
- Loan closing and disbursement.
- Payment processing.
- Escrow administration.
- Collateral administration.
- Loan payoffs.
- Collections and foreclosure, including:
  - Delinquency follow-up procedures;
  - Foreclosure timing;
  - Extensions and other forms of forbearance;
  - Acceptance of deeds in lieu of foreclosure.
- Claims processing (*e.g.*, seeking recovery on a defaulted loan covered by a government guaranty or insurance program).
- Servicing and participation agreements.

SUPERVISORY LOAN-TO-VALUE LIMITS

Institutions should establish their own internal loan-to-value limits for real estate loans. These internal limits should not exceed the following supervisory limits:

Loan category	Loan-to-value limit (percent)
Raw land	65
Land development	75
Construction:	
Commercial, multifamily,[1] and other non-residential	80
1- to 4-family residential	85
Improved property	85
Owner-occupied 1- to 4-family and home equity	([2])

[1] Multifamily construction includes condominiums and cooperatives.

[2] A loan-to-value limit has not been established for permanent mortgage or home equity loans on owner-occupied, 1- to 4-family residential property. However, for any such loan with a loan-to-value ratio that equals or exceeds 90 percent at origination, an institution should require appropriate credit enhancement in the form of either mortgage insurance or readily marketable collateral.

The supervisory loan-to-value limits should be applied to the underlying property that collateralizes the loan. For loans that fund multiple phases of the same real estate project (e.g., a loan for both land development and construction of an office building), the appropriate loan-to-value limit is the limit applicable to the final phase of the project funded by the loan; however, loan disbursements should not exceed actual development or construction outlays. In situations where a loan is fully cross-collateralized by two or more properties or is secured by a collateral pool of two or more properties, the appropriate maximum loan amount under supervisory loan-to-value limits is the sum of the value of each property, less senior liens, multiplied by the appropriate loan-to-value limit for each property. To ensure that collateral margins remain within the supervisory limits, lenders should redetermine conformity whenever collateral substitutions are made to the collateral pool.

In establishing internal loan-to-value limits, each lender is expected to carefully consider the institution-specific and market factors listed under ''Loan Portfolio Management Considerations,'' as well as any other relevant factors, such as the particular subcategory or type of loan. For any subcategory of loans that exhibits greater credit risk than the overall category, a lender should consider the establishment of an internal loan-to-value limit for that subcategory that is lower than the limit for the overall category.

The loan-to-value ratio is only one of several pertinent credit factors to be considered when underwriting a real estate loan. Other credit factors to be taken into account are highlighted in the ''Underwriting Standards'' section above. Because of these other factors, the establishment of these supervisory limits should not be interpreted to mean that loans at these levels will automatically be considered sound.

LOANS IN EXCESS OF THE SUPERVISORY LOAN-TO-VALUE LIMITS

The agencies recognize that appropriate loan-to-value limits vary not only among categories of real estate loans but also among individual loans. Therefore, it may be appropriate in individual cases to originate or purchase loans with loan-to-value ratios in excess of the supervisory loan-to-value limits, based on the support provided by other credit factors. Such loans should be identified in the institution's records, and

their aggregate amount reported at least quarterly to the institution's board of directors. (See additional reporting requirements described under ''Exceptions to the General Policy.'')

The aggregate amount of all loans in excess of the supervisory loan-to-value limits should not exceed 100 percent of total capital.[2] Moreover, within the aggregate limit, total loans for all commercial, agricultural, multifamily or other non-1-to-4 family residential properties should not exceed 30 percent of total capital. An institution will come under increased supervisory scrutiny as the total of such loans approaches these levels.

In determining the aggregate amount of such loans, institutions should: (a) Include all loans secured by the same property if any one of those loans exceeds the supervisory loan-to-value limits; and (b) include the recourse obligation of any such loan sold with recourse. Conversely, a loan should no longer be reported to the directors as part of aggregate totals when reduction in principal or senior liens, or additional contribution of collateral or equity (e.g., improvements to the real property securing the loan), bring the loan-to-value ratio into compliance with supervisory limits.

EXCLUDED TRANSACTIONS

The agencies also recognize that there are a number of lending situations in which other factors significantly outweigh the need to apply the supervisory loan-to-value limits. These include:

- Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.
- Loans backed by the full faith and credit of a state government, provided that the amount of the assurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.
- Loans guaranteed or insured by a state, municipal or local government, or an agency thereof, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit, and provided that the lender has determined that the guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.
- Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.
- Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs), or loans that are renewed, refinanced, or restructured in connection with a workout situation, either with or without the advancement of new funds, where consistent with safe and sound banking practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.
- Loans that facilitate the sale of real estate acquired by the lender in the ordinary course of collecting a debt previously contracted in good faith.
- Loans for which a lien on or interest in real property is taken as additional collateral through an abundance of caution by the lender (e.g., the institution takes a blanket lien on all or substantially all of the assets of the borrower, and the value of the real property is low relative to the aggregate value of all other collateral).
- Loans, such as working capital loans, where the lender does not rely principally on real estate as security and the extension of credit is not used to acquire, develop, or construct permanent improvements on real property.
- Loans for the purpose of financing permanent improvements to real property, but not secured by the property, if such security interest is not required by prudent underwriting practice.

EXCEPTIONS TO THE GENERAL LENDING POLICY

Some provision should be made for the consideration of loan requests from creditworthy borrowers whose credit needs do not fit within the institution's general lending policy. An institution may provide for prudently underwritten exceptions to its lending policies, including loan-to-value limits, on a loan-by-loan basis. However, any exceptions from the supervisory loan-to-value limits should conform to the aggregate limits on such loans discussed above.

The board of directors is responsible for establishing standards for the review and approval of exception loans. Each institution should establish an appropriate internal process for the review and approval of loans that do not conform to its own internal policy standards. The approval of any such loan should be supported by a written justification that clearly sets forth all of the relevant credit factors that support the underwriting decision. The justification and approval documents for such loans should be

[2] For the state member banks, the term ''total capital'' means ''total risk-based capital'' as defined in appendix A to 12 CFR part 208. For insured state non-member banks, ''total capital'' refers to that term described in table I of appendix A to 12 CFR part 325. For national banks, the term ''total capital'' is defined at 12 CFR 3.2(e). For savings associations, the term ''total capital'' is defined at 12 CFR 567.5(c).

maintained as a part of the permanent loan file. Each institution should monitor compliance with its real estate lending policy and individually report exception loans of a significant size to its board of directors.

SUPERVISORY REVIEW OF REAL ESTATE LENDING POLICIES AND PRACTICES

The real estate lending policies of institutions will be evaluated by examiners during the course of their examinations to determine if the policies are consistent with safe and sound lending practices, these guidelines, and the requirements of the regulation. In evaluating the adequacy of the institution's real estate lending policies and practices, examiners will take into consideration the following factors:

- The nature and scope of the institution's real estate lending activities.
- The size and financial condition of the institution.
- The quality of the institution's management and internal controls.
- The expertise and size of the lending and loan administration staff.
- Market conditions.

Lending policy exception reports will also be reviewed by examiners during the course of their examinations to determine whether the institutions' exceptions are adequately documented and appropriate in light of all of the relevant credit considerations. An excessive volume of exceptions to an institution's real estate lending policy may signal a weakening of its underwriting practices, or may suggest a need to revise the loan policy.

DEFINITIONS

For the purposes of these Guidelines:

Construction loan means an extension of credit for the purpose of erecting or rehabilitating buildings or other structures, including any infrastructure necessary for development.

Extension of credit or *loan* means:

(1) The total amount of any loan, line of credit, or other legally binding lending commitment with respect to real property; and

(2) The total amount, based on the amount of consideration paid, of any loan, line of credit, or other legally binding lending commitment acquired by a lender by purchase, assignment, or otherwise.

Improved property loan means an extension of credit secured by one of the following types of real property:

(1) Farmland, ranchland or timberland committed to ongoing management and agricultural production;

(2) 1- to 4-family residential property that is not owner-occupied;

(3) Residential property containing five or more individual dwelling units;

(4) Completed commercial property; or

(5) Other income-producing property that has been completed and is available for occupancy and use, except income-producing owner-occupied 1- to 4-family residential property.

Land development loan means an extension of credit for the purpose of improving unimproved real property prior to the erection of structures. The improvement of unimproved real property may include the laying or placement of sewers, water pipes, utility cables, streets, and other infrastructure necessary for future development.

Loan origination means the time of inception of the obligation to extend credit (i.e., when the last event or prerequisite, controllable by the lender, occurs causing the lender to become legally bound to fund an extension of credit).

Loan-to-value or *loan-to-value ratio* means the percentage or ratio that is derived at the time of loan origination by dividing an extension of credit by the total value of the property(ies) securing or being improved by the extension of credit plus the amount of any readily marketable collateral and other acceptable collateral that secures the extension of credit. The total amount of all senior liens on or interests in such property(ies) should be included in determining the loan-to-value ratio. When mortgage insurance or collateral is used in the calculation of the loan-to-value ratio, and such credit enhancement is later released or replaced, the loan-to-value ratio should be recalculated.

Other acceptable collateral means any collateral in which the lender has a perfected security interest, that has a quantifiable value, and is accepted by the lender in accordance with safe and sound lending practices. Other acceptable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral. Other acceptable collateral includes, among other items, unconditional irrevocable standby letters of credit for the benefit of the lender.

Owner-occupied, when used in conjunction with the term *1- to 4-family residential property* means that the owner of the underlying real property occupies at least one unit of the real property as a principal residence of the owner.

Readily marketable collateral means insured deposits, financial instruments, and bullion in which the lender has a perfected interest. Financial instruments and bullion must be salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market. Readily marketable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral.

Value means an opinion or estimate, set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of real property, prepared in accordance with the agency's appraisal regulations and guidance. For loans to purchase an existing property, the term ''value'' means the lesser of the actual acquisition cost or the estimate of value.

1- to 4-family residential property means property containing fewer than five individual dwelling units, including manufactured homes permanently affixed to the underlying property (when deemed to be real property under state law).

[57 FR 62896, 62900, Dec. 31, 1992; 58 FR 4460, Jan. 14, 1993]

PART 366—CONTRACTOR CONFLICTS OF INTEREST

Sec.
366.1 Authority, purpose, and scope.
366.2 Definitions.
366.3 Appropriate officials.
366.4 Disqualification of contractors.
366.5 Contractor conflicts of interest.
366.6 Information required to be submitted.
366.7 Minimum ethical standards for independent contractors.
366.8 Confidentiality of information.
366.9 Liability for rescission or termination.
366.10 Finality of determination.

AUTHORITY: 12 U.S.C. 1819, 1822(f)(3) and (4).

SOURCE: 61 FR 9596, Mar. 11, 1996, unless otherwise noted.

§ 366.1 Authority, purpose, and scope.

(a) *Authority.* This part is adopted pursuant to section 12(f)(3) and (4) of the Federal Deposit Insurance Act, 12 U.S.C. 1822(f)(3) and (4), and the rulemaking authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. Pursuant to those sections and consistent with the goals and purposes of titles 18 and 41 of the U.S. Code, the FDIC is promulgating regulations in this part applicable to independent contractors governing conflicts of interest, ethical responsibilities, and the use of confidential information. The regulations in this part also establish procedures for ensuring that independent contractors meet minimum standards of competence, experience, integrity, and fitness. The FDIC will apply this part to contractual activities it undertakes, including situations in which it is acting as manager of the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Fund (FRF). This part is in addition to, and not in lieu of, any other statute or regulation which may apply to such contractual activities. This part does not apply to the FDIC when acting as a conservator of a failed financial institution or when operating a bridge bank.

(b) *Purpose.* Consistent with the goals and purposes of titles 18 and 41 of the U.S. Code, this part seeks to establish:

(1) Minimum standards which govern conflicts of interest, ethical responsibilities, and the use of confidential information by contractors;

(2) Procedures to ensure that independent contractors meet minimum standards of competence, experience, integrity, and fitness; and

(3) Official written guidance to contracting personnel who award contracts for services and to contractors who bid on such contracts.

(c) *Scope.* (1) (i) This part applies to:

(A) Contractors, including law firms and other independent contractors, that are not deemed, under 12 U.S.C. 1822(f)(1)(B), to be employees of the FDIC, which submit offers to provide services to the FDIC or which enter into contracts for services with the FDIC; and

(B) Subcontractors which enter into contracts to perform services under a proposed or existing contract with the FDIC.

(ii) Contractors that are deemed under 12 U.S.C. 1822(f)(1)(B) to be employees of the Corporation are subject, in addition to this part, to Title 18 of the United States Code; the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635); the Supplemental Standards of Ethical Conduct for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3201); the Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture regulations (5 CFR part 2634); and the Supplemental Financial Disclosure Requirements for Employees of the Federal Deposit Insurance Corporation (5 CFR part 3202).

(2) For all contractors subject to this part, the FDIC will apply this part to contracts which are entered into between the contractors and the FDIC on

or after April 10, 1996. In addition, this part applies to contracts between contractors subject to this part and the FDIC which exist on April 10, 1996 for which a contractual action, such as a modification, extension, or exercise of an option, takes place on or after April 10, 1996.

(d) *Resolution Trust Corporation transition*. This part shall apply to all RTC contractors that provide services to the FDIC after the RTC's termination which occurred, by statute, December 31, 1995.

§366.2 Definitions.

As used in this part:

(a) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor or is under common control with the contractor.

(b) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, or any other organization or institution, but shall not include any corporation the majority of the shares of which are owned by the United States, any state, or the District of Columbia.

(c) *Conflict of interest* means a situation in which:

(1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract; or

(2) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, is an adverse party to the FDIC, RTC, FSLIC, or their successors in a lawsuit; or

(3) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC, has ever been suspended, excluded, or debarred from contracting with a Federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or

(4) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

(d) *Contractor* means a person which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services.

(e) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(f) *Default on a material obligation* means a loan or advance from an insured depository institution which has ever been delinquent for 90 or more days as to payment of principal or interest, or a combination thereof, with a remaining balance of principal and accrued interest on the ninetieth day, or any time thereafter, in an amount in excess of $50,000.

(g) *FDIC* means the Federal Deposit Insurance Corporation in its receivership and corporate capacities. It does not mean the FDIC in its conservatorship capacity or when it is

operating a bridge bank as defined, respectively, in 12 U.S.C. 1821(c) and (n).

(h) *Insured depository institution* means any bank or savings association the deposits of which are insured by the FDIC.

(i) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership whose management committee or executive committee has responsibility for the day-to-day operations of the partnership, management official means only a member of such committee but, if no such committee exists, management official means each of the general partners.

(j) *Offer* means a proposal to provide services to the FDIC. For law firms or sole practitioner lawyers, ''offer'' also means the application submitted by the law firm to the FDIC.

(k) *Pattern or practice of defalcation regarding obligations* means two or more instances in which:

(1) A loan or advance from an insured depository institution is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof and there remains a legal obligation to pay an amount in excess of $50,000; or

(2) A loan or advance from an insured depository institution where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of $50,000 to the insured depository institution.

(l) *Person* means an individual or company.

(m) *RTC* means the former Resolution Trust Corporation in any of its capacities.

(n) *Subcontractor* means a person that enters into a contract with an FDIC contractor to perform services under a proposed or existing contract with the FDIC.

(o) *Substantial loss to Federal deposit insurance funds* means:

(1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), the FRF, or funds maintained by the RTC for the benefit of insured depositors, that is or has ever been delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of $50,000;

(2) An obligation to pay an outstanding, unsatisfied, final judgment in excess of $50,000 in favor of the FDIC, RTC, FSLIC, or their successors, or the BIF, the SAIF, the FRF or the funds maintained by the RTC for the benefit of insured depositors; or

(3) A loan or advance from an insured depository institution which is currently owed to the FDIC, RTC, FSLIC or their successors, or the BIF, the SAIF, the FRF or the funds maintained by the RTC for the benefit of insured depositors, where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of $50,000.

§ 366.3 Appropriate officials.

(a) The General Counsel of the FDIC, or the designee of the General Counsel, shall administer the provisions of this part with respect to contracts involving the provision of services by law firms or sole practitioner lawyers.

(b) The FDIC Executive Secretary, or the designee of the Executive Secretary, shall administer the provisions of this part with respect to all other contracts.

§ 366.4 Disqualification of contractors.

(a) *Disqualifying conditions.* No person shall perform services under an FDIC contract and no contractor shall enter into any contract with the FDIC if that person or contractor:

(1) Has been convicted of any felony;

(2) Has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation or their successors;

(3) Has demonstrated a pattern or practice of defalcation regarding obligations; or

(4) Has caused a substantial loss to Federal deposit insurance funds.

(b) *Contractors with disqualifying conditions arising prior to contract award.* (1) A contractor which has any of the disqualifying conditions identified in paragraph (a) of this section prior to the award of an FDIC contract is disqualified and is prohibited from entering into contracts with the FDIC.

(2) If after submitting an offer but prior to award, a contractor discovers that it has any of the disqualifying conditions identified in paragraph (a) of this section, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier.

(c) *Disqualifying conditions that arise or are discovered after contract award.* A contractor must notify the FDIC in writing within 10 days after discovering that it or any person performing services under an FDIC contract has any of the disqualifying conditions identified in paragraph (a) of this section. Such notification shall contain a detailed description of the disqualifying condition and may include a statement of how the contractor intends to resolve such condition. The FDIC, after receipt of such notification or other discovery of the contractor's disqualifying condition, shall take such action as it determines is in the FDIC's best interests, including that:

(1) The FDIC may notify the contractor in writing of the corrective actions, if any, which the contractor must take to eliminate the disqualifying condition. Corrective actions must be completed by the contractor not later than 30 days after notification is mailed by the FDIC unless the FDIC, at its sole discretion, determines that it will be in the best interests of the FDIC to grant the contractor an extension of time in which to complete such corrective action;

(2) The FDIC may immediately declare any contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under the contracts; or

(3) The FDIC may declare any contracts with such contractor in default and temporarily waive such default in order to allow an orderly transfer of duties and responsibilities under the contracts.

(d) *Reconsideration of decisions.* Decisions issued by the FDIC may be reconsidered upon application by an affected party to the Chairman or the Chairman's designee. Such requests shall be in writing and contain the bases for the request. The FDIC, at its discretion and after determining that it is in its best interests, may stay any corrective or other actions ordered by it pending reconsideration of a decision.

§366.5 Contractor conflicts of interest.

(a) *General.* The FDIC will not award contracts to contractors that have conflicts of interest associated with a particular contract or permit contractors to continue performance under existing contracts when such contractors have conflicts of interest, unless such conflicts are eliminated by the contractor or are waived by the appropriate FDIC official.

(b) *Waivers.* Waivers of conflicts of interest will only be granted when, in light of all relevant circumstances, the interests of the FDIC in the contractor's participation outweigh the concern that a reasonable person may question the integrity of the FDIC's operations.

(c) *Conflicts of interest arising prior to contract award (1) Requests for review of conflicts of interest.* (i) A contractor, with its offer, may request a determination as to the existence of a conflict of interest, may request that the conflict of interest, if any, be waived in accordance with paragraph (b) of this section, or may propose how the contractor could eliminate the conflict.

(ii) If after submitting an offer, but prior to award, a contractor discovers that it has a conflict, it shall notify the FDIC in writing within 10 days or prior to award, whichever is earlier. The contractor, with its notice, may make such requests or proposals regarding the conflict or potential conflict as are described in paragraph (c)(1)(i) of this section.

(2) *Review by the FDIC.* (i) Subject to the restrictions set forth in paragraphs (c)(2)(ii) and (c)(3) of this section, the appropriate FDIC official, at his or her

sole discretion, may determine whether a conflict of interest exists, may waive the conflict of interest in accordance with paragraph (b) of this section, or may approve in writing a contractor's proposal to eliminate a conflict of interest.

(ii) For contractors other than law firms and sole practitioner lawyers, the FDIC may consider a contractor's conflict or potential conflict of interest only if the FDIC first determines that the contractor's offer is the most advantageous of all received.

(3) *Pre-bid requests and pre-bid review for contractors other than law firms and sole practitioner lawyers.* A request for pre-bid review must be in writing and describe in detail the conflict or potential conflict of interest. The request may provide a proposal for elimination of the conflict or request a waiver of the conflict. The FDIC may perform a pre-bid review of conflicts of interest only if it first determines, at its sole discretion, that the participation of the contractor in the bidding process is necessary to provide adequate competition.

(d) *Conflicts of interest that arise or are discovered after contract award.* A contractor shall notify the FDIC in writing within 10 days after discovering that it has a conflict of interest. Such notification shall contain a detailed description of the conflict of interest and state how the contractor intends to eliminate the conflict. The FDIC, after receipt of such notification or other discovery of the contractor's conflict or potential conflict of interest, shall take such action as it determines is in the FDIC's best interests, including that:

(1) The FDIC may notify the contractor in writing of its finding as to whether a conflict of interest exists and the basis for such determination; whether or not a waiver will be granted; or whether corrective actions may be taken in order to eliminate the conflict of interest. Corrective actions must be completed by the contractor not later than 30 days after notification is mailed by the FDIC unless the FDIC, at its sole discretion, determines that it is in the best interests of the FDIC to grant the contractor an extension in which to complete such corrective action;

(2) The FDIC may immediately declare any affected contracts with such contractor in default, terminate the contracts, and order an immediate transfer of duties and responsibilities under such contracts; or

(3) The FDIC may declare any affected contract with such contractor in default and temporarily waive such default in order to allow an orderly transfer of duties and responsibilities under such contract.

(e) *Reconsideration of decisions.* Decisions issued pursuant to this part may be reconsidered by the Chairman or the Chairman's designee upon application by the contractor. Such requests shall be in writing and shall contain the bases for the request. The FDIC, at its discretion and after determining that it is in its best interests, may stay any corrective or other actions ordered by the FDIC pending reconsideration of a decision.

§ 366.6 Information required to be submitted.

(a) *Initial submission.* Every offer submitted to the FDIC by any contractor shall include a completed Representations and Certifications Form and such other information as the FDIC may deem appropriate to permit it to make a determination with respect to disqualifying conditions or conflicts of interest. The Representations and Certifications Form shall require that the contractor provide the following:

(1) Certifications that, to the best of the contractor's knowledge, the contractor is not disqualified from service on behalf of the FDIC because of the existence of any of the conditions identified in § 366.4(a), or conflicts of interest as defined in § 366.2(c)(1) through (3), subject to the contractor's request for waiver of a conflict of interest or proposal for elimination of a conflict of interest as described in § 366.5;

(2) A list and description of any instance during the ten (10) years preceding the submission of the offer in which the contractor or any company under the contractor's control defaulted on a material obligation to any insured depository institution;

(3) The contractor's agreement that it will not allow any employee, agent, or subcontractor to perform services under the proposed contract with the FDIC unless the contractor first verifies with each such employee, agent, or subcontractor that, to the best of such person's knowledge, such person:

(i) Is not disqualified from performing services under the FDIC contract because of the existence of any of the conditions identified in §366.4(a);

(ii) Has no conflicts of interest as defined in §366.2(c)(1) through (3), subject to a request by the contractor for a conflict of interest waiver or proposal for the elimination of a conflict of interest as set forth in §366.5; and

(iii) Has not, during the ten (10) years preceding the submission of the offer, defaulted on a material obligation to any insured depository institution; and

(4) Any other information which the FDIC may deem appropriate, the scope of which will be dependent on the particular contract under consideration.

(b) *Subsequent submissions.* During the term of the contract, the contractor shall:

(1) Verify the information described in paragraph (a)(3) of this section for any employee, agent, or subcontractor who will perform services under the contract for whom such information has not been previously verified, prior to such employee, agent, or subcontractor performing services under the contract; and

(2) Immediately notify the FDIC if any of the information submitted pursuant to paragraph (a) of this section was incorrect at time of submission or has subsequently become incorrect.

(c) *Failure to provide information.* A contractor that fails to provide any required information or misstates a material fact may be determined by the FDIC to be ineligible for the award of the FDIC contract for which such information is required or to be in default with respect to any existing contract for which such information is required.

(d) *Retention of information.* A contractor shall retain the information upon which it relied in preparing its certification(s) during the term of the contract and for a period of three (3) years following the termination or expiration of the contract and shall make such information available for review by the FDIC upon request.

(e) *Delayed compliance in emergencies.* In emergencies, when unforeseeable circumstances make it necessary to contract immediately in order to protect FDIC personnel or property, the FDIC may authorize delayed compliance with this part.

(f) *Additional contractual requirements.* In addition to the provisions of this part, the FDIC may include in its contract provisions, conditions and limitations, including additional standards for contractor fitness and integrity.

§366.7 Minimum ethical standards for independent contractors.

(a) In connection with the performance of any contract and during the term of such contract, a contractor, shall not:

(1) Accept or solicit for itself or others favors, gifts, or other items of monetary value from any person the contractor knows is seeking official action from the FDIC in connection with the contract or has interests which may be substantially affected by the contractor's performance or nonperformance of duties to the FDIC;

(2) Use improperly or allow the improper use of FDIC property, or property over which the contractor has supervision or charge by reason of the contract;

(3) Use its status as an FDIC contractor for its personal, financial or business benefit or for the benefit of a third party, except as contemplated by the contract;

(4) Make any promise or commitment on behalf of the FDIC not authorized by the FDIC.

(b) Pursuant to 18 U.S.C. 201, whoever acts for or on behalf of the FDIC is deemed to be a public official and public officials are prohibited from soliciting or accepting anything of value in return for being influenced in the performance of official actions. Violators are subject to criminal sanctions under Title 18 of the United States Code.

(c) Pursuant to 18 U.S.C. 1001, whoever knowingly and willingly falsifies a material fact, makes a false statement, or utilizes a false writing in connection with an FDIC contract is subject to

criminal sanctions under Title 18 of the United States Code.

(d) A contractor that violates the provisions of this section may be determined by the FDIC to be ineligible for the award of an FDIC contract and the FDIC may determine that such contractor is in default under any existing FDIC contract.

§ 366.8 Confidentiality of information.

(a) A contractor has a duty to protect confidential information and shall not use or allow the use of confidential information to further a private interest other than as contemplated by the contract.

(b) If a contractor fails to comply with the provisions of this section, the FDIC may:

(1) Declare the contractor ineligible for the award of any FDIC contract not yet awarded; or

(2) Declare the contractor in default under any existing contract with the FDIC.

(c) As used in this section, ''confidential information'' means information that a contractor obtains from the FDIC or a third party in connection with an FDIC contract but does not include information generally available to the public unless the information becomes available to the public as a result of unauthorized disclosure by the contractor.

§ 366.9 Liability for rescission or termination.

The FDIC may seek its actual, direct, and consequential damages from a contractor whose disqualifying conditions, conflicts of interest, failure to comply with information submission or confidentiality requirements, or failure to comply with the minimum ethical standards for independent contractors were the basis for rescission or termination of a contract between the FDIC and the contractor. This right to terminate or rescind and these remedies are cumulative and in addition to any other remedies or rights the FDIC may have under the terms of the contract, at law, or otherwise.

§ 366.10 Finality of determination.

Any determination made by the FDIC pursuant to this part is at the FDIC's sole discretion and shall not be subject to further review.

PART 367—SUSPENSION AND EXCLUSION OF CONTRACTOR AND TERMINATION OF CONTRACTS

Sec.

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AUTHORITY: 12 U.S.C. 1822(f) (4) and (5).

SOURCE: 61 FR 68560, Dec. 30, 1996, unless otherwise noted.

§ 367.1 Authority, purpose, scope and application.

(a) *Authority.* This part is adopted pursuant to section 12(f) (4) and (5) of the Federal Deposit Insurance Act, 12 U.S.C. 1822(f) (4) and (5), and the rulemaking authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. Other regulations implementing these statutory directives appear at 12 CFR part 366.

(b) *Purpose.* This part is designed to inform contractors and subcontractors (including their affiliated business entities, key employees and management officials) regarding their rights to notice and an opportunity to be heard on FDIC actions involving suspension and exclusion from contracting and rescission of existing contracts. This part is in addition to, and not in lieu of, any other statute or regulation that may apply to such contractual activities.

(c) *Scope.* This part applies to:

(1) Contractors, other than attorneys or law firms providing legal services, submitting offers to provide services or entering into contracts to provide services to the FDIC acting in any capacity; and

(2) Subcontractors entering into contracts to perform services under a proposed or existing contract with the FDIC.

(d) *Application*. (1) This part will apply to entities that become contractors, as defined in § 367.2(f), on or after December 30, 1996. In addition, this part will apply to contractors as defined in § 367.2(f) that are performing contracts on December 30, 1996.

(2) This part will also apply to actions initiated on or after December 30, 1996 regardless of the date of the cause giving rise to the actions.

(3) Contracts entered into by the former Resolution Trust Corporation (RTC) that were transferred to the FDIC will be treated in the same manner as FDIC contracts under this part.

(4) RTC actions taken under the RTC regulations on or before December 31, 1995, will be honored as if taken by the FDIC. A contractor subject to an RTC exclusion or suspension will be precluded thereby from participation in the FDIC's contracting program unless that exclusion or suspension is modified or terminated under the provisions of this part.

§ 367.2 Definitions.

(a) *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor, or is under common control with the contractor.

(c) *Civil judgment* means a judgment of a civil offense or liability by any court of competent jurisdiction in the United States.

(d) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association, consortium or similar organization.

(e) *Conflict of interest* means a situation in which:

(1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC:

(i) Has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract;

(ii) Is an adverse party to the FDIC, RTC, the former Federal Savings and Loan Insurance Corporation (FSLIC), or their successors in a lawsuit; or

(iii) Has ever been suspended, excluded, or debarred from contracting with a federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or

(2) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

(f) *Contractor* means a person or company which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services. For purposes of this part, contractor also includes:

(1) A contractor's affiliated business entities, key employees, and management officials of the contractor;

(2) Any subcontractor performing services for the FDIC and the management officials and key employees of such subcontractors; and

(3) Any entity or organization seeking to perform services for the FDIC as a minority or woman-owned business (MWOB).

(g) *Contract(s)* means agreement(s) between FDIC and a contractor, including, but not limited to, agreements identified as ''Task Orders'', for a contractor to provide services to FDIC. Contracts also mean contracts between a contractor and its subcontractor.

(h) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(i) *Conviction* means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, and includes pleas of nolo contendere.

(j) *FDIC* means the Federal Deposit Insurance Corporation acting in its receivership and corporate capacities, and FDIC officials or committees acting under delegated authority.

(k) *Indictment* shall include an information or other filing by a competent authority charging a criminal offense.

(l) *Key employee* means an individual who participates personally and substantially in the negotiation of, performance of, and/or monitoring for compliance under a contract with the FDIC. Such participation is made through, but is not limited to, decision, approval, disapproval, recommendation, or the rendering of advice under the contract.

(m) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership, all partners are deemed to be management officials unless the partnership is governed by a management or executive committee with responsibility for the day-to-day operations. In partnerships with such committees, management official means only those partners who are a member of such a committee.

(n) *Material fact* means one that is necessary to determine the outcome of an issue or case and without which the case could not be supported.

(o) *Offer* means a proposal or other written or oral offer to provide services to FDIC.

(p) *Pattern or practice of defalcation regarding obligations* means two or more instances in which a loan or advance from an insured depository institution:

(1) Is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof, and there remains a legal obligation to pay an amount in excess of $50,000; or

(2) Where there has been a failure to comply with the terms of a loan or advance to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of $50,000 to the insured depository institution.

(q) *Preponderance of the evidence* means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(r) *Subcontractor* means an entity or organization that enters into a contract with an FDIC contractor or another subcontractor to perform services under a proposed or existing contract with the FDIC.

(s) *Substantial loss to federal deposit insurance funds* means:

(1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), the FSLIC Reserve Fund (FRF), or funds that were maintained by the RTC for the benefit of insured depositors, that is or has ever been delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of $50,000;

(2) An obligation to pay an outstanding, unsatisfied, final judgment in excess of $50,000 in favor of the FDIC, RTC, FSLIC, or their successors, or the BIF, the SAIF, the FRF or the funds that were maintained by the RTC for the benefit of insured depositors; or

(3) A loan or advance from an insured depository institution which is currently owed to the FDIC, RTC, FSLIC or their successors, or the BIF, the SAIF, the FRF or the funds that were maintained by the RTC for the benefit of insured depositors, where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance

was foreclosed upon, resulting in a loss in excess of $50,000.

§367.3 Appropriate officials.

(a) The *Ethics Counselor* is the Executive Secretary of the FDIC. The Ethics Counselor shall act as the official responsible for rendering suspension and exclusion decisions under this part. In addition to taking suspension and/or exclusion action under this part, the Ethics Counselor has authority to terminate exclusion and suspension proceedings. As used in this part, ''Ethics Counselor'' includes any official designated by the Ethics Counselor to act on the Ethics Counselor's behalf.

(b) The *Corporation Ethics Committee* is the Committee appointed by the Chairman of the FDIC, or Chairman's designee, which provides review of any suspension or exclusion decision rendered by the Ethics Counselor that is appealed by a contractor who has been suspended and/or excluded from FDIC contracting.

(c) Information concerning the possible existence of any cause for suspension or exclusion shall be reported to the Office of the Executive Secretary (Ethics Section). This part does not modify the responsibility to report allegations of fraud, waste and abuse, including but not limited to criminal violations, to the Office of Inspector General.

§367.4 [Reserved]

§367.5 Exclusions.

(a) The Ethics Counselor may exclude a contractor from the FDIC contracting program for any of the causes set forth in §367.6, using procedures established in this part.

(b) Exclusion is a serious action to be imposed when there exists a preponderance of the evidence that a contractor has violated one or more of the causes set forth in §367.6. Contractors excluded from FDIC contracting programs are prohibited from entering into any new contracts with FDIC for the duration of the period of exclusion as determined pursuant to this part. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Excluded contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors. *Provided however,* that these limitations do not become effective upon the notification of the contractor that there is a possible cause to exclude under §367.13. Rather, they become effective only upon the Ethics Counselor's decision to exclude the contractor pursuant to §367.16. *Provided further,* that the causes for exclusion set forth in §367.6(a)(1) through (4) reflect statutorily established mandatory bars to contracting with the FDIC.

(c) Except when one or more of the statutorily established mandatory bars to contracting are shown to exist, the existence of a cause for exclusion does not necessarily require that the contractor be excluded; the seriousness of the contractor's acts or omissions and any mitigating or aggravating circumstances shall be considered in making any exclusion decision.

§367.6 Causes for exclusion.

The FDIC may exclude a contractor, in accordance with the procedures set forth in this part, upon a finding that:

(a) The contractor has been convicted of any felony;

(b) The contractor has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the FDIC or their successors;

(c) The contractor has demonstrated a pattern or practice of defalcation;

(d) The contractor has caused a substantial loss to Federal deposit insurance funds;

(e) The contractor has failed to disclose, pursuant to 12 CFR 366.6, a material fact to the FDIC;

(f) The contractor has failed to disclosed any material adverse change in the representations and certifications provided to FDIC under 12 CFR 366.6;

(g) The contractor has miscertified its status as a minority and/or woman owned business (MWOB);

(h) The contractor has a conflict of interest that was not waived by the Ethics Counselor or designee;

(i) The contractor has been subject to a final enforcement action by any federal financial institution regulatory agency, or has stipulated to such action;

(j) The contractor is debarred from participating in other federal programs;

(k) The contractor has been convicted of, or subject to a civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction, or conspiracy to do the same;

(2) Violation of federal or state antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging, or conspiracy to do the same;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstructing of justice, or conspiracy to do the same;

(4) Commission of any other offense indicating a breach of trust, dishonesty or lack of integrity, or conspiracy to do the same;

(l) The contractor's performance under previous contract(s) with FDIC or RTC has resulted in:

(1) The FDIC or RTC declaring such contract(s) to be in default; or

(2) The termination of such contract(s) for poor performance; or

(3) A violation of the terms of a contract that would have resulted in a default or termination of the contract for poor performance if that violation had been discovered during the course of the contract; or

(m) The contractor has engaged in any conduct:

(1) Indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects its ability to meet standards of present responsibility required of an FDIC contractor; or

(2) So serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimum ethical standards required by 12 CFR part 366.

§ 367.7 Suspensions.

(a) The Ethics Counselor may suspend a contractor for any of the causes in § 367.8 using the procedures established in this section.

(b) Suspension is an action to be imposed when there exists adequate evidence of one or more of the causes set out in § 367.8. This includes, but is not limited to, situations where immediate action is necessary to protect the integrity of the FDIC contracting program and/or the security of FDIC assets during the pendency of legal or investigative proceedings initiated by FDIC, any federal agency or any law enforcement authority.

(c) The duration of any suspension action shall be for a temporary period pending the completion of an investigation and such other legal proceedings as may ensue.

(d) A suspension shall become effective immediately upon issuance of the notice specified in § 367.13(b).

(e) Contractors suspended from FDIC contracting programs are prohibited from entering into any new contracts with the FDIC for the duration of the period of suspension. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Suspended contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors.

§ 367.8 Causes for suspension.

(a) Suspension may be imposed under the procedures set forth in this section upon adequate evidence:

(1) Of suspension by another federal agency;

(2) That a cause for exclusion under § 367.6 may exist;

(3) Of the commission of any other offense indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects the minimum ethical standards required of an FDIC contractor; or

(4) Of any other cause so serious or compelling in nature that it adversely

affects the ability of a contractor to meet the minimal ethical standards required by 12 CFR part 366.

(b) Indictment for any offense described in §367.6 is adequate evidence to suspend a contractor.

(c) In assessing the adequacy of the evidence, FDIC will consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated and what inferences can reasonably be drawn as a result.

§367.9 Imputation of causes.

(a) Where there is cause to suspend and/or exclude any affiliated business entity of the contractor, that conduct may be imputed to the contractor if the conduct occurred in connection with the affiliated business entity's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) Where there is cause to suspend and/or exclude any contractor, that conduct may be imputed to any affiliated business entity, key employee, or management official of a contractor who participated in, knew of or had reason to know of the contractor's conduct.

(c) Where there is cause to suspend and/or exclude a key employee or management official of a contractor, that cause may be imputed to the contractor if the conduct occurred in connection with the key employee or management official's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(d) Where there is cause to suspend and/or exclude one contractor participating in a joint venture or similar arrangement, that cause may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(e) Where there is cause to suspend and/or exclude a subcontractor, that cause may be imputed to the contractor for which the subcontractor performed services, if the conduct occurred for or on behalf of the contractor and with the contractor's knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§§367.10–367.11 [Reserved]

§367.12 Procedures.

(a) FDIC shall process suspension and exclusion actions as informally as practicable, consistent with its policy of providing contractors with adequate information on the grounds that give rise to the proposed action and affording contractors with a reasonable opportunity to respond.

(b) For purposes of determining filing dates for the pleadings required by this part, including responses, notices of appeal, appeals and requests for reconsideration, the provisions relating to the construction of time limits in 12 CFR 308.12 will control.

§367.13 Notices.

(a) *Exclusions.* Before excluding a contractor, the FDIC shall send it a written notice of possible cause to exclude. Such notice shall include:

(1) Notification that exclusion for a specified period of time is being considered based on the specified cause(s) in §367.6 to be relied upon;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicates that there is cause to believe a cause for exclusion exists, described in sufficient detail to put the contractor on notice of the conduct or transaction(s) upon which an exclusion proceeding is based;

(3) Notification that the contractor is not prohibited from contracting with the FDIC unless and until it is either suspended from FDIC contracting or the FDIC Ethics Counselor issues a decision excluding the contractor, *provided however,* in any case where the

possible cause for exclusion would also be an impediment to the contractor's eligibility pursuant to 12 CFR part 366, the contractor's eligibility for any contract will be determined under that part; and

(4) Notification of the regulatory provisions governing the exclusion proceeding and the potential effect of a final exclusion decision.

(b) *Suspensions.* Before suspending a contractor, the FDIC shall send it notice, including:

(1) Notice that a suspension is being imposed based on specified causes in § 367.8;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicate that there is adequate evidence to believe a cause for suspension exists, described in sufficient detail to put the contractor on notice of the basis for the suspension, recognizing that the conduct of ongoing investigations and legal proceedings, including criminal proceedings, place limitations on the evidence that can be released;

(3) Notification that the suspension prohibits the contractor from contracting with the FDIC for a temporary period, pending the completion of an investigation or other legal proceedings; and

(4) Notification of the regulatory provisions governing the suspension proceeding.

(c) *Service of notices.* Notices will be sent to the contractor by first class mail, postage prepaid. For purposes of compliance with this section, notice shall be considered to have been received by the contractor if the notice is properly mailed to the last known address of such contractor. Whenever practical, a copy of the notice will also be transmitted to the contractor by facsimile. In the event the notice is not sent by facsimile, a copy will be sent by an overnight delivery service such as Express Mail or a commercial equivalent.

§ 367.14 Responses.

(a) The contractor will have 15 days from the date of the notice within which to respond.

(b) The response shall be in writing and may include: information and argument in opposition to the proposed exclusion and/or suspension, including any additional specific information pertaining to the possible causes for exclusion; and information and argument in mitigation of the proposed period of exclusion.

(c) The response may request a meeting with an FDIC official identified in the notice to permit the contractor to discuss issues of fact or law relating to the suspension and/or proposed exclusion or to otherwise resolve the pending matters.

(1) Any such meetings between a contractor and FDIC shall take such form as the FDIC deems appropriate.

(2) In cases of suspensions, no meeting will be held where a representative of the Department of Justice has advised in writing that the substantial interests of the Government would be prejudiced by such a meeting and the Ethics Counselor determines that a suspension is based on the same facts as pending or contemplated legal proceedings referenced by the representative of the Department of Justice.

(d) Failure to respond to the notice shall be deemed an admission of the existence of the cause(s) for suspension and/or exclusion set forth in the notice and an acceptance of the period of exclusion proposed therein. In such circumstances, the FDIC may proceed to a final decision without further proceedings.

(e) Where a contractor has received more than one notice, the FDIC may consolidate the pending proceedings, including the scheduling of any meetings, in accordance with this section.

§ 367.15 Additional proceedings as to disputed material facts.

(a) In actions not based upon a conviction or civil judgment, if the Ethics Counselor finds that the contractor's submission raises a genuine dispute over facts material to the proposed suspension and/or exclusion, the contractor shall be afforded an opportunity to appear (with counsel, if desired), submit documentary evidence, present witnesses, and confront any witnesses the FDIC presents.

(b) The Ethics Counselor may refer disputed material facts to another official for analysis and recommendation.

(c) If requested, a transcribed record of any additional proceedings shall be made available at cost to the contractor.

§367.16 Ethics Counselor decisions.

(a) Standard of proof:

(1) An exclusion must be based on a finding that the cause(s) for exclusion is established by a preponderance of the evidence in the administrative record of the case; and

(2) A suspension must be based on a finding that the cause(s) for suspension is established by adequate evidence in the administrative record of the case.

(b) The administrative record consists of the portion of any information, reports, documents or other evidence identified and relied upon in the Notice of Possible Cause to Exclude, the Notice of Suspension and/or supplemental notices, if any, together with any material portions of the contractor's response. When additional proceedings are necessary to determine disputed material facts, the Ethics Counselor shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(c) In actions based upon a conviction, judgment, a final enforcement action by a federal financial institution regulatory agency, or in which all facts and circumstances material to the exclusion action have been finally adjudicated in another forum, the Ethics Counselor may exclude a contractor without regard to the procedures set out in §§367.13 and 367.14. Any such decisions will be subject to the review and reconsideration provisions of §367.20.

(d) *Notice of decisions.* Contractors shall be given prompt notice of the Ethics Counselor's decision in the manner described in §367.13(c). If the Ethics Counselor suspends a contractor or imposes a period of exclusion, the decision shall:

(1) Set forth the cause(s) for suspension and/or exclusion included in the notice that were found by a preponderance of the evidence with reference to the administrative record support for that finding;

(2) Set forth the effect of the exclusion action and the effective dates of that action;

(3) Refer the contractor to its procedural rights of review and reconsideration under §367.20; and

(4) Inform the contractor that a copy of the exclusion decision shall be placed in the FDIC Public Reading Room.

(e) If the FDIC Ethics Counselor decides that a period of exclusion is not warranted, the Notice of Possible Cause to Exclude may be withdrawn or the proceeding may be otherwise terminated. A decision to terminate an exclusion proceeding may include the imposition of appropriate conditions on the contractor in their future dealings with the FDIC.

§367.17 Duration of suspensions and exclusions.

(a) *Suspensions.* (1) Suspensions shall be for a temporary period pending the completion of an investigation or other legal or exclusion proceedings.

(2) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless a representative of the Department of Justice requests its extension in writing. In such cases, the suspension may be extended for an additional six months. In no event may a suspension be imposed for more than 18 months, unless such proceedings have been initiated within that period.

(3) FDIC shall notify the Department of Justice of an impending termination of a suspension at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

(4) The time limitations for suspension in this section may be waived by the affected contractor.

(b) *Exclusions.* (1) Exclusions shall be for a period commensurate with the seriousness of the cause(s) after due consideration of mitigating evidence presented by the contractor.

(2) If a suspension precedes an exclusion, the suspension period shall be considered in determining the exclusion period.

(3) Exclusion for causes other than the mandatory bars in 12 CFR 366.4(a)

generally should not exceed three years, but where circumstances warrant, a longer period of exclusion may be imposed.

(4) The Ethics Counselor may extend an existing exclusion for an additional period if the Ethics Counselor determines that an extension is necessary to protect the integrity of the FDIC contracting program and the public interest. However, an exclusion may not be extended solely on the basis of the facts and circumstances upon which the initial exclusion action was based. The standards and procedures in this part shall be applied in any proceeding to extend an exclusion.

§ 367.18 Abrogation of contracts.

(a) The FDIC may, in its discretion, rescind or terminate any contract in existence at the time a contractor is suspended or excluded.

(b) Any contract not rescinded or terminated shall continue in force in accordance with the terms thereof.

(c) The right to rescind or terminate a contract in existence is cumulative and in addition to any other remedies or rights the FDIC may have under the terms of the contract, at law, or otherwise.

§ 367.19 Exceptions to suspensions and exclusions.

(a) Exceptions to the effects of suspensions and exclusions may be available in unique circumstances, where there are compelling reasons to utilize a particular contractor for a specific task. Requests for such exceptions may be submitted only by the FDIC program office requesting the contract services.

(b) In the case of the modification or extension of an existing contract, the Ethics Counselor may except such a contracting action from the effects of suspension and/or exclusion upon a determination, in writing, that a compelling reason exists for utilization of the contractor in the particular instance. The Ethics Counselor's authority under this section shall not be delegated to any lower official.

(c) In the case of new contracts, the Corporation Ethics Committee may except a particular new contract from the effects of suspension and/or exclusion upon a determination in writing that a compelling reason exists for utilization of the contractor in the particular instance.

§ 367.20 Review and reconsideration of Ethics Counselor decisions.

(a) *Review*. (1) A suspended and/or excluded contractor may appeal the exclusion decision to the Corporation Ethics Committee.

(2) In order to avail itself of the right to appeal, a suspended and/or excluded contractor must file a written notice of intent to appeal within 5 days of the Ethics Counselor's decision.

(3) The appeal shall be filed in writing within 30 days of the decision.

(4) The Corporation Ethics Committee, at its discretion and after determining that it is in the best interests of the FDIC, may stay the effect of the suspension and/or exclusion pending conclusion of its review of the matter.

(b) *Reconsideration*. (1) A suspended and/or excluded contractor may submit a request to the Ethics Counselor to reconsider the suspension and/or exclusion decision, reduce the period of exclusion or terminate the suspension and/or exclusion.

(2) Such requests shall be in writing and supported by documentation that the requested action is justified by:

(i) Reversal of the conviction or civil judgment upon which the suspension and/or exclusion was based;

(ii) Newly discovered material evidence;

(iii) Bona fide change in ownership or management;

(iv) Elimination of other causes for which the suspension and/or exclusion was imposed; or

(v) Other reasons the FDIC Ethics Counselor deems appropriate.

(3) A request for reconsideration based on the reversal of the conviction or civil judgment may be filed at any time.

(4) Requests for reconsideration based on other grounds may only be filed during the period commencing 60 days after the Ethics Counselor's decision imposing the suspension and/or exclusion. Only one such request may be filed in any twelve month period.

(5) The Ethics Counselor's decision on a request for reconsideration is subject to the review procedure set forth in paragraph (a) of this section.