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SUBCHAPTER A—PROCEDURE AND RULES OF PRACTICE

PARTS 300–302 [RESERVED]

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§ 303.0 Scope.

(a) This part describes the procedures to be followed by both the FDIC and applicants with respect to applications, requests, or notices (filings) required to be filed by statute or regulation. Additional details concerning processing are explained in related FDIC statements of policy. This part also sets forth delegations of authority from the FDIC's Board of Directors to the Directors of the Division of Supervision (DOS), the Division of Compliance and Consumer Affairs (DCA), the General

Counsel of the Legal Division, the Executive Secretary, and, in some cases, their designees to act on certain filings and enforcement matters.

(b) Additional application procedures may be found in the following FDIC regulations:

(1) 12 CFR part 327—Assessments (Request for review of assessment risk classification);

(2) 12 CFR part 328—Advertisement of Membership (Application for temporary waiver of advertising requirements);

(3) 12 CFR part 345—Community Reinvestment (CRA strategic plans and requests for designation as a wholesale or limited purpose institution);

Subpart A—Rules of General Applicability

§303.1 Scope.

This subpart A prescribes the general procedures for submitting filings to the FDIC which are required by statute or regulation. This subpart also prescribes the procedures to be followed by the FDIC, applicants and interested parties during the process of considering a filing, including public notice and comment. This subpart explains the availability of expedited processing for eligible depository institutions (defined in §303.2(r)). Certain terms used throughout this part are also defined in this subpart. Finally, this subpart sets forth general principles governing delegations of authority by the FDIC's Board of Directors.

§303.2 Definitions.

For purposes of this part:

(a) *Act* or *FDI Act* means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(b) *Adjusted part 325 total assets* means adjusted 12 CFR part 325 total assets as calculated and reflected in the FDIC's Report of Examination.

(c) *Adverse comment* means any objection, protest, or other adverse written statement submitted by an interested party relative to a filing. The term adverse comment shall not include any comment concerning the Community Reinvestment Act (CRA), fair lending, consumer protection, or civil rights that the appropriate regional director or deputy regional director (DCA) determines to be frivolous (for example, raising issues between the commenter and the applicant that have been resolved). The term adverse comment also shall not include any other comment that the appropriate regional director or deputy regional director (DOS) determines to be frivolous (for example, a non-substantive comment submitted primarily as a means of delaying action on the filing).

(d) *Amended order to pay* means 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.

(e) *Applicant* means a person or entity that submits a filing to the FDIC.

(f) *Application* means a submission requesting FDIC approval to engage in various corporate activities and transactions.

(g) *Appropriate FDIC region, appropriate FDIC regional office, appropriate regional director, appropriate deputy regional director, appropriate regional counsel* mean, respectively, the FDIC region, and the FDIC regional office, regional director, deputy regional director, and regional counsel, which the FDIC designates as follows:

(1) When an institution or proposed institution that is the subject of a filing or administrative action is not and will not be part of a group of related institutions, the appropriate region for the institution and any individual associated with the institution is the FDIC region in which the institution or proposed institution is or will be located; or

(2) When an institution or proposed institution that is the subject of a filing or administrative action is or will be part of a group of related institutions, the appropriate region for the institution and any individual associated with the institution is the FDIC region in which the group's major policy and decision makers are located, or any other region the FDIC designates on a case-by-case basis.

(h) *Associate director* means any associate director of the Division of Supervision (DOS) or the Division of Compliance and Consumer Affairs (DCA) or, in the event such titles become obsolete,

any official of equivalent authority within the respective divisions.

(i) *Book capital* means 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.

(j) *Comment* means any written statement of fact or opinion submitted by an interested party relative to a filing.

(k) *Corporation* or *FDIC* means the Federal Deposit Insurance Corporation.

(l) *CRA protest* means any adverse comment from the public related to a pending filing which raises a negative issue relative to the Community Reinvestment Act (CRA) (12 U.S.C. 2901 *et seq.*), whether or not it is labeled a protest and whether or not a hearing is requested.

(m) *Deputy Director* means the Deputy Director of the Division of Supervision (DOS) or the Deputy Director of the Division of Compliance and Consumer Affairs (DCA) or, in the event such titles become obsolete, any official of equivalent or higher authority within the respective divisions.

(n) *Deputy regional director* means any deputy regional director of the Division of Supervision (DOS) or the Division of Compliance and Consumer Affairs (DCA) or, in the event such titles become obsolete, any official of equivalent authority within the same FDIC region of DOS or DCA.

(o) *DCA* means the Division of Compliance and Consumer Affairs or, in the event the Division of Compliance and Consumer Affairs is reorganized, such successor division.

(p) *DOS* means the Division of Supervision or, in the event the Division of Supervision is reorganized, such successor division.

(q) *Director* means the Director of the Division of Supervision (DOS) or the Director of the Division of Compliance and Consumer Affairs (DCA) or, in the event such titles become obsolete, any official of equivalent or higher authority within the respective divisions.

(r) *Eligible depository institution* means a depository institution that meets the following criteria:

(1) Received an FDIC-assigned composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (UFIRS) as a result of its most recent federal or state examination;

(2) Received a satisfactory or better Community Reinvestment Act (CRA) rating from its primary federal regulator at its most recent examination, if the depository institution is subject to examination under part 345 of this chapter;

(3) Received a compliance rating of 1 or 2 from its primary federal regulator at its most recent examination;

(4) Is well-capitalized as defined in the appropriate capital regulation and guidance of the institution's primary federal regulator; and

(5) Is not subject to a cease and desist order, consent order, prompt corrective action directive, written agreement, memorandum of understanding, or other administrative agreement with its primary federal regulator or chartering authority.

(s) *Filing* means an application, notice or request submitted to the FDIC under this part.

(t) *General Counsel* means the head of the Legal Division of the FDIC or any official within the Legal Division exercising equivalent authority for purposes of this part.

(u) *Insider* means a person who is or is proposed to be a director, officer, organizer, or incorporator of an applicant; a shareholder who directly or indirectly controls 10 percent or more of any class of the applicant's outstanding voting stock; or the associates or interests of any such person.

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

(w) *NEPA* means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

(x) *NHPA* means the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*).

(y) *Notice* means a submission notifying the FDIC that a depository institution intends to engage in or has commenced certain corporate activities or transactions.

(z) *Notice of assessment of civil money penalties* means a notice of assessment of civil money 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(h) of the Act (12 U.S.C. 1817(a)(1), 1817(j)(15), 1818(i), or 1828(h)), 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.

(aa) *Notice of charges* means a notice of charges and of hearing setting forth the allegations of unsafe or unsound practices 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)).

(bb) *Notice to primary regulator* means the notice described in section 8(a)(2)(A) of the Act concerning termination of deposit insurance (12 U.S.C. 1818(a)(2)(A)).

(cc) *Regional counsel* means a regional counsel of the Legal Division or, in the event the title becomes obsolete, any official of equivalent authority within the Legal Division. The authority delegated to a regional counsel may be exercised, when confirmed in writing by the regional counsel, by a deputy regional counsel, or any official of equivalent or higher authority in the Supervision and Legislation Branch of the Legal Division.

(dd) *Regional director* means any regional director in the Division of Supervision (DOS) or the Division of Compliance and Consumer Affairs (DCA), or in the event such titles become obsolete, any official of equivalent authority within the respective divisions.

(ee) *Section 8 orders:*

(1) *Section 8(a) order* means an order terminating the insured status of a depository institution under section 8(a) of the Act (12 U.S.C. 1818(a)).

(2) *Section 8(b) order, cease-and-desist order* means a final order to cease and desist issued under section 8(b) of the Act (12 U.S.C. 1818(b)).

(3) *Section 8(c) order, temporary cease-and-desist order* means a temporary order to cease and desist issued under section 8(c) of the Act (12 U.S.C. 1818(c)).

(4) *Section 8(e) order* means a final order of removal or prohibition issued under section 8(e) of the Act (12 U.S.C. 1818(e)).

(5) *Section 8(e)(3) order, temporary order of suspension* means a temporary order of suspension or prohibition issued under section 8(e)(3) of the Act (12 U.S.C. 1818(e)(3)).

(6) *Section 8(g) order* means an order of suspension or order of prohibition issued under section 8(g) of the Act (12 U.S.C. 1818(g)).

(ff) *Standard conditions* means the conditions that any FDIC official acting under delegated authority may impose as a routine matter when approving a filing, whether or not the applicant has agreed to their inclusion. The following conditions, or variations thereof, are standard conditions:

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

(2) That if the transaction does not take effect within a specified time period, 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 specified time period;

(3) 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

(4) In the case of a merger transaction (as defined in § 303.61(a)), including a corporate reorganization, that the proposed transaction not be consummated before the 30th calendar day (or shorter time period as may be prescribed by the FDIC with the concurrence of the Attorney General) after the date of the order approving the merger transaction.

(gg) *Tier 1 capital* shall have the same meaning as provided in § 325.2(t) of this chapter.

(hh) *Total assets* shall have the same meaning as provided in § 325.2(v) of this chapter.

§ 303.3 General filing procedures.

Unless stated otherwise, filings should be submitted to the appropriate regional director (DOS). Forms and instructions for submitting filings may be obtained from any FDIC regional office (DOS). If no form is prescribed, the filing should be in writing; be signed by the applicant or a duly authorized agent; and contain a concise statement of the action requested. For specific filing and content requirements, consult the appropriate subparts of this part. The FDIC may require the applicant to submit additional information.

§ 303.4 Computation of time.

For purposes of this part, the FDIC begins computing the relevant period on the day after an event occurs (*e.g.*, the day after a substantially complete filing is received by the FDIC or the day after publication begins) through the last day of the relevant period. When the last day is a Saturday, Sunday or federal holiday, the period runs until the end of the next business day.

§ 303.5 Effect of Community Reinvestment Act performance on filings.

Among other factors, the FDIC takes into account the record of performance under the Community Reinvestment Act (CRA) of each applicant in considering a filing for approval of:

(a) The establishment of a domestic branch;

(b) The relocation of the bank's main office or a domestic branch;

(c) The relocation of an insured branch of a foreign bank;

(d) A transaction subject to the Bank Merger Act; and

(e) Deposit insurance.

§ 303.6 Investigations and examinations.

The Board of Directors, Directors of (DOS) or (DCA), the associate directors, or the appropriate regional director or appropriate deputy regional director (DOS) or (DCA) acting under delegated authority may examine or investigate and evaluate facts related to any filing under this chapter to the extent necessary to reach an informed decision and take any action necessary or appropriate under the circumstances.

§ 303.7 Public notice requirements.

(a) *General.* The public must be provided with prior notice of a filing to establish a domestic branch, relocate a domestic branch or the main office, relocate an insured branch of a foreign bank, engage in a merger transaction, initiate a change of control transaction, or request deposit insurance. The public has the right to comment on, or to protest, these types of proposed transactions during the relevant comment period. In order to fully apprise the public of this right, an applicant shall publish a public notice of its filing in a newspaper of general circulation. For specific publication requirements, consult subparts B (Deposit Insurance), C (Branches and Relocations), D (Merger Transactions), E (Change in Bank Control), and J (International Banking) of this part.

(b) *Confirmation of publication.* The applicant shall mail or otherwise deliver a copy of the newspaper notice to the appropriate regional director (DOS) as part of its filing, or, if a copy is not available at the time of filing, promptly after publication.

(c) *Content of notice.* (1) The public notice referred to in paragraph (a) of this section shall consist of the following:

(i) Name and address of the applicant(s). In the case of an application for deposit insurance for a de novo bank, include the names of all organizers or incorporators. In the case of an application to establish a branch, include the location of the proposed branch or, in the case of an application to relocate a branch or main office, include the current and proposed address of the office. In the case of a merger application, include the names of all parties to the transaction. In the case of a notice of acquisition of control, include the name(s) of the acquiring parties. In the case of an application to relocate an insured branch of a foreign bank, include the current and proposed address of the branch;

(ii) Type of filing being made;

(iii) Name of the depository institution(s) that is the subject matter of the filing;

(iv) That the public may submit comments to the appropriate FDIC regional director (DOS);

(v) The address of the appropriate FDIC regional office (DOS) where comments may be sent (the same location that where the filing will be made);

(vi) The closing date of the public comment period as specified in the appropriate subpart of this part; and

(vii) That the nonconfidential portions of the application are on file in the regional office and are available for public inspection during regular business hours; photocopies of the nonconfidential portion of the application file will be made available upon request.

(2) The requirements of paragraphs (c)(1)(iv) through (vii) of this section may be satisfied through use of the following notice:

Any person wishing to comment on this application may file his or her comments in writing with the regional director (DOS) of the Federal Deposit Insurance Corporation at its regional office [insert address of regional office] not later than [insert closing date of the public comment period specified in the appropriate subpart of part 303]. The non-confidential portions of the application are on file in the regional office and are available for public inspection during regular business hours. Photocopies of the nonconfidential portion of the application file will be made available upon request.

(d) *Multiple transactions.* The FDIC may consider more than one transaction, or a series of transactions, to be a single filing for purposes of the publication requirements of this section. When publishing a single public notice for multiple transactions, the applicant shall explain in the public notice how the transactions are related. The closing date of the comment period shall be the closing date of the longest public comment period that applies to any of the related transactions.

(e) *Joint public notices.* For a transaction subject to public notice requirements by the FDIC and another federal or state banking authority, the FDIC will accept publication of a single joint notice containing all the information required by both the FDIC and the other federal agency or state banking authority, provided that the notice states that comments must be submitted to the FDIC and, if applicable, the other federal or state banking authority.

(f) Where public notice is required, the FDIC may determine on a case-by-case basis that unusual circumstances surrounding a particular filing warrant modification of the publication requirements.

§303.8 Public access to filing.

(a) *General.* For filings subject to a public notice requirement, any person may inspect or request a copy of the non-confidential portions of a filing (the public file) until 180 days following final disposition of a filing. Following the 180-day period, non-confidential portions of an application file will be made available in accordance with paragraph (c) of this section. The public file generally consists of portions of the filing, supporting data, supplementary information, and comments submitted by interested persons (if any) to the extent that the documents have not been afforded confidential treatment. To view or request photocopies of the public file, an oral or written request should be submitted to the appropriate regional director (DOS). The public file will be produced for review not more than one business day after receipt by the regional office of the request (either written or oral) to see the file. The FDIC may impose a fee for photocopying in accordance with §309.5(c) of this chapter at the rates the FDIC publishes annually in the FEDERAL REGISTER.

(b) *Confidential treatment.* (1) The applicant may request that specific information be treated as confidential. 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 could result in substantial competitive harm to the submitter; and

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

(2) If an applicant requests confidential treatment for information that the FDIC does not consider to be confidential, the FDIC may include that information in the public file after notifying the applicant. On its own initiative, the FDIC may determine that certain information should be treated as

confidential and withhold that information from the public file.

(c) *FOIA requests.* A written request for information withheld from the public file, or copies of the public file following closure of the file 180 days after final disposition, should be submitted pursuant to the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter to the FDIC, Office of the Executive Secretary, 550 17th Street, N.W., Washington, D.C. 20429.

§ 303.9 Comments.

(a) *Submission of comments.* For filings subject to a public notice requirement, any person may submit comments to the appropriate FDIC regional director (DOS) during the comment period.

(b) *Comment period*—(1) *General.* Consult appropriate subparts of this part for the comment period applicable to a particular filing.

(2) *Extension.* The appropriate regional director or deputy regional director (DOS) may extend or reopen the comment period if:

(i) The applicant fails to file all required information on a timely basis to permit review by the public or makes a request for confidential treatment not granted by the FDIC that delays the public availability of that information;

(ii) Any person requesting an extension of time satisfactorily demonstrates to the FDIC that additional time is necessary to develop factual information that the FDIC determines may materially affect the application; or

(iii) The appropriate regional director or deputy regional director (DOS) determines that other good cause exists.

(3) *Solicitation of comments.* Whenever appropriate, the appropriate regional director (DOS) may solicit comments from any person or institution which might have an interest in or be affected by the pending filing.

(4) *Applicant response.* The FDIC will provide copies of all comments received to the applicant and may give the applicant an opportunity to respond.

§ 303.10 Hearings and other meetings.

(a) *Matters covered.* This section covers hearings and other proceedings in connection with filings and determinations for or by:

(1) Deposit insurance by a proposed new depository institution or operating non-insured institution;

(2) An insured state nonmember bank to establish a domestic branch or to relocate a main office or domestic branch;

(3) Relocation of an insured branch of a foreign bank;

(4)(i) Merger transaction which requires the FDIC's prior approval under the Bank Merger Act (12 U.S.C. 1828(c));

(ii) Except as otherwise expressly provided, the provisions of this section shall not be applicable to any proposed merger transaction which the FDIC Board of Directors determines must be acted upon immediately to prevent the probable failure 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));

(5) Nullification of a decision on a filing; and

(6) Any other purpose or matter which the FDIC Board of Directors in its sole discretion deems appropriate.

(b) *Hearing requests.* (1) Any person may submit a written request for a hearing on a filing:

(i) To the appropriate regional director (DOS) before the end of the comment period; or

(ii) To the appropriate regional director (DOS or DCA), pursuant to a notice to nullify a decision on a filing issued pursuant to § 303.11(g)(2)(i) or (ii).

(2) The request must describe the nature of the issues or facts to be presented and the reasons why written submissions would be insufficient to make an adequate presentation of those issues or facts to the FDIC. A person requesting a hearing shall simultaneously submit a copy of the request to the applicant.

(c) *Action on a hearing request.* The appropriate regional director (DOS or DCA), after consultation with the Legal Division, may grant or deny a request for a hearing and may limit the issues that he or she deems relevant or material. The FDIC generally grants a hearing request only if it determines

that written submissions would be insufficient or that a hearing otherwise would be in the public interest.

(d) *Denial of a hearing request.* If the appropriate regional director (DOS or DCA), after consultation with the Legal Division, denies a hearing request, he or she shall notify the person requesting the hearing of the reason for the denial. A decision to deny a hearing request shall be a final agency determination and is not appealable.

(e) *FDIC procedures prior to the hearing*—(1) *Notice of hearing.* The FDIC shall issue a notice of hearing if it grants a request for a hearing or orders a hearing because it is in the public interest. The notice of hearing shall state the subject and date of the filing, the time and place of the hearing, and the issues to be addressed. The FDIC shall send a copy of the notice of hearing to the applicant, to the person requesting the hearing, and to anyone else requesting a copy.

(2) *Presiding officer.* The presiding officer shall be the Regional Director (DOS or DCA) or his or her designee or such other person as may be named by the Board or the Director (DOS or DCA). The presiding officer is responsible for conducting the hearing and determining all procedural questions not governed by this section.

(f) *Participation in the hearing.* Any person who wishes to appear (participant) shall notify the appropriate regional director (DOS or DCA) of his or her intent to participate in the hearing no later than 10 days from the date that the FDIC issues the Notice of Hearing. At least 5 days before the hearing, each participant shall submit to the appropriate regional director (DOS or DCA), as well as to the applicant and any other person as required by the FDIC, the names of witnesses, a statement describing the proposed testimony of each witness, and one copy of each exhibit the participant intends to present.

(g) *Transcripts.* The FDIC shall arrange for a hearing transcript. The person requesting the hearing and the applicant each shall bear the cost of one copy of the transcript for his or her use unless such cost is waived by the presiding officer and incurred by the FDIC.

(h) *Conduct of the hearing*—(1) *Presentations.* Subject to the rulings of the presiding officer, the applicant and participants may make opening and closing statements and present and examine witnesses, material, and data.

(2) *Information submitted.* Any person presenting material shall furnish one copy to the FDIC, one copy to the applicant, and one copy to each participant.

(3) *Laws not applicable to hearings.* The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*), and the FDIC's Rules of Practice and Procedure (12 CFR part 308) do not govern hearings under this section.

(i) *Closing the hearing record.* At the applicant's or any participant's request, or at the FDIC's discretion, the FDIC may keep the hearing record open for up to 10 days following the FDIC's receipt of the transcript. The FDIC shall resume processing the filing after the record closes.

(j) *Disposition and notice thereof.* The presiding officer shall make a recommendation to the FDIC within 20 days following the date the hearing and record on the proceeding are closed. The FDIC shall notify the applicant and all participants of the final disposition of a filing and shall provide a statement of the reasons for the final disposition.

(k) *Computation of time.* In computing periods of time under this section, the provisions of § 308.12 of the FDIC's Rules of Practice and Procedure (12 CFR 308.12) shall apply.

(l) *Informal proceedings.* The FDIC may arrange for an informal proceeding with an applicant and other interested parties in connection with a filing, either upon receipt of a written request for such a meeting made during the comment period, or upon the FDIC's own initiative. No later than 10 days prior to an informal proceeding, the appropriate regional director (DOS or DCA) shall notify the applicant and each person who requested a hearing or oral presentation of the date, time, and place of the proceeding. The proceeding may assume any form, including a meeting with FDIC representatives at

which participants will be asked to present their views orally. The appropriate regional director (DOS or DCA) may hold separate meetings with each of the participants.

(m) *Authority retained by FDIC Board of Directors to modify procedures.* The FDIC Board of Directors may delegate authority by resolution on a case-by-case basis to the presiding officer to adopt different procedures in individual matters and on such terms and conditions as the Board of Directors determines in its discretion. Such resolution shall be made available for public inspection and copying in the Office of the Executive Secretary under the Freedom of Information Act (5 U.S.C. 552(a)(2)).

§ 303.11 Decisions.

(a) *General procedures.* The FDIC may approve, conditionally approve, deny, or not object to a filing after appropriate review and consideration of the record. The FDIC will promptly notify the applicant and any person who makes a written request of the final disposition of a filing. If the FDIC denies a filing, the FDIC will immediately notify the applicant in writing of the reasons for the denial.

(b) *Authority retained by FDIC Board of Directors to modify procedures.* In acting on any filing under this part, the FDIC Board of Directors may by resolution adopt procedures which differ from those contained in this part when it deems it necessary or in the public interest to do so. The resolution shall be made available for public inspection and copying in the Office of the Executive Secretary under the Freedom of Information Act (5 U.S.C. 552(a)(2)).

(c) *Expedited processing.* (1) A filing submitted by an eligible depository institution as defined in § 303.2(r) will receive expedited processing as specified in the appropriate subparts of this part unless the appropriate regional director or deputy regional director (DOS) determines to remove the filing from expedited processing for any of the reasons set forth in paragraph (c)(2) of this section. Except for filings made pursuant to subpart J of this part (International Banking), expedited processing will not be available for any filing that the appropriate regional director (DOS) does not have delegated authority to approve.

(2) *Removal of filing from expedited processing.* The appropriate regional director or deputy regional director (DOS) may remove a filing from expedited processing at any time prior to final disposition if:

(i) For filings subject to public notice under § 303.7, an adverse comment is received that warrants additional investigation or review;

(ii) For filings subject to evaluation of CRA performance under § 303.5, a CRA protest is received that warrants additional investigation or review, or the appropriate regional director (DCA) determines that the filing presents a significant CRA or compliance concern;

(iii) For any filing, the appropriate regional director (DOS) determines that the filing presents a significant supervisory concern, or raises a significant legal or policy issue; or

(iv) For any filing, the appropriate regional director (DOS) determines that other good cause exists for removal.

(3) For purposes of this section, a significant CRA concern includes, but is not limited to, a determination by the appropriate regional director (DCA) that, although a depository institution may have an institution-wide rating of satisfactory or better, a depository institution's CRA rating is less than satisfactory in a state or multi-state metropolitan statistical area, or a depository institution's CRA performance is less than satisfactory in a metropolitan statistical area as defined in 12 CFR 345.12 (MSA) or in the non-MSA portion of a state in which it seeks to expand through approval of an application for a deposit facility as defined in 12 U.S.C. 2902(3).

(4) If the FDIC determines that it is necessary to remove a filing from expedited processing pursuant to paragraph (c)(2) of this section, the FDIC promptly will provide the applicant with a written explanation.

(d) *Multiple transactions.* If the FDIC is considering related transactions, some or all of which have been granted expedited processing, then the longest processing time for any of the related

transactions shall govern for purposes of approval.

(e) *Abandonment of filing.* A filing must contain all information set forth in the applicable subpart of this part. To the extent necessary to evaluate a filing, the FDIC may require an applicant to provide additional information. If information requested by the FDIC is not provided within the time period specified by the agency, the FDIC may deem the filing abandoned and shall provide written notification to the applicant and any interested parties that submitted comments to the FDIC that the file has been closed.

(f) *Appeals and requests for reconsideration.*—(1) *General.* Appeal procedures for a denial of a change in bank control (subpart E of this part), change in senior executive officer or board of directors (subpart F of this part) or denial of an application pursuant to section 19 of the FDI Act (subpart L of this part) are contained in 12 CFR part 308, subparts D, L, and M, respectively. For all other filings covered by this chapter for which appeal procedures are not provided by regulation or other written guidance, the procedures specified in paragraphs (f) (2) through (5) of this section shall apply. A decision to deny a request for a hearing is a final agency determination and is not appealable.

(2) *Filing procedures.* Within 15 days of receipt of notice from the FDIC that its filing has been denied, any applicant may file a request for reconsideration with the appropriate regional director (DOS), if the filing initially was submitted to DOS, or the appropriate regional director (DCA), if the filing initially was submitted to DCA.

(3) *Content of filing.* A request for reconsideration must contain the following information:

(i) A resolution of the board of directors of the applicant authorizing filing of the request if the applicant is a corporation, or a letter signed by the individual(s) filing the request if the applicant is not a corporation;

(ii) Relevant, substantive information that for good cause was not previously set forth in the filing; and

(iii) Specific reasons why the FDIC should reconsider its prior decision.

(4) *Delegation of authority for requests for reconsideration.* (i) Authority is delegated to the Director and Deputy Director (DOS) and (DCA), as appropriate and, where confirmed in writing by the appropriate Director, to an associate director and the appropriate regional director and deputy regional director, to grant a request for reconsideration, after consultation with the Legal Division.

(ii) Authority is delegated to the Director and Deputy Director (DOS) and (DCA), as appropriate and, where confirmed in writing, to an associate director, to deny a request for reconsideration, after consultation with the Legal Division. Such a denial is a final agency decision and is not appealable.

(5) *Reconsideration of the filing.* If a request for reconsideration is granted pursuant to this paragraph (f), the filing will be reconsidered as follows:

(i) The Board of Directors will reconsider any such filing if the filing was originally denied by the Board of Directors.

(ii) Authority is delegated to the FDIC's Supervisory Appeals Review Committee to reconsider any such filing if the filing was originally denied by the Director or Deputy Director or an associate director (DOS) or (DCA), and to make the final agency decision on such filing, after consultation with the Legal Division.

(iii) Authority is delegated to the Director or Deputy Director (DOS) or (DCA), as appropriate, to reconsider any such filing that was originally denied by a regional director or deputy regional director, and to make the final agency decision on such filing, after consultation with the Legal Division.

(iv) Notwithstanding paragraphs (f)(5)(ii) and (iii) of this section, no reconsideration of a filing that originally required Legal Division concurrence may be acted upon without Legal Division concurrence.

(6) *Processing.* The appropriate regional director (DOS or DCA) will notify the applicant whether reconsideration will be granted or denied within 15 days of receipt of a request for reconsideration. If a request for reconsideration is granted pursuant to this paragraph (f), the FDIC will notify the applicant of the final agency decision

on such filing within 60 days of its receipt of the request for reconsideration.

(g) *Nullification, withdrawal, revocation, amendment, and suspension of decisions on filing.*—(1) *Grounds for action.* (i) Except as otherwise provided by law or regulation, the FDIC may nullify, withdraw, revoke, amend or suspend a decision on a filing if it becomes aware at anytime:

(A) Of any material misrepresentation or omission related to the filing or of any material change in circumstance that occurred prior to the consummation of the transaction or commencement of the activity authorized by the decision on the filing; or

(B) That the decision on the filing is contrary to law or regulation or was granted due to clerical or administrative error.

(ii) Any person responsible for a material misrepresentation or omission in a filing or supporting materials may be subject to an enforcement action and other penalties, including criminal penalties provided in Title 18 of the United States Code.

(2) *Notice of intent and temporary order.* (i) Except as provided in paragraph (g)(2)(ii) of this section, before taking action under this paragraph (g), the FDIC shall issue and serve on an applicant written notice of its intent to take such action. A notice of intent to act on a filing shall include:

(A) The reasons for the proposed action; and

(B) The date by which the applicant may file a written response with the FDIC.

(ii) The FDIC may issue a temporary order on a decision on a filing without providing an applicant a prior notice of intent if the FDIC determines that:

(A) It is necessary to reevaluate the impact of a change in circumstance prior to the consummation of the transaction or commencement of the activity authorized by the decision on the filing; or

(B) The activity authorized by the filing may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution.

(iii) A temporary order shall provide the applicant with an opportunity to make a written response in accordance with paragraph (g)(3) of this section.

(3) *Response to notice of intent or temporary order.* An applicant may file a written response to a notice of intent or a temporary order within 15 days from the date of service of the notice or temporary order. The written response should include:

(i) An explanation of why the proposed action or temporary order is not warranted; and

(ii) Any other relevant information, mitigating circumstance, documentation, or other evidence in support of the applicant's position. An applicant may also request a hearing under § 303.10. Failure by an applicant to file a written response with the FDIC to a notice of intent or a temporary order within the specified time period, shall constitute a waiver of the opportunity to respond and shall constitute consent to a final order under this paragraph (g).

(4) *Effective date.* All orders issued pursuant to this section shall become effective immediately upon issuance unless otherwise stated therein.

(5) *Retained and delegated authority.* The FDIC Board of Directors retains authority to issue notices of intent and temporary and final orders under this paragraph (g), as to any decision on a filing originally acted on by the Board. For decisions on filings under this paragraph (g) that were not originally acted on by the Board, authority is delegated to the Director and Deputy Director (DOS and DCA) and, where confirmed in writing by the appropriate Director, to an associate director or the appropriate regional director or deputy regional director, to issue notices of intent and final orders, after consultation with the Legal Division. Authority is delegated to the Director and Deputy Director (DOS and DCA) and, where confirmed in writing by the appropriate Director, to an associate director, to issue temporary orders under this paragraph (g), after consultation with the Legal Division. This delegated authority may be exercised only by the official who acted on the original filing or an official of equivalent or higher authority.

§303.12 General rules governing delegations of authority.

(a) *Scope.* This section contains general rules governing the FDIC Board of Director's delegations of authority under this part. These principles are procedural in nature only and are not substantive standards. All delegations of authority, confirmations, limitations, revisions, and rescissions under this part must be in writing and maintained with the Office of the Executive Secretary.

(b) *Authority not delegated.* Except as otherwise expressly provided, the FDIC Board of Directors does not delegate its authority.

(1) The FDIC Board of Directors retains and does not delegate the authority to act on agreements with foreign regulatory or supervisory authorities, matters that would establish or change existing Corporation policy, matters that might attract unusual attention or publicity, or involve an issue of first impression notwithstanding any existing delegation of authority.

(2) The FDIC Board of Directors retains the authority to act on any filing or enforcement matter upon which any member of the Board of Directors wishes to act, even if the authority to act on such filing or enforcement matter has been delegated.

(c) *Exercise of delegated authority not mandated.* Any FDIC official with delegated authority under this part may elect not to exercise that authority.

(d) *Action by FDIC officials.* In matters where the FDIC Board of Directors has neither specifically delegated nor retained authority, FDIC officials may take action with respect to matters which generally involve conditions or circumstances requiring prompt action to protect the interests of the FDIC and to achieve flexibility in and expedite its operations and the exercise of FDIC functions under this part.

(e) *Construction.* The delegations of authority contained in this part are to be broadly construed in favor of the existence of authority in FDIC officials who act under delegated authority. Any exercise of authority under this part by an FDIC official is conclusive evidence of that official's authority.

(f) *Written confirmations, limitations, revisions or rescissions.* Where the FDIC Board of Directors has delegated authority to the Director (DOS), Director (DCA) or the General Counsel, or their respective designees, each shall have the right to confirm, limit, revise, or rescind any delegation of authority issued or approved by them, respectively, to any subordinate official(s).

§303.13 Delegations of authority to officials in the Division of Supervision and the Division of Compliance and Consumer Affairs.

(a) *CRA protests.* Where a CRA protest is filed and remains unresolved, authority is delegated to the Director and Deputy Director (DCA) and, where confirmed in writing by the Director, to an associate director or the appropriate regional director or deputy regional director to concur that approval of any filing subject to CRA is consistent with the purposes of CRA.

(b) *Adequacy of filings.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to determine whether a filing is substantially complete for purposes of commencing processing.

(c) *National Historic Preservation Act.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to enter into memoranda of agreement pursuant to regulations of the Advisory Council on Historic Preservation which implement the National Historic Preservation Act of 1966 (16 U.S.C. 470).

(d) *Modification of publication requirements.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to modify the publication requirements for a particular filing where the unusual circumstances surrounding the filing warrant such modification.

Subpart B—Deposit Insurance

§ 303.20 Scope.

This subpart sets forth the procedures for applying for deposit insurance for a proposed depository institution or an operating noninsured depository institution under section 5 of the FDI Act (12 U.S.C. 1815). It also sets forth the procedures for requesting continuation of deposit insurance for a state-chartered bank withdrawing from membership in the Federal Reserve System and for interim institutions chartered to facilitate a merger transaction. Related delegations of authority are also set forth.

§ 303.21 Filing procedures.

(a) Applications for deposit insurance shall be filed with the appropriate regional director (DOS). The relevant application forms and instructions for applying for deposit insurance for an existing or proposed depository institution may be obtained from any FDIC regional office (DOS).

(b) An application for deposit insurance for an interim depository institution shall be filed and processed in accordance with the procedures set forth in § 303.24, subject to the provisions of § 303.62(b)(2) regarding deposit insurance for interim institutions. An interim institution is defined as a state- or federally-chartered depository institution that does not operate independently but exists solely as a vehicle to accomplish a merger transaction.

(c) A request for continuation of deposit insurance upon withdrawing from membership in the Federal Reserve System shall be in letter form and shall provide the information prescribed in § 303.25.

§ 303.22 Processing.

(a) *Expedited processing for proposed institutions.* (1) An application for deposit insurance for a proposed institution which will be a subsidiary of an eligible depository institution as defined in § 303.2(r) or an eligible holding company will be acknowledged in writing by the FDIC and will receive expedited processing unless the applicant is notified in writing to the contrary and provided with the basis for that decision. An eligible holding company is defined as a bank or thrift holding company that has consolidated assets of $150 million or more, has an assigned composite rating of 2 or better, and has at least 75 percent of its consolidated depository institution assets comprised of eligible depository institutions. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2).

(2) Under expedited processing, the FDIC will take action on an application within 60 days of receipt of a substantially complete application or 5 days after the expiration of the comment period described in § 303.23, whichever is later. Final action may be withheld until the FDIC has assurance that permission to organize the proposed institution will be granted by the chartering authority. Notwithstanding paragraph (a)(1) of this section, if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

(b) *Standard processing.* For those applications that are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

§ 303.23 Public notice requirements.

(a) *De novo institutions and operating noninsured institutions.* The applicant shall publish a notice as prescribed in § 303.7 in a newspaper of general circulation in the community in which the main office of the depository institution is or will be located. Notice shall be published as close as practicable to, but no sooner than five days before, the date the application is mailed or delivered to the appropriate regional director (DOS). Comments by interested parties must be received by the appropriate regional director (DOS) within 30 days following the date of publication, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2).

(b) *Exceptions to public notice requirements.* No publication shall be required in connection with the granting of insurance to a new depository institution established pursuant to the resolution of a depository institution in default, or to an interim depository institution

formed solely to facilitate a merger transaction, or for a request for continuation of federal deposit insurance by a state-chartered bank withdrawing from membership in the Federal Reserve System.

§303.24 Application for deposit insurance for an interim institution.

(a) *Application required.* Subject to §303.62(b)(2), a deposit insurance application is required for a state-chartered interim institution if the related merger transaction is subject to approval by a federal banking agency other than the FDIC. A separate application for deposit insurance for an interim institution is not required in connection with any merger requiring FDIC approval pursuant to subpart D of this part.

(b) *Content of separate application.* A letter application for deposit insurance for an interim institution, accompanied by a copy of the related merger application, shall be filed with the appropriate regional director (DOS). The letter application shall briefly describe the transaction and contain a statement that deposit insurance is being requested for an interim institution that does not operate independently but exists solely as a vehicle to accomplish a merger transaction which will be reviewed by a federal banking agency other than the FDIC.

(c) *Processing.* An application for deposit insurance for an interim depository institution will be acknowledged in writing by the FDIC. Final action will be taken within 21 days after receipt of a substantially complete application, unless the applicant is notified in writing that additional review is warranted. If the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

§303.25 Continuation of deposit insurance upon withdrawing from membership in the Federal Reserve System.

(a) *Content of application.* To continue its insured status upon withdrawal from membership in the Federal Reserve System, a state-chartered bank shall submit a letter application to the appropriate regional director (DOS). A complete application shall consist of the following information:

(1) A copy of the letter, and any attachments thereto, sent to the appropriate Federal Reserve Bank setting forth the bank's intention to terminate its membership;

(2) A copy of the letter from the Federal Reserve Bank acknowledging the bank's notice to terminate membership;

(3) A statement regarding any anticipated changes in the bank's general business plan during the next 12-month period; and

(4)(i) A statement by the bank's management that there are no outstanding or proposed corrective programs or supervisory agreements with the Federal Reserve System.

(ii) If such programs or agreements exist, a statement by the applicant that its Board of Directors is willing to enter into similar programs or agreements with the FDIC which would become effective upon withdrawal from the Federal Reserve System.

(b) *Processing.* An application for deposit insurance under this section will be acknowledged in writing by the FDIC. The appropriate regional director (DOS) shall notify the applicant, within 15 days of receipt of a substantially complete application, either that federal deposit insurance will continue upon termination of membership in the Federal Reserve System or that additional review is warranted and the applicant will be notified, in writing, of the FDIC's final decision regarding continuation of deposit insurance. If the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

§303.26 Delegation of authority.

(a) *Proposed depository institutions.* (1) Authority is delegated to the Director and the Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve applications for deposit insurance for proposed depository institutions. For the delegate to exercise this authority, the criteria in paragraphs (a)(1)(i) through

(a)(1)(v) of this section must be satisfied and the applicant shall have agreed in writing to comply with any conditions imposed by the delegate, other than those listed in paragraph (d) of this section which may be imposed without the applicant's consent:

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

(ii) 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 or any other applicable implementing regulation, exist;

(iii) The application is in conformity with the standards and guidelines for the granting of deposit insurance established in the FDIC statement of policy ''Applications for Deposit Insurance'' (2 FDIC Law, Regulations and Related Acts (FDIC) 5349; see § 309.4(a) and (b) of this chapter for availability);

(iv) Compliance with the CRA, the NEPA, the NHPA and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved; and

(v) No CRA protest as defined in § 303.2(l) has been filed which remains unresolved or, where such a protest has been filed and remains unresolved, the Director (DCA), Deputy Director (DCA), an associate director (DCA) or the appropriate regional director (DCA) or deputy regional director (DCA) concurs that approval is consistent with the purposes of the CRA and the applicant agrees in writing to any conditions imposed regarding the CRA.

(2) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve applications for deposit insurance filed by or on behalf of proposed interim depository institutions formed or organized solely for the purpose of facilitating a merger transaction which will be reviewed by a responsible agency as defined in section 18(c)(2) of the FDI Act. For the delegate to exercise this authority, the criteria in paragraphs (a)(1)(i) through (a)(1)(v) of this section must be satisfied and the applicant must agree in writing to comply with any conditions imposed by the delegate, other than those listed in paragraph (d) of this section which may be imposed without the applicant's consent.

(b) *Operating noninsured depository institutions.* Authority is delegated to the Director and the Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve applications for deposit insurance by operating noninsured depository institutions. For the delegate to exercise this authority, the following criteria must be satisfied and the applicant must have agreed in writing to comply with any condition imposed by the delegate, other than those listed in paragraph (d) of this section which may be imposed without the applicant's consent:

(1) 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 section 3(a) of the Act (12 U.S.C. 1813(a)) in which the applicant is located;

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

(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 or any other applicable implementing regulation, exist;

(4) The application is in conformity with the standards and guidelines for the granting of deposit insurance to operating noninsured depository institutions established in the FDIC statement of policy ''Applications for Deposit Insurance'' (2 FDIC Law, Regulations and Related Acts (FDIC) 5349);

(5) Compliance with the CRA, the NEPA, the NHPA, and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved; and

(6) No CRA protest as defined in § 303.2(l) has been filed which remains unresolved or, where such a protest has been filed and remains unresolved, the Director (DCA), Deputy Director (DCA), an associate director (DCA) or the appropriate regional director (DCA)

or deputy regional director (DCA) concurs that approval is consistent with the purposes of the CRA and the applicant agrees in writing to any conditions imposed regarding the CRA.

(c) *Continuation of deposit insurance upon withdrawing from membership in the Federal Reserve System.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director to approve continuation of federal deposit insurance where the applicant has agreed in writing to comply with any conditions imposed by the delegate, other than the standard conditions defined in § 303.2(ff) which may be imposed without the applicant's written consent.

(d) *Conditions that may be imposed under delegated authority.* Following are conditions which may be imposed by a delegate in approving applications for deposit insurance without affecting the authority granted under paragraphs (a) and (b) of this section:

(1) The applicant will provide a specific amount of initial paid-in capital;

(2) With respect to a proposed depository institution that has applied for deposit insurance pursuant to this subpart, the Tier 1 capital to assets leverage ratio (as defined in the appropriate capital regulation and guidance of the institution's primary federal regulator) will be maintained at not less than eight percent throughout the first three years of operation and that an adequate allowance for loan and lease losses will be provided;

(3) Any changes in proposed management or proposed ownership to the extent of 10 percent or more of stock, including new acquisitions of or subscriptions to 10 percent or more of stock shall be approved by the FDIC prior to the opening of the depository institution for business;

(4) The applicant will adopt an accrual accounting system for maintaining the books of the depository institution;

(5) Where applicable, deposit insurance will not become effective until the applicant has been granted a charter as a depository institution, has authority to conduct a depository institution business, and its establishment and operation as a depository institution have been fully approved by the appropriate state and/or federal supervisory authority;

(6) Where deposit insurance is granted to an interim institution formed or organized solely to facilitate a related transaction, deposit insurance will only become effective in conjunction with consummation of the related transaction;

(7) 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 or the Office of Thrift Supervision to acquire voting stock control of the proposed depository institution prior to its opening for business;

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

(9) Where applicable, full disclosure has been made to all proposed directors and stockholders of the facts concerning the interest of any insider in any transactions being effected or then contemplated, including the identity of the parties to the transaction and the terms and costs involved. An insider is one who is or is proposed to be a director, officer, or incorporator of an applicant; a shareholder who directly or indirectly controls 10 or more percent of any class of the applicant's outstanding voting stock; or the associates or interests of any such person;

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

(11) The applicant will have adequate fidelity coverage;

(12) The depository institution will 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

(13) Any standard condition defined in § 303.2(ff).

§ 303.27 Authority retained by the FDIC Board of Directors.

Without limiting the Board of Director's authority, the Board of Directors retains authority to deny applications for deposit insurance and approve applications for deposit insurance where the applicant does not agree in writing to comply with any condition imposed by the FDIC, other than the standard conditions listed in §§ 303.2(ff) and 303.26(d), which may be imposed without the applicant's written consent.

Subpart C—Establishment and Relocation of Domestic Branches and Offices

§ 303.40 Scope.

(a) *General.* This subpart sets forth the application requirements, procedures and the delegations of authority for insured state nonmember banks to establish a branch, relocate a branch or main office, and retain existing branches after the interstate relocation of the main office subject to the approval by the FDIC pursuant to sections 13(f), 13(k), 18(d) and 44 of the FDI Act.

(b) *Merger transaction.* Applications for approval of the acquisition and establishment of branches in connection with a merger transaction under section 18(c) of the FDI Act (12 U.S.C. 1828(c)), are processed in accordance with subpart D (Merger Transactions) of this part.

(c) *Insured branches of foreign banks and foreign branches of domestic banks.* Applications regarding insured branches of foreign banks and foreign branches of domestic banks are processed in accordance with subpart J (International Banking) of this part.

(d) *Interstate acquisition of individual branch.* Applications requesting approval of the interstate acquisition of an individual branch or branches located in a state other than the applicant's home state without the acquisition of the whole bank are treated as interstate bank merger transactions under section 44 of the FDI Act (12 U.S.C. 1831a(u)), and are processed in accordance with subpart D (Merger Transactions) of this part.

§ 303.41 Definitions.

For purposes of this subpart:

(a) *Branch* includes any branch bank, branch office, additional office, or any branch place of business located in any State of the United States or in any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands at which deposits are received or checks paid or money lent. A branch does not include an automated teller machine, an automated loan machine, or a remote service unit. The term branch also includes the following:

(1) A *messenger service* that is operated by a bank or its affiliate that picks up and delivers items relating to transactions in which deposits are received or checks paid or money lent. A messenger service established and operated by a non-affiliated third party generally does not constitute a branch for purposes of this subpart. Banks contracting with third parties to provide messenger services should consult with the appropriate regional director (DOS) to determine if the messenger service constitutes a branch.

(2) A *mobile branch,* other than a messenger service, that does not have a single, permanent site and uses a vehicle that travels to various locations to enable the public to conduct banking business. A mobile branch may serve defined locations on a regular schedule or may serve a defined area at varying times and locations.

(3) A *temporary branch* that operates for a limited period of time not to exceed one year as a public service, such as during an emergency or disaster situation.

(4) A *seasonal branch* that operates at various periodically recurring intervals, such as during state and local fairs, college registration periods, and other similar occasions.

(b) *Branch relocation* means a move within the same immediate neighborhood of the existing branch that does not substantially affect the nature of the business of the branch or the customers of the branch. Moving a branch to a location outside its immediate neighborhood is considered the closing of an existing branch and the establishment of a new branch. Closing of a branch is covered in the FDIC Statement of Policy Concerning Branch Closing Notices and Policies (2 FDIC Law, Regulations, Related Acts 5391; see §309.4 (a) and (b) of this chapter for availability).

(c) *De novo branch* means a branch of a bank which is established by the bank as a branch and does not become a branch of such bank as a result of:

(1) The acquisition by the bank of an insured depository institution or a branch of an insured depository institution; or

(2) The conversion, merger, or consolidation of any such institution or branch.

(d) *Home state* means the state by which the bank is chartered.

(e) *Host state* means a state, other than the home state of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.

§303.42 Filing procedures.

(a) *General.* An applicant shall submit an application to the appropriate regional director (DOS) on the date the notice required by §303.44 is published, or within 5 days after the date of the last required publication.

(b) *Content of filing.* A complete letter application shall include the following information:

(1) A statement of intent to establish a branch, or to relocate the main office or a branch;

(2) The exact location of the proposed site including the street address. With regard to messenger services, specify the geographic area in which the services will be available. With regard to a mobile branch specify the community or communities in which the vehicle will operate and the manner in which it will be used;

(3) Details concerning any involvement in the proposal by an insider of the bank as defined in §303.2(u), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(4) A statement on the impact of the proposal on the human environment, including, information on compliance with local zoning laws and regulations and the effect on traffic patterns for purposes of complying with the applicable provisions of the NEPA and the FDIC Statement of Policy on NEPA (2 FDIC Law, Regulations, Related Acts 5185; see §309.4 (a) and (b) of this chapter for availability);

(5) A statement as to whether or not the site is eligible for inclusion in the National Register of Historic Places for purposes of complying with applicable provisions of the NHPA and the FDIC Statement of Policy on NHPA (2 FDIC Law, Regulations, Related Acts 5175; see §309.4 (a) and (b) of this chapter for availability) including documentation of consultation with the State Historic Preservation Officer, as appropriate;

(6) 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 CRA;

(7) A copy of each newspaper publication required by §303.44, the name and address of the newspaper, and date of the publication;

(8) When an application is submitted to relocate the main office of the applicant from one state to another, a statement of the applicant's intent regarding retention of branches in the state where the main office exists prior to relocation.

(c) *Undercapitalized institutions.* Applications to establish a branch by applicants subject to section 38 of the FDI Act (12 U.S.C. 1831*o*) also should provide the information required by §303.204. Applications pursuant to sections 38 and 18(d) of the FDI Act (12 U.S.C. 1831*o* and 1828(d)) may be filed concurrently or as a single application.

(d) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

§303.43 Processing.

(a) *Expedited processing for eligible depository institutions.* An application

filed under this subpart by an eligible depository institution as defined in § 303.2(r) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited processing will be deemed approved on the latest of the following:

(1) The 21st day after receipt by the FDIC of a substantially complete filing;

(2) The 5th day after expiration of the comment period described in § 303.44; or

(3) In the case of an application to establish and operate a de novo branch in a state that is not the applicant's home state and in which the applicant does not maintain a branch, the 5th day after the FDIC receives confirmation from the host state that the applicant has both complied with the filing requirements of the host state and submitted a copy of the application with the FDIC to the host state bank supervisor.

(b) *Standard processing.* For those applications which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

§ 303.44 Public notice requirements.

(a) *Newspaper publications.* For applications to establish or relocate a branch, a notice as described in § 303.7(b) shall be published once in a newspaper of general circulation. For applications to relocate a main office, notice shall be published at least once each week on the same day for two consecutive weeks. The required publication shall be made in the following communities:

(1) *To establish a branch.* In the community in which the main office is located and in the communities to be served by the branch (including messenger services and mobile branches).

(2) *To relocate a main office.* In the community in which the main office is currently located and in the community to which it is proposed the main office will relocate.

(3) *To relocate a branch.* In the community in which the branch is located.

(b) *Public comments.* Comments by interested parties must be received by the appropriate regional director (DOS) within 15 days after the date of the last newspaper publication required by paragraph (a) of this section, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2).

(c) *Lobby notices.* In the case of applications to relocate a main office or a branch, a copy of the required newspaper publication shall be posted in the public lobby of the office to be relocated for at least 15 days beginning on the date of the last published notice required by paragraph (a) of this section.

§ 303.45 Special provisions.

(a) *Emergency or disaster events.* (1) In the case of an emergency or disaster at a main office or a branch which requires that an office be immediately relocated to a temporary location, applicants shall notify the appropriate regional director (DOS) within 3 days of such temporary relocation.

(2) Within 10 days of the temporary relocation resulting from an emergency or disaster, the bank shall submit a written application to the appropriate regional director (DOS), that identifies the nature of the emergency or disaster, specifies the location of the temporary branch, and provides an estimate of the duration the bank plans to operate the temporary branch.

(3) As part of the review process, the appropriate regional director (DOS) will determine on a case by case basis whether additional information is necessary and may waive public notice requirements.

(b) *Redesignation of main office and existing branch.* In cases where an applicant desires to redesignate its main office as a branch and redesignate an existing branch as the main office, a single application shall be submitted. The appropriate regional director (DOS) may waive the public notice requirements in instances where an application presents no significant or novel policy, supervisory, CRA, compliance or legal concerns. A waiver will be

granted only to a redesignation within the applicant's home state.

(c) *Expiration of approval.* Approval of an application expires if within 18 months after the approval date a branch has not commenced business or a relocation has not been completed.

§303.46 Delegation of authority.

(a) *Approval of applications.* (1) Where the applicant agrees in writing to comply with any conditions imposed by the delegate, other than the standard conditions defined in §303.2(ff) which may be imposed without the applicant's written consent, authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve the following applications:

(i) Establish a branch;

(ii) Establish and operate a de novo branch in a state that is not the applicant's home state and in which the applicant does not maintain a branch;

(iii) Relocate a main office (including an application to relocate a main office to another state and retain existing branches); and

(iv) Relocate a branch.

(2) For the delegate to exercise this authority, the criteria in paragraphs (c)(1) through (c)(7) of this section must be satisfied.

(3) Where the applicant does not agree in writing to comply with any condition imposed by the delegate, authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director to approve the applications listed in paragraph (a)(1) of this section.

(b) *Denial of applications.* (1) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to deny an application to establish a temporary branch.

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

(i) Establish a branch;

(ii) Establish and operate a de novo branch in a state that is not the applicant's home state and in which the applicant does not maintain a branch;

(iii) Relocate a main office (including an application to relocate a main office to another state and retain existing branches); and

(iv) Relocate a branch.

(c) *Criteria for delegated authority.* The following criteria must be satisfied before the authority delegated in paragraph (a) of this section may be exercised:

(1) The factors set forth in section 6 of the FDI Act (12 U.S.C. 1816) have been considered and favorably resolved except that this criterion does not apply to applications to establish messenger services and temporary branches;

(2) The applicant meets the capital requirements set forth in 12 CFR part 325 and the FDIC ''Statement of Policy on Capital Adequacy'' (12 CFR part 325, appendix B) 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 filing, except that this criterion does not apply to applications to establish messenger services and temporary branches, or to relocate branches or main offices;

(3) Any financial arrangements which have been made in connection with the proposed branch or relocation and which involve the applicant's insiders are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties;

(4) Compliance with the CRA, the NEPA, the NHPA, and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved;

(5) No CRA protest as defined in §303.2(l) has been filed which remains unresolved or, where such a protest has been filed and remains unresolved, the Director (DCA), Deputy Director (DCA), an associate director (DCA) or the appropriate regional director or deputy regional director (DCA) concurs that approval is consistent with the purposes of the CRA and the applicant

agrees in writing to any conditions imposed regarding the CRA;

(6) An applicant with one or more existing branches in a state other than the applicant's home state has not failed the credit needs test in a host state under section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (12 U.S.C. 1835a);

(7) Additionally, for applications submitted to establish and operate a de novo branch in a state that is not the applicant's home state and in which the applicant does not maintain a branch:

(i) Confirmation by the appropriate regional director (DOS) that the applicant has complied with that state's filing requirements and that the applicant also has submitted to the host state bank supervisor a copy of its FDIC filing to establish and operate a de novo branch;

(ii) Determination by the FDIC that the applicant is adequately capitalized as of the date of the filing and will continue to be adequately capitalized and adequately managed upon consummation of the transaction;

(iii) Confirmation that the host state has in effect a law that meets the requirements of section 18(d)(4)(A) of the FDI Act (12 U.S.C. 1828(d)(4)(A)); and

(iv) Compliance with section 44(b)(3) of the FDI Act (12 U.S.C. 1831u(b)(3)); and

(8) Additionally, for applications submitted to relocate a main office from one state to another where the applicant seeks to retain branches in the state where the applicant's main office exists prior to an interstate relocation of the main office, confirmation that the filing meets the requirements of section 18(d)(3)(B) of the FDI Act (12 U.S.C. 1828(d)(3)(B)).

Subpart D—Merger Transactions

§ 303.60 Scope.

This subpart sets forth the application requirements, procedures, and delegations of authority for transactions subject to FDIC approval under the Bank Merger Act, section 18(c) of the FDI Act (12 U.S.C. 1828(c)). Additional guidance is contained in the FDIC ''Statement of Policy on Bank Merger Transactions'' (2 FDIC Law, Regulations, Related Acts (FDIC) 5145; see § 309.4 (a) and (b) of this chapter for availability).

§ 303.61 Definitions.

For purposes of this subpart:

(a) *Merger transaction* includes any transaction:

(1) In which an insured depository institution merges or consolidates with any other insured depository institution or, either directly or indirectly, acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution; or

(2) In which an insured depository institution merges or consolidates with any noninsured bank or institution or assumes liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution, or in which an insured depository institution transfers assets to any noninsured bank or institution in consideration of the assumption of any portion of the deposits made in the insured depository institution.

(b) *Corporate reorganization* means a merger transaction between commonly-owned institutions, between an insured depository institution and its subsidiary, or between an insured depository institution and its holding company, provided that the merger transaction would have no effect on competition or otherwise have significance under the statutory standards set forth in section 18(c) of the FDI Act (12 U.S.C. 1828(c)). For purposes of this paragraph, institutions are commonly-owned if more than 50 percent of the voting stock of each of the institutions is owned by the same company, individual, or group of closely-related individuals acting in concert.

(c) *Interim merger transaction* means a merger transaction (other than a purchase and assumption transaction) between an operating depository institution and a newly-formed depository institution or corporation that will not operate independently and that exists solely for the purpose of facilitating a corporate reorganization.

(d) *Optional conversion* (Oakar transaction) means a merger transaction in which an insured depository institution assumes deposit liabilities insured

by the deposit insurance fund (either the Bank Insurance Fund (BIF) or the Savings Association Insurance Fund (SAIF)) of which that assuming institution is not a member, and elects not to convert the insurance covering the assumed deposits. Such transactions are covered by section 5(d)(3) of the FDI Act (12 U.S.C. 1815(d)(3)).

(e) *Resulting institution* refers to the acquiring, assuming or resulting institution in a merger transaction.

§303.62 Transactions requiring prior approval.

(a) *Merger transactions.* The following merger transactions require the prior written approval of the FDIC under this subpart:

(1) Any merger transaction, including any corporate reorganization, interim merger transaction, or optional conversion, in which the resulting institution is to be an insured state nonmember bank; and

(2) Any merger transaction, including any corporate reorganization or interim merger transaction, that involves an uninsured bank or institution.

(b) *Related provisions.* Transactions covered by this subpart also may be subject to other provisions or application requirements, including the following:

(1) *Interstate merger transactions.* Merger transactions between insured banks that are chartered in different states are subject to the provisions of section 44 of the FDI Act (12 U.S.C. 1831u). In the case of a merger transaction that consists of the acquisition by an out of state bank of a branch without acquisition of the bank, the branch is treated for section 44 purposes as a bank whose home state is the state in which the branch is located.

(2) *Deposit insurance.* An application for deposit insurance will be required in connection with a merger transaction between a state-chartered interim institution and an insured depository institution if the related merger application is being acted upon by a federal banking agency other than the FDIC. If the FDIC is the federal banking agency responsible for acting on the related merger application, a separate application for deposit insurance is not necessary. Procedures for applying for deposit insurance are set forth in subpart B of this part. An application for deposit insurance will not be required in connection with a merger transaction (other than a purchase and assumption transaction) of a federally-chartered interim institution and an insured institution, even if the resulting institution is to operate under the charter of the federal interim institution.

(3) *Deposit insurance fund conversions.* Procedures for conversion transactions involving the transfer of deposits from BIF to SAIF or from SAIF to BIF are set forth in subpart M of this part at §303.246.

(4) *Branch closings.* Branch closings in connection with a merger transaction are subject to the notice requirements of section 42 of the FDI Act (12 U.S.C. 1831r–1), including requirements for notice to customers. These requirements are addressed in the ''Interagency Policy Statement Concerning Branch Closings Notices and Policies'' (2 FDIC Law, Regulations, Related Acts (FDIC) 5391).

(5) *Undercapitalized institutions.* Applications for a merger transaction by applicants subject to section 38 of the FDI Act (12 U.S.C. 1831*o*) should also provide the information required by §303.204. Applications pursuant to sections 38 and 18(c) of the FDI Act (12 U.S.C, 1831*o* and 1828(c)) may be filed concurrently or as a single application.

(6) *Certification of assumption of deposit liability.* An insured depository institution assuming deposit liabilities of another insured institution must provide certification of assumption of deposit liability to the FDIC in accordance with 12 CFR part 307.

§303.63 Filing procedures.

(a) *General.* Applications required under this subpart shall be filed with the appropriate regional director (DOS). The appropriate forms and instructions may be obtained upon request from any DOS regional office.

(b) *Merger transactions.* Applications for approval of merger transactions shall be accompanied by copies of all agreements or proposed agreements relating to the merger transaction and

any other information requested by the FDIC.

(c) *Interim merger transactions.* Applications for approval of interim merger transactions and any related deposit insurance applications shall be made by filing the forms and other documents required by paragraphs (a) and (b) of this section and such other information as may be required by the FDIC for consideration of the request for deposit insurance.

(d) *Optional conversions.* If the proposed merger transaction is an optional conversion, the merger application shall include a statement that the proposed merger transaction is a transaction covered by section 5(d)(3) of the FDI Act (12 U.S.C. 1815(d)(3)).

§ 303.64 Processing.

(a) *Expedited processing for eligible depository institutions.*—(1) *General.* An application filed under this subpart by an eligible depository institution as defined in § 303.2(r) and which meets the additional criteria in paragraph (a)(4) of this section will be acknowledged by the FDIC in writing and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2).

(2) Under expedited processing, the FDIC will take action on an application by the date that is the latest of:

(i) 45 days after the date of the FDIC's receipt of a substantially complete merger application; or

(ii) 10 days after the date of the last notice publication required under § 303.65; or

(iii) 5 days after receipt of the Attorney General's report on the competitive factors involved in the proposed transaction; or

(iv) For an interstate merger transaction subject to the provisions of section 44 of the FDI Act (12 U.S.C. 1831u), 5 days after the FDIC receives confirmation from the host state (as defined in § 303.41(e)) that the applicant has both complied with the filing requirements of the host state and submitted a copy of the FDIC merger application to the host state's bank supervisor.

(3) Notwithstanding paragraph (a)(1) of this section, if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

(4) *Criteria.* The FDIC will process an application using expedited procedures if:

(i) Immediately following the merger transaction, the resulting institution will be ''well-capitalized'' pursuant to subpart B of part 325 of this chapter; and

(ii)(A) All parties to the merger transaction are eligible depository institutions as defined in § 303.2(r); or

(B) The acquiring party is an eligible depository institution as defined in § 303.2(r) and the amount of the total assets to be transferred does not exceed an amount equal to 10 percent of the acquiring institution's total assets as reported in its report of condition for the quarter immediately preceding the filing of the merger application.

(b) *Standard processing.* For those applications not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action taken by the FDIC on the application when the decision is rendered.

§ 303.65 Public notice requirements.

(a) *General.* Except as provided in paragraph (b) of this section, an applicant for approval of a merger transaction must publish notice of the proposed transaction on at least three occasions at approximately equal intervals in a newspaper of general circulation in the community or communities where the main offices of the merging institutions are located or, if there is no such newspaper in the community, then in the newspaper of general circulation published nearest thereto.

(1) *First publication.* The first publication of the notice should be as close as practicable to the date on which the application is filed with the FDIC, but no more than 5 days prior to the filing date.

(2) *Last publication.* The last publication of the notice shall be on the 25th day after the first publication or, if the newspaper does not publish on the 25th

day, on the newspaper's publication date that is closest to the 25th day.

(b) *Exceptions*—(1) *Emergency requiring expeditious action.* If the FDIC determines that an emergency exists requiring expeditious action, notice shall be published twice. The first notice shall be published as soon as possible after the FDIC notifies the applicant of such determination. The second notice shall be published on the 7th day after the first publication or, if the newspaper does not publish on the 7th day, on the newspaper's publication date that is closest to the 7th day.

(2) *Probable failure.* If the FDIC determines that it must act immediately to prevent the probable failure of one of the institutions involved in a proposed merger transaction, publication is not required.

(c) *Content of notice.*—(1) *General.* The notice shall conform to the public notice requirements set forth in § 303.7.

(2) *Branches.* If it is contemplated that the resulting institution will operate offices of the other institution(s) as branches, the following statement shall be included in the notice required in § 303.7(b):

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

(3) *Emergency requiring expeditious action.* If the FDIC determines that an emergency exists requiring expeditious action, the notice shall specify as the closing date of the public comment period the date that is the 10th day after the date of the first publication.

(d) *Public comments.* Comments must be received by the appropriate regional director (DOS) within 30 days after the first publication of the notice, unless the comment period has been extended or reopened in accordance with § 303.9(b)(2). If the FDIC has determined that an emergency exists requiring expeditious action, comments must be received by the appropriate regional director within 10 days after the first publication.

§ 303.66 Delegation of authority.

(a) *General.*—(1) *Bank Merger Act approval.* Subject to paragraphs (a)(3) and (e) of this section, authority is delegated in paragraphs (b), (c), and (d) of this section to the designated FDIC officials to approve under the Bank Merger Act, 18(c) of the FDI Act (12 U.S.C. 1828(c)), applications filed under this subpart.

(2) *Interstate merger approval.* With respect to an interstate merger transaction covered by section 44 of the FDI Act (12 U.S.C. 1831u), in addition to the authority delegated to any official in paragraph (b), (c), or (d) of this section to approve the merger transaction under the Bank Merger Act, authority is also delegated to such official to approve the merger transaction under section 44. This delegation is subject to paragraph (a)(3) of this section and to the condition that the merger transaction is eligible for FDIC approval under section 44.

(3) *Combined approvals.* The delegations in paragraphs (a)(2), (b), (c), and (d) of this section do not apply to an interstate bank merger transaction covered both by section 44 and by the Bank Merger Act unless the merger transaction is being approved pursuant to delegated authority under both section 44 and the Bank Merger Act.

(b) *Basic delegation.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, and the appropriate regional director and deputy regional director to approve applications under the Bank Merger Act. For the delegate to exercise this authority, the following criteria must be satisfied:

(1) The resulting institution would meet all applicable capital requirements upon consummation of the transaction (or, where the resulting entity is an insured branch of a foreign bank, would be in compliance with 12 CFR 347.211 upon consummation of the transaction); and

(2) The factors set forth in section 18(c)(5) of the Act (12 U.S.C. 1828(c)(5)) have been considered and favorably resolved; and

(3)(i) The merging institutions do not operate in the same relevant geographic market(s); or

(ii) In each relevant geographic market in which more than one of the merging institutions operate, the resulting institution upon consummation

of the merger transaction would hold no more than 15 percent of the total deposits held by banks and/or other depository institutions (as appropriate) in the market; or

(iii) In each relevant geographic market in which more than one of the merging institutions operate, the resulting institution upon consummation of the merger transaction would hold no more than 25 percent of the total deposits held by banks and/or other depository institutions (as appropriate) in the market, and the Attorney General has notified the FDIC in writing that the proposed merger transaction would not have a significantly adverse effect on competition; and

(4) Compliance with the CRA and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved; and

(5) No CRA protest as defined in § 303.2(l) has been filed which remains unresolved or, where such a protest has been filed and remains unresolved, the Director (DCA), Deputy Director (DCA), associate director (DCA), the appropriate regional director (DCA), or deputy regional director (DCA) concurs that approval is consistent with the purposes of the CRA, and the applicant agrees in writing to any conditions imposed regarding the CRA; and

(6) The applicant agrees in writing to comply with any conditions imposed by the delegate, other than the standard conditions defined in § 303.2(ff), which may be imposed without the applicant's written consent.

(c) *Additional delegations.* In addition to the delegations otherwise provided for in this section, and subject to the criteria set forth in paragraphs (b)(1), (2), (4), (5), and (6) of this section, authority is delegated to the Director and to the Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to approve an application for a merger transaction upon the consummation of which the resulting institution would hold not more than 35 percent of the total deposits held by banks and/or other depository institutions (as appropriate) in any relevant geographic market in which more than one of the merging institutions operate, and the Attorney General has notified the FDIC in writing that the merger transaction would not have a significantly adverse effect on competition.

(d) *Corporate reorganizations; interim merger transactions.* In addition to the delegations otherwise provided for in this section, authority is delegated to the Director and to the Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve:

(1) An application for a corporate reorganization or an interim merger transaction that satisfies the criteria set forth in paragraphs (b)(5) and (6) of this section; and

(2) Any related application for deposit insurance.

(e) *Limitations.* The delegations in paragraphs (b) through (d) of this section do not apply if:

(1) The Attorney General has determined that the merger transaction would have a significantly adverse effect on competition; or

(2) The FDIC has made a determination pursuant to section 18 (c)(6) of the FDI Act (12 U.S.C. 1828(c)(6)) that an emergency exists requiring expeditious action or that the transaction must be consummated immediately in order to avoid a probable failure.

(f) *Review of competitive factors reports.* In deciding whether to approve a merger transaction under the authority delegated by this section, the delegate shall review any reports provided by the Attorney General, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Director of the Office of Thrift Supervision in response to a request by the FDIC for reports on the competitive factors involved in the proposed merger transaction.

(g) *Competitive factor reports provided by the FDIC.* Authority is delegated to the Director and the Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to furnish requested reports to the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, or the Director of the Office of Thrift Supervision on the competitive

factors involved in any merger transaction subject to approval by one of those agencies, if the delegate determines that the proposed merger transaction would not have a substantially adverse effect on competition.

§303.67 Authority retained by the FDIC Board of Directors.

Without limiting the authority of the Board of Directors, the Board of Directors retains authority to act on applications covered by this subpart if the criteria or other conditions for delegation are not satisfied. This includes the retention of authority to deny applications for merger transactions. It further includes retention of authority to approve applications for merger transactions where:

(a) The limitations specified in §303.66(e) preclude action under delegated authority;

(b) The applicant does not agree in writing to comply with any conditions imposed by the delegate, other than the standard conditions defined in §303.2(ff), which may be imposed without the applicant's written consent; or

(c) The resulting institution, upon consummation of a merger transaction other than a corporate reorganization, would have more than 35 percent of the total deposits held by banks and/or other depository institutions (as appropriate) in any relevant geographic market in which more than one of the merging institutions operate.

Subpart E—Change in Bank Control

§303.80 Scope.

This subpart sets forth the procedures for submitting a notice to acquire control of an insured state nonmember bank pursuant to the Change in Bank Control Act of 1978, section 7(j) of the FDI Act (12 U.S.C. 1817(j)), and delegations of authority regarding such filings.

§303.81 Definitions.

For purposes of this subpart:

(a) *Acquisition* means a purchase, assignment, transfer, pledge or other disposition of voting shares, or an increase in percentage ownership of an insured state nonmember bank resulting from a redemption of voting shares.

(b) *Acting in concert* means knowing participation in a joint activity or parallel action towards a common goal of acquiring control of an insured state nonmember bank, whether or not pursuant to an express agreement.

(c) *Control* means the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 percent or more of any class of voting shares of an insured bank.

(d) *Person* means an individual, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, and any other form of entity; and a voting trust, voting agreement, and any group of persons acting in concert.

§303.82 Transactions requiring prior notice.

(a) *Prior notice requirement.* Any person acting directly or indirectly, or through or in concert with one or more persons, shall give the FDIC 60 days prior written notice, as specified in §303.84, before acquiring control of an insured state nonmember bank, unless the acquisition is exempt under §303.83.

(b) *Acquisitions requiring prior notice.*—(1) *Acquisition of control.* The acquisition of control, unless exempted, requires prior notice to the FDIC.

(2) *Rebuttable presumption of control.* The FDIC presumes that an acquisition of voting shares of an insured state nonmember bank constitutes the acquisition of the power to direct the management or policies of an insured bank requiring prior notice to the FDIC, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 10 percent or more of any class of voting shares of the institution, and if:

(i) The institution has registered shares under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control or hold the power to vote a greater percentage of that class of voting shares immediately after the transaction. If

two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting shares of an insured state nonmember bank, each such person shall file prior notice with the FDIC.

(c) *Acquisitions of loans in default.* The FDIC presumes an acquisition of a loan in default that is secured by voting shares of an insured state nonmember bank to be an acquisition of the underlying shares for purposes of this section.

(d) *Other transactions.* Transactions other than those set forth in paragraph (b)(2) of this section resulting in a person's control of less than 25 percent of a class of voting shares of an insured state nonmember bank are not deemed by the FDIC to constitute control for purposes of the Change in Bank Control Act.

(e) *Rebuttal of presumptions.* Prior notice to the FDIC is not required for any acquisition of voting shares under the presumption of control set forth in this section, if the FDIC finds that the acquisition will not result in control. The FDIC will afford any person seeking to rebut a presumption in this section an opportunity to present views in writing or, if appropriate, orally before its designated representatives at an informal meeting.

§ 303.83 Transactions not requiring prior notice.

(a) *Exempt transactions.* The following transactions do not require notice to the FDIC under this subpart:

(1) The acquisition of additional voting shares of an insured state nonmember bank by a person who:

(i) Held the power to vote 25 percent or more of any class of voting shares of that institution continuously since March 9, 1979, or since that institution commenced business, whichever is later; or

(ii) Is presumed, under § 303.82(b)(2), to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting shares held does not exceed 25 percent or more of any class of voting shares of the institution or, in other cases, where the FDIC determines that the person has controlled the bank continuously since March 9, 1979;

(2) The acquisition of additional shares of a class of voting shares of an insured state nonmember bank by any person (or persons acting in concert) who has lawfully acquired and maintained control of the institution (for purposes of § 303.82) after complying with the procedures of the Change in Bank Control Act to acquire voting shares of the institution under this subpart;

(3) Acquisitions of voting shares subject to approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842(a)), section 18(c) of the FDI Act (12 U.S.C. 1828(c)), or section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a);

(4) Transactions exempt under the Bank Holding Company Act: foreclosures by institutional lenders, fiduciary acquisitions by banks, and increases of majority holdings by bank holding companies described in sections 2(a)(5), 3(a)(A), or 3(a)(B) respectively of the Bank Holding Company Act (12 U.S.C. 1841(a)(5), 1842(a)(A), and 1842(a)(B));

(5) A customary one-time proxy solicitation;

(6) The receipt of voting shares of an insured state nonmember bank through a pro rata stock dividend; and

(7) The acquisition of voting shares in a foreign bank, which has an insured branch or branches in the United States. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j) (9), (10), and (12)).

(b) *Prior notice exemption.* (1) The following acquisitions of voting shares of an insured state nonmember bank, which otherwise would require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate regional director (DOS) within 90 calendar days after the acquisition and provides any relevant information requested by the regional director (DOS):

(i) The acquisition of voting shares through inheritance;

(ii) The acquisition of voting shares as a bona fide gift; or

(iii) The acquisition of voting shares in satisfaction of a debt previously contracted in good faith, except that the acquiror of a defaulted loan secured by a controlling amount of a state nonmember bank's voting securities shall file a notice before the loan is acquired.

(2) The following acquisitions of voting shares of an insured state nonmember bank, which otherwise would require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate regional director (DOS) within 90 calendar days after receiving notice of the acquisition and provides any relevant information requested by the regional director (DOS):

(i) A percentage increase in ownership of voting shares resulting from a redemption of voting shares by the issuing bank; or

(ii) The sale of shares by any shareholder that is not within the control of a person resulting in that person becoming the largest shareholder.

(3) Nothing in paragraph (b)(1) of this section limits the authority of the FDIC to disapprove a notice pursuant to §303.85(c).

§303.84 Filing procedures.

(a) *Filing notice.* (1) A notice required under this subpart shall be filed with the appropriate regional director (DOS) and shall contain all the information required by paragraph 6 of the Change in Bank Control Act, section 7 (j) of the FDI Act, (12 U.S.C. 1817(j)(6)), or prescribed in the designated interagency form which may be obtained from any FDIC regional office.

(2) The FDIC may waive any of the informational requirements of the notice if the FDIC determines that it is in the public interest.

(3) A notificant shall notify the appropriate regional director (DOS) immediately of any material changes in a notice submitted to the regional director (DOS), including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated interagency form, together with a statement of any material changes since the date of the statement or summary. The appropriate regional director (DOS) may require additional information if appropriate.

(b) *Other laws.* Nothing in this subpart shall affect any obligation which the acquiring person(s) may have to comply with the federal securities laws or other laws.

§303.85 Processing.

(a) *Acceptance of notice.* The 60-day notice period specified in §303.82 shall commence on the date of receipt of a substantially complete notice. The regional director (DOS) shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is accepted for processing. The FDIC may request additional information at any time.

(b) *Time period for FDIC action; consummation of acquisition.* (1) The notificant(s) may consummate the proposed acquisition 60 days after submission to the regional director (DOS) of a substantially complete notice under paragraph (a) of this section, unless within that period the FDIC disapproves the proposed acquisition or extends the 60-day period.

(2) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period if the FDIC notifies the notificant(s) in writing of its intention not to disapprove the acquisition.

(c) *Disapproval of acquisition of control.* Subpart D of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

§303.86 Public notice requirements.

(a) *Publication*—(1) *Newspaper announcement.* Any person(s) filing a notice under this subpart shall publish an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the home office of the state nonmember bank to be acquired is located. The announcement shall be published as close as is practicable to the date the notice is filed with the appropriate regional director

(DOS), but in no event more than 10 calendar days before or after the filing date.

(2) *Contents of newspaper announcement.* The newspaper announcement shall conform to the public notice requirements set forth in § 303.7.

(b) *Delay of publication.* The FDIC may permit delay in the publication required by this section if the FDIC determines, for good cause, that it is in the public interest to grant such a delay. Requests for delay of publication may be submitted to the appropriate regional director (DOS).

(c) *Shortening or waiving notice.* The FDIC may shorten the public comment period to a period of not less than 10 days, or waive the public comment or newspaper publication requirements of this paragraph, or act on a notice before the expiration of a public comment period, if it determines in writing either that an emergency exists or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the bank to be acquired.

(d) *Consideration of public comments.* In acting upon a notice filed under this subpart, the FDIC shall consider all public comments received in writing within 20 days following the required newspaper publication or, if the FDIC has shortened the public comment period pursuant to paragraph (c) of this section, within such shorter period.

(e) *Publication if filing is subsequent to acquisition of control.* (1) Whenever a notice of a proposed acquisition of control is not filed in accordance with the Change in Bank Control Act and these regulations, the acquiring person(s) shall, within 10 days of being so directed by the FDIC, publish an announcement of the acquisition of control in a newspaper of general circulation in the community in which the home office of the state nonmember bank to be acquired is located.

(2) The newspaper announcement shall contain the name(s) of the acquiror(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 also shall state that any person wishing to comment on the change in control may do so by submitting written comments to the appropriate regional director (DOS) of the FDIC (give address of regional office) within 20 days following the required newspaper publication.

§ 303.87 Delegation of authority.

(a) Authority is delegated to the Director and the Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to issue a written notice of the FDIC's intent not to disapprove an acquisition of control of an insured state nonmember bank.

(b) The authority delegated by paragraph (a) of this section shall include the power to:

(1) Act in situations where information is submitted on acquisitions arising out of events beyond the person's control, as set forth in § 303.83(b);

(2) Extend notice periods;

(3) 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 shares of an insured state nonmember bank; and

(4) Delay or 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 §§ 303.86(a)(3) and (4).

(c) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to disapprove an acquisition of control of an insured state nonmember bank.

Subpart F—Change of Director or Senior Executive Officer

§ 303.100 Scope.

This subpart sets forth the circumstances under which an insured state nonmember bank must notify the FDIC of a change in any member of its board of directors or any senior executive officer and the procedures for filing such notice, as well as applicable delegations of authority. This subpart

implements section 32 of the FDI Act (12 U.S.C. 1831i).

§ 303.101 Definitions.

For purposes of this subpart:

(a) *Director* means a person who serves on the board of directors or board of trustees of an insured state nonmember bank, except that this term does not include an advisory director who:

(1) Is not elected by the shareholders;

(2) Is not authorized to vote on any matters before the board of directors or board of trustees or any committee thereof;

(3) Solely provides general policy advice to the board of directors or board of trustees and any committee thereof; and

(4) Has not been identified by the FDIC as a person who performs the functions of a director for purposes of this subpart.

(b) *Senior executive officer* means a person who holds the title of president, chief executive officer, chief operating officer, chief managing official (in an insured state branch of a foreign bank), chief financial officer, chief lending officer, or chief investment officer, or, without regard to title, salary, or compensation, performs the function of one or more of these positions. *Senior executive officer* also includes any other person identified by the FDIC, whether or not hired as an employee, with significant influence over, or who participates in, major policymaking decisions of the insured state nonmember bank.

(c) *Troubled condition* means any insured state nonmember bank that:

(1) Has a composite rating, as determined in its most recent report of examination of 4 or 5 under the Uniform Financial Institutions Rating System (UFIRS), or in the case of an insured state branch of a foreign bank, an equivalent rating; or

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

(3) Is subject to a cease-and-desist order or written agreement issued by either the FDIC or the appropriate state banking authority that requires action to improve the financial condition of the bank or is subject to a proceeding initiated by the FDIC or state authority which contemplates the issuance of an order that requires action to improve the financial condition of the bank, unless otherwise informed in writing by the FDIC; or

(4) Is informed in writing by the FDIC that it is in troubled condition for purposes of the requirements of this subpart on the basis of the bank's most recent report of condition or report of examination, or other information available to the FDIC.

§ 303.102 Filing procedures and waiver of prior notice.

(a) *Insured state nonmember banks.* An insured state nonmember bank shall give the FDIC written notice, as specified in paragraph (c)(1) of this section, at least 30 days prior to adding or replacing any member of its board of directors, employing any person as a senior executive officer of the bank, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if:

(1) The bank is not in compliance with all minimum capital requirements applicable to the bank as determined on the basis of the bank's most recent report of condition or report of examination;

(2) The bank is in troubled condition; or

(3) The FDIC determines, in connection with its review of a capital restoration plan required under section 38(e)(2) of the FDI Act (12 U.S.C. 1831*o*(e)(2)) or otherwise, that such notice is appropriate.

(b) *Insured branches of foreign banks.* 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.

(c) *Waiver of prior notice*—(1) *Waiver requests.* The FDIC may permit an individual, upon petition by the bank to the appropriate regional director (DOS), to serve as a senior executive officer or director before filing the notice required under this subpart if the FDIC finds that:

(i) Delay would threaten the safety or soundness of the bank;

(ii) Delay would not be in the public interest; or

(iii) Other extraordinary circumstances exist that justify waiver of prior notice.

(2) *Automatic waiver.* In the case of the election of a new director not proposed by management at a meeting of the shareholders of an insured state nonmember bank, the prior 30-day notice is automatically waived and the individual immediately may begin serving, provided that a complete notice is filed with the appropriate regional director (DOS) within two business days after the individual's election.

(3) *Effect on disapproval authority.* A waiver shall not affect the authority of the FDIC to disapprove a notice within 30 days after a waiver is granted under paragraph (c)(1) of this section or the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (c)(2) of this section.

(d)(1) *Content of filing.* The notice required by paragraph (a) of this section shall be filed with the appropriate regional director (DOS) 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 interagency form which is available from any FDIC regional office. The regional director or his or her designee may require additional information.

(2) *Modification.* The FDIC may modify or accept other information in place of the requirements of paragraph (d)(1) of this section for a notice filed under this subpart.

§ 303.103 Processing.

(a) *Processing.* The 30-day notice period specified in § 303.102(a) shall begin on the date substantially all information required to be submitted by the notificant pursuant to § 303.102(c)(1) is received by the appropriate regional director (DOS). The regional director shall notify the bank submitting the notice of the date on which the notice is accepted for processing and of the date on which the 30-day notice period will expire. If processing cannot be completed within 30 days, the notificant will be advised in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed.

(b) *Commencement of service*—(1) *At expiration of period.* A proposed director or senior executive officer may begin service after the end of the 30-day period or any other additional period as provided under paragraph (a) of this section, unless the FDIC disapproves the notice before the end of the period.

(2) *Prior to expiration of period.* A proposed director or senior executive officer may begin service before the end of the 30-day period or any additional time period as provided under paragraph (a) of this section, if the FDIC notifies the bank and the individual in writing of the FDIC's intention not to disapprove the notice.

(c) *Notice of disapproval.* The FDIC may disapprove a notice filed under § 303.102 if the FDIC finds that the competence, experience, character, or integrity of the individual with respect to whom the notice 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. Subpart L of 12 CFR part 308 sets forth the rules of practice and procedure for a notice of disapproval.

§ 303.104 Delegation of authority.

The following authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director or deputy regional director to:

(a) Designate an insured state nonmember bank as being in troubled condition;

(b) Grant waivers of the prior notice requirement;

(c) Extend the 30-day processing period for an additional period of up to 60 days in the event of extenuating circumstances; and

(d) Issue notices of disapproval or notices of intent not to disapprove under this subpart.

Subpart G—Activities of Insured State Banks

SOURCE: 63 FR 66325, Dec. 1, 1998, unless otherwise noted.

§ 303.120 Scope.

This subpart sets forth procedures for complying with notice and application requirements contained in subpart A of part 362 of this chapter, governing insured State banks and their subsidiaries engaging in activities which are not permissible for national banks and their subsidiaries. This subpart also sets forth procedures for complying with notice and application requirements contained in subpart B of part 362 of this chapter, governing certain activities of insured State nonmember banks, their subsidiaries, and certain affiliates.

§ 303.121 Filing procedures.

(a) *Where to file.* A notice or application required by subpart A or subpart B of part 362 of this chapter shall be submitted in writing to the appropriate regional director (DOS).

(b) *Contents of filing*—(1) *Filings generally.* A complete letter notice or letter application shall include the following information:

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

(ii) The amount of the bank's existing or proposed direct or indirect investment in the activity as well as calculations sufficient to indicate compliance with any specific capital ratio or investment percentage limitation detailed in subpart A or B of part 362 of this chapter;

(iii) A copy of the bank's business plan regarding the conduct of the activity;

(iv) A citation to the State statutory or regulatory authority for the conduct of the activity;

(v) 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;

(vi) A brief description of the bank's policy and practice with regard to any anticipated involvement in the activity by a director, executive office or principal shareholder of the bank or any related interest of such a person; and

(vii) A description of the bank's expertise in the activity.

(2) [Reserved]

(3) *Copy of application or notice filed with another agency.* If an insured State bank has filed an application or notice with another Federal or State regulatory authority which contains all of the information required by paragraph (b) (1) of this section, the insured State bank may submit a copy to the FDIC in lieu of a separate filing.

(4) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

§ 303.122 Processing.

(a) *Expedited processing.* A notice filed by an insured State bank seeking to commence or continue an activity under § 362.4(b)(3)(i), § 362.4(b)(5), or § 362.8(a)(2) of this chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. The FDIC may remove the notice from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, a notice processed under expedited processing is deemed approved 30 days after receipt of a complete notice by the FDIC (subject to extension for an additional 15 days upon written notice to the bank) or on such earlier date authorized by the FDIC in writing.

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured State bank seeking to commence or continue an activity under § 362.3(a)(2)(iii)(A), § 362.3(b)(2)(i), § 362.3(b)(2)(ii)(A), § 362.3(b)(2)(ii)(C), § 362.4(b)(1), § 362.4(b)(2), § 362.4(b)(4), § 362.5(b)(2), § 362.8(a)(2), or § 362.8(b) of this chapter or for notices which are not processed pursuant to the expedited processing procedures, the FDIC will provide the insured State bank with written notification of the final action as soon as the decision is rendered. The FDIC will normally review and act in such cases within 60 days

after receipt of a completed application or notice (subject to extension for an additional 30 days upon written notice to the bank), but failure of the FDIC to act prior to the expiration of these periods does not constitute approval.

§ 303.123 Delegations of authority.

(a) *Instruments having the character of debt securities.* Authority is delegated to the Director (DOS) to make determinations contemplated under §§ 362.2(h) and 362.3(b)(2)(iii)(B) of this chapter.

(b) *Other applications, notices, and actions.* The authority to review and act upon applications and notices filed pursuant to this subpart G and to take any other action authorized by this subpart G or subparts A and B of part 362 of this chapter is delegated to the Director (DOS), and except as limited by paragraph (a) of this section, to the Deputy Director and where confirmed in writing by the Director to an associate director and the appropriate regional director and deputy regional director.

Subpart H—Activities of Insured Savings Associations

SOURCE: 63 FR 66325, Dec. 1, 1998, unless otherwise noted.

§ 303.140 Scope.

This subpart sets forth procedures for complying with the notice and application requirements contained in subpart C of part 362 of this chapter, governing insured state savings associations and their service corporations engaging in activities which are not permissible for federal savings associations and their service corporations. This subpart also sets forth procedures for complying with the notice requirements contained in subpart D of part 362 of this chapter, governing insured savings associations which establish or engage in new activities through a subsidiary.

§ 303.141 Filing procedures.

(a) *Where to file.* All applications and notices required by subpart C or subpart D of part 362 of this chapter are to be in writing and filed with the appropriate regional director.

(b) *Contents of filing*—(1) *Filings generally.* A complete letter notice or letter application shall include the following information:

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

(ii) The amount of the association's existing or proposed direct or indirect investment in the activity as well as calculations sufficient to indicate compliance with any specific capital ratio or investment percentage limitation detailed in subpart C or D of this chapter;

(iii) A copy of the association's business plan regarding the conduct of the activity;

(iv) A citation to the state statutory or regulatory authority for the conduct of the activity;

(v) A copy of the order or other document from the appropriate regulatory authority granting approval for the association to conduct the activity if such approval is necessary and has already been granted;

(vi) A brief description of the association's policy and practice with regard to any anticipated involvement in the activity by a director, executive officer or principal shareholder of the association or any related interest of such a person; and

(vii) A description of the association's expertise in the activity.

(2) [Reserved]

(3) *Copy of application or notice filed with another agency.* If an insured savings association has filed an application or notice with another federal or state regulatory authority which contains all of the information required by paragraph (b) (1) of this section, the insured state bank may submit a copy to the FDIC in lieu of a separate filing.

(4) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

§ 303.142 Processing.

(a) *Expedited processing.* A notice filed by an insured state savings association seeking to commence or continue an activity under § 362.11(b)(2)(i), § 362.12(b)(2)(i), or § 362.12(b)(4) of this

chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. The FDIC may remove the notice from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, a notice processed under expedited processing is deemed approved 30 days after receipt of a complete notice by the FDIC (subject to extension for an additional 15 days upon written notice to the bank) or on such earlier date authorized by the FDIC in writing.

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured state savings association seeking to commence or continue an activity under § 362.11(a)(2), § 362.11(b)(2), § 362.12(b)(1) of this chapter or for notices which are not processed pursuant to the expedited processing procedures, the FDIC will provide the insured state savings association with written notification of the final action as soon as the decision is rendered. The FDIC will normally review and act in such cases within 60 days after receipt of a completed application or notice (subject to extension for an additional 30 days upon written notice to the bank), but failure of the FDIC to act prior to the expiration of these periods does not constitute approval.

(c) *Notices of activities in excess of an amount permissible for a federal savings association; subsidiary notices.* Receipt of a notice filed by an insured state savings association as required by § 362.11(b)(3) or § 362.15 of this chapter will be acknowledged in writing by the appropriate regional director (DOS). The notice will be reviewed at the appropriate regional office, which will take such action as it deems necessary and appropriate.

§ 303.143 Delegations of authority.

(a) *Instruments having the character of debt securities.* Authority is delegated to the Director (DOS) to make determinations contemplated under §§ 362.2(h) and 362.3(b)(2)(iii)(B) of this chapter.

(b) *Other applications, notices, and actions.* The authority to review and act upon applications and notices filed pursuant to this subpart H and to take any other action authorized by this subpart H or subparts C and D of part 362 of this chapter is delegated to the Director (DOS), and except as limited by paragraph (a) of this section, to the Deputy Director and where confirmed in writing by the Director to an associate director and the appropriate regional director and deputy regional director.

Subpart I—Mutual-to-Stock Conversions

§ 303.160 Scope.

This subpart sets forth the notice requirements, procedures, and delegations of authority for the conversion of an insured mutual state-chartered savings bank to the stock form of ownership. The substantive requirements governing such conversions are contained in § 333.4 of this chapter.

§ 303.161 Filing procedures.

(a) *Prior notice required.* 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.

(b) *General.* (1) A notice required under this subpart shall be filed in letter form with the appropriate regional director (DOS) at the same time as required conversion application materials are filed with the institution's state regulator.

(2) An insured mutual savings bank chartered by a state that does not require the filing of a conversion application shall file a notice in letter form with the appropriate regional director (DOS) as soon as practicable after adoption of its plan of conversion.

(c) *Content of notice.* The notice shall provide a description of the proposed conversion and include all materials that have been filed with any state or federal banking regulator and any state or federal securities regulator. At a minimum, the notice shall include, as applicable, copies of:

(1) The plan of conversion, with specific information concerning the record date used for determining eligible depositors and the subscription offering priority established in connection with any proposed stock offering;

(2) Certified board resolutions relating to the conversion;

(3) A business plan, including a detailed discussion of how the capital acquired in the conversion will be used, expected earnings for at least a three-year period following the conversion, and a justification for any proposed stock repurchases;

(4) The charter and bylaws of the converted institution;

(5) The bylaws and operating plans of any other entities formed in connection with the conversion transaction, such as a holding company or charitable foundation;

(6) A full appraisal report, prepared by an independent appraiser, of the value of the converting institution and the pricing of the stock to be sold in the conversion transaction;

(7) Detailed descriptions of any proposed management or employee stock benefit plans or employment agreements and a discussion of the rationale for the level of benefits proposed, individually and by participant group;

(8) Indemnification agreements;

(9) A preliminary proxy statement and sample proxy;

(10) Offering circular(s) and order form;

(11) All contracts or agreements relating to solicitation, underwriting, market-making, or listing of conversion stock and any agreements among members of a group regarding the purchase of unsubscribed shares;

(12) A tax opinion concerning the federal income tax consequences of the proposed conversion;

(13) Consents from experts to use their opinions as part of the notice; and

(14) An estimate of conversion-related expenses.

(d) *Additional information.* The FDIC, in its discretion, may request any additional information it deems necessary to evaluate the proposed conversion. The institution proposing to convert from mutual to stock form shall promptly provide such information to the FDIC.

(e) *Acceptance of notice.* The 60-day notice period specified in § 303.163 shall commence on the date of receipt of a substantially complete notice. The appropriate regional director (DOS) shall notify the institution proposing to convert in writing of the date the notice is accepted.

(f) *Related applications.* Related applications that require FDIC action may include:

(1) Applications for deposit insurance, as required by subpart B of this part; and

(2) Applications for consent to merge, as required by subpart D of this part.

§ 303.162 Waiver from compliance.

(a) *General.* An institution proposing to convert from mutual to stock form may file with the appropriate regional director (DOS) a letter requesting waiver of compliance with this subpart or § 333.4 of this chapter:

(1) When compliance with any provision of this section or § 333.4 of this chapter would be inconsistent or in conflict with applicable state law; or

(2) For any other good cause shown.

(b) *Content of filing.* In making a request for waiver under paragraph (a) of this section, the institution 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 institution, entail a breach of fiduciary duty on part of the institution's management or otherwise be detrimental or inequitable to the institution, its depositors, any other insured depository institution(s), the federal deposit insurance funds, or to the public interest.

§ 303.163 Processing.

(a) *General considerations.* The FDIC shall review the notice and other materials submitted by the institution proposing to convert from mutual to stock form, specifically considering the following factors:

(1) The proposed use of the proceeds from the sale of stock, as set forth in the business plan;

(2) The adequacy of the disclosure materials;

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

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

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

(6) 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;

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

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

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

(b) *Additional considerations.* (1) In reviewing the notice and other materials submitted under this subpart, the FDIC will take into account the extent to which the proposed conversion transaction conforms with the various provisions of the mutual-to-stock conversion regulations of the Office of Thrift Supervision (OTS) (12 CFR part 563b), as currently in effect at the time the notice is submitted. Any non-conformity with those provisions will be closely reviewed.

(2) Conformity with the OTS requirements will not be sufficient for FDIC regulatory purposes if the FDIC determines that the proposed conversion transaction would pose a risk to the bank's safety or soundness, violate any law or regulation, or present a breach of fiduciary duty.

(c) *Notice period.* (1) The period in which the FDIC may object to the proposed conversion transaction shall be the later of:

(i) 60 days after receipt of a substantially complete notice of proposed conversion; or

(ii) 20 days after the last applicable state or other federal regulator has approved the proposed conversion.

(2) The FDIC may, in its discretion, extend the initial 60-day period for up to an additional 60 days by providing written notice to the institution.

(d) *Letter of non-objection.* If the FDIC determines, in its discretion, that the proposed conversion transaction would not pose a risk to the institution's safety or soundness, violate any law or regulation, or present a breach of fiduciary duty, then the FDIC shall issue to the institution proposing to convert a letter of non-objection to the proposed conversion.

(e) *Letter of objection.* If the FDIC determines, in its discretion, that the proposed conversion transaction poses a risk to the institution's safety or 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 not to consummate the proposed conversion 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 regulator and state or federal securities regulator involved in the conversion.

(f) *Consummation of the conversion.* (1) An institution may consummate the proposed conversion upon either:

(i) The receipt of a letter of non-objection; or

(ii) The expiration of the notice period.

(2) If a letter of objection is issued, then the institution shall not consummate the proposed conversion until the FDIC rescinds such letter.

§ 303.164 Delegation of authority.

(a) Authority is delegated to the Director and Deputy Director (DOS) to issue a letter of non-objection to an institution proposing to convert when the proposed conversion transaction is determined not to pose a risk to the institution's safety or soundness, violate any law or regulation, present a breach of fiduciary duty, and not to raise any unique legal or policy issues. Such authority will be exercised in accordance with the time periods contained in

§ 303.163, unless the institution proposing to convert agrees to a longer time period.

(b) Authority to approve or deny a waiver under § 303.162 is retained by the Board of Directors.

(c) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director to accept notices of intent to convert to stock form and to extend the initial 60-day period within which FDIC may object by an additional 60 days.

Subpart J—International Banking

§ 303.180 Scope.

This subpart sets forth procedures for complying with application requirements relating to the foreign activities of insured state nonmember banks, U.S. activities of insured branches of foreign banks, and certain foreign mergers of insured depository institutions. Related delegations of authority are also set forth in the subpart.

§ 303.181 Definitions.

For the purposes of this subpart, the following additional definitions apply:

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

(b) *Comptroller* means the Office of the Comptroller of the Currency.

(c) *Eligible insured branch.* An insured branch will be treated as an eligible depository institution within the meaning of § 303.2(r) if the insured branch:

(1) Received an FDIC-assigned composite ROCA rating of 1 or 2 as a result of its most recent federal or state examination, and the FDIC, Comptroller, or Board of Governors have not expressed concern about the condition or operations of the foreign banking organization or the support it offers the branch;

(2) Received a satisfactory or better Community Reinvestment Act (CRA) rating from its primary federal regulator at its most recent examination, if the depository institution is subject to examination under part 345 of this chapter;

(3) Received a compliance rating of 1 or 2 from its primary federal regulator at its most recent examination;

(4) Is well-capitalized as defined in subpart B of part 325 of this chapter; and

(5) Is not subject to a cease and desist order, consent order, prompt corrective action directive, written agreement, memorandum of understanding, or other administrative agreement with any U.S. bank regulatory authority.

(d) *Federal branch* means a federal branch of a foreign bank as defined by § 347.202 of this chapter.

(e) *Foreign bank* means a foreign bank as defined by § 347.202 of this chapter.

(f) *Foreign branch* means a foreign branch of an insured state nonmember bank as defined by § 347.102 of this chapter.

(g) *Foreign organization* means a foreign organization as defined by § 347.102 of this chapter.

(h) *Insured branch* means an insured branch of a foreign bank as defined by § 347.202 of this chapter.

(i) *Noninsured branch* means a noninsured branch of a foreign bank as defined by § 347.202 of this chapter.

(j) *State branch* means a state branch of a foreign bank as defined by § 347.202 of this chapter.

§ 303.182 Establishing, moving or closing a foreign branch of a state nonmember bank; § 347.103.

(a) *Notice procedures for general consent.* Notice in the form of a letter from an eligible depository institution establishing or relocating a foreign branch pursuant to § 347.103(b) of this chapter shall be provided to the appropriate regional director (DOS) no later than 30 days after taking such action, and include the location of the foreign branch, including a street address, and a statement that the foreign branch has not been located on a site on the World Heritage List or on the foreign country's equivalent of the National Register of Historic Places (National Register), in accordance with section 402 of the National Historic Preservation Act Amendments of 1980 (NHPA Amendments Act) (16 U.S.C. 470a–2). The regional director will provide written acknowledgment of receipt of the notice.

(b) *Filing procedures for other branch establishments.* (1) *Where to file.* An applicant seeking to establish a foreign branch other than under §347.103(b) of this chapter shall submit an application to the appropriate regional director (DOS).

(2) *Content of filing.* A complete letter application shall include the following information:

(i) The exact location of the proposed foreign branch, including the street address, and a statement whether the foreign branch will be located on a site on the World Heritage List or on the foreign country's equivalent of the National Register, in accordance with section 402 of the NHPA Amendments Act;

(ii) Details concerning any involvement in the proposal by an insider of the applicant, as defined in §303.2(u), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(iii) A brief description of the applicant's business plan with respect to the foreign branch; and

(iv) A brief description of the activities of the branch, and to the extent any activities are not authorized by §347.103(a) of this chapter, the applicant's reasons why they should be approved.

(3) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

(c) *Processing*—(1) *Expedited processing for eligible depository institutions.* An application filed under §347.103(c) of this chapter by an eligible depository institution as defined in §303.2(r) seeking to establish a foreign branch by expedited processing will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove the application from expedited processing for any of the reasons set forth in §303.11(c)(2). Absent such removal, an application processed under expedited processing is deemed approved 45 days after receipt of a substantially complete application by the FDIC, or on such earlier date authorized by the FDIC in writing.

(2) *Standard processing.* For those applications which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(d) *Closing.* Notices of branch closing under §347.103(f) of this chapter, in the form of a letter including the name, location, and date of closing of the closed branch, shall be filed with the appropriate regional director (DOS) no later than 30 days after the branch is closed.

(e) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, if confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director to approve an application under paragraph (c) of this section if the following criteria are satisfied:

(1) The requirements of section 402 the NHPA Amendments Act have been favorably resolved;

(2) The applicant will only conduct activities authorized by §347.103(a) of this chapter; and

(3) If the foreign branch will be located in a foreign country in which applicable law or practice would limit the FDIC's access to information for supervisory purposes, the delegate is satisfied that adequate arrangements have been made (through conditions imposed in connection with the approval and agreed to in writing by the applicant) to ensure that the FDIC will have necessary access to information for supervisory purposes.

§303.183 Investment by insured state nonmember banks in foreign organizations; §347.108.

(a) *Notice procedures for general consent.* Notice in the form of a letter from an eligible depository institution making direct or indirect investments in a foreign organization pursuant to §347.108(a) of this chapter shall be provided to the appropriate regional director (DOS) no later than 30 days after taking such action. The appropriate regional director will provide written acknowledgment of receipt of the notice.

(b) *Filing procedures for other investments.* (1) *Where to file.* An applicant seeking to make a foreign investment other than under §347.108(a) of this

chapter shall submit an application to the appropriate regional director (DOS).

(2) *Content of filing.* A complete application shall include the following information:

(i) Basic information about the terms of the proposed transaction, the amount of the investment in the foreign organization and the proportion of its ownership to be acquired;

(ii) Basic information about the foreign organization, its financial position and income, including any available balance sheet and income statement for the prior year, or financial projections for a new foreign organization;

(iii) A listing of all shareholders known to hold ten percent or more of any class of the foreign organization's stock or other evidence of ownership, and the amount held by each;

(iv) A brief description of the applicant's business plan with respect to the foreign organization;

(v) A brief description of any business or activities which the foreign organization will conduct directly or indirectly in the United States, and to the extent such activities are not authorized by subpart A of part 347 of this chapter, the applicant's reasons why they should be approved;

(vi) A brief description of the foreign organization's activities, and to the extent such activities are not authorized by subpart A of part 347 of this chapter, the applicant's reasons why they should be approved; and

(vii) If the applicant seeks approval to engage in underwriting or dealing activities, a description of the applicant's plans and procedures to address all relevant risks.

(3) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

(c) *Processing.*—(1) *Expedited processing for eligible depository institutions.* An application filed under § 347.108(b) of this chapter by an eligible depository institution as defined in § 303.2(r) seeking to make direct or indirect investments in a foreign organization by expedited processing will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove the application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited processing is deemed approved 45 days after receipt of a complete application by the FDIC, or on such earlier date authorized by the FDIC in writing.

(2) *Standard processing.* For those applications which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(d) *Divestiture.* If an insured state nonmember bank holding 50 percent or more of the voting equity interests of a foreign organization or otherwise controlling the foreign organization divests itself of such ownership or control, the insured state nonmember bank shall file a notice in the form of a letter, including the name, location, and date of divestiture of the foreign organization, with the appropriate regional director (DOS) no later than 30 days after the divestiture.

(e) *Delegations of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, if confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director to approve applications under paragraph (c) of this section so long as:

(1) The investment complies with the amount limits in § 347.104 through § 347.107 of this chapter and is in a foreign organization which only conducts such activities as authorized thereunder; and

(2) For foreign investments resulting in the applicant holding 20 percent or more of the voting equity interests of the foreign organization or controlling such organization, if the organization is located in a foreign country in which applicable law or practice would limit the FDIC's access to information for supervisory purposes, the delegate is satisfied that adequate arrangements have been made (through conditions imposed in connection with the approval and agreed to in writing by the applicant) to ensure that the FDIC will

have necessary access to information for supervisory purposes.

§ 303.184 Moving an insured branch of a foreign bank.

(a) *Filing procedures.*—(1) *Where and when to file.* An application by an insured branch of a foreign bank seeking the FDIC's consent to move from one location to another, as required by section 18(d)(1) of the FDI Act (12 U.S.C. 1828(d)(1)), shall be submitted in writing to the appropriate regional director (DOS) on the date the notice required by paragraph (c) of this section is published, or within 5 days after the date of the last required publication.

(2) *Content of filing.* A complete letter application shall include the following information:

(i) The exact location of the proposed site, including the street address;

(ii) Details concerning any involvement in the proposal by an insider of the applicant, as defined in § 303.2(u), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

(iii) A statement of the impact of the proposal on the human environment, including information on compliance with local zoning laws and regulations and the effect on traffic patterns, for purposes of complying with the applicable provisions of the NEPA, and the FDIC ''Statement Policy on NEPA'' (2 FDIC Law, Regulations, Related Acts 5185; see § 309.4 (a) and (b) of this chapter for availability);

(iv) A statement as to whether or not the site is eligible for inclusion in the National Register of Historic Places for purposes of complying with the applicable provisions of the NHPA, and the FDIC ''Statement on NHPA'' (2 FDIC Law, Regulations, Related Acts 5175; see § 309.4 (a) and (b) of this chapter for availability), including documentation of consultation with the State Historic Preservation Officer, as appropriate;

(v) 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 CRA; and

(vi) A copy of the newspaper publication required by paragraph (c) of this section, as well as the name and address of the newspaper and the date of the publication.

(3) *Comptroller's application.* If the applicant is filing an application with the Comptroller which contains the information required by paragraph (a)(2) of this section, the applicant may submit a copy to the FDIC in lieu of a separate application.

(4) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

(b) *Processing.*—(1) *Expedited processing for eligible insured branches.* An application filed by an eligible insured branch as defined in § 303.181(c) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited processing will be deemed approved on the latest of the following:

(i) The 21st day after the FDIC's receipt of a substantially complete application; or

(ii) The 5th day after expiration of the comment period described in paragraph (c) of this section.

(2) *Standard processing.* For those applications that are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(c) *Publication requirement and comment period.*—(1) *Newspaper publications.* The applicant shall publish a notice of its proposal to move from one location to another, as described in § 303.7(b), in a newspaper of general circulation in the community in which the insured branch is located prior to its being moved and in the community to which it is to be moved. The notice shall include the insured branch's current and proposed addresses.

(2) *Public comments.* All public comments must be received by the appropriate regional director (DOS) within 15 days after the date of the last newspaper publication required by paragraph (c)(1) of this section, unless the comment period has been extended or

reopened in accordance with § 303.9(b)(2).

(3) *Lobby notices.* If the insured branch has a public lobby, a copy of the newspaper publication shall be posted in the public lobby for at least 15 days beginning on the date of the publication required by paragraph (c)(1) of this section.

(d) *Delegation of authority.* (1) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director to approve an application under this section. For the delegate to exercise this authority, the criteria in paragraphs (d)(1)(i) through (d)(1)(vi) of this section must be satisfied:

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

(ii) The applicant is at least adequately capitalized as defined in subpart B of part 325 of this chapter;

(iii) Any financial arrangements which have been made in connection with the proposed 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;

(iv) Compliance with the CRA, the NEPA, the NHPA and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved;

(v) No CRA protest as defined in § 303.2(l) has been filed which remains unresolved or, where such a protest has been filed and remains unresolved, the Director (DCA), Deputy Director (DCA), an associate director (DCA) or the appropriate regional director or deputy regional director (DCA) concurs that approval is consistent with the purposes of the CRA and the applicant agrees in writing to any conditions imposed regarding the CRA; and

(vi) The applicant agrees in writing to comply with any conditions imposed by the delegate, other than the standard conditions defined in § 303.2(ff) which may be imposed without the applicant's written consent.

(2) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to approve applications under this section which meet all criteria in paragraph (d)(1) of this section except that the applicant does not agree in writing to comply with any condition imposed by the delegate, other than the standard conditions defined in § 303.2(ff) which may be imposed without the applicant's written consent.

(3) Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to deny applications under this section.

§ 303.185 Merger transactions involving foreign banks or foreign organizations.

(a) *Merger transactions involving an insured branch of a foreign bank.* Merger transactions requiring the FDIC's prior approval as set forth in § 303.62 include any merger transaction in which the resulting institution is an insured branch of a foreign bank which is not a federal branch, or any merger transaction which involves any insured branch and any uninsured institution. In such cases:

(1) References to an eligible depository institution in subpart D of this part include an eligible insured branch as defined in § 303.181;

(2) The definition of a corporate reorganization in § 303.61(b) includes a merger transaction between an insured branch and other branches, agencies, or subsidiaries in the United States of the same foreign bank; and

(3) For the purposes of § 303.62(b)(1) on interstate mergers, a merger transaction involving an insured branch is one involving the acquisition of a branch of an insured bank without the acquisition of the bank for purposes of section 44 of the FDI Act (12 U.S.C. 1831u) only when the merger transaction involves fewer than all the insured branches of the same foreign bank in the same state.

(b) *Certain merger transactions with foreign organizations outside any State.* Merger transactions requiring the FDIC's prior approval as set forth in § 303.62 include any merger transaction

in which an insured depository institution becomes directly liable for obligations which will, after the merger transaction, be treated as deposits under section 3(l)(5)(A)(i)–(ii) of the FDI Act (12 U.S.C. 1813(l)(5)(A)(i)–(ii)), as a result of a merger or consolidation with a foreign organization or an assumption of liabilities of a foreign organization.

§ 303.186 Exemptions from insurance requirement for a state branch of a foreign bank; § 347.206.

(a) *Filing procedures.*—(1) *Where to file.* An application by a state branch for consent to operate as a noninsured state branch, as permitted by § 347.206(b) of this chapter, shall be submitted in writing to the appropriate regional director (DOS).

(2) *Content of filing.* A complete letter application shall include the following information:

(i) The kinds of deposit activities in which the state branch proposes to engage;

(ii) The expected source of deposits;

(iii) The manner in which deposits will be solicited;

(iv) How the activity will maintain or improve the availability of credit to all sectors of the United States economy, including the international trade finance sector;

(v) That the activity will not give the foreign bank an unfair competitive advantage over United States banking organizations; and

(vi) A resolution by the applicant's board of directors, or evidence of approval by senior management if a resolution is not required pursuant to the applicant's organizational documents, authorizing the filing of the application.

(2) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

(b) *Processing.* The FDIC will provide the applicant with written notification of the final action taken.

§ 303.187 Approval for an insured state branch of a foreign bank to conduct activities not permissible for federal branches; § 347.213.

(a) *Filing procedures.*—(1) *Where to file.* An application by an insured state branch seeking approval to conduct activities not permissible for a federal branch, as required by § 347.213(a) of this chapter, shall be submitted in writing to the appropriate regional director (DOS).

(2) *Content of filing.* A complete letter application shall include the following information:

(i) 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;

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

(iii) A resolution by the applicant's board of directors, or evidence of approval by senior management if a resolution is not required pursuant to the applicant's organizational documents, authorizing the filing of the application;

(iv) A statement by the applicant of whether it is in compliance with §§ 347.210 and 347.211 of this chapter, Pledge of assets and Asset maintenance, respectively;

(v) 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 each such application, including a copy of the Board of Governors' disposition of such application, if applicable; and

(vi) A statement of why the activity will pose no significant risk to the Bank Insurance Fund.

(3) *Board of Governors application.* If the application to the Board of Governors contains the information required by paragraph (a) of this section, the applicant may submit a copy to the FDIC in lieu of a separate letter application.

(4) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

(b) *Divestiture or cessation.*—(1) *Where to file.* Divestiture plans necessitated

by a change in law or other authority, as required by § 347.213(e) of this chapter, shall be submitted in writing to the appropriate regional director (DOS).

(2) *Content of filing.* A complete letter application shall include the following information:

(i) A detailed description of the manner in which the applicant proposes to divest itself of or cease the activity in question; and

(ii) A projected timetable describing how long the divestiture or cessation is expected to take.

(3) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

(c) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve plans of divestiture and cessation submitted pursuant to paragraph (b) of this section.

Subpart K—Prompt Corrective Action

§ 303.200 Scope.

(a) *General.* (1) This subpart covers applications filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*), which requires insured depository institutions that are not adequately capitalized to receive approval prior to engaging in certain activities. Section 38 restricts or prohibits certain activities and requires an insured depository institution to submit a capital restoration plan when it becomes undercapitalized. The restrictions and prohibitions become more severe as an institution's capital level declines.

(2) Definitions of the capital categories referenced in this Prompt Corrective Action subpart may be found in subpart B of part 325 of this chapter, § 325.103(b) for state nonmember banks and § 325.103(c) for insured branches of foreign banks.

(b) *Institutions covered.* Restrictions and prohibitions contained in subpart B of part 325 of this chapter apply primarily to insured state nonmember banks and insured branches of foreign banks, as well as to directors and senior executive officers of those institutions. Portions of subpart B of part 325 of this chapter also apply to all insured depository institutions that are deemed to be critically undercapitalized.

§ 303.201 Filing procedures.

Applications shall be filed with the appropriate regional director (DOS). The application shall contain the information specified in each respective section of this subpart, and shall be in letter form as prescribed in § 303.3. Additional information may be requested by the FDIC. 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.

§ 303.202 Processing.

The FDIC will provide the applicant with a subsequent written notification of the final action taken as soon as the decision is rendered.

§ 303.203 Applications for capital distributions.

(a) *Scope.* An insured state nonmember bank and any insured branch of a foreign bank shall submit an application for capital distribution if, after having made a capital distribution, the institution would be undercapitalized, significantly undercapitalized, or critically undercapitalized.

(b) *Content of filing.* 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 also shall explain how the proposal will reduce the institution's financial obligations or otherwise improve its financial condition. If the proposed action also requires an application under section 18(i) of the FDI Act (12 U.S.C. 1828(i)) as implemented by § 303.241 regarding prior consent to

retire capital, such application should be filed concurrently with, or made a part of, the application filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*).

§ 303.204 Applications for acquisitions, branching, and new lines of business.

(a) *Scope.* (1) Any insured state nonmember bank and any insured branch of a foreign bank which is undercapitalized or significantly undercapitalized, and any insured depository institution which is critically undercapitalized, shall submit an application to engage in acquisitions, branching or new lines of business.

(2) A new line of business will include any new activity exercised which, although it may be permissible, has not been exercised by the institution.

(b) *Content of filing.* Applications shall describe the proposal, state the date the institution's capital restoration plan was accepted by its primary federal regulator, describe the institution's status in 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. If the FDIC is not the applicant's primary federal regulator, the application also should 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. If the proposed action also requires applications pursuant to section 18 (c) or (d) of the FDI Act (mergers and branches) (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 FDI Act (12 U.S.C. 1831*o*).

§ 303.205 Applications for bonuses and increased compensation for senior executive officers.

(a) *Scope.* Any insured state nonmember bank or insured branch of a foreign bank that is significantly or critically undercapitalized, or any insured state nonmember bank or any insured branch of a foreign bank that is undercapitalized and which has failed to submit or implement in any material respect an acceptable capital restoration plan, shall submit an application to pay a bonus or increase compensation for any senior executive officer.

(b) *Content of filing.* 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 also shall state the date the institution's capital restoration plan was accepted by the FDIC, and describe any progress made in implementing the plan.

§ 303.206 Application for payment of principal or interest on subordinated debt.

(a) *Scope.* Any critically undercapitalized insured depository institution shall submit an application to pay principal or interest on subordinated debt.

(b) *Content of filing.* Applications shall describe the proposed payment and provide an explanation of action taken under section 38(h)(3)(A)(ii) of the FDI Act (action other than receivership or conservatorship). The application also shall explain how such payments would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831*o*). Existing approvals pursuant to requests filed under section 18(i)(1) of the FDI Act (12 U.S.C. 1828(i)(1)) (capital stock reductions or retirements) shall not be deemed to be the permission needed pursuant to section 38.

§ 303.207 Restricted activities for critically undercapitalized institutions.

(a) *Scope.* Any critically undercapitalized insured depository institution shall submit an application to engage in certain restricted activities.

(b) *Content of filing.* Applications to engage in any of the following activities, as set forth in sections 38(i)(2) (A) through (G) of the FDI Act, shall describe the proposed activity and explain how the activity would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831*o*):

(1) 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. Materiality will be determined on a case-by-case basis;

(2) Extend credit for any highly leveraged transaction (as defined in part 325 of this chapter);

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

(4) Make any material change in accounting methods;

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

(6) Pay excessive compensation or bonuses. Part 364 of this chapter provides guidance for determining excessive compensation; or

(7) Pay 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 area. Section 337.6 of this chapter (Brokered deposits) provides guidance for defining the relevant terms of this provision; however this provision does not supersede the general prohibitions contained in § 337.6 of this chapter.

§ 303.208 Delegation of authority.

Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or deny the following applications, requests or petitions submitted pursuant to this subpart:

(a) Applications filed pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*) (prompt corrective action), including applications to make a capital distribution;

(b) 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 section 18 (c) or (d) of the FDI Act (12 U.S.C. 1828 (c) or (d));

(c) Applications to pay a bonus or increase compensation;

(d) Applications for an exception to pay principal or interest on subordinated debt; and

(e) Applications by critically undercapitalized insured depository institutions to engage in any restricted activity listed in this subpart.

Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of Certain Criminal Offenses)

§ 303.220 Scope.

This subpart covers applications under section 19 of the FDI Act (12 U.S.C. 1829). Pursuant to section 19, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not become, or continue as, an institution-affiliated party of an insured depository institution; own or control, directly or indirectly, any insured depository institution; or otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution without the prior written consent of the FDIC.

§ 303.221 Filing procedures.

(a) *Regional office.* An application under section 19 shall be filed with the appropriate regional director (DOS).

(b) *Contents of filing.* Application forms may be obtained from any FDIC regional office. The FDIC may require additional information beyond that sought in the form, as warranted, in individual cases.

§ 303.222 Service at another insured depository institution.

In the case of a person who has already been approved by the FDIC under this subpart or section 19 of the FDI Act in connection with a particular insured depository institution, such person may not become an institution affiliated party, or own or control directly or indirectly another insured depository institution, or participate in

the conduct of the affairs of another insured depository institution, without the prior written consent of the FDIC.

§ 303.223 Applicant's right to hearing following denial.

An applicant may request a hearing following a denial of an application in accordance with the provisions of part 308 of this chapter.

§ 303.224 Delegation of authority.

(a) *Approvals.* Authority is delegated to the Director and Deputy 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 made by insured depository institutions pursuant to section 19 of the FDI Act, after consultation with the Legal Division; provided however, that authority may not be delegated to the regional director or deputy regional director where the applicant's primary supervisory authority interposes any objection to such application.

(b) *Denials.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to deny applications made by insured depository institutions pursuant to section 19 of the FDI Act.

(c) *Concurrent legal certification.* The authority to deny applications delegated under this section shall be exercised only upon the concurrent certification by the General Counsel and, where confirmed in writing by the General Counsel, his or her designee, that the action taken is not inconsistent with section 19 of the FDI Act.

(d) *Conditions on application approvals.* Regional directors and deputy regional directors acting under delegated authority under this subpart may impose any of the following conditions on the approval of applications, as appropriate in individual cases:

(1) A participant or institution-affiliated party of an institution shall be bonded to the same extent as others in similar positions; and/or

(2) When deemed necessary, the prior consent of the appropriate regional director (DOS) shall be required for any proposed significant changes in duties and/or responsibilities of the person who is the subject of the application.

(e) *Authority not delegated by FDIC Board of Directors.* The FDIC Board of Directors has not delegated its authority to consider and act upon an application under section 19 of the FDI Act after a hearing held in accordance with the provisions of part 308 of this chapter.

Subpart M—Other Filings

§ 303.240 General.

This subpart sets forth the filing procedures to be followed when seeking the FDIC's consent to engage in certain activities or accomplish other matters as specified in the individual sections contained herein. For those matters covered by this subpart that also have substantive FDIC regulations or related statements of policy, references to the relevant regulations or statements of policy are contained in the specific sections.

303.241 Reduce or retire capital stock or capital debt instruments.

(a) *Scope.* This section contains the procedures to be followed by an insured state nonmember bank to seek the prior approval of the FDIC to reduce the amount or retire any part of its common or preferred stock, or to retire any part of its capital notes or debentures pursuant to section 18(i)(1) of the Act (12 U.S.C. 1828(i)(1)).

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(c) *Content of filing.* The application shall contain the following:

(1) The type and amount of the proposed change to the capital structure and the reason for the change;

(2) A schedule detailing the present and proposed capital structure;

(3) The time period that the proposal will encompass;

(4) If the proposal involves a series of transactions affecting Tier 1 capital components which will be consummated over a period of time which shall not exceed twelve months, the application shall certify that the insured depository institution will maintain itself as a well-capitalized institution as defined in part 325 of this chapter,

both before and after each of the proposed transactions;

(5) If the proposal involves the repurchase of capital instruments, the amount of the repurchase price and the basis for establishing the fair market value of the repurchase price;

(6) A statement that the proposal will be available to all holders of a particular class of outstanding capital instruments on an equal basis, and if not, the details of any restrictions; and

(7) The date that the applicant's board of directors approved the proposal.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the application.

(e) *Undercapitalized institutions.* Procedures regarding applications by an undercapitalized insured depository institution to retire capital stock or capital debt instruments pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*) are set forth in subpart K of this part (Prompt Corrective Action), § 303.203. Applications pursuant to sections 38 and 18(i) may be filed concurrently, or as a single application.

(f) *Expedited processing for eligible depository institutions.* An application filed under this section by an eligible depository institution as defined in § 303.2(r) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited processing will be deemed approved 20 days after the FDIC's receipt of a substantially complete application.

(g) *Standard processing.* For those applications that are not processed pursuant to expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(h) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or deny an application pursuant to section 18(i)(1) of the FDI Act (12 U.S.C. 1828(i)) to reduce the amount or retire any part of common or preferred capital stock, or to retire any part of capital notes or debentures.

§ 303.242 Exercise of trust powers.

(a) *Scope.* This section contains the procedures to be followed by a state nonmember bank to seek the FDIC's prior consent to exercise trust powers. The FDIC's prior consent to exercise trust powers is not required in the following circumstances:

(1) Where a state nonmember bank received authority to exercise trust powers from its chartering authority prior to December 1, 1950; or

(2) Where an insured depository institution continues to conduct trust activities pursuant to authority granted by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System.

(b) *Filing procedures.* Applicants shall submit to the appropriate regional director (DOS) a completed form, ''Application for Consent To Exercise Trust Powers.'' This form may be obtained from any FDIC regional office.

(c) *Content of filing.* The filing shall consist of the completed trust application form.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Expedited processing for eligible depository institutions.* An application filed under this section by an eligible depository institution as defined in § 303.2(r) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited procedures will be deemed approved 30 days after the FDIC's receipt of a substantially complete application.

(f) *Standard processing.* For those applications that are not processed pursuant to the expedited procedures, the

FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(g) *Delegation of authority.* (1) Where the criteria listed in paragraph (g)(2) of this section are satisfied and the applicant agrees in writing to comply with any conditions imposed by the approving FDIC official, other than the standard conditions defined in § 303.2(ff), which may be imposed without the applicant's written consent, authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve applications for the FDIC's consent to exercise trust powers.

(2) The following criteria must be satisfied before the authority delegated in paragraph (g)(1) of this section may be exercised:

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

(ii) The proposed management of the trust business is determined to be capable of satisfactorily handling the anticipated business; and

(iii) The applicant's board of directors formally has adopted the FDIC Statement of Principles of Trust Department Management available from any FDIC regional office.

(h) *Denials and certain conditional approvals.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director to:

(1) Deny applications for trust powers; and

(2) Approve applications for trust powers where the criteria listed in paragraph (g)(2) of this section are satisfied but the applicant does not agree in writing to comply with any condition imposed by the delegate, other than the standard conditions defined in § 303.2(ff) which may be imposed without the applicant's written consent.

§ 303.243 Brokered deposit waivers.

(a) *Scope.* Pursuant to section 29 of the FDI Act (12 U.S.C. 1831f) and part 337 of this chapter, an adequately capitalized insured depository institution may not accept, renew or roll over any brokered deposits unless it has obtained a waiver from the FDIC. A well-capitalized insured depository institution may accept brokered deposits without a waiver, and an undercapitalized insured depository institution may not accept, renew or roll over any brokered deposits under any circumstances. This section contains the procedures to be followed to file with the FDIC for a brokered deposit waiver. 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. 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.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(c) *Content of filing.* The application shall contain the following:

(1) The time period for which the waiver is requested;

(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 of 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) How brokered deposits are costed and compared to other funding alternatives and how they are used in the institution's lending and investment activities, including a detailed discussion of asset growth plans;

(5) Procedures and practices used to solicit brokered deposits, including an identification of the principal sources of such deposits;

(6) Management systems overseeing the solicitation, acceptance and use of brokered deposits;

(7) A recent consolidated financial statement with balance sheet and income statements; and

(8) The reasons the institution believes its acceptance, renewal or rollover of brokered deposits would pose no undue risk.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the application.

(e) *Expedited processing for eligible depository institutions.* An application filed under this section by an eligible depository institution as defined in this § 303.243(e) will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. For the purpose of this section, an applicant will be deemed an eligible depository institution if it satisfies all of the criteria contained in § 303.2(r) except that the applicant may be adequately capitalized rather than well-capitalized. The FDIC may remove an application from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, an application processed under expedited procedures will be deemed approved 21 days after the FDIC's receipt of a substantially complete application.

(f) *Standard processing.* For those filings which are not processed pursuant to the expedited procedures, the FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(g) *Conditions for approval.* A waiver issued pursuant to this section shall:

(1) Be for a fixed period, generally no longer than two years, but may be extended upon refiling; and

(2) May be revoked by the FDIC at any time by written notice to the institution.

(h) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or deny brokered deposit waiver applications. Based upon a preliminary review, any delegate may grant a temporary waiver for a short period in order to facilitate the orderly processing of a filing for a waiver.

§ 303.244 Golden parachute and severance plan payments.

(a) *Scope.* Pursuant to section 18(k) of the FDI Act (12 U.S.C. 1828(k)) and part 359 of this chapter, an insured depository institution or depository institution holding company may not make golden parachute payments or excess nondiscriminatory severance plan payments unless the depository institution or holding company obtains permission to make such payments in accordance with the rules contained in part 359 of this chapter. This section contains the procedures to file for the FDIC's consent when such consent is necessary under part 359 of this chapter.

(1) *Golden parachute payments.* A troubled insured depository institution or a troubled depository institution holding company is prohibited from making golden parachute payments (as defined in § 359.1(f)(1) of this chapter) unless it obtains the consent of the appropriate federal banking agency and the written concurrence of the FDIC. Therefore, in the case of golden parachute payments, the procedures in this section apply to all troubled insured depository institutions and troubled depository institution holding companies.

(2) *Excess nondiscriminatory severance plan payments.* In the case of excess nondiscriminatory severance plan payments as provided by § 359.1(f)(2)(v) of this chapter, the FDIC's consent is necessary for state nonmember banks that meet the criteria set forth in § 359.1(f)(1)(ii) of this chapter. In addition, the FDIC's consent is required for all insured depository institutions or depository institution holding companies that meet the same criteria and seek to make payments in excess of the 12-month amount specified in § 359.1(f)(2)(v) of this chapter.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate FDIC regional director (DOS).

(c) *Content of filing.* The application shall contain the following:

(1) The reasons why the applicant seeks to make the payment;

(2) An identification of the institution–affiliated party who will receive the payment;

(3) A copy of any contract or agreement regarding the subject matter of the filing;

(4) The cost of the proposed payment and its impact on the institution's capital and earnings; and

(5) The reasons why consent to the payment should be granted.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Processing.* The FDIC will provide the applicant with a subsequent written notification of the final action taken as soon as the decision is rendered.

(f) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or to deny filings 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.

§ 303.245 Waiver of liability for commonly controlled depository institutions.

(a) *Scope.* Section 5(e) of the FDI Act (12 U.S.C. 1815(e)) creates liability for commonly controlled insured depository institutions for losses incurred or anticipated to be incurred by the FDIC in connection with the default of a commonly controlled insured depository institution or any assistance provided by the FDIC to any commonly controlled insured depository institution in danger of default. In addition to certain statutory exceptions and exclusions contained in sections 5(e)(6), (7) and (8), the FDI Act also permits the FDIC, in its discretion, to exempt any insured depository institution from this liability if it determines that such exemption is in the best interests of the Bank Insurance Fund (BIF) or the Savings Association Insurance Fund (SAIF). This section describes procedures to request a conditional waiver of liability pursuant to section 5 of the FDI Act (12 U.S.C. 1815(e)(5)(A)).

(b) *Definition. Conditional waiver of liability* means an exemption from liability pursuant to section 5(e) of the FDI Act (12 U.S.C. 1815(e)) subject to terms and conditions.

(c) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(d) *Content of filing.* The application shall contain the following information:

(1) The basis for requesting a waiver;

(2) The existence of any significant events (e.g., change in control, capital injection, etc.) that may have an impact upon the applicant and/or any potentially liable institution;

(3) Current, and if applicable, pro forma financial information regarding the applicant and potentially liable institution(s); and

(4) The benefits to the appropriate FDIC insurance fund resulting from the waiver and any related events.

(e) *Additional information.* The FDIC may request additional information at any time during the processing of the filing.

(f) *Processing.* The FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(g) *Failure to comply with terms of conditional waiver.* In the event a conditional waiver of liability is issued, failure to comply with the terms specified therein may result in the termination of the conditional waiver of liability. The FDIC reserves the right to revoke the conditional waiver of liability after giving the applicant written notice of such revocation and a reasonable opportunity to be heard on the matter pursuant to § 303.10.

(h) *Authority retained by FDIC Board of Directors.* The FDIC Board of Directors retains the authority to act on any application for waiver of liability of commonly controlled depository institutions.

§ 303.246 Insurance fund conversions.

(a) *Scope.* This section contains the procedures to be followed by an insured depository institution to seek the FDIC's prior approval to engage in an insurance fund conversion that involves the transfer of deposits between the SAIF and the BIF. Optional conversion transactions, commonly referred to as Oakar transactions, pursuant to

section 5(d)(3) of the FDI Act (12 U.S.C. 1815(d)(3)), which do not involve the transfer of deposits between the SAIF and the BIF, are governed by the procedures set forth in subpart D (Merger Transactions) of this part.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate FDIC regional director (DOS). The filing shall be signed by representatives of each institution participating in the transaction. Insurance fund conversions which are proposed in conjunction with a merger application filed by a state nonmember bank pursuant to section 18(c) of the FDI Act (12 U.S.C. 1828(c)) should be included with that filing.

(c) *Content of filing.* The application shall include the following information:

(1) A description of the transaction;

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

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

(4) Certification by each party to the transaction that applicable entrance and exit fees will be paid pursuant to part 312 of this chapter.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Processing.* The FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(f) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or deny filings for insurance fund conversions involving the transfers of deposits between the SAIF and the BIF.

§ 303.247 Conversion with diminution of capital.

(a) *Scope.* This section contains the procedures to be followed by an insured federal depository institution seeking the prior written consent of the FDIC pursuant to section 18(i)(2) of the FDI Act (12 U.S.C. 1828(i)(2)) to convert from an insured federal depository institution to an insured state nonmember bank (except a District bank) where the capital stock or surplus of the resulting bank will be less than the capital stock or surplus, respectively, of the converting institution at the time of the shareholders' meeting approving such conversion.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(c) *Content of filing.* The application shall contain the following information:

(1) A description of the proposed transaction;

(2) A schedule detailing the present and proposed capital structure; and

(3) A copy of any documents submitted to the state chartering authority with respect to the charter conversion.

(d) *Additional information.* The FDIC may request additional information at any time during the processing.

(e) *Processing.* The FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(f) *Delegation of authority.*—(1) *Approvals.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve applications to convert with diminution of capital.

(2) *Denials.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director to deny applications to convert with diminution of capital.

§ 303.248 Continue or resume status as an insured institution following termination under section 8 of the FDI Act.

(a) *Scope.* This section relates to an application by a depository institution whose insured status has been terminated under section 8 of the FDI Act (12 U.S.C. 1818) for permission to continue or resume its status as an insured depository institution. This section covers institutions whose deposit insurance continues in effect for any purpose or for any length of time under

the terms of an FDIC order terminating deposit insurance, but does not cover operating non-insured depository institutions which were previously insured by the FDIC, or any non-insured, non-operating depository institution whose charter has not been surrendered or revoked.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(c) *Content of filing.* The filing shall contain the following information:

(1) A complete statement of the action requested, all relevant facts, and the reason for such requested action; and

(2) A certified copy of the resolution of the depository institution's board of directors authorizing submission of the filing.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Processing.* The FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(f) *Authority retained by FDIC Board of Directors.* The FDIC Board of Directors retains the authority to act on any application to continue or resume status as an insured institution following termination under section 8 of the FDI Act (12 U.S.C. 1818).

§ 303.249 Truth in Lending Act—relief from reimbursement.

(a) *Scope.* This section applies to requests for relief from reimbursement pursuant to the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) and Regulation Z (12 CFR part 226). Related delegations of authority are also set forth.

(b) *Procedures to be followed in filing initial requests for relief.* Requests for relief from reimbursement shall be filed with the appropriate regional director (DCA) within 60 days after receipt of the compliance report of examination containing the request to conduct a file search and make restitution to affected customers. The filing shall contain a complete and concise statement of the action requested, all relevant facts, the reasons and analysis relied upon as the basis for such requested action, and all supporting documentation.

(c) *Additional information.* The FDIC may request additional information at any time during processing of any such requests.

(d) *Processing.* The FDIC will acknowledge receipt of the request and provide the applicant with written notification of its determination within 60 days of its receipt of the request.

(e) *Delegation of authority.*—(1) *Denial of initial requests for relief.* Authority is delegated to the Director and Deputy Director (DCA), and where confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to deny initial requests for relief from the requirement 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 director or deputy regional director is not authorized to deny any request where the estimated amount of reimbursement is greater than $25,000.

(2) *Approval of initial requests for relief.* Authority is delegated to the Director and Deputy Director (DCA), and where confirmed in writing by the director, to an associate director, to approve requests for relief from the requirement for reimbursement under section 608(a)(2) of the Truth in Lending Simplification and Reform Act (15 U.S.C. 1607(a)(2)).

(f) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, or, in cases where a regional director or deputy regional director 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.

(g) *Procedures to be followed in filing requests for reconsideration.* Within 15 days of receipt of written notice that its request for relief has been denied, the requestor may petition the appropriate regional director (DCA) for reconsideration of such request in accordance with the procedures set forth in § 303.11(f).

§ 303.250 Management official interlocks.

(a) *Scope.* This section contains the procedures to be followed by an insured state nonmember bank to seek the approval of FDIC to establish an interlock pursuant to the Depository Institutions Management Interlocks Act (12 U.S.C. 3207), section 13 of the FDI Act (12 U.S.C. 1823(k)) and part 348 of this chapter.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(c) *Content of filing.* The application shall contain the following:

(1) A description of the proposed interlock;

(2) A statement of reason as to why the interlock will not result in a monopoly or a substantial lessening of competition; and

(3) If the applicant is seeking an exemption set forth in § 348.5 or § 348.6 of this chapter, a description of the particular exemption which is being requested and a statement of reasons as to why the exemption is applicable.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Processing.* The FDIC will provide the applicant with written notification of the final action when the decision is rendered.

(f) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director and the appropriate regional director, deputy regional director, to approve or deny a request to establish a management official interlock pursuant to § 348.5 or § 348.6 of this chapter or section 205(8) of the Depository Institutions Management Interlocks Act (12 U.S.C. 3207, 12 U.S.C. 1823(k)).

§ 303.251 Modification of conditions.

(a) *Scope.* This section contains the procedures to be followed by an insured depository institution to seek the prior consent of the FDIC to modify the requirement of a prior approval of a filing issued by the FDIC.

(b) *Filing procedures.* Applicants should submit a letter application to the appropriate FDIC regional director (DOS).

(c) *Content of filing.* The application should contain the following information:

(1) A description of the original approved application;

(2) A description of the modification requested; and

(3) The reason for the request.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Processing.* The FDIC will provide the applicant with a written notification of the final action as soon as the decision is rendered.

(f) *Delegation of authority.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or deny requests to modify the requirements of a prior approval of a filing issued by the FDIC subject to the following criteria;

(1) The Legal Division is consulted to the same extent as was required for approval of the original filing; and

(2) The approving delegate had the authority to approve the original filing.

§ 303.252 Extension of time.

(a) *Scope.* This section contains the procedures to be followed by an insured depository institution to seek the prior consent of the FDIC for additional time to fulfill a condition required in an approval of a filing issued by the FDIC or to consummate a transaction which was the subject of an approval by the FDIC.

(b) *Filing procedures.* Applicants shall submit a letter application to the appropriate regional director (DOS).

(c) *Content of filing.* The application shall contain the following information:

(1) A description of the original approved application;

(2) Identification of the original time limitation;

(3) The additional time period requested; and

(4) The reason for the request.

(d) *Additional information.* The FDIC may request additional information at any time during processing of the filing.

(e) *Processing.* The FDIC will provide the applicant with written notification of the final action as soon as the decision is rendered.

(f) *Delegation of authority.* (1) Except as provided in paragraph (f)(2) of this section, authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to approve or deny requests for extensions of time within which to perform acts or fulfill conditions required by a prior FDIC action on a filing of the insured depository institution.

(2) *Limits on exercise of delegated authority.* (i) An extension of time may not exceed one year; however, more than one extension may be granted regarding a particular filing.

(ii) Notwithstanding the delegations in paragraph (f)(1) of this section, no delegate shall have the authority to deny an extension of time request unless that delegate has the authority under this part to deny the original filing upon which the extension of time is predicated.

Subpart N—Enforcement Delegations

§ 303.260 Scope.

This subpart contains delegations of authority relating to the initiation, prosecution, and settlement of administrative enforcement actions under the FDI Act and other laws and regulations enforced by the FDIC, including investigations and subpoenas.

§ 303.261 Issuance of notification to primary regulator under section 8(a) of the FDI Act (12 U.S.C. 1818(a)).

(a) *Book capital less than 2 percent.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director and to the appropriate regional director and deputy regional director, to issue notifications to primary regulator when the respondent depository institution's book capital is less than 2 percent of total assets; provided that authority may not be delegated to the regional director or deputy regional director whenever the respondent depository institution has issued any mandatory convertible debt or any form of Tier 2 capital (such as limited life preferred stock, subordinated notes and debentures).

(b) *Tier 1 capital less than 2 percent.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to issue notifications to primary regulator when the respondent depository institution's adjusted Tier 1 capital is less than 2 percent of adjusted part 325 total assets as defined in § 303.2(b).

(c) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, 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 violations of law or regulation and/or unsafe or unsound practices and/or unsafe or unsound condition, if proven, constitute a basis for the issuance of a notification to primary regulator pursuant to section 8(a) of the FDI Act (12 U.S.C. 1818(a)).

§ 303.262 Issuance of notice of intention to terminate insured status under section 8(a) of the FDI Act (12 U.S.C. 1818(a)).

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director, to issue notices of intent to terminate insured status when the respondent depository institution has failed to correct any violations of law or regulation and/or unsafe or unsound practices and/or unsafe or unsound condition as specified in the relevant notification to primary regulator.

(b) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or,

where confirmed in writing by the General Counsel, by his or her designee, that the allegations contained in the findings in the notice of intention to terminate insured status of violations of law or regulation and/or unsafe or unsound practices and/or unsafe or unsound condition, if proven, constitute a basis for termination of the insured status of the respondent depository institution pursuant to section 8(a) of the FDI Act (12 U.S.C. 1818(a)).

§ 303.263 Cease-and-desist actions under section 8(b) of the FDI Act (12 U.S.C. 1818(b)).

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS), to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate Director, to an associate director and to the appropriate regional director and deputy regional director to issue:

(1) Notices of charges; and

(2) Cease-and-desist orders (with or without a prior notice of charges) where the respondent depository institution 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.

(b) *Joint DOS–DCA action.* The Director (DOS) and the Director (DCA) may issue a joint notice of charges or cease-and-desist order under 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 Deputy Directors or associate directors, appropriate regional directors or deputy regional directors.

(c) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, or, in cases where a regional director or deputy regional director 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 FDI Act, and, upon its effective date, shall be a cease-and-desist order which has become final for purposes of enforcement pursuant to the FDI Act.

§ 303.264 Temporary cease-and-desist orders under section 8(c) of the FDI Act (12 U.S.C. 1818(c)).

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS) and to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate Director, to an associate director, to issue temporary cease-and-desist orders.

(b) *Joint DOS–DCA action.* 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 their Deputy Directors or associate directors.

(c) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the action is not inconsistent with section 8(c) of the FDI Act (12 U.S.C. 1818(c)) and the temporary cease-and-desist order is enforceable in a United States District Court.

§ 303.265 Removal and prohibition actions under section 8(e) of the FDI Act (12 U.S.C. 1818(e)).

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS) or the Director and Deputy Director (DCA) and, where confirmed in writing by the appropriate Director, to an associate director, to issue:

(1) 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 FDI Act (12 U.S.C. 1818(e) (1) and (2)), and temporary orders of suspension pursuant to

section 8(e)(3) of the FDI Act (12 U.S.C. 1818(e)(3)); and

(2) 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.

(b) *Joint DOS–DCA action.* The Director (DOS) and the Director (DCA) may issue joint notices and orders pursuant to 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 deputy directors or associate directors.

(c) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, 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 FDI Act, or that the stipulated section 8(e) order is not inconsistent with section 8(e) of the FDI Act, and, upon issuance, shall be an order which has become final for purposes of enforcement pursuant to the FDI Act.

§ 303.266 Suspension and removal action under section 8(g) of the FDI Act (12 U.S.C. 1818(g)).

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS), to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate 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, or who is convicted of or enters a pretrial diversion or similar program, as to any criminal offense cited in or covered by section 8(g) of the FDI Act, when such institution-affiliated party consents to the suspension or prohibition.

(b) *Delegation of authority where suspension or prohibition mandated.* Authority is delegated to the Director and Deputy Director (DOS), to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate Director, to an associate director, to issue orders of suspension and prohibition to any institution-affiliated party who is charged in any information, indictment, or complaint, or who is convicted or enters a pretrial diversion or similar program, as to any criminal offense involving mandatory suspension or prohibition under sections 8(g)(1) (A)(ii) and (C)(ii) of the FDI Act (12 U.S.C. 1818(g)(1) (A)(ii) and (C)(ii)), whether or not such institution-affiliated party consents to the suspension or prohibition.

(c) *Joint DOS–DCA action.* The Director (DOS) and the Director (DCA) may issue joint orders pursuant to 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 Deputy Directors or associate directors.

(d) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the action taken is not inconsistent with section 8(g) of the FDI 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 FDI Act (12 U.S.C. 1818 (i) and (j)).

§ 303.267 Termination of insured status under section 8(p) of the FDI Act (12 U.S.C. 1818(p)).

(a) *General.* 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 FDI Act (12 U.S.C. 1818(p)).

(b) *DOS and legal concurrence.* The authority delegated under this section shall be exercised only upon the recommendation and concurrence of the Director or Deputy Director (DOS) and,

when confirmed in writing by the Director, an associate director, and upon the certification of the General Counsel and, where confirmed in writing by the General Counsel, by his or her designee, that the action taken is not inconsistent with section 8(p) of the FDI Act (12 U.S.C. 1818(p)).

§ 303.268 Termination of insured status under section 8(q) of the FDI Act (12 U.S.C. 1818(q)).

(a) *General.* Authority is delegated to the Executive Secretary to issue consent orders terminating the insured status of an insured depository institution where the liabilities of the insured institution for deposits shall have been assumed by another insured depository institution or depository institutions, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, pursuant to section 8(q) of the FDI Act (12 U.S.C. 1818(q)).

(b) *DOS and legal concurrence.* The authority delegated under this section shall be exercised only upon the recommendation and concurrence of the Director or Deputy Director (DOS) or, when confirmed in writing by the Director, an associate director, and upon the certification of the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the action taken is not inconsistent with section 8(q) of the FDI Act (12 U.S.C. 1818(q)).

§ 303.269 Civil money penalties.

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS), to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate Director, to an associate director, to issue:

(1) Notice of assessment of civil money penalties; and

(2) Final orders to pay (with or without a prior notice of assessment of civil money penalty) where the insured depository institution or institution-affiliated party consents to the issuance of the order to pay and waives, as applicable, receipt of a notice of assessment of civil money penalty and the right to an administrative hearing.

(b) *Legal concurrence.* The authority delegated under paragraph (a) of this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the allegations contained in the notice of assessment, if proven, constitute a basis for assessment of civil money penalties, or that the stipulated final order to pay is authorized under the FDI Act, and upon its effective date, shall be an order to pay which has become final for purposes of enforcement pursuant to the FDI Act.

(c) *Joint DOS–DCA action.* The Director (DOS) and the Director (DCA) may issue joint notices pursuant to paragraph (a) 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 Deputy Directors or associate directors.

(d) *Prosecution of civil money penalty actions and collection of civil money penalties.* Authority is delegated to the General Counsel or, where confirmed in writing, to his or her designee, to prosecute administrative civil money penalty actions and to collect civil money penalties under this section.

§ 303.270 Notices of assessment under section 5(e) of the FDI Act (12 U.S.C. 1815(e)).

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director, to issue notices of assessment of liability to commonly controlled insured depository institutions for the estimated amount of loss to the deposit insurance funds.

(b) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the action taken is not inconsistent with section 5(e) of the FDI Act (12 U.S.C. 1815(e)).

§303.271 Prompt corrective action directives and capital plans under section 38 of the FDI Act (12 U.S.C. 1831o) and part 325 of this chapter.

(a) *General—notices, directives and orders.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director, and to the appropriate regional director and deputy regional director, to accept, reject, require new or revised capital restoration plans, or 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:

(1) Notices of intent to issue capital directives;

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

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

(4) Directives to insured depository institutions pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*), 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 FDI Act (12 U.S.C. 1831*o*(f)(2)(F)(ii));

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

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

(7) 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

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

(b) *Notices—dismissal of director and officer.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to:

(1) 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 FDI Act (12 U.S.C. 1831*o*(f)(2)(F)(ii)) and in accordance with the requirements contained in §308.203 of this chapter;

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

(3) Issue orders of dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the FDI Act (12 U.S.C. 1831*o*(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.

(c) *Reclassification of institution other than on basis of capital.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director, to:

(1) 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; and

(2) Act on requests for rescission of a reclassification.

(d) *Appeals of immediately effective PCA directives.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director, to act on appeals from immediately effective directives issued pursuant to section 38 of the FDI Act (12 U.S.C. 1831*o*) and §308.201 of this chapter.

(e) *Informal hearings.* 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 FDI Act (12 U.S.C. 1831*o*(f)(2)(F)(ii)).

(f) *Legal concurrence.* The authority delegated under this section shall be

exercised only upon the concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, or, in cases where a regional director or deputy regional director issues a notice, directive, or order, by the appropriate regional counsel, that the action taken is not inconsistent with section 38 of the FDI Act (12 U.S.C. 1831*o*) and part 325 of this chapter.

§ 303.272 Investigations under section 10(c) of the FDI Act (12 U.S.C. 1820(c)).

(a) *Authority of division directors.* Authority is delegated to the Director and Deputy Director (DOS), to the Director and Deputy Director (DCA), to the Director and Deputy Director of the Division of Resolutions and Receiverships, and where confirmed in writing by the appropriate Director, to an associate director, and to the appropriate regional director and deputy regional director, to issue an order of investigation pursuant to section 10(c) of the FDI Act (12 U.S.C. 1820(c)) and subpart K of part 308 of this chapter.

(b) *Authority of General Counsel.* Authority is delegated to the General Counsel, and where confirmed in writing by the General Counsel, to his or her designee, to issue an order of investigation pursuant to sections 8 through 13 of the FDI Act (12 U.S.C. 1818–1823), as appropriate, and subpart K of part 308 of this chapter.

(c) *Concurrence in certain situations.* 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, or a post-conservatorship or post-receivership order of investigation, the authority delegated under this section shall be exercised only upon the concurrent execution of the order of investigation by the Director or Deputy Director (DOS), or the Director or Deputy Director (DCA), or the Director or Deputy Director of the Division of Resolutions and Receiverships, their respective associate directors, and the General Counsel or his or her 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 Deputy Directors, or their associate directors, and upon the certification and execution of the order by the General Counsel or his or her designee.

§ 303.273 Unilateral settlement offers.

(a) *General.* Authority is delegated to the Director and Deputy Director (DOS), to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate Director, to an associate director, to accept, deny or enter into negotiations for or regarding settlement and settlement offers with insured depository institutions, or with an institution-affiliated party, pertaining to or arising in connection with a proceeding under part 308 of this chapter. In cases where a proceeding under part 308 of this chapter was issued jointly by DOS and DCA, both Directors or Deputy Directors, or their associate directors, must agree to accept, deny or enter into negotiations regarding settlement and settlement offers with insured depository institutions or with an institution-affiliated party.

(b) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the action taken is not inconsistent with the FDI Act.

§ 303.274 Acceptance of written agreements.

(a) *Written agreements under section 8(a) of the FDI Act.* Authority is delegated to the Director and Deputy 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 FDI Act (12 U.S.C. 1818(a)).

(b) *Written agreements in lieu of cease-and-desist orders.* Authority is delegated to the Director and Deputy Director (DOS) and to the Director and Deputy Director (DCA), and where confirmed in writing by the appropriate 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 FDI Act (12 U.S.C. 1818(b)) or any other provision of the FDI 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 any institution-affiliated party.

(c) *Written agreements as condition attendant to FDIC filings contained in this part.* Authority is delegated to the Director and Deputy Director (DOS), and to the Director and Deputy Director (DCA), as appropriate, and, where confirmed in writing by the appropriate Director, to an associate director, and to the appropriate regional director and deputy regional director, to accept or enter into any written agreements with any insured depository institution, any institution-affiliated party or any other petitioner which contains conditions precedent to the FDIC's non-objection to a filing pursuant to this part. A written agreement under this paragraph (c) shall not affect an institution's rating for prompt corrective action purposes, unless the written agreement expressly provides to the contrary.

(d) *Legal concurrence.* The authority delegated under this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, that the action taken is not inconsistent with the FDI Act.

§ 303.275 Modifications and terminations of enforcement actions and orders.

(a) *Termination of section 8(a) (12 U.S.C. 1818(a)) orders and agreements.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, and to the appropriate regional director and 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 FDI Act when the depository institution is closed by a federal or state authority or merges into another institution.

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

(c) *Termination of section 8(a) (12 U.S.C. 1818(a)) notice of intent to terminate insured status.* In cases where the Board of Directors has issued a notice of intent to terminate insured status pursuant to section 8(a) of the FDI Act, authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, and to the appropriate regional director and 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.

(d) *Sections 8(b) and 8(c)(12 U.S.C. 1818(b) and (c)) actions and orders.* (1) Authority is delegated to the Director and Deputy Director (DOS) and to the Director and Deputy Director (DCA), as appropriate and, where confirmed in writing by the appropriate Director, to an associate director, and to the appropriate regional director and deputy regional director, 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 FDI 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 Deputy Directors or associate directors, or the appropriate regional directors or deputy regional directors, must execute the order of termination.

(2) Authority is delegated to the Director and Deputy Director (DOS) and to the Director and Deputy Director (DCA), as appropriate, and where confirmed in writing by the appropriate Director, to an associate director, and to the appropriate regional director and deputy regional director, to terminate outstanding section 8(b) orders issued by the Board of Directors either where 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 of Directors addresses both safety and soundness and consumer compliance matters, both Directors or Deputy Director, or the designees of the Directors, must execute the order of termination.

(e) *Modification and termination of section 8(e) (12 U.S.C. 1818(e)) orders and actions.* Authority is delegated to the Director and Deputy Director (DOS) and the Director and Deputy Director (DCA), as appropriate, and where confirmed in writing by the appropriate Director, to an associate director, to modify or terminate outstanding section 8(e) orders and pending actions and to grant consent under section 8(e)(7)(B) of the Act (12 U.S.C. 1818(e)(7)(B)) for the modification or termination of an outstanding section 8(e) order issued by another Federal financial institution regulatory agency where:

(1) The respondent has demonstrated his or her fitness to participate in any manner in the conduct of the affairs of an insured depository institution; and

(2) The respondent has shown that his or her participation would not pose a risk to the institution's safety and soundness; and

(3) The respondent has proven that his or her participation would not erode public confidence in the institution.

(f) *Modification and termination of section 8(g) (12 U.S.C. 1818(g)) orders and actions.* Pursuant to section 8(j) of the FDI Act (12 U.S.C. 1818(j)), authority is delegated to the Director and Deputy Director (DOS) and the Director and Deputy Director (DCA), as appropriate, and where confirmed in writing by the appropriate Director, to an associate director, to approve requests for modifications or terminations of section 8(g) orders issued by either the Board of Directors or under delegated authority.

(g) *Other matters not specifically addressed.* For all outstanding or pending notices, actions, orders, directives and agreements not specifically addressed in this subpart, the delegations of authority contained in this subpart shall include the authority to modify or terminate any outstanding or pending notice, order, directive or agreement issued pursuant to delegated authority, as may be appropriate.

(h) *Termination of pending actions—general.* Any pending enforcement action may be dismissed or terminated by the Director or Deputy Director of DOS or DCA, as appropriate, at any time prior to the commencement of a hearing on the merits by an administrative law judge. Once a hearing on the merits has been convened by an administrative law judge, a pending enforcement action may be dismissed or terminated by stipulation or consent of the affected parties no later than 14 days after the administrative law judge has closed the record of the hearing. Only the FDIC Board of Directors may terminate or dismiss an enforcement action more than 14 days after the record has been closed by an administrative law judge.

(i) *Legal concurrence.* Any dismissals, modifications or terminations pursuant to this section shall be exercised only upon concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, or, in cases where a regional director or deputy regional director acts under delegated authority, by the appropriate regional counsel, that the action taken is not inconsistent with the FDI Act.

§ 303.276 Enforcement of outstanding enforcement orders.

After consultation with the Director (DOS) or the Director (DCA), or a Deputy Director or an associate director, or the appropriate regional director or deputy regional director, 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*, 1831*o*, 1972, or 3909, or any provision thereof, in the appropriate United States District Court.

§ 303.277 Compliance plans under section 39 of the FDI Act (12 U.S.C. 1831p–1) (standards for safety and soundness) and part 308 of this chapter.

(a) *Compliance plans.* Authority is delegated to the Director and Deputy Director (DOS), and where confirmed in writing by the Director, to an associate director, and to the appropriate regional director and 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.

(b) *Notices, orders, and other action.* Authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director, to:

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

(2) 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 FDI Act (12 U.S.C. 1831p–1) and in accordance with the requirements contained in § 308.304(a)(2) of this chapter; and

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

(c) *Legal concurrence—compliance plans.* The authority delegated under this section as to compliance plans shall be exercised only upon the concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee, 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 FDI Act.

(d) *Legal concurrence—notices and orders.* The authority delegated under this section as to notices and orders shall be exercised only upon the concurrent certification by the General Counsel or, where confirmed in writing by the General Counsel, by his or her designee 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 FDI Act or that the issuance of a final order is not inconsistent with section 39 of the FDI Act or that the stipulated section 39 order is not inconsistent with section 39 of the FDI Act and is an order which has become final for purposes of enforcement pursuant to the FDI Act.

§ 303.278 Enforcement matters where authority is not delegated.

Without limiting the Board of Directors' authority, the Board of Directors has retained the authority to act upon the following enforcement matters:

(a) Notifications to primary regulator under section 8(a) of the FDI Act (12 U.S.C. 1818(a)) when the respondent bank's book capital is at or above 2 percent of total assets and adjusted Tier 1 capital is at or above 2 percent of adjusted part 325 total assets as defined in § 303.2(b);

(b) Orders terminating insured status under section 8(a) of the FDI Act (12 U.S.C. 1818(a));

(c) Cease-and-desist orders under section 8(b) of the FDI Act (12 U.S.C. 1818(b)) when the respondent depository institution or individual does not consent to the issuance of such orders;

(d) Temporary orders of suspension and prohibition under section 8(e) of the FDI Act (12 U.S.C. 1818(e));

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

(f) 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 under section 8(g) of the FDI Act (12 U.S.C. 1818(g)) when such director, officer or person does not consent to the suspension or removal;

(g) Final orders to pay civil money penalties where respondents do not consent to the assessment of civil money penalties and hearings have been held;

(h) Denials of requests for modifications or terminations of orders issued pursuant to section 8(g) of the FDI Act;

(i) Grants or denials of requests for reinstatement to office, whether or not an informal hearing has been requested, pursuant to §308.203 of this chapter; and

(j) Grants or denials of requests for waivers of liability of commonly controlled insured depository institutions as to assessments under section 5(e) of the FDI Act (12 U.S.C. 1815(e)).

PART 304—FORMS, INSTRUCTIONS AND REPORTS

Sec.
304.1 Purpose and scope.
304.2 Forms and instructions—general.
304.3 Certified statements.
304.4 Reports of condition and income.
304.5 Other forms.
304.6 [Reserved]
304.7 Display of control numbers.
APPENDIX A TO PART 304—LIST OF FORMS

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 forms required by the FDIC and identifies the sections of FDIC's regulations where the forms are referenced.

[51 FR 36684, Oct. 15, 1986, as amended at 62 FR 4896, Feb. 3, 1997]

§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—Division of Supervision. The FDIC regional offices are listed in the directory of the FDIC Law, Regulations and Related Acts looseleaf service, published by the FDIC. A listing of FDIC forms can also be obtained by writing to the FDIC, Division of Supervision, 550 17th Street, NW, Washington, D.C. 20429. The forms are also available in the FDIC Public Information Center at 801 17th Street, NW, Washington, D.C. 20429.

[62 FR 4896, Feb. 3, 1997]

§304.3 Certified statements.

The certified statements required to be filed by insured institutions under the provisions of section 7 of the Federal Deposit Insurance Act (12 U.S.C. 1817), as amended, shall be filed in accordance with part 327 of this chapter. The applicable forms are Form 6420/07A—Form 6420/07H which show 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 forms 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.

[62 FR 4896, Feb. 3, 1997]

§304.4 Reports of condition and income.

(a) *Description.* Forms FFIEC 031, 032, 033, and 034, Consolidated Reports of Condition and Income, are quarterly reports for insured state nonmember banks (except District banks) of different asset sizes or with foreign offices, as appropriate, that are required to be prepared as of the close of business on the following report dates: March 31, June 30, September 30, and December 31. These reports are also known as the ''Call Report.'' The Call Report includes a balance sheet, an income statement, and a statement of changes in equity capital 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 regulatory capital. All assets and liabilities, including contingent assets and liabilities, must be reported in, or otherwise taken into account in the preparation of, the Call Report. 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. Call Reports 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''. 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, D.C. 20429.

(b) *Submission of reports.* All insured state nonmember banks (except District banks) shall file their completed reports by the method and with the appropriate collection agent for the FDIC as designated in the materials accompanying the report forms each quarter. Completed reports must be received no more than 30 calendar days after the report date, subject to the timely filing provisions set forth in the ''Instructions—Consolidated Reports of Condition and Income'' and in the materials accompanying the report forms each quarter. Any bank which has or has had more than one foreign office, other than a shell branch or an International Banking Facility, may take an additional 15 calendar days to submit its Call Reports. A bank using any of these additional 15 calendar days to complete its reports is required to submit its reports electronically.

[62 FR 4896, Feb. 3, 1997]

§304.5 Other forms.

The forms described in this section have been prepared for the use of banks.

(a) *Form 8020/05: Summary of Deposits.* Form 8020/05 is a report on the amount of deposits 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 31. The report is filed with the appropriate collection agent for the FDIC as designated in the materials accompanying the survey forms each year. 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 Trust and Survey Group, Division of Supervision, FDIC, 550 17th Street, NW, Washington, D.C. 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—Division of 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 report must be filed by 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. The report must be filed 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 must be prepared and submitted in accordance with the appropriate instructions. The report is filed with the appropriate collection agent for the FDIC as designated in the report form and instructions. The report forms and instructions for completing the report will be furnished automatically to all such banks by, or may be obtained upon request from the Trust and Survey Group, Division of Supervision, FDIC, 550 17th Street, NW, Washington, D.C. 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 supporting schedules that request additional detail with respect to selected assets and liabilities, off-balance sheet items, and, in the case of insured branches, information for assessment purposes. All assets and liabilities, including contingent assets and liabilities, must be reported in, or otherwise taken into account in the preparation of, this report. 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 this chapter. The reports or any form containing identical information must be submitted to the bank's board of directors by 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 insured state nonmember bank.

[62 FR 4897, Feb. 3, 1997]

§ 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 FDICs 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

Form	Title	Section of FDICs regulations (12 CFR chapter III) where the form is referenced	OMB No.
FDIC 6112/02	Statement of Changes in Beneficial Ownership of Equity Securities (Form F–8).	335.414	3064–0030
FDIC 6120/06	Notification of Bank Services	304.5(b)	3064–0029
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 19(c) of the Federal Deposit Insurance Act.	303.3	3064–0016
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 6342/12	Request for Deregistration Registered Transfer Agent.	341.5	3064–0027
FDIC 6420/07	Certified Statement	304.3(a)	3064–0057
FDIC 6440/12	Loan/Application Register	338.8(3)	7100–0247
FDIC 6710/06	Suspicious Activity Report	353.1	3064–0077
FDIC 6710/07	Application Pursuant to Section 19 of the Federal Deposit Insurance Act.	(4)	3064–0018
FDIC 6810/01	Notification of Addition of a Director or Employment of a Senior Executive Officer.	333.2	3064–0097
FDIC 6822/01	Notice of Acquisition of Control	303.4(b)	3064–0019
FDIC 8020/05	Summary of Deposits	304.5(a)	3064–0061
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(b)	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)	3064–0017
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
GFIN	Notice of Government Securities Broker or Government Securities Dealer Activities to be Filed by a Financial Institution Under Section 15C(a)(1)(B).	(7)	1535–0089
GFIN–W	Notice by Financial Institutions of Termination of Activities as a Government Securities Broker or Government Securities Dealer.	(7)	7100–0224
GFIN–4	Disclosure Form for Person Associated With a Financial Institution Government Securities Broker or Dealer.	(7)	1535–0089
GFIN–5	Uniform Termination Notice for Person Associated With a Financial Institution Government Securities Broker or Dealer.	(7)	1535–0089
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 for Municipal Securities Principal or Municipal Securities Representative Associated With a Bank Municipal Securities Dealer.	343.3	3064–0022
TA–1	Transfer Agent Registration and Amendment Form	341.6	3064–0026

Notes:

[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] The report form can be obtained from the HMDA Assistance line by telephoning (202) 452–2016.
[3] 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.
[4] 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.
[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 monthly report on behalf of insured state nonmember banks.
[7] Not referenced in 12 CFR chapter III. The report form is submitted by banks or persons associated with banks required to file under section 15C of the Securities and Exchange Act of 1934.

[62 FR 4897, Feb. 3, 1997]

PARTS 305–306 [RESERVED]

PART 307—NOTIFICATION OF CHANGES OF INSURED STATUS

Sec.
307.1 Certification of assumption of deposit liabilities.
307.2 Notice to be given when deposit liabilities are not assumed.

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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308.401 Applications for stays of disciplinary sanctions or summary suspensions by a bank clearing agency.
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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.
309.2 Definitions.
309.3 Federal Register publication.
309.4 Publicly available records.
309.5 Procedures for requesting records.
309.6 Disclosure of exempt records.
309.7 Service of process.

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. Section 309.2 sets forth definitions applicable to this part 309. Section 309.3 describes the types of information and documents typically published in the FEDERAL REGISTER. Section 309.4 explains how to access public records maintained on the Federal Deposit Insurance Corporation's World Wide Web page and in the Federal Deposit Insurance Corporation's Public Information Center or ''PIC'', and describes the categories of records generally found there. Section 309.5 implements the Freedom of Information Act (5 U.S.C. 552). Section 309.6 authorizes the discretionary disclosure of exempt records under certain limited circumstances. Section 309.7 outlines procedures for serving a subpoena or other legal process to obtain information maintained by the FDIC.

[63 FR 16404, Apr. 3, 1998]

§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, in any form the FDIC regularly maintains them.

(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.

[60 FR 61465, Nov. 30, 1995, as amended at 63 FR 16404, Apr. 3, 1998]

§ 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.

(a) *Records available on the FDIC's World Wide Web page*—(1) *Discretionary release of documents.* The FDIC encourages the public to explore the wealth of resources available on the FDIC's World Wide Web page, located at: http://www.fdic.gov. The FDIC has elected to publish a broad range of materials on its World Wide Web page, including consumer guides; financial and statistical information of interest to the banking industry; and information concerning the FDIC's responsibilities and structure.

(2) *Documents required to be made available via computer telecommunications.* (i) The following types of documents created on or after November 1, 1996, and required to be made available through computer telecommunications, may be found on the FDIC's World Wide Web page located at: http://www.fdic.gov:

(A) Final opinions, including concurring and dissenting opinions, as well as final orders and written agreements, made in the adjudication of cases;

(B) Statements of policy and interpretations adopted by the Board of Directors that are not published in the FEDERAL REGISTER;

(C) Administrative staff manuals and instructions to staff that affect the public;

(D) Copies of all records released to any person under § 309.5 that, because of the nature of their subject matter, the FDIC has determined are likely to be the subject of subsequent requests;

(E) A general index of the records referred to in paragraph (a)(2)(i)(D) of this section.

(ii) 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. If redaction is necessary, the FDIC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction.

(b) *Public Information Center.* The FDIC maintains a Public Information

Center or ''PIC'' that contains Corporate records that the Freedom of Information Act requires be made available for regular inspection and copying, as well as any records or information the FDIC, in its discretion, has regularly made available to the public. The PIC has extensive materials of interest to the public, including many Reports, Summaries and Manuals used or published by the Corporation that are available for inspection and copying. The PIC is open from 9:00 AM to 5:00 PM, Monday through Friday, excepting federal holidays. It is located at 801 17th Street, NW., Washington, DC 20006. The PIC may be reached during business hours by calling (800) 276–6003.

(c) *Applicable fees.* (i) If applicable, fees for furnishing records under this section are as set forth in § 309.5(f) except that all categories of requesters shall be charged duplication costs.

(ii) Information on the FDIC's World Wide Web page is available to the public without charge. If, however, information available on the FDIC's World Wide Web page is provided pursuant to a Freedom of Information Act request processed under § 309.5, then fees apply and will be assessed pursuant to § 309.5(f).

[63 FR 16404, Apr. 3, 1998]

§ 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) *Noncommercial 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 primarily engaged in gathering news for, or a free-lance journalist who can demonstrate a reasonable expectation of having 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) *Making a request for records.* (1) The request shall be submitted in writing to the Office of the Executive Secretary:

(i) By completing the online request form located on the FDIC's World Wide Web page, found at: http://www.fdic.gov;

(ii) By facsimile clearly marked Freedom of Information Act Request to (202) 898–8778; or

(iii) By sending a letter to the Office of the Executive Secretary, ATTN: FOIA/PA Unit, 550 17th Street, NW., Washington, DC 20429.

(2) The request shall contain the following information:

(i) The name and address of the requester, an electronic mail address, if available, and the telephone number at which the requester may be reached during normal business hours;

(ii) Whether the requester is an educational institution, noncommercial scientific institution, or news media representative;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying a maximum fee that is acceptable to the requester, or a request for a waiver or reduction of fees that satisfies paragraph (f)(1)(x) of this section; and

(iv) The preferred form and format of any responsive information requested, if other than paper copies.

(3) A request for identifiable records shall reasonably describe the records in a way that enables the FDIC's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the FDIC's operations.

(c) *Defective requests.* The FDIC need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this part. The FDIC may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

(d) *Processing requests*—(1) *Receipt of requests.* Upon receipt of any request that satisfies paragraph (b) of this section, the FOIA/PA Unit, Office of the Executive Secretary, shall assign the request to the appropriate processing track pursuant to this section. The date of receipt for any request, including one that is addressed incorrectly or that is referred by another agency, is the date the Office of the Executive Secretary actually receives the request.

(2) *Multitrack processing.* (i) The FDIC provides different levels of processing for categories of requests under this part. Requests for records that are readily identifiable by the Office of the Executive Secretary and that have already been cleared for public release may qualify for fast-track processing. All other requests shall be handled under normal processing procedures, unless expedited processing has been granted pursuant to paragraph (d)(3) of this section.

(ii) The FDIC will make the determination whether a request qualifies for fast-track processing. A requester may contact the FOIA/PA Unit to learn whether a particular request has been assigned to fast-track processing. If the request has not qualified for fast-track processing, the requester will be given an opportunity to refine the request in order to qualify for fast-track processing. Changes made to requests to obtain faster processing must be in writing.

(3) *Expedited processing.* (i) Where a person requesting expedited access to records has demonstrated a compelling need for the records, or where the FDIC has determined to expedite the response, the FDIC shall process the request as soon as practicable. To show a compelling need for expedited processing, the requester shall provide a statement demonstrating that:

(A) The failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) The requester can establish that they are primarily engaged in information dissemination as their main professional occupation or activity, and there is urgency to inform the public of the government activity involved in the request; and

(C) The requester's statement must be certified to be true and correct to the best of the person's knowledge and belief and explain in detail the basis for requesting expedited processing.

(ii) The formality of the certification required to obtain expedited treatment

may be waived by the FDIC as a matter of administrative discretion.

(4) A requester seeking expedited processing will be notified whether expedited processing has been granted within ten (10) working days of the receipt of the request. If the request for expedited processing is denied, the requester may file an appeal pursuant to the procedures set forth in paragraph (h) of this section, and the FDIC shall respond to the appeal within ten (10) working days after receipt of the appeal.

(5) *Priority of responses.* Consistent with sound administrative process the FDIC processes requests in the order they are received in the separate processing tracks. However, in the agency's discretion, or upon a court order in a matter to which the FDIC is a party, a particular request may be processed out of turn.

(6) *Notification.* (i) The time for response to requests will be twenty (20) working days except:

(A) In the case of expedited treatment under paragraph (d)(3) of this section;

(B) Where the running of such time is suspended for the calculation of a cost estimate for the requester if the FDIC determines that the processing of the request may exceed the requester's maximum fee provision or if the charges are likely to exceed $250 as provided for in paragraph (f)(1)(v) of this section;

(C) Where the running of such time is suspended for the payment of fees pursuant to the paragraphs (d)(6)(i)(B) and (f)(1) of this section; or

(D) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B) and further described in paragraph (d)(6)(iii) of this section.

(ii) In unusual circumstances as referred to in paragraph (d)(6)(i)(D) of this section, the time limit may be extended for a period of:

(A) Ten (10) working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or

(B) Such alternative time period as agreed to by the requester or as reasonably determined by the FDIC when the FDIC notifies the requester that the request cannot be processed in the specified time limit.

(iii) Unusual circumstances may arise when:

(A) The records are in facilities, such as field offices or storage centers, that are not located at the FDIC's Washington office;

(B) The records requested are voluminous or are not in close proximity to one another; or

(C) 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.

(7) *Response to request.* In response to a request that satisfies the requirements of paragraph (b) of this section, a search shall be conducted of records maintained by the FDIC in existence on the date of receipt of the request, and a review made of any responsive information located. The FDIC shall notify the requester of:

(i) The FDIC's determination of the request;

(ii) The reasons for the determination;

(iii) If the response is a denial of an initial request or if any information is withheld, the FDIC will advise the requester in writing:

(A) If the denial is in part or in whole;

(B) The name and title of each person responsible for the denial (when other than the person signing the notification);

(C) The exemptions relied on for the denial; and

(D) The right of the requester to appeal the denial to the FDIC's General Counsel within 30 business days following receipt of the notification, as specified in paragraph (h) of this section.

(e) *Providing responsive records.* (1) Copies of requested records shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the FDIC or makes other acceptable arrangements, or the FDIC deems it appropriate to send the documents by another means.

(2) The FDIC shall provide a copy of the record in any form or format requested if the record is readily reproducible by the FDIC in that form or

format, but the FDIC need not provide more than one copy of any record to a requester.

(3) By arrangement with the requester, the FDIC may elect to send the responsive records electronically if a substantial portion of the request is in electronic format. If the information requested is made pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, it will not be sent by electronic means unless reasonable security measures can be provided.

(f) *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 (f)(2) and (f)(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 or, 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 shall ordinarily collect all applicable fees under the final invoice before releasing copies of requested records to the requester.

(vii) The FDIC may require any requester who has previously failed to pay the charges under this section within 30 calendar 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 calendar 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.

(viii) The FDIC may begin assessing interest charges on unpaid bills on the 31st day following the day on which the invoice 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.

(ix) The time limit for the FDIC to respond to a request will not begin to run until the FDIC has received the requester's written agreement under paragraph (f)(1)(iv) of this section, and advance payment under paragraph (f)(1) (v) or (vii) of this section, or payment of outstanding charges under paragraph (f)(1)(vii) or (viii) of this section.

(x) 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 (h) 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 described in paragraph (f)(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). The FDIC may charge fees that recoup the full allowable direct costs it incurs. 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 apportioned 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, other than a readily produced electronic form or format, is at the FDIC's discretion. The FDIC may recover the full costs of providing such services to the requester.

(4) *Publication of fee schedule and effective date of changes.* (i) The fee schedule is made available on the FDIC's World Wide Web page, found at http://www.fdic.gov.

(ii) The fee schedule 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 Office of the Executive Secretary, FOIA/PA Unit, 550 17th Street NW., Washington, DC 20429, and are available on the FDIC's World Wide Web page as noted in paragraph (f)(4)(i) of this section.

(iii) The fees implemented in the December or Interim Notice will be effective 30 days after issuance.

(5) *Use of contractors.* 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.

(g) *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.[1] 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. If redaction is necessary, the FDIC will, to the extent technically feasible, indicate the amount of material deleted at the place in the record where such deletion is made unless that indication in and of itself will jeopardize the purpose for the redaction. The categories of exempt records are as follows:

(1) Records that 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;

(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 that 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.

(h) *Appeals.* (1) Appeals should be addressed to the Office of the Executive Secretary, FDIC, 550 17th Street, NW., Washington, DC 20429.

(2) A person whose initial request for records under this section, or whose request for a waiver of fees under paragraph (f)(1)(x) of this section, has been denied, either in part or in whole, has the right to appeal the denial to the 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.

(3) Except in the case of an appeal for expedited treatment under paragraph

[1] Classification of a record as exempt from disclosure under the provisions of this paragraph (g) 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.

(d)(3) of this section, the FDIC will notify the appellant in writing within 20 business days after receipt of the appeal and will state:

(i) Whether it is granted or denied in whole or in part;

(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.

(4) If a requester is appealing for denial of expedited treatment, the FDIC will notify the appellant within 10 business days after receipt of the appeal of the FDIC's disposition.

(5) Complete payment of any outstanding fee invoice will be required before an appeal is processed.

(i) *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.

[63 FR 16404, Apr. 3, 1998]

§309.6 Disclosure of exempt records.

(a) *Disclosure prohibited*. Except as provided in paragraph (b) of this section or by 12 CFR part 310[2], 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:

(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

[2] The procedures for disclosing records under the Privacy Act are separately set forth in 12 CFR part 310.

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)[3] 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)[4]

[3] 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.

[4] The form of notice generally is as follows. Additional information may be added:

Dear Mr./Ms. _____:

of the RFPA is sent within fourteen days of the disclosure to the customer whose records are disclosed.[5]

(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, 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

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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.

[5] 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.

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.[6] 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

[6] 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 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, 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.

[60 FR 61465, Nov. 30, 1995, as amended at 63 FR 16408, Apr. 3, 1998]

§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, NW., 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, NW., 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 NW., 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 NW., 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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310.10 Disclosure of record to person other than the individual to whom it pertains.
310.11 Fees.
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, NW., 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.

SOURCE: 54 FR 40380, Oct. 2, 1989, unless otherwise noted.

§ 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 [RESERVED]

PART 325—CAPITAL MAINTENANCE

Subpart A—Minimum Capital Requirements

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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.

AUTHORITY: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (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 assets* means those assets (net of any related valuation allowances) that result from contracts to service loans secured by real estate (that have been securitized or are owned by others) for which the benefits of servicing are expected to more than adequately compensate the servicer for performing the servicing. For purposes of determining regulatory capital under this part, mortgage servicing assets will be recognized only to the extent that the assets 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 assets to the extent that the FDIC determines pursuant to § 325.5(f) of this part that mortgage servicing assets 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 assets, nonmortgage servicing assets, 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 assets, nonmortgage servicing assets, 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)).

[56 FR 10160, Mar. 11, 1991, as amended at 57 FR 44899, Sept. 29, 1992; 58 FR 6368, 6369, Jan. 28, 1993; 58 FR 8219, Feb. 12, 1993; 58 FR 60103, Nov. 15, 1993; 59 FR 66666, Dec. 28, 1994; 60 FR 8187, Feb. 13, 1995; 60 FR 39232, Aug. 1, 1995; 63 FR 42677, Aug. 10, 1998]

§ 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.

(Approved by the Office of Management and Budget under control number 3064–0075 for use through December 31, 1993)

[56 FR 10162, Mar. 11, 1991, as amended at 58 FR 8219, Feb. 12, 1993; 59 FR 64564, Dec. 15, 1994; 60 FR 45609, Aug. 31, 1995; 62 FR 55493, Oct. 24, 1997]

§ 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 assets, purchased credit card relationships, and nonmortgage servicing assets.* For purposes of determining Tier 1 capital under this part, mortgage servicing assets, purchased credit card relationships, and nonmortgage servicing assets will be deducted from assets and from common stockholders' equity to the extent that these items do not meet the conditions, limitations, and restrictions described in this section. Banks may elect to deduct disallowed servicing assets on a basis that is net of any associated deferred tax liability. Any deferred tax liability netted in this manner cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income and calculating the maximum allowable amount of these assets under paragraph (g) of this section.

(1) *Valuation.* The fair value of mortgage servicing assets, purchased credit card relationships, and nonmortgage servicing assets shall be estimated at least quarterly. The quarterly fair value estimate shall include adjustments for any significant changes in

the original valuation assumptions, including changes in prepayment estimates or attrition rates. The FDIC in its discretion may require independent fair value estimates on a case-by-case basis where it is deemed appropriate for safety and soundness purposes.

(2) *Fair 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 assets, purchased credit card relationships, and nonmortgage servicing assets will each be reduced to an amount equal to the lesser of:

(i) 90 percent of the fair value of these assets, determined in accordance with paragraph (f)(1) of this section; or

(ii) 100 percent of the remaining unamortized book value of these assets (net of any related valuation allowances), determined in accordance with the instructions for the preparation of the Consolidated Reports of Income and Condition (Call Reports).

(3) *Tier 1 capital limitation.* The maximum allowable amount of mortgage servicing assets, purchased credit card relationships, and nonmortgage servicing assets, in the aggregate, will be limited to the lesser of:

(i) 100 percent of the amount of Tier 1 capital that exists before the deduction of any disallowed mortgage servicing assets, any disallowed purchased credit card relationships, any disallowed nonmortgage servicing assets, and any disallowed deferred tax assets; or

(ii) The sum of the amounts of mortgage servicing assets, purchased credit card relationships, and nonmortgage servicing assets determined in accordance with paragraph (f)(2) of this section.

(4) *Tier 1 capital sublimit.* In addition to the aggregate limitation on mortgage servicing assets, purchased credit card relationships, and nonmortgage servicing assets set forth in paragraph (f)(3) of this section, a sublimit will apply to purchased credit card relationships and nonmortgage servicing assets. The maximum allowable amount of purchased credit card relationships and nonmortgage servicing assets, in the aggregate, 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 assets, any disallowed purchased credit card relationships, any disallowed nonmortgage servicing assets, and any disallowed deferred tax assets; or

(ii) The sum of the amounts of purchased credit card relationships and nonmortgage servicing assets, 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 assets, any disallowed nonmortgage servicing assets, 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 assets, nonmortgage servicing assets, 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.

[56 FR 10163, Mar. 11, 1991, as amended at 57 FR 7647, Mar. 4, 1992; 58 FR 6369, Jan. 28, 1993; 58 FR 8219, Feb. 12, 1993; 60 FR 8187, Feb. 13, 1995; 60 FR 39232, Aug. 1, 1995; 63 FR 42677, Aug. 10, 1998]

§ 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, an 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 § 347.210 of this chapter; and

(ii) Maintains the eligible assets prescribed under § 347.211 of this chapter 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 28.15(b), or to comply with asset maintenance requirements pursuant to 12 CFR 28.20; or

(B) The FDIC to pledge additional assets pursuant to § 347.210 of this chapter or to maintain a higher ratio of eligible assets pursuant to § 347.211 of this chapter.

(2) *Adequately capitalized* if the insured branch:

(i) Maintains the pledge of assets required under § 347.210 of this chapter; and

(ii) Maintains the eligible assets prescribed under § 347.211 of this chapter 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 § 347.210 of this chapter; or

(ii) Fails to maintain the eligible assets prescribed under § 347.211 of this chapter 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 § 347.211 of this chapter 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 it fails to maintain the eligible assets prescribed under § 347.211 of this chapter 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.

[57 FR 44900, Sept. 29, 1992, as amended at 63 FR 17074, Apr. 8, 1998]

§ 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 this part for supplemental rules to determine qualifying and excess capital, calculate risk-

[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.

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 assets, nonmortgage servicing assets 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 assets, nonmortgage servicing assets and purchased credit card relationships are generally recognized for risk-based capital purposes, the deduction of part or all of the mortgage servicing assets, nonmortgage servicing assets 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 assets, nonmortgage servicing assets 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:

i. Allowance for loan and lease losses, up to a maximum of 1.25 percent of risk-weighted assets;

ii. Cumulative perpetual preferred stock, long-term preferred stock (original maturity of at least 20 years), and any related surplus;

iii. 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;

iv. Hybrid capital instruments, including mandatory convertible debt securities;

v. Term subordinated debt and intermediate-term preferred stock (original average maturity of five years or more) and any related surplus; and

vi. Net unrealized holding gains on equity securities (subject to the limitations discussed in paragraph I.*A*.2.(f) of this section).

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 and disallowed deferred tax assets). 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.

(e) *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.

(f) *Unrealized gains on equity securities and unrealized gains (losses) on other assets.* Up to 45 percent of pretax net unrealized holding gains (that is, the excess, if any, of the fair value over historical cost) on available-for-sale equity securities with readily determinable fair values may be included in supplementary capital. However, the FDIC may exclude all or a portion of these unrealized gains from Tier 2 capital if the FDIC determines that the equity securities are not prudently valued. Unrealized gains (losses) on other types of assets, such as bank premises and available-for-sale debt securities, are not included in supplementary capital, but the FDIC may take these unrealized gains (losses) into account as additional factors when assessing a bank's overall capital adequacy.

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 assets, nonmortgage servicing assets 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

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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 assets, nonmortgage servicing assets 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.

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.

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.

[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

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.

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

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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.

[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.

Business Act (15 U.S.C. 632(a)) 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 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

[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.

short-term claims that are guaranteed[19] by, U.S. depository institutions[20] and foreign 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.

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[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, 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.

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 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:

(1) The purchaser is an individual(s) who intends to occupy the residence and is not a partnership, joint venture, trust, corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing one or more of the homes for speculative purposes;

(2) The builder must incur at least the first ten percent of the direct costs (i.e., actual costs of the land, labor, and material) before any drawdown is made under the construction loan and the construction loan may not exceed 80 percent of the sales price of the presold home;

(3) The purchaser has made a substantial ''earnest money deposit'' of no less than three percent of the sales price of the home and the deposit must be subject to forfeiture if the purchaser terminates the sales contract; and

(4) The earnest money deposit must be held in escrow by the bank financing the builder or by an independent party in a fiduciary capacity and the escrow agreement must provide that, in the event of default arising from the cancellation of the sales contract by the buyer, the escrow funds must first be used to defray any costs incurred by the bank.

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);

[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 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.

(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 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

[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.

[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.

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 assets, nonmortgage servicing assets 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. 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

[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.

[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.

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.

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.

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[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.

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 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.

[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.

(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 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 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

[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.

[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.

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 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

Components	Minimum requirements and limitations
(1) Core Capital (Tier 1)	Must equal or exceed 4% of risk-weighted assets.
(2) Common stockholders' equity capital.	No limit.[1]
(3) Noncumulative perpetual preferred stock and any related surplus.	No limit.[1]

TABLE I— DEFINITION OF QUALIFYING CAPITAL—Continued

Components	Minimum requirements and limitations
(4) Minority interests in equity capital accounts of consolidated subsidiaries.	No limit.[1]
(5) Less: All intangible assets other than mortgage servicing rights and purchased credit card relationships.	([2])
(6) Less: Certain deferred tax assets	([3])
(7) Supplementary Capital (Tier 2)	Total of Tier 2 is limited to 100% of Tier 1.[4]
(8) Allowance for loan and lease losses	Limited to 1.25% of risk-weighted assets.[4]
(9) Unrealized gains on certain equity securities[5].	Limited to 45% of pretax net unrealized gains.[5]
(10) 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.
(11) Auction rate and similar preferred stock (both cumulative and non-cumulative).	No limit within Tier 2.
(12) Hybrid capital instruments (including mandatory convertible debt securities).	No limit within Tier 2.
(13) Term subordinated debt and intermediate-term preferred stock (original weighted average maturity of five 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.
(14) Deductions (from the sum of Tier 1 plus Tier 2).	
(15) Investments in banking and finance subsidiaries that are not consolidated for regulatory capital purposes.	
(16) Intentional, reciprocal cross-holdings of capital securities issued by banks.	
(17) Other deductions (such as investments in other subsidiaries or in joint ventures) as determined by supervisory authority.	On a case-by-case basis or as a matter of policy after formal consideration of relevant issues.
(18) 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). 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.

[5] Unrealized gains on equity securities are subject to the capital limitations set forth in paragraph I.A.2.(f) of Appendix A to part 325.

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.

[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.

(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.

(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.

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[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.

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 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}=(0.4×2,900,000)+0.6(0×2,900,000)
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}=(0.4×2,900,000)+0.6(.67×2,900,000)
A_{net}=2,325,800

Credit Equivalent Amount: 2,325,800+200,000=2,525,800

[54 FR 11509, Mar. 21, 1989]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Appendix A of part 325, see the List of CFR Sections Affected in the Finding Aids section of this volume.

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 assets, nonmortgage servicing assets 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,

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[1] Although intangible assets in the form of mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships are generally recognized for regulatory capital purposes, the — — deduction of part or all of the mortgage servicing assets, nonmortgage servicing assets 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 assets, nonmortgage servicing assets 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.

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 assets, nonmortgage servicing assets 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 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; 63 FR 42678, Aug. 10, 1998]

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

[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 Risks,'' January 1996. Also see modifications issued in September 1997.

[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.

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. Specific risk includes such risk as idiosyncratic variation, as well as event and default risk.

(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 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

[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.

(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 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

[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.

[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.

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

Section 5. Specific Risk

(a) *Modeled specific risk.* A bank may use its internal model to measure specific risk. If the bank has demonstrated to the FDIC that its internal model measures the specific risk, including event and default risk as well as idiosyncratic variation, of covered debt and equity positions and includes the specific risk measure in the VAR-based capital charge in section 3(a)(2)(i) of this appendix, then the bank has no specific risk add-on for purposes of section 3(a)(2)(ii) of this appendix. The model should explain the historical price variation in the trading portfolio and capture concentration, both magnitude and changes in composition. The model should also be robust to an adverse environment and have been validated through backtesting which assesses whether specific risk is being accurately captured.

(b) *Add-on charge for modeled specific risk.* If a bank's model measures specific risk, but the bank has not been able to demonstrate to the FDIC that the model adequately measures event and default risk for covered debt and equity positions, then the bank's specific risk add-on for purposes of section 3(a)(2)(ii) of this appendix is as follows:

(1) If the model is susceptible to valid separation of the VAR-measure into a specific risk portion and a general market risk portion, then the specific risk add-on is equal to the previous day's specific risk portion.

(2) If the model does not separate the VAR measure into a specific risk portion and a general market risk portion, then the specific risk add-on is the sum of the previous day's VAR measures for subportfolios of covered debt and covered equity positions.

(c) *Add-on Charge if specific risk is not modeled.* If a bank does not model specific risk in accordance with paragraph (a) or (b) of this section, the bank's specific risk add-on charge for purposes of section 3(a)(2)(ii) of this appendix equals the components for covered debt and equity positions as appropriate:

(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, as amended at 62 FR 68068, Dec. 30, 1997]

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)

§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 §347.202 of this chapter, the term *branch* has the same meaning given in §347.202 of this chapter.

[56 FR 13581, Apr. 3, 1991, as amended at 63 FR 17075, Apr. 8, 1998]

§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

[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*.

[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.

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 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 as defined in § 326.1[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, United States Code, 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.

[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 § 347.202 of this chapter which is a *State branch* as defined in § 347.202 of this chapter.

(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 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; 63 FR 17075, Apr. 8, 1998]

PART 327—ASSESSMENTS

Subpart A—In General

Sec.
327.1 Purpose and scope.
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Subpart B—Insured Depository Institutions Participating in Section 5(d)(3) Transactions

327.31 Scope.
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AUTHORITY: 12 U.S.C. 1441, 1441b, 1813, 1815, 1817–1819; Pub. L. 104–208, 110 Stat. 3009–479 (12 U.S.C. 1821).

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 subpart B of part 347 of this chapter.

[54 FR 51374, Dec. 15, 1989, as amended at 63 FR 17075, Apr. 8, 1998]

§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 § 347.210 of this chapter; and

(*2*) Maintains the eligible assets prescribed under § 347.211 of this chapter 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 § 347.210 of this chapter; and

(*2*) Maintains the eligible assets prescribed under § 347.211 of this chapter 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; 63 FR 17075, Apr. 8, 1998]

§ 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.

For the purposes of this part 327:

(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; BIF member*—(1) *BIF.* The term *BIF* means the Bank Insurance Fund.

(2) *BIF member* The term *BIF member* means a depository institution that is a member of the BIF.

(g) *SAIF; SAIF member.*—(1) *SAIF.* The term *SAIF* means the Savings Association Insurance Fund.

(2) *SAIF member.* The term *SAIF member* means a depository institution that is a member of the SAIF.

(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; 62 FR 27176, May 19, 1997]

§ 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.* Except as provided in paragraph (b)(3)(ii) of this section, 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.* The Board has adjusted the BIF Base Assessment Schedule by reducing each rate therein by 4 basis points for the first semiannual period of 1997 and thereafter. Accordingly, the following adjusted assessment schedule applies to BIF members:

BIF ADJUSTED ASSESSMENT SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	0	3	17
2	3	10	24
3	10	24	27

(3) *Adjusted rates for SAIF members*—(i) *In general.* The Board has adjusted the SAIF Base Assessment Schedule by reducing each rate therein by 4 basis points for the first semiannual period of 1997 and thereafter. Accordingly, except as provided in paragraph (b)(3)(ii) of this section, the following adjusted assessment schedule applies to SAIF members:

SAIF ADJUSTED ASSESSMENT SCHEDULE

Capital group	Supervisory subgroup		
	A	B	C
1	0	3	17
2	3	10	24
3	10	24	27

(ii) *Institutions exempt from the special assessment*—(A) *Rate schedule.* An institution that, pursuant to former § 327.43 (a) or (b) as in effect on November 27, 1996 (See 12 CFR 327.43 as revised January 1, 1997.), was exempt from the special assessment prescribed by 12 U.S.C. 1817 Note 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 former § 327.9(d)(1) as in effect for SAIF members on June 30, 1995 (See 12 CFR 327.9 as revised January 1, 1996.), as follows:

Capital group	Supervisory subgroup		
	A	B	C
1	23	26	29
2	26	29	30
3	29	30	31

(B) *Termination of special rate schedule.* An institution that makes a pro-rata payment of the special assessment shall cease to be subject to paragraph (b)(3)(ii)(A) 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.

(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, as amended at 62 FR 27176, May 19, 1997]

§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]

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.

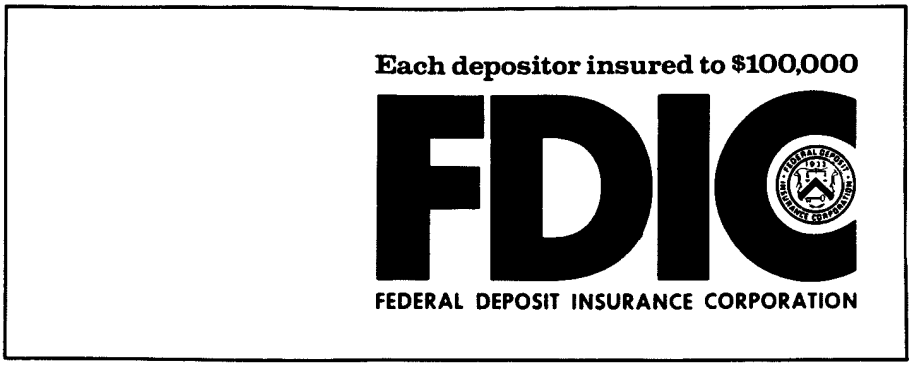
§328.0 Scope.

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]

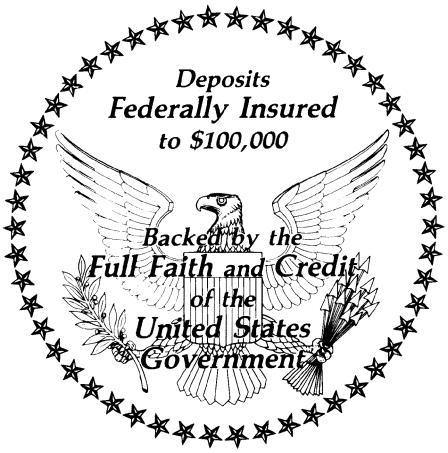
§328.1 Official signs.

(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.
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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.

§ 329.3 Exception to prohibition on payment of interest.

Section 329.2 shall not apply to the payment of interest or other remuneration on any deposit which, if held by a member bank, would be allowable under 12 U.S.C. 371a and 461, or by regulation of the Board of Governors of the Federal Reserve System.

[63 FR 8342, Feb. 19, 1998]

§ 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

[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.

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 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 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.

(e) Notwithstanding paragraph (a) of this section, any premium that is not, directly or indirectly, related to or dependent on the balance in a demand deposit account and the duration of the account balance shall not be considered the payment of interest on a demand deposit account and shall not be subject to the limitations in paragraph (a) of this section.

[51 FR 10808, Mar. 31, 1986, as amended at 62 FR 40732, July 30, 1997]

§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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330.5 Recognition of deposit ownership and recordkeeping requirements.
330.6 Single ownership accounts.
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330.16 Effective dates.

AUTHORITY: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818(q), 1819(Tenth), 1820(f), 1821(a), 1822(c).

SOURCE: 63 FR 25756, May 11, 1998, 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) *Corporation* means the Federal Deposit Insurance Corporation.

(c) *Default* has the same meaning as provided under section 3(x) of the Act (12 U.S.C. 1813(x)).

(d) *Deposit* has the same meaning as provided under section 3(l) of the Act (12 U.S.C. 1813(l)).

(e) *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.

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

(g) *Independent activity*. A corporation, partnership or unincorporated association shall be deemed to be engaged in an ''independent activity'' if the entity is operated primarily for some purpose other than to increase deposit insurance.

(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) *Insured deposit* has the same meaning as that provided under section 3(m)(1) of the Act (12 U.S.C. 1813(m)(1)).

(j) *Insured depository institution* is any depository institution whose deposits are insured pursuant to the Act, including a foreign bank having an insured branch.

(k) *Natural person* means a human being.

(l) *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.

(m) *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.

(n) *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.

(o) *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.

(p) *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.

§330.2 Purpose.

The purpose of this part is to clarify the rules and define the terms necessary to afford deposit insurance coverage under the Act and provide rules for the recognition of deposit ownership in various circumstances.

§330.3 General principles.

(a) *Ownership rights and capacities.* The insurance coverage provided by the Act and 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 this part. Deposits maintained in different rights and capacities, as recognized under this part, shall be insured separately from each other. (Example: Single ownership accounts and joint ownership accounts are 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. (Example: Deposits held by the same individual at two different banks owned by the same bank holding company would be insured separately, per bank.)

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 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 this part. In addition, deposits denominated in a foreign currency shall be insured in accordance with 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 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 and certain other locations.* 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) *Bank investment contracts.* As required by section 11(a)(8) of the Act (12 U.S.C. 1821(a)(8)), any liability arising under any investment contract between any insured depository institution and any employee benefit plan which expressly permits ''benefit responsive withdrawals or transfers'' (as defined in section 11(a)(8) of the Act) are not insured deposits for purposes of this part. The term ''substantial penalty or adjustment'' used in section 11(a)(8) of the Act 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.

(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.

(j) *Continuation of insurance coverage following the death of a deposit owner.* The death of a deposit owner shall not affect the insurance coverage of the deposit for a period of six months following the owner's death unless the deposit account is restructured. The operation of this grace period, however,

shall not result in a reduction of coverage. If an account is not restructured within six months after the owner's death, the insurance shall be provided on the basis of actual ownership in accordance with the provisions of §330.5(a)(1).

§330.4 Continuation of separate deposit insurance after merger of insured depository institutions.

Whenever the liabilities of one or more insured depository institutions for deposits are assumed by another insured depository institution, whether by merger, consolidation, other statutory assumption or contract:

(a) The insured status of the institutions whose liabilities have been assumed terminates on the date of receipt by the FDIC of satisfactory evidence of the assumption; and

(b) The separate insurance of deposits assumed continues for six months from the date the 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 the 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 applies 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.

§330.5 Recognition of deposit ownership and recordkeeping requirements.

(a) *Recognition of deposit ownership*—(1) *Evidence of deposit ownership.* Except as indicated in this paragraph (a)(1) or as provided in §330.3(j), 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 the FDIC shall consider no other records on the manner in which the funds are owned. If the deposit account records are ambiguous or unclear on 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. Despite the general requirements of this paragraph (a)(1), 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 the 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'' (as defined in §330.1(e)) 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. The general requirement for the express indication that the account is held in a fiduciary capacity will not apply, however, in instances where the FDIC determines, in its sole discretion, that the titling of the deposit account and the underlying deposit account records sufficiently indicate the existence of a fiduciary relationship. This exception may apply, for example, where the deposit account title or records indicate that the account is held by an escrow agent, title company or a company whose business is to hold deposits and securities for others.

(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 (including the exception provided for in paragraph (b)(1) of this section), 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 methods of satisfying paragraphs (b)(1) and (b)(2) of this section 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 there are multiple levels of fiduciary relationships;

(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.

§330.6 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. Exception: Despite the general requirement in this paragraph (a), 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 (although not necessarily a qualifying joint account) and shall be insured in accordance with the provisions of §330.9, 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.* Funds owned by a business which is a ''sole proprietorship'' (as defined in §330.1(m)) 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.

(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; provided, however, that nothing in this paragraph (d) shall affect the operation of §330.3(j). The deposit insurance provided by this paragraph (d) 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.

§330.7 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 §330.13.

(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 §330.9.

(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 insured in accordance with paragraph (a) of this section

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 accordance with paragraph (a) of this section for the ownership interest of each mortgagor in such accounts.

(e) *Custodian 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.

§ 330.8 Annuity contract accounts.

(a) 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 separately 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;

(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.

(b) Such insurance coverage shall be separate from the insurance provided for any other accounts maintained by the corporation or the annuitants at the same insured depository institution.

§ 330.9 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. (Example: If A has a single ownership account and also is a joint owner of a qualifying joint account, A's interest in the joint account would be insured separately from his or her interest in the individual account.) 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.* Step one: all qualifying joint accounts owned by the same combination of individuals shall be added together; the aggregate amount is insurable up to a limit of $100,000.(Example: A qualifying joint account owned by ''A&B'' would be added to a qualifying joint account owned by ''B&A'' and the insurable limit on the combined balances in those accounts would be $100,000. Moreover, the insurable limit on a single qualifying joint account owned by ''A&B'' would be $100,000. Thus, any qualifying joint account (or group of qualifying joint accounts owned by the same combination of persons) with a balance over $100,000 will be over the insurance limit.)

Step two: 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. (Example: ''A&B'' have a qualifying joint account with a balance of $100,000; ''A&C'' have a qualifying joint account with a balance of $150,000; and ''A&D'' have a qualifying joint account with a balance of $100,000. The balance in the account owned by ''A&C'' exceeds $100,000, so under step one the excess amount, $50,000, would be uninsured. A's combined ownership interests in the insurable amounts in the accounts would be $150,000, of which under step two

$100,000 would be insured and $50,000 would be uninsured; B's ownership interest would be $50,000, all of which would be insured; C's insurable ownership interest would be $50,000, all of which would be insured; and D's ownership interest would be $50,000, all of which would be insured.)

(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'' (as defined in § 330.1(k)); 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 signature-card 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 § 330.5(a), 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 (although not necessarily a qualifying 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.* The interests of the co-owners of qualifying joint accounts, held as tenants in common, shall be deemed equal, unless otherwise stated in the depository institution's deposit account records. This section applies 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.

§ 330.10 Revocable trust accounts.

(a) *General rule.* Funds owned by an individual and deposited into an account evidencing an intention that upon the death of the owner the funds shall belong to one or more qualifying beneficiaries shall be insured in the amount of up to $100,000 in the aggregate as to each such named qualifying beneficiary, separately from any other accounts of the owner or the beneficiaries. For purposes of this provision, the term ''qualifying beneficiaries'' means the owner's spouse, child/children or grandchild/grandchildren. (Example: If A establishes a qualifying account payable upon death to his spouse, two children and one grandchild, assuming compliance with the requirements of this provision, the account would be insured up to $400,000 separately from any other different types of accounts either A or the beneficiaries may have with the same depository institution.)

Accounts covered by this provision are commonly referred to as tentative or ''Totten trust'' accounts, ''payable-

on-death'' accounts, or revocable trust accounts.

(b) *Required intention.* The required intention in paragraph (a) of this section that upon the owner's death the funds shall belong to one or more qualifying beneficiaries 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. In addition, the beneficiaries 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.

(c) *Interests of nonqualifying beneficiaries.* If a named beneficiary of an account covered by this section is not a qualifying beneficiary, the funds corresponding to that beneficiary shall be treated as individually owned (single ownership) accounts of such owner(s), aggregated with any other single ownership accounts of such owner(s), and insured up to $100,000 per owner. (Examples: If A establishes an account payable upon death to his or her nephew, the account would be insured as a single ownership account owned by A. Similarly, if B establishes an account payable upon death to her husband, son and nephew, two-thirds of the account balance would be eligible for POD coverage up to $200,000 corresponding to the two qualifying beneficiaries (i.e., the spouse and child). The amount corresponding to the non-qualifying beneficiary (i.e., the nephew) would be deemed to be owned by B in her single ownership capacity and insured accordingly.)

(d) *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 joint account provisions of § 330.9.

(e) *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 biological, adopted and step-children of the owner and ''grandchildren'' includes biological, adopted, or step-children of any of the owner's children.

(f) *Living trusts.* This section also applies to revocable trust accounts held in connection with a so-called ''living trust,'' a formal trust which an owner creates and retains control over during his or her lifetime. If a named beneficiary in a living trust is a qualifying beneficiary under this section, then the deposit account held in connection with the living trust may be eligible for deposit insurance under this section, assuming compliance with all the provisions of this part. If, however, for example, the living trust includes a ''defeating contingency'' relative to that beneficiary's interest in the trust assets, then insurance coverage under this section would not be provided. For purposes of this section, a ''defeating contingency'' is defined as a condition which would prevent the beneficiary from acquiring a vested and non-contingent interest in the funds in the deposit account upon the owner's death.

§ 330.11 Accounts of a corporation, partnership or unincorporated association.

(a) *Corporate accounts.* (1) The deposit accounts of a corporation engaged in any ''independent activity'' (as defined in § 330.1(g)) 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 §330.7.

(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'' (as defined in §330.1(g)) 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) *Non-qualifying entities.* The deposit accounts of an entity which is not engaged in an ''independent activity'' (as defined in §330.1(g)) 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.

§330.12 Accounts held by a depository institution as the trustee of an irrevocable trust.

(a) *Separate insurance coverage.* ''Trust funds'' (as defined in §330.1(o)) 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 for 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 provisions:

(1) *Allocated funds of a trust estate.* If trust funds of a particular ''trust estate'' (as defined in §330.1(n)) 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 § 330.11(a)(2).

§ 330.13 Irrevocable trust accounts.

(a) *General rule.* Funds representing the ''non-contingent trust interest(s)'' (as defined in § 330.1(l)) 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'' (as defined in § 330.1(p)) 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) *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 up to $100,000, separately from the funds of any other such estate.

§ 330.14 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 prescribed in § 330.5, 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 (12 U.S.C. 1831f) 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 (26 U.S.C. 457), 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 (26 U.S.C. 457); 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) *Defined 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 employees' interests in an employee benefit plan are not capable of evaluation in accordance with the provisions of 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 of an employee benefit plan's deposits which is 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 organization'' 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.* 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.

(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 ten 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 (h), 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).

§ 330.15 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.* (i) 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:

(A) Up to $100,000 in the aggregate for all time and savings deposits; and

(B) Up to $100,000 in the aggregate for all demand deposits.

(ii) 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.* (i) 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:

(A) Up to $100,000 in the aggregate for all time and savings deposits; and

(B) Up to $100,000 in the aggregate for all demand deposits.

(ii) 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.* (i) 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:

(A) Up to $100,000 in the aggregate for all time and savings deposits; and

(B) Up to $100,000 in the aggregate for all demand deposits.

(ii) 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.

§ 330.16 Effective dates.

(a) *Prior effective dates.* Former §§ 330.1(j), 330.10(a), 330.12(c), 330.12(d)(3) and 330.13 (see 12 CFR part 330, as revised January 1, 1998) became effective on December 19, 1993.

(b) *Time deposits.* Except with respect to the provisions in former § 330.12 (a) and (b) (see 12 CFR part 330, as revised January 1, 1998) and current § 330.14(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.

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''. As provided in § 303.162 of this chapter, the Board of Directors of the FDIC may grant a waiver in writing from any requirement of this section for good cause shown.

[2] A bank's business may include two or more of the general classifications.

(b) *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.

(c) *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; and

(3) Management shall not use proxies executed outside the context of the proposed conversion to satisfy the voting requirement imposed in the previous paragraph.

(d) *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)).

(e) *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, as amended at 63 FR 44750, Aug. 20, 1998]

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

Sec.

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335.901 Delegation of authority to the Director (DOS) and to the associate directors, regional directors and deputy regional directors to act on matters with respect to disclosure laws and regulations.

AUTHORITY: 15 U.S.C. 78l(i).

SOURCE: 62 FR 6856, Feb. 14, 1997, unless otherwise noted.

§ 335.101 Scope of part, authority and OMB control number.

(a) 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 Exchange Act) and applies to all securities of FDIC insured banks (including foreign banks having an insured branch) which are neither a member of the Federal Reserve System nor a District bank (collectively referred to as nonmember banks) that are subject to the registration requirements of section 12(b) or section 12(g) of the Exchange Act (registered nonmember banks). The FDIC is vested with the powers, functions, and duties vested in the Securities and Exchange Commission (the Commission or SEC) to administer and enforce the provisions of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Securities Exchange Act of 1934, as amended (the Exchange Act) (15 U.S.C. 78*l*, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78(p)), regarding nonmember banks with one or more classes of securities subject to the registration provisions of sections 12(b) and 12(g).

(b) This part 335 generally incorporates through cross reference the regulations of the SEC issued under sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act. References to the Commission are deemed to refer to the FDIC unless the context otherwise requires.

(c) The Office of Management and Budget has reviewed and approved the recordkeeping and reporting required

by this part (OMB control number 3064–0030).

§ 335.111 Forms and schedules.

The Exchange Act regulations of the SEC, which are incorporated by cross reference under this part, require the filing of forms and schedules as applicable. Reference is made to SEC Exchange Act regulation 17 CFR 249.0–1 regarding the availability of all applicable SEC Exchange Act forms. Required schedules are codified and are found within the context of the SEC's regulations. The filings of all applicable SEC forms and schedules shall be made with the FDIC at the address in this section. They shall be titled with the name of the FDIC in substitution for the name of the SEC. Forms F–7 (§ 335.611), F–8 (§ 335.612), F–8A (§ 335.613), are FDIC forms which are issued under section 16 of the Exchange Act and can be obtained from the Registration and Disclosure Section, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Reference is also made to § 335.701 for general filing requirements, public reference, and confidentiality provisions.

§ 335.201 Securities exempted from registration.

Persons generally subject to registration requirements under Exchange Act section 12 and subject to this part shall follow the applicable and currently effective SEC regulations relative to exemptions from registration issued under sections 3 and 12 of the Exchange Act as codified at 17 CFR 240.3a12–1 through 240.3a12–11, 240.12a–4 through 240.12a–7, 240.12g–1 through 240.12h–4.

§ 335.211 Registration and reporting.

Persons with securities subject to registration under Exchange Act sections 12(b) and 12(g), required to report under Exchange Act section 13, and subject to this part shall follow the applicable and currently effective SEC regulations issued under section 12(b) of the Exchange Act as codified at 17 CFR 240.12b–1 through 240.12b–36.

§ 335.221 Forms for registration of securities and similar matters.

(a) The applicable forms for registration of securities and similar matters are codified in subpart C of 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

(b) The requirements for Financial Statements can generally be found in Regulation S–X (17 CFR part 210). Banks may also refer to the instructions for FFIEC Reports of Income and Reports of Condition when preparing unaudited interim statements. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found in at 17 CFR 229.300. Industry Guide 3, Statistical Disclosure by Bank Holding Companies, is codified at 17 CFR 229.802.

(c) A ''small business issuer,'' as defined under 17 CFR 240.12b–2, has the option of filing Small Business (SB) Forms (as codified in 17 CFR part 249) in lieu of the Exchange Act forms otherwise required to be filed, which provide for financial and other item disclosures in conformance with Regulation S–B of the Securities and Exchange Commission (17 CFR part 228). 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.

§ 335.231 Certification, suspension of trading, and removal from listing by exchanges.

The provisions of the applicable and currently effective SEC regulations under section 12(d) of the Exchange Act shall be followed as codified at 17 CFR 240.12d1–1 through 240.12d2–2.

§ 335.241 Unlisted trading.

The provisions of the applicable and currently effective SEC regulations under section 12(f) of the Exchange Act shall be followed as codified at 17 CFR 240.12f–1 through 240.12f–6.

§ 335.251 Forms for notification of action taken by national securities exchanges.

The applicable forms for notification of action taken by national securities exchanges are codified in subpart A of 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

§ 335.261 Exemptions; terminations; and definitions.

The provisions of the applicable and currently effective SEC regulations under sections 12(g) and 12(h) of the Exchange Act shall be followed as codified at 17 CFR 240.12g–1 through 240.12h–4.

§ 335.301 Reports of issuers of securities registered pursuant to section 12.

The provisions of the applicable and currently effective SEC regulations under section 13(a) of the Exchange Act shall be followed as codified at 17 CFR 240.13a–1 through 240.13a–17.

§ 335.311 Forms for annual, quarterly, current, and other reports of issuers.

(a) The applicable forms for annual, quarterly, current, and other reports are codified in subpart D of 17 CFR part 249. All forms shall be filed with the FDIC as appropriate and shall be titled with the name of the FDIC instead of the SEC.

(b) The requirements for Financial Statements can generally be found in Regulation S–X (17 CFR part 210). Banks may also refer to the instructions for FFIEC Reports of Income and Reports of Condition when preparing unaudited interim reports. The requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations can be found at 17 CFR 229.300. Industry Guide 3, Statistical Disclosure by Bank Holding Companies, is codified at 17 CFR 229.802.

(c) A ''small business issuer,'' as defined under 17 CFR 240.12b–2, has the option of filing Small Business (SB) Forms (as codified in 17 CFR part 249) in lieu of the Exchange Act forms otherwise required to be filed, which provide for financial and other item disclosures in conformance with Regulation S–B of the Securities and Exchange Commission (17 CFR part 228). 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.

§ 335.321 Maintenance of records and issuer's representations in connection with required reports.

The provisions of the applicable and currently effective SEC regulations under section 13(b) of the Exchange Act shall be followed as codified at 17 CFR 240.13b2–1 through 240.13b2–2.

§ 335.331 Acquisition statements and acquisitions of securities by issuers.

The provisions of the applicable and currently effective SEC regulations under section 13(d) and 13(e) of the Exchange Act shall be followed as codified at 17 CFR 240.13d–1 through 240.13e–102.

§ 335.401 Solicitations of proxies.

The provisions of the applicable and currently effective SEC regulations under section 14(a) and 14(c) of the Exchange Act shall be followed as codified at 17 CFR 240.14a–1 through 240.14a–103 and 240.14c–1 through 240.14c–101.

§ 335.501 Tender offers.

The provisions of the applicable and currently effective SEC regulations under section 14(d), 14(e), and 14(f) of the Exchange Act shall be followed as codified at 17 CFR 240.14d–1 through 240.14f–1.

§ 335.601 Requirements of section 16 of the Securities Exchange Act of 1934.

Persons subject to section 16 of the Act with respect to securities registered under this part 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(1), except that the forms described in § 335.611 (Form F–7), § 335.612 (Form F–8), and § 335.613 (Form F–8A) shall be used in lieu of SEC Form 3 (17 CFR 249.103), Form 4 (17 CFR 249.104),

or Form 5 (17 CFR 249.105), respectively. Copies of Forms F–7, F–8, F–8A and the instructions thereto can be obtained from the Registration, Disclosure, and Securities Operations Unit, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

§ 335.611 Initial statement of beneficial ownership of securities (Form F–7).

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 regulations thereunder. SEC regulations referenced in this form are codified at 17 CFR 240.16a–1 through 240.16e–1.

§ 335.612 Statement of changes in beneficial ownership of securities (Form F–8).

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 regulations referenced in this form are codified at 17 CFR 240.16a–1 through 240.16e–1.

§ 335.613 Annual statement of beneficial ownership of securities (Form F–8A).

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 regulations referenced in this form are codified at 17 CFR 240.16a–1 through 240.16e–1.

§ 335.701 Filing requirements, public reference, and confidentiality.

(a) *Filing requirements.* Unless otherwise indicated in this part, one original and four conformed copies of all papers required to be filed with the FDIC under the Exchange Act or regulations thereunder shall be filed at its office in Washington, DC. Official filings made at the FDIC's office in Washington, DC should be addressed as follows: Attention: Registration, Disclosure, and Securities Operations Unit, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Material may be filed by delivery to the FDIC through the mails or otherwise. The date on which papers are actually received by the designated FDIC office shall be the date of filing thereof if all of the requirements with respect to the filing have been complied with.

(b) *Inspection.* Except as provided in paragraph (c) of this section, 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.

(c) *Nondisclosure of certain information filed.* Any person filing any statement, report, or document under the Act may make a written objection to the public disclosure of any information contained therein in accordance with the procedure set forth in this paragraph (c).

(1) 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.

(2) The person shall file with the copies of the statement, report, or document filed with the FDIC:

(i) 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 the case where 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;

(ii) 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:

(A) An identification of the portion of the statement, report, or document that has been omitted;

(B) A statement of the grounds of objection;

(C) Consent that the FDIC may determine the question of public disclosure upon the basis of the application, subject to proper judicial reviews;

(D) The name of each exchange, if any, with which the statement, report, or document is filed;

(iii) 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.

(3) Pending the determination by the FDIC as to the objection filed in accordance with paragraph (c)(2)(ii) of this section, the confidential portion will not be disclosed by FDIC.

(4) 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.

(5) 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.

(6) The confidential portion shall be made available to the public:

(i) 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 (c)(5) 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;

(ii) 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 (c)(6)(i) of this section shall have been filed and if a petition for judicial review shall not have been filed within such 60 days; or

(iii) 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.

(7) 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.

§ 335.801 Inapplicable SEC regulations; FDIC substituted regulations; additional information.

(a) *Filing fees.* Filing fees will not be charged relative to any filings or submissions of materials made with the FDIC pursuant to the cross reference to regulations of the SEC issued under sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act, and this part.

(b) *Electronic filings.* The FDIC does not participate in the SEC's EDGAR (Electronic Data Gathering Analysis and Retrieval) electronic filing program (17 CFR part 232), and does not permit electronically transmitted filings or submissions of materials in electronic format to the FDIC.

(c) *Legal proceedings.* Whenever this part or cross referenced provisions of the SEC regulations require disclosure of legal proceedings, administrative or judicial proceedings arising under section 8 of the Federal Deposit Insurance Act shall be deemed material and shall be described.

(d) *Indebtedness of management.* Whenever this part or cross referenced provisions of the SEC regulations require disclosure of indebtedness of management, extensions of credit to specified

persons in excess of ten (10) percent of the equity capital accounts of the bank or $5 million, whichever is less, shall be deemed material and shall be disclosed in addition to any other required disclosure. The disclosure of this material indebtedness shall include 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 since the beginning of the bank's last fiscal year, and as of the latest practicable date.

(1) If aggregate extensions of credit to all 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, the aggregate amount of such extensions of credit shall also be disclosed.

(2) Other loans are deemed material and shall be disclosed where:

(i) The extension(s) of credit was 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;

(ii) The extension(s) of credit was not made in the ordinary course of business; or

(iii) The extension(s) of credit has involved or presently involves 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.

(e) *Proxy material required to be filed.* (1) Three preliminary copies of each information statement, proxy 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 12 CFR 335.401 at least ten calendar days (or 15 calendar days in the case of other than routine meetings, as defined in paragraph (e)(2) of this section) prior to the date such item is first sent or given to any security holders, or such shorter date as may be authorized.

(2) For the purposes of this paragraph (e), a routine meeting means:

(i) A meeting with respect to which no one is soliciting proxies subject to § 335.401 other than on behalf of the bank, and at which the bank intends to present no matters other than:

(A) The election of directors;

(B) The election, approval or ratification of accountants;

(C) A Security holder proposal included pursuant to SEC Rule 14(a)-8 (17 CFR 240.14a-8); and

(D) The approval or ratification of a plan as defined in paragraph (a)(7)(ii) of Item 402 of SEC Regulation S–K (17 CFR 229.402(a)(7)(ii)) or amendments to such a plan; and

(ii) The bank does not comment upon or refer to a solicitation in opposition (as defined in 17 CFR 240.14a-6) in connection with the meeting in its proxy material.

(3) 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.

(f) *Additional information; filing of other statements in certain cases.* (1) In addition to the information expressly required to be included in a statement, form, schedule 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.

(2) The FDIC may, upon the written request of the bank, and where consistent with the protection of investors, permit the omission of one or more of the statements or disclosures herein required, or the filing in substitution therefor of appropriate statements or disclosures of comparable character.

(3) The FDIC may also require the filing of other statements or disclosures in addition to, or in substitution for those 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 disclosure about which is otherwise necessary for the protection of investors.

§ 335.901 Delegation of authority to the Director (DOS) and to the associate directors, regional directors and deputy regional directors to act on matters with respect to disclosure laws and regulations.

(a) Except as provided in paragraph (b) of this section, authority is delegated to the Director, Division of Supervision (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 and 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78) or this part.

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

(1) Exemption from disclosure requirements pursuant to section 12(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*(h)); or

(2) 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)).

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.
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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.
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337.10 Waiver.
337.11 Effect on other banking practices.
337.12 Frequency of examination.

AUTHORITY: 12 U.S.C. 375a(4), 375b, 1816, 1818(a), 1818(b), 1819, 1820(d)(10), 1821f, 1828(j)(2), 1831, 1831f–l.

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 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

[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.

[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.

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;

(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]

[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)).

§ 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 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.

[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.

(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]

(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

[6] If the affiliate conducts business in the same location in which the bank conducts 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.

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 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

[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.

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 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.

[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.

(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.

(i) *Coordination with part 362 of this chapter*—(1) *New subsidiary or affiliate relationships.* Beginning January 1, 1999, every insured state nonmember bank that establishes a new subsidiary relationship subject to the provisions of § 362.4(b)(4) or § 362.4(b)(5)(ii) of this chapter or a new affiliate relationship that is subject to § 362.8(b) of this chapter shall comply with § 362.4(b)(4), § 362.4(b)(5)(ii) or § 362.8(b) of this chapter, respectively, or to the extent the insured state nonmember bank's planned subsidiary or affiliate will not comply with all requirements thereunder, submit an application to the FDIC under § 362.4(b)(1) or § 362.8(b) of this chapter, respectively. This section shall not apply to such subsidiary or affiliate.

(2) *Existing insured State nonmember bank subsidiaries subject to § 362.4.* Applicable transition rules for insured state nonmember bank subsidiaries engaged, before January 1, 1999, in securities activities pursuant to this section and also subject to § 362.4 of this chapter are set out in § 362.5 of this chapter.

(3) *Continued effectiveness of this section.* Insured state nonmember banks establishing or holding subsidiaries or affiliates subject to this section, but not covered by § 362.4 or § 362.8 of this chapter, remain subject to the requirements of this section, except that to the extent such subsidiaries or affiliates engage only in activities permissible for a national bank directly, including such permissible activities

that may require the subsidiary or affiliate to register as a securities broker, no notice under paragraph (d) of this section is required.

[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; 63 FR 66326, Dec. 1, 1998]

§ 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 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

[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.

[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.

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 that is not well-capitalized, and any employee of any such 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 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 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. For filing requirements, consult 12 CFR 303.243.

(d) *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.

(e) *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; 63 FR 44750, Aug. 20, 1998]

§§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.

§337.12 Frequency of examination.

(a) *General.* The Federal Deposit Insurance Corporation examines insured state nonmember banks pursuant to authority conferred by section 10 of the Federal Deposit Insurance Act (12 U.S.C. 1820). The FDIC is required to conduct a full-scope, on-site examination of every insured state nonmember bank at least once during each 12-month period.

(b) *18-month rule for certain small institutions.* The FDIC may conduct a full-scope, on-site examination of an insured state nonmember bank at least once during each 18-month period, rather than each 12-month period as provided in paragraph (a) of this section, if the following conditions are satisfied:

(1) The bank has total assets of $250 million or less;

(2) The bank is well capitalized as defined in §325.103(b)(1) of this chapter;

(3) At the most recent FDIC or applicable State banking agency examination, the FDIC found the bank to be well managed;

(4) At the most recent FDIC or applicable State banking agency examination, the FDIC assigned the insured state nonmember bank a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (copies are available at the addresses specified in §309.4 of this chapter);

(5) The bank currently is not subject to a formal enforcement proceeding or order by the FDIC, OCC, or Federal Reserve System; and

(6) No person acquired control of the bank during the preceding 12-month period in which a full-scope, on-site examination would have been required but for this section.

(c) *Authority to conduct more frequent examinations.* This section does not limit the authority of the FDIC to examine any insured state nonmember bank as frequently as the agency deems necessary.

[63 FR 16381, Apr. 2, 1998]

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 Fair housing poster.

Subpart B—Recordkeeping

338.5 Purpose.
338.6 Definitions applicable to this subpart B.
338.7 Recordkeeping requirements.
338.8 Compilation of loan data in register format.
338.9 Mortgage lending of a controlled entity.

AUTHORITY: 12 U.S.C. 1817, 1818, 1819, 1820(b), 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR parts 202, 203; 24 CFR part 110.

Subpart A—Advertising

§ 338.1 Purpose.

The purpose of this subpart A is to prohibit insured state nonmember banks from engaging in discriminatory advertising with regard to residential real estate-related transactions. This subpart A also requires insured state nonmember banks to publicly display either the Equal Housing Lender poster set forth in §338.4(b) of the FDIC's regulations or the Equal Housing Opportunity poster prescribed by part 110 of the regulations of the United States Department of Housing and Urban Development (24 CFR part 110). This subpart A enforces section 805 of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–3619 (Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988.

[62 FR 36204, July 7, 1997]

§ 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 advertisements, this requirement may be satisfied by including in the advertisement a copy of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender poster prescribed in §338.4(b) of the

FDIC's regulations or a copy of the logotype with the Equal Housing Opportunity legend contained in the Equal Housing Opportunity poster prescribed in §110.25(a) of the United States Department of Housing and Urban Development's regulations (24 CFR 110.25(a)).

(2) With respect to oral advertisements, this requirement may be satisfied by a statement, in the spoken text of the advertisement, that the bank is an ''Equal Housing Lender'' or an ''Equal Opportunity 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; 62 FR 36204, July 7, 1997]

§338.4 Fair housing 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 either the Equal Housing Lender poster set forth in paragraph (b) of this section or the Equal Housing Opportunity poster prescribed by §110.25(a) of the United States Department of Housing and Urban Development's regulations (24 CFR 110.25(a)), in a central location within the bank where deposits are received or where such loans are made in a manner clearly visible to the general public entering the area, where the poster is displayed.

(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; 62 FR 36204, July 7, 1997]

Subpart B—Recordkeeping

§338.5 Purpose.

The purpose of this subpart B is twofold. First, this subpart B notifies all insured state nonmember banks of their duty to collect and retain certain information about a home loan applicant's personal characteristics in accordance with Regulation B of the Board of Governors of the Federal Reserve System (12 CFR part 202) in order to monitor an institution's compliance with the Equal Credit Opportunity Act of 1974 (15 U.S.C. 1691 *et seq.*). Second, this subpart B notifies certain insured state nonmember banks of their duty to maintain, update and report a register of home loan applications in accordance with Regulation C of the Board of Governors of the Federal Reserve System (12 CFR part 203), which implements the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*).

[62 FR 36204, July 7, 1997]

§338.6 Definitions applicable to this subpart B.

For purposes of this subpart B—

(a) *Bank* means an insured state nonmember bank as defined in section 3 of the Federal Deposit Insurance Act.

(b) *Controlled entity* means a corporation, partnership, association, or other business entity with respect to which a bank possesses, directly or indirectly, the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract, or otherwise.

[62 FR 36204, July 7, 1997]

§338.7 Recordkeeping requirements.

All banks that receive an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence where the extension of credit will be secured by the dwelling shall request and retain the monitoring information required by Regulation B of the Board of Governors of the Federal Reserve System (12 CFR part 202).

[62 FR 36204, July 7, 1997]

§338.8 Compilation of loan data in register format.

Banks and other lenders required to file a Home Mortgage Disclosure Act loan application register (LAR) with the Federal Deposit Insurance Corporation shall maintain, update and report such LAR in accordance with Regulation C of the Board of Governors of the Federal Reserve System (12 CFR part 203).

[62 FR 36204, July 7, 1997]

§338.9 Mortgage lending of a controlled entity.

Any bank which refers any applicants to a controlled entity and which purchases any home purchase loans or home improvement loans as defined in Regulation C of the Board of Governors of the Federal Reserve Board (12 CFR part 203) 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 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; 62 FR 36204, July 7, 1997]

PART 339—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
339.1 Authority, purpose, and scope.
339.2 Definitions.
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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.
341.7 Delegation of authority.

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.

§ 341.7 Delegation of authority.

(a) Except as provided in paragraph (b) of this section, authority is delegated to the Director and Deputy Director (DOS) and, where confirmed in writing by the Director, to an associate director and the appropriate regional director and deputy regional director, to act on disclosure matters under and pursuant to sections 17 and 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78).

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

[63 FR 44750, Aug. 20, 1998]

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 Exceptions.
344.3 Definitions.
344.4 Recordkeeping.
344.5 Content and time of notification.
344.6 Notification by agreement; alternative forms and times of notification.
344.7 Settlement of securities transactions.
344.8 Securities trading policies and procedures.
344.9 Personal securities trading reporting by bank officers and employees.
344.10 Waivers.,

AUTHORITY: 12 U.S.C. 1817, 1818 and 1819.

SOURCE: 62 FR 9919, Mar. 5, 1997, 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 a state nonmember insured bank (except a District bank) or a foreign bank having an insured branch are provided adequate information regarding transactions. This part is also designed to ensure that banks subject to this part maintain adequate records and controls with respect to the securities transactions they effect.

(b) *Scope; general.* Any security transaction effected for a customer by a bank is subject to this part unless excepted by §344.2. A bank effecting transactions in government securities is subject to the notification, recordkeeping, and policies and procedures requirements of this part. This part also applies to municipal securities transactions by a bank that is not registered as a ''municipal securities dealer'' with the Securities and Exchange Commission. See 15 U.S.C. 78c(a)(30) and 78o–4.

§344.2 Exceptions.

(a) A bank effecting securities transactions for customers is not subject to all or part of this part 344 to the extent that they qualify for one or more of the following exceptions:

(1) *Small number of transactions.* The requirements of §§344.4(a) (2) through (4) and 344.8(a) (1) through (3) do not apply to a bank effecting an average of fewer than 200 securities transactions per year for customers over the prior three calendar year period. The calculation of this average does not include transactions in government securities.

(2) *Government securities.* The recordkeeping requirements of § 344.4 do not apply to banks effecting fewer than 500 government securities brokerage transactions per year. This exemption does not apply to government securities dealer transactions by banks.

(3) *Municipal securities.* This part does not apply to transactions in municipal securities effected by a bank registered with the Securities and Exchange Commission as a ''municipal securities dealer'' as defined in title 15 U.S.C. 78c(a)(30). See 15 U.S.C. 78o–4.

(4) *Foreign branches.* Activities of foreign branches of a bank shall not be subject to the requirements of this part.

(5) *Transactions effected by registered broker/dealers.* (i) This part does not apply to securities transactions effected for a bank customer by a registered broker/dealer if:

(A) The broker/dealer is fully disclosed to the bank customer; and

(B) The bank customer has a direct contractual agreement with the broker/dealer.

(ii) This exemption extends to bank arrangements with broker/dealers which involve bank employees when acting as employees of, and subject to the supervision of, the registered broker/dealer when soliciting, recommending, or effecting securities transactions.

(b) *Safe and sound operations.* Notwithstanding this section, every bank effecting securities transactions for customers shall maintain, directly or indirectly, effective systems of records and controls regarding their customer securities transactions to ensure safe and sound operations. The records and systems maintained must clearly and accurately reflect the information required under this part and provide an adequate basis for an audit.

§ 344.3 Definitions.

(a) *Asset-backed security* means a security that is serviced primarily by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.

(b) *Bank* means a state nonmember insured bank (except a District bank) or a foreign bank having an insured branch.

(c) *Cash management sweep account* means a prearranged, automatic transfer of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

(d) *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 (26 U.S.C.).

(e) *Completion of the transaction* means:

(1) For purchase transactions, the time when the customer pays the bank any part of the purchase price (or the time when the bank makes the bookentry for any part of the purchase price, if applicable), however, if the customer pays for the security prior to the time payment is requested or becomes due, then the transaction shall be completed when the bank transfers the security into the account of the customer; and

(2) For sale transactions, the time when the bank transfers the security out of the account of the customer or, if the security is not in the bank's custody, then the time when the security is delivered to the bank, however, if the customer delivers the security to the bank prior to the time delivery is requested or becomes due then the transaction shall be completed when

the bank makes payment into the account of the customer.

(f) *Crossing of buy and sell orders* means a security transaction in which the same bank acts as agent for both the buyer and the seller.

(g) *Customer* means any person or account, including any agency, trust, estate, guardianship, or other fiduciary account for which a bank effects or participates in effecting the purchase or sale of securities, but does not include a broker, dealer, bank acting as a broker or a dealer, issuer of the securities that are the subject of the transaction or a person or account having a direct, contractual agreement with a fully disclosed broker/dealer.

(h) *Debt security* means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing; provided, however, that securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.*, shall not be included in this definition.

(i) *Government security* means:

(1) A security that is a direct obligation of, or obligation guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest and which is designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by any corporation whose securities are designated, by statute specifically naming the corporation, to constitute exempt securities within the meaning of the laws administered by the Securities and Exchange Commission; or

(4) Any put, call, straddle, option, or privilege on a security described in paragraph (i) (1), (2), or (3) of this section other than a put, call, straddle, option, or privilege that is traded on one or more national securities exchanges, or for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(j) *Investment discretion* means that, with respect to an account, a bank directly or indirectly:

(1) Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or

(2) Makes decisions 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 these investment decisions.

(k) *Municipal security* means a security which is a direct obligation of, or an obligation guaranteed as to principal or interest by, a State or any political subdivision, or any agency or instrumentality of a State or any political subdivision, or any municipal corporate instrumentality of one or more States or any security which is an industrial development bond (as defined in 26 U.S.C. 103(c)(2)) the interest on which is excludable from gross income under 26 U.S.C. 103(a)(1) if, by reason of the application of paragraph (4) or (6) of 26 U.S.C. 103(c) (determined as if paragraphs (4)(A), (5) and (7) were not included in 26 U.S.C. 103(c), paragraph (1) of 26 U.S.C. 103(c) does not apply to such security.

(l) *Periodic plan* means any written authorization for a bank to act as agent to purchase or sell for a customer a specific security or securities, in a specific amount (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 or the manner of calculating them. Periodic plans include dividend reinvestment plans, automatic investment plans, and employee stock purchase plans.

(m) *Security* means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and

any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a ''security''; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant 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 or state 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.

§ 344.4 Recordkeeping.

(a) *General rule.* A bank effecting securities transactions for customers shall maintain the following records for at least three years:

(1) *Chronological records.* An itemized daily record of each purchase and sale of securities maintained in chronological order, and including:

(i) Account or customer name for which each transaction was effected;

(ii) Description of the securities;

(iii) Unit and aggregate purchase or sale price;

(iv) Trade date; and

(v) Name or other designation of the broker/dealer or other person from whom the securities were purchased or to whom the securities were sold;

(2) *Account records.* Account records for each customer, reflecting:

(i) Purchases and sales of securities;

(ii) Receipts and deliveries of securities;

(iii) Receipts and disbursements of cash; and

(iv) Other debits and credits pertaining to transactions in securities;

(3) *A separate memorandum (order ticket)* of each order to purchase or sell securities (whether executed or canceled), which shall include:

(i) The accounts for which the transaction was effected;

(ii) Whether the transaction was a market order, limit order, or subject to special instructions;

(iii) The time the order was received by the trader or other bank employee responsible for effecting the transaction;

(iv) The time the order was placed with the broker/dealer, or if there was no broker/dealer, time the order was executed or canceled;

(v) The price at which the order was executed; and

(vi) The broker/dealer utilized;

(4) *Record of broker/dealers.* 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; and

(5) *Notifications.* A copy of the written notification required by §§ 344.5 and 344.6.

(b) *Manner of maintenance.* Records may be maintained in whatever manner, form or format a bank deems appropriate, provided however, the records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Records may be maintained in hard copy, automated or electronic form provided the records are easily retrievable, readily available for inspection, and capable of being reproduced in a hard copy. A bank may contract with third party service providers, including broker/dealers, to maintain records required under this part.

§ 344.5 Content and time of notification.

Every bank effecting a securities transaction for a customer shall give or send, by mail, facsimile or other means of electronic transmission, to the customer at or before completion

of the transaction one of the types of written notification identified below:

(a) *Broker/dealer's confirmations.* (1) A copy of the confirmation of a broker/dealer relating to the securities transaction. A bank may either have the broker/dealer send the confirmation directly to the bank's customer or send a copy of the broker/dealer's confirmation to the customer upon receipt of the confirmation by the bank. If a bank chooses to send a copy of the broker/dealer's confirmation, it must be sent within one business day from the bank's receipt of the broker/dealer's confirmation; and

(2) If the bank is to receive remuneration from the customer or any other source in connection with the transaction, a statement of the source and amount of any remuneration to be received if such would be required under paragraph (b)(6) of this section; or

(b) *Written notification.* A written notification disclosing:

(1) Name of the bank;

(2) Name of the customer;

(3) Whether the bank is acting as agent for such customer, as agent for both such 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 such customer in connection with the transaction;

(6)(i) 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 received or to be received by the bank in connection with the transaction, unless:

(A) Remuneration is determined pursuant to a prior written agreement between the bank and the customer; or

(B) In the case of government securities and municipal securities, the bank received the remuneration in other than an agency transaction; or

(C) In the case of open end investment company securities, the bank has provided the customer with a current prospectus which discloses all current fees, loads and expenses at or before completion of the transaction;

(ii) If the bank elects not to disclose the source and amount of remuneration it has or will receive from a party other than the customer pursuant to paragraph (b)(6)(i) (A), (B), or (C) of this section, the written notification must disclose whether the bank has received or will receive remuneration from a party other than the customer, and that the bank will furnish within a reasonable time the source and amount of this remuneration upon written request of the customer. This election is not available, however, if, with respect to a purchase, the bank was participating in a distribution of that security; or, with respect to a sale, the bank was participating in a tender offer for that security;

(7) Name of the broker/dealer utilized; or where there is no broker/dealer, the name of the person from whom the security was purchased or to whom the security was sold, or a statement that the bank will furnish this information within a reasonable time upon written request;

(8) In the case of a transaction in a debt security subject to redemption before maturity, a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that the redemption could affect the yield represented and that additional information is available upon request;

(9) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price:

(i) The dollar price at which the transaction was effected; and

(ii) The yield to maturity calculated from the dollar price, provided however, that this shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer thereof, with a variable interest payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial

assets that are subject continuously to prepayment;

(10) In the case of a transaction in a debt security effected on the basis of yield:

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; provided however, that this paragraph (b)(10) shall not apply to a transaction in a debt security that either has a maturity date that may be extended by the issuer with a variable interest rate payable thereon, or is an asset-backed security that represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment;

(11) In the case of a transaction in a debt security that is an asset-backed security, which represents an interest in or is secured by a pool of receivables or other financial assets that are subject continuously to prepayment, a statement indicating that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid and a statement of the fact that information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) will be furnished upon written request of the customer; and

(12) In the case of a transaction in a debt security, other than a government security, that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

§ 344.6 Notification by agreement; alternative forms and times of notification.

A bank may elect to use the following alternative notification procedures if the transaction is effected for:

(a) *Notification by agreement.* 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 written notification; provided however, that such agreement makes clear the customer's right to receive the written notification pursuant to § 344.5 (a) or (b) at no additional cost to the customer.

(b) *Trust accounts.* Accounts (except collective investment funds) where the bank exercises investment discretion in other than in 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, give or send to such person the written notification within a reasonable time. The bank may charge such person a reasonable fee for providing this information.

(c) *Agency accounts.* Accounts where the bank exercises investment discretion in an agency capacity, in which instance:

(1) The bank shall give or send to each customer not less frequently than once every three months an itemized statement which shall specify 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 accounts during such period; and

(2) If requested by the customer, the bank shall give or send to each customer within a reasonable time the written notification described in § 344.5. The bank may charge a reasonable fee for providing the information described in § 344.5.

(d) *Cash management sweep accounts.* A bank effecting a securities transaction for a cash management sweep account shall give or send its customer

a written statement, in the same form as required under paragraph (f) of this section, for each month in which a purchase or sale of a security takes place in the account and not less than once every three months if there are no securities transactions in the account. Notwithstanding the provisions of this paragraph (d), banks that retain custody of government securities that are the subject of a hold-in-custody repurchase agreement are subject to the requirements of 17 CFR 403.5(d).

(e) *Collective investment fund accounts.* The bank shall at least annually give or send to the customer a copy of a financial report of the fund, or provide notice that a copy of such report is available and will be furnished upon request to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. This report shall be based upon an audit made by independent public accountants or internal auditors responsible only to the board of directors of the bank.

(f) *Periodic plan accounts.* The bank shall give or send to the customer not less than once every three months 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 written request of the customer, the bank shall give or send the information described in §344.5, except that any such information relating to remuneration paid in connection with the transaction need not be provided to the customer when the remuneration is paid by a source other than the customer. The bank may charge a reasonable fee for providing information described in §344.5.

§344.7 Settlement of securities transactions.

(a) A bank shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(b) Paragraphs (a) and (c) of this section shall not apply to contracts:

(1) For the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association; or

(2) For the purchase or sale of securities that the Securities and Exchange Commission (SEC) may from time to time, taking into account then existing market practices, exempt by order from the requirements of paragraph (a) of SEC Rule 15c6–1, 17 CFR 240.15c6–1(a), either unconditionally or on specified terms and conditions, if the SEC determines that an exemption is consistent with the public interest and the protection of investors.

(c) Paragraph (a) of this section shall not apply to contracts for the sale for cash of securities that are priced after 4:30 p.m. Eastern time on the date the securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a et seq., or sold to an initial purchaser by a bank participating in the offering. A bank shall not effect or enter into a contract for the purchase or sale of the securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

(d) For purposes of paragraphs (a) and (c) of this section, the parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to the date for all securities sold pursuant to the offering and the parties to the contract

have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

§ 344.8 Securities trading policies and procedures.

(a) *Policies and procedures.* Every bank effecting securities transactions for customers shall establish written policies and procedures providing:

(1) Assignment of responsibility for supervision of all officers or employees who:

(i) Transmit orders to or place orders with broker/dealers; or

(ii) Execute transactions in securities for customers;

(2) Assignment of responsibility for supervision and reporting, separate from those in paragraph (a)(1) of this section, with respect to all officers or employees who process orders for notification or settlement purposes, or perform other back office functions with respect to securities transactions effected for customers;

(3) 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; and

(4) 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.

§ 344.9 Personal securities trading reporting by bank officers and employees.

(a) *Officers and employees subject to reporting.* Bank officers and employees who:

(1) Make investment recommendations or decisions for the accounts of customers;

(2) Participate in the determination of such recommendations or decisions; or

(3) In connection with their duties, obtain information concerning which securities are being purchased or sold or recommend such action, must report to the bank, within ten business days after the end of the calendar quarter, all transactions in securities 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.

(b) *Exempt transactions.* Excluded from this reporting requirement are:

(1) Transactions for the benefit of the officer or employee over which the officer or employee has no direct or indirect influence or control;

(2) Transactions in registered investment company shares;

(3) Transactions in government securities; and

(4) All transactions involving in the aggregate $10,000 or less during the calendar quarter.

(c) *Alternative report.* Where a bank acts as an investment adviser to an investment company registered under the Investment Company Act of 1940, the bank's officers and employees may fulfill their reporting requirement under paragraph (a) of this section by filing with the bank the ''access persons'' personal securities trading report required by (SEC) Rule 17j–1, 17 CFR 270.17j–1.

§ 344.10 Waivers.

The Board of Directors of the FDIC, in its discretion, may waive for good cause all or any part of this part 344.

PART 345—COMMUNITY REINVESTMENT

Subpart A—General

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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.

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 alpha-numeric 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 alpha-numeric 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.

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 [RESERVED]

PART 347—INTERNATIONAL BANKING

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Subpart A—Foreign Branching and Investment by Insured State Nonmember Banks

§ 347.101 Purpose, authority, and scope.

Under sections 18(d) and 18(l) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d), 1828(l)), the Federal Deposit Insurance Corporation prescribes the regulations in this subpart relating to foreign branches of insured state nonmember banks, the acquisition and holding of stock of foreign organizations, and loans or extensions of credit to or for the account of such foreign organizations.

§ 347.102 Definitions.

For the purposes of this subpart:

(a) An *affiliate* of an insured state nonmember bank means:

(1) Any entity of which the insured state nonmember bank is a direct or indirect subsidiary or which otherwise controls the insured state nonmember bank;

(2) Any organization which is a direct or indirect subsidiary of such entity or which is otherwise controlled by such entity; or

(3) Any other organization which is a direct or indirect subsidiary of the insured state nonmember bank or is otherwise controlled by the insured state nonmember bank.

(b) *Control* means the ability to control in any manner the election of a majority of an organization's directors or trustees; or the ability to exercise a controlling influence over the management and policies of an organization. An insured state nonmember bank is deemed to control an organization of which it is a general partner or its affiliate is a general partner.

(c) *Eligible* insured state nonmember bank means an eligible depository institution as defined in § 347.401(c).

(d) *Equity interest* means any ownership interest or rights in an organization, whether through an equity security, contribution to capital, general or limited partnership interest, debt or warrants convertible into ownership interests or rights, loans providing profit participation, binding commitments to acquire any such items, or some other form of business transaction.

(e) *Equity security* means voting or nonvoting shares, stock, investment contracts, or other interests representing ownership or participation in a company or similar enterprise, as well as any instrument convertible to any such interest at the option of the holder without payment of substantial additional consideration.

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

(g) *Foreign bank* means an organization that is organized under the laws of a foreign country, a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands that:

(1) Is recognized as a bank by the bank supervisory or monetary authority of the country of its organization or the country in which its principal banking operations are located;

(2) Receives deposits to a substantial extent in the regular course of its business; and

(3) Has the power to accept demand deposits.

(h) *Foreign banking organization* means a foreign organization that is formed for the sole purpose of either holding shares of a foreign bank or performing nominee, fiduciary, or other

banking services incidental to the activities of a foreign branch or foreign bank affiliate of the insured state nonmember bank.

(i) *Foreign branch* means an office or place of business located outside the United States, its territories, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands, at which banking operations are conducted, but does not include a representative office.

(j) *Foreign country* means any country other than the United States and includes any territory, dependency, or possession of any such country or of the United States.

(k) *Foreign organization* means an organization that is organized under the laws of a foreign country.

(l) *Indirectly* means investments held or activities conducted by a subsidiary of an organization.

(m) *Loan or extension of credit* means all direct and indirect advances of funds to a person, government, or entity made on the basis of any obligation of that person, government, or entity to repay funds.

(n) *Organization* or *entity* means a corporation, partnership, association, bank, or other similar entity.

(o) *Representative office* means an office that engages solely in representative functions such as soliciting new business for its home office or acting as liaison between the home office and local customers, but which has no authority to make business or contracting decisions other than those relating to the personnel and premises of the representative office.

(p) *Subsidiary* means any organization more than 50 percent of the voting equity interests of which are directly or indirectly held by another organization.

(q) *Tier 1 capital* means Tier 1 capital as defined in § 325.2 of this chapter.

(r) *Well capitalized* means well capitalized as defined in § 325.103 of this chapter.

§ 347.103 Foreign branches of insured state nonmember banks.

(a) *Powers of foreign branches.* To the extent authorized by state law, an insured state nonmember bank may establish a foreign branch. In addition to its general banking powers, and if permitted by state law, a foreign branch of an insured state nonmember bank may conduct the following activities to the extent the activities are consistent with banking practices in the foreign country in which the branch is located:

(1) *Guarantees.* Guarantee debts, or otherwise agree to make payments on the occurrence of readily ascertainable events including without limitation such things as nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents, if:

(i) The guarantee or agreement specifies a maximum monetary liability; and

(ii) To the extent the guarantee or agreement is not subject to a separate amount limit under State or Federal law, the amount of the guarantee or agreement is combined with loans and other obligations for purposes of applying any legal lending limits.

(2) *Local investments.* Acquire and hold the following local investments, so long as aggregate investments (other than those required by the law of the foreign country or permissible under section 5136 of the Revised Statutes (12 U.S.C. 24 (Seventh)) by all the bank's branches in one foreign country do not exceed 1 percent of the total deposits in all the bank's branches in that country as reported in the preceding year-end Report of Income and Condition (Call Report):[1]

(i) Equity securities of the central bank, clearing houses, governmental entities, and development banks of the country in which the branch is located;

(ii) Other debt securities eligible to meet local reserve or similar requirements; and

(iii) Shares of automated electronic payment networks, professional societies, schools, and similar entities necessary to the business of the branch.

(3) *Government obligations.* Make the following types of transactions with respect to the obligations of foreign countries, so long as aggregate investments, securities held in connection

[1] If a branch has recently been acquired by the state nonmember bank and the branch was not previously required to file a Call Report, branch deposits as of the acquisition date must be used.

with distribution and dealing, and underwriting commitments do not exceed ten percent of the insured state nonmember bank's Tier 1 capital:

(i) Underwrite, distribute and deal, invest in, or trade obligations of:

(A) The national government of the country in which the branch is located or its political subdivisions; and

(B) An agency or instrumentality of such national government if supported by the taxing authority, guarantee, or full faith and credit of the national government.

(ii) Underwrite, distribute and deal, invest in or trade obligations[2] rated as investment grade by at least two established international rating agencies of:

(A) The national government of any foreign country or its political subdivisions, to the extent permissible under the law of the issuing foreign country; and

(B) An agency or instrumentality of the national government of any foreign country to the extent permissible under the law of the issuing foreign country, if supported by the taxing authority, guarantee, or full faith and credit of the national government.

(4) *Insurance.* Act as an insurance agent or broker.

(5) *Other activities.* Engage in these activities in an additional amount, or in other activities, approved by the FDIC.

(b) *General consent to establish and relocate foreign branches.* (1) General consent of the FDIC is granted for an eligible insured state nonmember bank to establish foreign branches conducting activities authorized by this section in any foreign country in which the bank already operates one or more foreign branches or foreign bank subsidiaries.

(2) General consent of the FDIC is granted for an insured state nonmember bank to relocate an existing foreign branch within a foreign country.

(3) An insured state nonmember bank acting under this paragraph must provide written notice of such action to the FDIC within 30 days after establishing or relocating the branch.

[2] If the obligation is an equity interest, it must be held through a subsidiary of the foreign branch and the insured state nonmember bank must meet its minimum capital requirements.

(c) *Expedited processing of branch applications.* (1) Forty-five days after filing a substantially complete application with the FDIC, or upon such earlier time as authorized by the FDIC, an eligible insured state nonmember bank may establish foreign branches conducting activities authorized by this section in any foreign country in which:

(i) An affiliated bank or Edge or Agreement corporation operates one or more foreign branches or foreign bank subsidiaries; or

(ii) The bank's holding company operates a foreign bank subsidiary.

(2) If any of the following are located in two or more foreign countries, an eligible insured state nonmember bank may establish a foreign branch conducting activities authorized by this section in an additional foreign country 45 days after the bank files a substantially complete application with the FDIC, or upon such earlier time as authorized by the FDIC:

(i) Foreign branches or foreign bank subsidiaries of the eligible insured state nonmember bank;

(ii) Foreign branches or foreign bank subsidiaries of banks and Edge or Agreement corporations affiliated with the eligible insured state nonmember bank; and

(iii) Foreign bank subsidiaries of the eligible insured state nonmember bank's holding company.

(d) *Limitations on general consent and expedited processing.* General consent under paragraph (b) or expedited processing under paragraph (c) of this section does not apply:

(1) If the foreign branch would be located on a site on the World Heritage List or on the foreign country's equivalent of the National Register of Historic Places, in accordance with section 403 of the National Historic Preservation Act Amendments of 1980 (16 U.S.C. 470a–2);

(2) If the foreign branch would be located in a foreign country in which applicable law or practice would limit the FDIC's access to information for supervisory purposes; or

(3) If the FDIC at any time notifies the insured state nonmember bank

that the FDIC is modifying or suspending its general consent or expedited processing procedure.

(e) *Specific consent required.* An insured state nonmember bank may not engage in a type or amount of foreign branch activity not authorized by this section, or establish a foreign branch other than as authorized by paragraphs (b) and (c) of this section, without obtaining the prior specific consent of the FDIC.

(f) *Branch closing.* An insured state nonmember bank must notify the FDIC in writing at the time it closes a foreign branch.

(g) *Procedures.* Procedures for notices and applications under this section are set out in subpart D of this part.

§347.104 Investment by insured state nonmember banks in foreign organizations.

(a) *Investment authorized.* To the extent authorized by state law, an insured state nonmember bank may directly or indirectly acquire and retain equity interests in foreign organizations, subject to the requirements of this subpart.

(b) *Authorized financial activities.* An insured state nonmember bank may not directly or indirectly acquire or hold equity interests of a foreign organization resulting in the insured state nonmember bank and its affiliates holding more than 50 percent of a foreign organization's voting equity interests in the aggregate, or the insured state nonmember bank or its affiliates otherwise controlling the foreign organization, unless the activities of the foreign organization are limited to the following financial activities:

(1) Commercial and other banking activities.

(2) Underwriting, distributing, and dealing debt securities outside the United States.

(3) With the prior approval of the FDIC under §347.108(d), underwriting, distributing, and dealing equity securities outside the United States.

(4) Organizing, sponsoring, and managing a mutual fund if the fund's shares are not sold or distributed in the United States or to U.S. residents and the fund does not exercise management control over the firms in which it invests.

(5) General insurance agency and brokerage.

(6) Underwriting credit life, credit accident and credit health insurance.

(7) Performing management consulting services provided that such services when rendered with respect to the United States market must be restricted to the initial entry.

(8) Data processing.

(9) Operating a travel agency in connection with financial services offered abroad by the insured state nonmember bank or others.

(10) Engaging in activities that the FRB has determined in Regulation Y (12 CFR 225.28(b)) are closely related to banking under section 4(c)(8) of the Bank Holding Company Act.

(11) Performing services for other direct or indirect operations of a U.S. banking organization, including representative functions, sale of long-term debt, name saving, liquidating assets acquired to prevent loss on a debt previously contracted in good faith, and other activities that are permissible for a bank holding company under sections 4(a)(2)(A) and 4(c)(1)(C) of the Bank Holding Company Act.

(12) Holding the premises of a branch of an Edge corporation or insured state nonmember bank or the premises of a direct or indirect subsidiary, or holding or leasing the residence of an officer or employee of a branch or a subsidiary.

(13) Engaging in the foregoing activities in an additional amount, or in other activities, with the prior approval of the FDIC under §347.108(d).

(c) *Going concerns.* If an insured state nonmember bank acquires equity interests of a foreign organization under paragraph (b) of this section and the foreign organization is a going concern, up to five percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under paragraph (b) of this section.

(d) *Joint ventures.* If an insured state nonmember bank directly or indirectly acquires or holds equity interests of a foreign organization resulting in the insured state nonmember bank and its affiliates holding 20 percent or more, but not in excess of 50 percent, of the

voting equity interests of a foreign organization in the aggregate, and the insured state nonmember bank or its affiliates do not control the foreign organization, up to 10 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under paragraph (b) of this section.

(e) *Portfolio investment.* If an insured state nonmember bank directly or indirectly acquires or holds equity interests of a foreign organization resulting in the insured state nonmember bank and its affiliates holding less than 20 percent of the voting equity interests of a foreign organization in the aggregate, and the insured state nonmember bank or its affiliates do not control the foreign organization:

(1) Up to ten percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under paragraph (b) of this section; and

(2) Any loans or extensions of credit made by the insured state nonmember bank and its affiliates to the foreign organization must be on substantially the same terms, including interest rates and collateral, as those prevailing at the same time for comparable transactions between the insured state nonmember bank or its affiliates and nonaffiliated organizations.

(f) *Indirect holding of foreign organizations which are not foreign banks or foreign banking organizations.* Any investment pursuant to the authority of paragraphs (b) through (e) of this section in a foreign organization which is not a foreign bank or foreign banking organization must be held indirectly through a U.S. or foreign subsidiary of the insured state nonmember bank if the foreign organization does not constitute a subsidiary of the insured state nonmember bank, and the insured state nonmember bank must meet its minimum capital requirements.

(g) *Indirect investments in nonfinancial foreign organizations.* An insured state nonmember bank may indirectly acquire and hold equity interests in an amount up to 15 percent of the insured state nonmember bank's Tier 1 capital in foreign organizations engaged generally in activities beyond those listed in paragraph (b) of this section, subject to the following:

(1) The equity interests must be acquired and held indirectly through a subsidiary authorized by paragraphs (b) or (c) of this section, or an Edge corporation if also authorized by the FRB;

(2) The aggregate holding of voting equity interests of one foreign organization by the insured state nonmember bank and its affiliates must be less than 20 percent of the foreign organization's voting equity interests;

(3) The aggregate holding of voting and nonvoting equity interests of one foreign organization by the insured state nonmember bank and its affiliates must be less than 40 percent of the foreign organization's equity interests;

(4) The insured state nonmember bank or its affiliates must not otherwise control the foreign organization; and

(5) Any loans or extensions of credit made by the insured state nonmember bank and its affiliates to the foreign organization must be on substantially the same terms, including interest rates and collateral, as those prevailing at the same time for comparable transactions between the insured state nonmember bank or its affiliates and nonaffiliated organizations.

(h) *Affiliate holdings.* References in this section to equity interests of foreign organizations held by an affiliate of an insured state nonmember bank includes equity interests held in connection with an underwriting or for distribution or dealing by an affiliate permitted to do so by § 337.4 of this chapter or section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)).

§ 347.105 Underwriting and dealing limits applicable to foreign organizations held by insured state nonmember banks.

If an insured state nonmember bank, in reliance on the authority of § 347.104, holds an equity interest in one or more foreign organizations which underwrite, deal, or distribute equity securities outside the United States as authorized by § 347.104(b)(3):

(a) *Underwriting commitment limits.* The aggregate underwriting commitments by the foreign organizations for the equity securities of a single entity, taken together with underwriting commitments by any affiliate of the insured state nonmember bank under the authority of 12 CFR 211.5, must not exceed the lesser of $60 million or 25 percent of the insured state nonmember bank's Tier 1 capital unless excess amounts are either:

(1) Covered by binding commitments from subunderwriters or purchasers; or

(2) Deducted from the capital of the insured state nonmember bank, with at least 50 percent of the deduction being taken from Tier 1 capital, and the insured state nonmember bank remains well capitalized after this deduction.

(b) *Distribution and dealing limits.* The equity securities of any single entity held for distribution or dealing by the foreign organizations, taken together with equity securities held for distribution or dealing by any affiliate of the insured state nonmember bank under the authority of 12 CFR 211.5:

(1) Must not exceed the lesser of $30 million or 5 percent of the insured state nonmember bank's Tier 1 capital, subject to the following:

(i) Any equity securities acquired pursuant to any underwriting commitment extending up to 90 days after the payment date for the underwriting may be excluded from this limit;

(ii) Any equity securities of the entity held under the authority of § 347.104 or 12 CFR 211.5(b) for purposes other than distribution or dealing must be included in this limit; and

(iii) Up to 75 percent of the position in an equity security may be reduced by netting long and short positions in the same security, or offsetting cash positions against derivative instruments referenced to the same security so long as the derivatives are part of a prudent hedging strategy; and

(2) Must be included in calculating the general consent limits under § 347.108(a)(3) if the insured state nonmember bank relies on the general consent provisions as authority to acquire equity interests of the same foreign entity for investment or trading.

(c) *Additional distribution and dealing limits.* With the exception of equity securities acquired pursuant to any underwriting commitment extending up to 90 days after the payment date for the underwriting, equity securities of a single entity held for distribution or dealing by all affiliates of the state nonmember bank (this includes shares held in connection with an underwriting or for distribution or dealing by an affiliate permitted to do so by § 337.4 of this chapter or section 4(c)(8) of the Bank Holding Company Act), combined with any equity interests held for investment or trading purposes by all affiliates of the state nonmember bank, must conform to the limits of § 347.104.

(d) *Combined limits.* The aggregate of the following may not exceed 25 percent of the insured state nonmember bank's Tier 1 capital:

(1) All equity interests of foreign organizations held for investment or trading under § 347.104(g) or by an affiliate of the insured state nonmember bank under the corresponding paragraph of 12 CFR 211.5;

(2) All underwriting commitments under paragraph (a) of this section, taken together with all underwriting commitments by any affiliate of the insured state nonmember bank under the authority of 12 CFR 211.5, after excluding the amount of any underwriting commitment:

(i) Covered by binding commitments from subunderwriters or purchasers under paragraph (a)(1) of this section or the comparable provision of 12 CFR 211.5; or

(ii) Already deducted from the insured state nonmember bank's capital under paragraph (a)(2) of this section, or the appropriate affiliate's capital under the comparable provisions of 12 CFR 211.5; and

(3) All equity securities held for distribution or dealing under paragraph (b) of this section, taken together with all equity securities held for distribution or dealing by any affiliate of the insured state nonmember bank under the authority of 12 CFR 211.5, after reducing by up to 75 percent the position in any equity security by netting and offset, as permitted by paragraph (b)(1)(iii) of this section or the comparable provision of 12 CFR 211.5.

§ 347.106 Restrictions on certain activities applicable to foreign organizations held by insured state nonmember banks.

Futures commission merchant. If an insured state nonmember bank, in reliance on the authority of § 347.104, acquires or retains an equity interest in one or more foreign organizations which acts as a futures commission merchant as authorized by § 347.104(b)(10), the foreign organization may not be a member of an exchange or clearing association that requires members to guarantee or otherwise contract to cover losses suffered by other members unless the foreign organization's liability does not exceed two percent of the insured state nonmember bank's Tier 1 capital, or the insured state nonmember bank has obtained the prior approval of the FDIC under § 347.108(d).

§ 347.107 U.S. activities of foreign organizations held by insured state nonmember banks.

(a) An insured state nonmember bank may not directly or indirectly hold the equity interests of any foreign organization pursuant to the authority of this section if the organization engages in the general business of buying or selling goods, wares, merchandise, or commodities in the United States.

(b) An insured state nonmember bank may not directly or indirectly hold more than 5 percent of the equity interests of any foreign organization pursuant to the authority of this subpart unless any activities in which the foreign organization engages directly or indirectly in the United States are incidental to its international or foreign business.

(c) A foreign organization is not engaged in any business or activities in the United States for these purposes unless it maintains an office in the United States other than a representative office.

(d) The following activities are incidental to international or foreign business:

(1) Activities that the FRB has determined in Regulation K (12 CFR 211.4) are permissible in the United States for an Edge corporation.

(2) Other activities approved by the FDIC.

§ 347.108 Obtaining FDIC approval to invest in foreign organizations.

(a) *General consent.* General consent of the FDIC is granted for an eligible insured state nonmember bank to make direct or indirect investments in foreign organizations in conformity with the limits and requirements of this subpart if:

(1) The insured state nonmember bank presently operates at least one foreign bank subsidiary or foreign branch, an affiliated bank or Edge or Agreement corporation operates at least one foreign bank subsidiary or foreign branch, or the insured state nonmember bank's holding company operates at least one foreign bank subsidiary;

(2) In any case in which the insured state nonmember bank and its affiliates will hold 20 percent or more of the foreign organization's voting equity interests or control the foreign organization, at least one insured state nonmember bank has a foreign bank subsidiary in the relevant foreign country;[3]

(3) The investment is within one of the following limits:

(i) The investment is acquired at net asset value from an affiliate;

(ii) The investment is a reinvestment of cash dividends received from the same foreign organization during the preceding 12 months; or

(iii) The total investment directly or indirectly in a single foreign organization in any transaction or series of transactions during a twelve-month period does not exceed two percent of the insured state nonmember bank's Tier 1 capital, and such investments in all foreign organizations in the aggregate do not exceed:

(A) 5 percent of the insured state nonmember bank's Tier 1 capital during a 12-month period; and

(B) Up to an additional five percent of the insured state nonmember bank's Tier 1 capital if the investments are acquired for trading purposes; and

[3] A list of these countries can be obtained from the FDIC's Internet Web Site at www.fdic.gov.

(4) Within 30 days, the insured state nonmember bank provides the FDIC written notice of the investment, unless the investment was acquired for trading purposes, in which case no notice is required.

(b) *Expedited processing.* An investment that does not qualify for general consent but is otherwise in conformity with the limits and requirements of this subpart may be made 45 days after an eligible insured state nonmember bank files a substantially complete application with the FDIC, or upon such earlier time as authorized by the FDIC.

(c) *Inapplicability of general consent or expedited processing.* General consent or expedited processing under this section do not apply:

(1) For foreign investments resulting in the insured state nonmember bank holding 20 percent or more of the voting equity interests of a foreign organization or controlling such organization and the foreign organization would be located in a foreign country in which applicable law or practice would limit the FDIC's access to information for supervisory purposes; or

(2) If the FDIC at any time notifies the insured state nonmember bank that the FDIC is modifying or suspending its general consent or expedited processing procedure.

(d) *Specific consent.* Any investment that is not authorized under general consent or expedited processing procedures must not be made without the prior specific consent of the FDIC.

(e) *Computation of amounts.* In computing the amount that may be invested in any foreign organization under this section, any investments held by an affiliate of the insured state nonmember bank must be included.

(f) *Procedures.* Procedures for applications and notices under this section are set out in subpart D of this part.

§ 347.109 Extensions of credit to foreign organizations held by insured state nonmember banks; shares of foreign organizations held in connection with debts previously contracted.

(a) *Loans or extensions of credit.* An insured state nonmember bank which directly or indirectly holds equity interests in a foreign organization pursuant to the authority of this subpart may make loans or extensions of credit to or for the accounts of the organization without regard to the provisions of section 18(j) of the FDI Act (12 U.S.C. 1828(j)).

(b) *Debts previously contracted.* Equity interests acquired to prevent a loss upon a debt previously contracted in good faith are not subject to the limitations or procedures of this subpart; however they must be disposed of promptly but in no event later than two years after their acquisition, unless the FDIC authorizes retention for a longer period.

§ 347.110 Supervision and recordkeeping of the foreign activities of insured state nonmember banks.

(a) *Records, controls and reports.* An insured state nonmember bank with any foreign branch, any investment in a foreign organization of 20 percent or more of the organization's voting equity interests, or control of a foreign organization must 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 risk assets, including loans and other extensions of credit. Coverage should extend to a substantial proportion of the risk assets in the branch or foreign organization, and include the status of all large credit lines and of credits to customers also borrowing from other offices or affiliates of the insured state nonmember bank. Appropriate information on risk assets may include:

(i) A recent financial statement of the borrower or obligee and current information on the borrower's or obligee's financial condition;

(ii) 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, and other funding sources,

employed in the branch or foreign organization 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 guarantees 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 foreign organization in sufficient detail to permit determination of conformance to auditing guidelines. Appropriate audit reports may include coverage of:

(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) *Availability of information to examiners; reports.* (1) Information about foreign branches or foreign organizations must be made available to the FDIC by the insured state nonmember bank for examination and other supervisory purposes.

(2) If any applicable law or practice in a particular foreign country would limit the FDIC's access to information for supervisory purposes, no insured state nonmember bank may utilize the general consent or expedited processing procedures under §§ 347.103 and 347.108 to:

(i) Establish any foreign branch in the foreign country; or

(ii) Make any investment resulting in the state nonmember bank holding 20 percent or more of the voting equity interests of a foreign organization in the foreign country or controlling such organization.

(3) The FDIC 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 subpart, and the insured state nonmember bank shall submit an annual report of condition for each foreign branch pursuant to instructions provided by the FDIC.

Subpart B—Foreign Banks

§ 347.201 Scope.

(a)(1) Sections 347.203 through 347.207 implement the insurance provisions of section 6 of the International Banking Act of 1978 (12 U.S.C. 3104). They set out the FDIC's rules regarding domestic retail deposit activities requiring a foreign bank to establish an insured bank subsidiary; deposit activities permissible for a noninsured branch; authority for a state branch to apply for an exemption from the insurance requirement; and, depositor notification requirements. Sections 347.204, 347.205, 347.206 and 347.207 do not apply to a Federal branch. The Comptroller of the Currency's regulations (12 CFR part 28) establish such rules for Federal branches. However, Federal branches deemed by the Comptroller to require insurance must apply to the FDIC for insurance.

(2) Sections 347.203 through 347.207 also set out the FDIC's rules regarding the operation of insured and noninsured branches, whether state or Federal, by a foreign bank.

(b) Sections 347.208 through 347.212 set 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.

§ 347.202 Definitions.

For the purposes of this subpart:

(a) *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.

(b) *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.

(c) *Deposit* has the same meaning as that term in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)).

(d) *Depository* means any insured state bank, national bank, or insured branch.

(e) *Domestic retail deposit activity* means the acceptance by a state branch of any initial deposit of less than $100,000.

(f) *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).

(g) *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 §§ 347.208, 347.209, 347.210, and 347.211.

(h) *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 foreign country or any United States entity which is owned or controlled by an entity which is organized under the laws of a foreign country or a foreign national.

(i) *Foreign country* means any country other than the United States and includes any colony, dependency or possession of any such country.

(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) *Immediate family member of a natural person* means the spouse, father, mother, brother, sister, son or daughter of that natural person.

(l) *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 existing deposit relationship between the depositor and the branch.

(m) *Insured bank* means any bank, including a foreign bank having an insured branch, the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act.

(n) *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.

(o) *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.

(p) A *majority owned subsidiary* means a company the voting stock of which is more than 50 percent owned or controlled by another company.

(q) *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.

(r) *Person* means an individual, bank, corporation, partnership, trust, association, foundation, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(s) *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.

(t) *State* means any state of the United States or the District of Columbia.

(u) *State branch* means a branch of a foreign bank established and operating under the laws of any state.

(v) 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.

§ 347.203 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.

§ 347.204 Insurance requirement.

(a) *Domestic retail deposit activity*. In order to initiate or conduct domestic retail deposit activity which requires deposit insurance protection in any state a foreign bank shall:

(1) Establish one or more insured bank subsidiaries in the United States for that purpose; and

(2) Obtain deposit insurance for any such subsidiary in accordance with the Federal Deposit Insurance Act.

(b) *Exception*. For purposes of paragraph (a) of this section, ''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.

(c) *Grandfathered insured branches*. Domestic retail deposit accounts with balances of less than $100,000 that require deposit insurance protection may be accepted or maintained in a branch of a foreign bank only if such branch was an insured branch on December 19, 1991.

(d) *Noninsured branches*. A foreign bank may establish or operate a state branch which is not an insured branch whenever:

(1) The branch only accepts initial deposits in an amount of $100,000 or greater; or

(2) The branch meets the criteria set forth in § 347.205 or § 347.206.

§ 347.205 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).

§ 347.206 Exemptions from the insurance requirement.

(a) Deposit activities not requiring insurance. A state branch will not be deemed to be engaged in domestic retail deposit activity which requires the foreign bank parent to establish an insured bank subsidiary in accordance with § 347.204(a) if the state branch only accepts initial deposits in an amount of less than $100,000 which 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 branch's average deposits under this paragraph (a)(7) do not exceed one percent of the branch's average total deposits for the last 30 days of the most recent calendar quarter (de minimis exception). In calculating this de minimis exception, both the average deposits under this paragraph (a)(7) and the average total deposits shall be computed by summing the close of business figures for each of the last 30 calendar days, ending with and including the last day of the calendar quarter, and dividing the resulting sum by 30. For days on which the branch is closed, balances from the last previous business day are to be used. In determining its average branch deposits, the branch may exclude deposits in the branch of other offices, branches, agencies or wholly owned subsidiaries of the bank. In addition, the branch must 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).

(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 States 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) Procedures for applications under this section are set out in subpart D of this part.

(c) *Transition period*. A noninsured state branch may maintain a retail deposit lawfully accepted prior to April 1, 1996 pursuant to regulations in effect prior to July 1, 1998 (See §346.6 as contained in 12 CFR parts 300 to 499 revised as of January 1, 1998):

(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.

§ 347.207 Notification to depositors.

Any state branch that is exempt from the insurance requirement pursuant to § 347.206 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.

§ 347.208 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)(i) The foreign bank will provide the FDIC with information regarding the affairs of the foreign bank and its affiliates which are located outside of the United States as the FDIC from time to time may request to:

(A) Determine the relations between the insured branch and the foreign bank and its affiliates; and

(B) Assess the financial condition of the foreign bank as it relates to the insured branch.

(ii) If the laws of the country of the foreign 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 English and 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)(i) 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:

(A) Determine the relations between the insured branch and such offices, agencies, branches or affiliates; and

(B) Assess the financial condition of the foreign bank as it relates to the insured branch.

(ii) 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 this paragraph (a).

(b) The agreement shall be signed by an officer of the foreign 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.

§ 347.209 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 insured 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 insured branches as one entity for record keeping purposes and may designate one branch to maintain

records for all the branches in the state.

§ 347.210 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 most recent calendar quarter. This average shall be computed by using the sum of the close of business figures for the 30 calendar days of the most recent calendar quarter, ending with and including the last day of the calendar quarter, divided by 30.[4] In determining its average liabilities, the insured 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 day of the most recent calendar quarter.

(2) The initial five-percent deposit for a newly established insured branch 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 insured branch's condition is such that the assets pledged under paragraph (b)(1) or (b)(2) of this section will not adequately protect the deposit insurance fund. In requiring a foreign bank to pledge additional assets, the FDIC will consult with the insured 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, the concentration of transfer risk to any one country, including the country in which the foreign bank's head office is located or any other factor the FDIC determines is relevant.

(4) Each insured branch shall separately comply with the requirements of this section. However, 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 insured 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. However, a depository may not be an affiliate of the foreign bank whose insured branch is seeking to use the depository. 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 pledge 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 paragraph (a) of this section.

(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 in this paragraph (d); 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, as follows:

(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

[4] For days on which the branch is closed, balances from the previous business day are to be used.

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 lower 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 nationally-recognized rating service (with any conflict in a rating resolved in favor of the lower rating);

(6) Obligations of the African Development Bank, Asian Development Bank, Inter-American Development Bank, and the International Bank for Reconstruction and Development;

(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 lower 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; or

(8) Any other 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 paragraph (d) of this section, having an aggregate value in the amount as required pursuant to paragraph (b) of this section.

(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 paragraph (b)(3) of this section, it shall place (within two business days after the last day of the most recent calendar quarter, unless otherwise ordered) additional assets of the kind described in paragraph (d) of this section, 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 paragraph (d) of this section 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. The foreign bank shall provide copies of all such documents described in this paragraph (e)(4) to the appropriate regional director concurrently with their delivery to the depository.

(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 assets 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 insured branch and the depository.* (i) *Initial reports.* Upon the original pledge of assets as provided in paragraph (e)(1) of this section:

(A) The depository shall provide to the foreign bank and to the appropriate regional director 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 appropriate regional director 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 paragraph (b) of this section and that all such assets are of the kind described in paragraph (d) of this section.

(ii) *Quarterly reports.* Within ten calendar days after the end of the most recent calendar quarter:

(A) The depository shall provide to the appropriate regional director a written report specifying in reasonable detail with respect to each asset currently pledged (including any asset pledged to satisfy the requirements of paragraph (b)(3) of this section and identified as such), as of two business days after the end of the most recent calendar quarter, 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 the most recent calendar quarter to the appropriate regional director 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 paragraph (b) of this section and that all such assets are of the kind described in paragraph (d) of this section, and which states the average of the liabilities of each insured branch of the foreign bank computed in the manner and for the period prescribed in paragraph (b) of this section.

(iii) *Additional reports.* The foreign bank shall, from time to time, as may be required, provide to the appropriate regional director 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 appropriate regional director, 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 obligated 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 retain 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 60 days' written notice thereof to the other party and to the appropriate regional director. The FDIC, upon 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.

(f)(1) Authority is delegated to the Director (DOS), the Deputy 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 to this section. 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 pledge agreement used for such deposit agreements.

§ 347.211 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 percent of the preceding quarter's average book value of the insured branch's liabilities or, in the case of a newly-established insured 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 insured branch's primary regulator, may require that a higher ratio of eligible

assets be maintained if the financial condition of the insured 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, the concentration of transfer risk to any one country, including the country in which the foreign bank's head office is located or any other factor the FDIC determines is relevant. Eligible assets shall be payable in United States dollars.

(b) In determining eligible assets for the purposes of compliance with paragraph (a) of this section, the insured 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 extent 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 insured 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, as follows:

(i) 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 insured branch must have adequate documentation to show that the asset is of good quality and is being supervised adequately by the foreign 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 foreign 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;

(ii) 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, or upon request of the insured branch, by the appropriate regional director;

(5) Any asset not in the insured branch's actual possession unless the insured branch holds title to such asset and the insured branch maintains records sufficient to enable independent verification of the insured branch's ownership of the asset, as determined at the most recent State or Federal examination;

(6) Any intangible asset;

(7) Any other asset not considered bankable by the FDIC.

(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 insured branch to be responsible for maintaining the records of the insured branches' compliance with this section.

(d) The average book value of the insured branch's liabilities for a quarter shall be, at the insured 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 insured branch is closed, balances from the previous business day are to be used. Calculations of the average book value of the insured branch's liabilities for a quarter shall be retained by the insured branch until the next Federal examination.

§ 347.212 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.

§ 347.213 FDIC approval to conduct activities not permissible for Federal branches.

(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, 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.

(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 part 362 of this chapter, ''Activities and Investment 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 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 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) *Conditions of approval.* 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 § 347.210 and/or the maintenance of eligible assets in excess of the requirements of § 347.211. In the case of an application to initially engage in 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 of the Federal Reserve System (Board of Governors), and any and all conditions imposed in such approvals have been satisfied.

(e) *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 plan of divestiture or cessation of the activity to the appropriate regional director.

(2) A foreign bank operating an insured state branch which elects not to apply to the FDIC for permission to continue to conduct an activity which is rendered impermissible by any change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction shall submit a plan of divestiture or cessation to the appropriate regional director.

(3) Divestitures or cessations shall be completed within one year from the date of the disapproval, or within such shorter period of time as the FDIC shall direct.

(f) *Procedures.* Procedures for applications under this section are set out in subpart D of this part.

§ 347.214 Examination of branches of foreign banks.

(a) *Frequency of on-site examination.* Each branch or agency of a foreign bank shall be examined on-site at least once during each 12-month period (beginning on the date the most recent examination of the office ended) by:

(1) The Board of Governors of the Federal Reserve System (Board);

(2) The FDIC, if the branch of the foreign bank accepts or maintains insured deposits;

(3) The Office of the Comptroller of the Currency (OCC), if the branch or agency of the foreign bank is licensed by the Comptroller; or

(4) The state supervisor, if the office of the foreign bank is licensed or chartered by the state.

(b) *18-month cycle for certain small institutions*—(1) *Mandatory standards.* The FDIC may conduct a full-scope, on-site examination at least once during each 18-month period, rather than each 12-month period as provided in paragraph (a) of this section, if the branch or Agency:

(i) Has total assets of $250 million or less;

(ii) Has received a composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 at its most recent examination;

(iii) Satisfies the requirement of either the following paragraph (b)(1)(iii)(A) or (B):

(A) The foreign bank's most recently reported capital adequacy position consists of, or is equivalent to, Tier 1 and total risk-based capital ratios of at least 6 percent and 10 percent, respectively, on a consolidated basis; or

(B) The branch or agency has maintained on a daily basis, over the past three quarters, eligible assets (determined consistent with applicable federal and state law) in an amount not less than 108 percent of the preceding quarter's average third party liabilities and sufficient liquidity is currently available to meet its obligations to third parties;

(iv) Is not subject to a formal enforcement action or order by the Board, FDIC, or the OCC; and

(v) Has not experienced a change in control during the preceding 12-month period in which a full-scope, on-site examination would have been required but for this section.

(2) *Discretionary standards.* In determining whether a branch of a foreign bank is eligible for an 18-month examination cycle pursuant to this paragraph (b), the FDIC may consider additional factors, including, but not limited to, whether:

(i) Any of the individual components of the ROCA supervisory rating of a branch of a foreign bank is rated ''3'' or worse;

(ii) The results of any off-site monitoring indicate a deterioration in the condition of the branch;

(iii) The size, relative importance, and role of a particular branch when reviewed in the context of the foreign bank's entire U.S. operations otherwise necessitate an annual examination; and

(iv) The condition of the parent foreign bank gives rise to such a need.

(c) *Authority to conduct more frequent examinations.* Nothing in paragraphs (a) and (b) of this section limits the authority of the FDIC to examine any U.S. branch or agency of a foreign bank as frequently as it deems necessary.

[63 FR 46121, Aug. 28, 1998]

Subpart C—International Lending

§ 347.301 Purpose, authority, and scope.

Under the International Lending Supervision Act of 1983 (Title IX, Pub. L. 98–181, 97 Stat. 1153) (12 U.S.C. 3901 *et seq.*) (ILSA), the Federal Deposit Insurance Corporation prescribes the regulations in this subpart relating to international lending activities of insured state nonmember banks.

§ 347.302 Definitions.

For the purposes of this subpart:

(a) *Administrative cost* means 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. No portion of supervisory and administrative expenses or other indirect expenses such as occupancy and other similar overhead costs shall be included.

(b) *Banking institution* means an insured state nonmember bank.

(c) *Federal banking agencies* means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

(d) *International assets* means those assets required to be included in banking institutions' ''Country Exposure Report'' form (FFIEC No. 009).

(e) *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.

(f) *Restructured international loan* means a loan that meets the following criteria:

(1) 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

(2) Either:

(i) The terms of the existing loan are amended to reduce stated interest or extend the schedule of payments; or

(ii) A new loan is made to, or for the benefit of, the borrower, enabling the borrower to service or refinance the existing debt.

(g) *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.

§ 347.303 Allocated transfer risk reserve.

(a) *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.

(b) *Procedures and standards*—(1) *Joint agency determination.* At least annually, the Federal banking agencies shall determine jointly, based on the standards set forth in paragraph (b)(2) of this section, the following:

(i) Which international assets subject to transfer risk warrant establishment of an ATRR;

(ii) The amount of the ATRR for the specified assets; and

(iii) Whether an ATRR established for specified assets may be reduced.

(2) *Standards for requiring ATRR*—(i) *Evaluation of assets.* The Federal banking agencies shall apply the following criteria in determining whether an ATRR is required for particular international assets:

(A) Whether the quality of a banking institution's assets has been impaired by a protracted inability of public or private obligers in a foreign country to make payments on their external indebtedness as indicated by such factors, among others, as whether:

(*1*) Such obligors have failed to make full interest payments on external indebtedness; or

(*2*) Such obligors have failed to comply with the terms of any restructured indebtedness; or

(*3*) A foreign country has failed to comply with any International Monetary Fund or other suitable adjustment program; or

(B) Whether no definite prospects exist for the orderly restoration of debt service.

(ii) *Determination of amount of ATRR.* (A) In determining the amount of the ATRR, the Federal banking agencies shall consider:

(*1*) The length of time the quality of the asset has been impaired;

(*2*) Recent actions taken to restore debt service capability;

(*3*) Prospects for restored asset quality; and

(*4*) Such other factors as the Federal banking agencies may consider relevant to the quality of the asset.

(B) 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 determined by the Federal banking agencies.

(3) *FDIC notification.* Based on the joint agency determinations under paragraph (b)(1) of this section, the FDIC shall notify each banking institution holding assets subject to an ATRR:

(i) Of the amount of the ATRR to be established by the institution for specified international assets; and

(ii) That an ATRR established for specified assets may be reduced.

(c) *Accounting treatment of ATRR*—(1) *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.

(2) *Separate accounting.* A banking institution shall account for an ATRR separately from the Allowance for Loan and Lease 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 percentage amount specified.

(3) *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).

(4) *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 (c)(4), international assets may be written down by a charge to the Allowance for Loan and Lease Losses or a reduction in the principal amount of the asset by application of interest payments or other collections on the asset; provided, that only those international assets that may be charged to the Allowance for Loan and Lease Losses pursuant to generally accepted accounting principles may be written down by a charge to the Allowance for Loan and Lease Losses. However, the Allowance for Loan and Lease 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 and lease portfolio.

(5) *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.

§ 347.304 Accounting for fees on international loans.

(a) *Restrictions on fees for restructured international loans.* No banking institution shall charge, in connection with the restructuring of an international loan, any fee exceeding the administrative cost of the restructuring unless it amortizes the amount of the fee exceeding the administrative cost over the effective life of the loan.

(b) *Accounting treatment.* Subject to paragraph (a) of this section, banking institutions shall account for fees on international loans in accordance with generally accepted accounting principles.

§ 347.305 Reporting and disclosure of international assets.

(a) *Requirements.* (1) Pursuant to section 907(a) of 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 subpart 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.

PART 348—MANAGEMENT OFFICIAL INTERLOCKS

Sec.
348.1 Authority, purpose, and scope.
348.2 Definitions.
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

[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.

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.

(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

[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.

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) 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.
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350.10 Prohibited conduct and penalties.
350.11 Safe harbor provision.
350.12 Disclosure required by applicable banking or 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 as of December 31 and make available on request an annual disclosure statement. The statement shall contain information required by §350.4(a) and (b) 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 the public 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 make a disclosure statement available continuously until the disclosure statement for the succeeding year becomes available.

[62 FR 10200, Mar. 6, 1997]

§ 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, Leases, and Other Assets—column A covering financial instruments 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); and

(v) Schedule RI-B, Part II (Changes in Allowance for Loan and Lease Losses).

(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.* A bank may, at its option, provide additional information that bank management considers important to an evaluation of the overall condition of the bank. This information could include, but is not limited to, a discussion of the financial data; 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 every annual disclosure statement to advise 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.''

[62 FR 10200, Mar. 6, 1997]

§ 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 or the bank's annual report (see 12 CFR part 335);

(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), 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.

(d) *In the case of a bank covered by 12 CFR part 363,* by an annual report prepared pursuant to 12 CFR 363.4. However, if the annual report is for a bank subsidiary of a holding company which provides only the consolidated financial statements of the holding company, this annual report may be used to satisfy the requirements of this part only if it is the report of a one-bank holding company and provided that 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.

[62 FR 10200, Mar. 6, 1997]

§350.6 Signature and attestation.

An authorized officer of the bank shall sign the annual disclosure statement. The officer shall also 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.

[62 FR 10200, Mar. 6, 1997]

§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 banking or securities law or regulations.

The requirements of this part are not intended to replace or waive any disclosure required to be made under applicable banking or securities law or regulations.

[62 FR 10201, Mar. 6, 1997]

PART 351 [RESERVED]

PART 352—NONDISCRIMINATION ON THE BASIS OF HANDICAP

Sec.
352.1 Purpose.
352.2 Application.
352.3 Definitions.
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352.10 Compliance procedures.
352.11 Notice.

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. 1819, 1823(k)(5).

§ 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.* (1) For the purpose of determining ''economically depressed regions'', the FDIC will determine whether an institution qualifies as being located in an ''economically depressed region'' on a case-by-case basis. That determination will be based on four criteria:

(i) High unemployment rates;

(ii) Significant declines in non-farm employment;

(iii) High delinquency rates of real estate assets at insured depository institutions; and

(iv) Evidence indicating declining real estate values.

(2) In addition, the FDIC will also consider relevant information from institutions regarding their geographic market area, as well as information on whether that market is ''economically depressed''.

[55 FR 11161, Mar. 27, 1990, as amended at 63 FR 10295, Mar. 3, 1998]

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 appropriate regional director (DOS). For filing requirements, consult 12 CFR 303.244. 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 only the prior consent of 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.

[63 FR 44751, Aug. 20, 1998]

§ 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. 1823(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, as amended at 63 FR 37761, July 14, 1998]

§ 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) The claim is 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 section 306(d) of the Competitive Equality Banking Act of 1987 (CEBA) (12 U.S.C. 1430(e), footnote (1), or otherwise so that the aggregate of the outstanding principal on the advances secured by such collateral, the accrued but 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, as amended at 63 FR 37761, July 14, 1998]

§ 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

Sec.

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361.2 Policy.
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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 OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

Subpart A—Activities of Insured State Banks

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Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

362.14 Purpose and scope.
362.15 Acquiring or establishing a subsidiary; conducting new activities through a subsidiary.

AUTHORITY: 12 U.S.C. 1816, 1818, 1819(a)(Tenth), 1828(m), 1831a, 1831e.

SOURCE: 63 FR 66326, Dec. 1, 1998, unless otherwise noted.

Subpart A—Activities of Insured State Banks

§362.1 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter, implements the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) that restrict and prohibit insured State banks and their subsidiaries from engaging in activities and investments that are not permissible for national banks and their subsidiaries. The phrase ''activity permissible for a national bank'' means any activity authorized for national banks under any statute including the National Bank Act (12 U.S.C. 21 *et seq.*), as well as activities recognized as permissible for a national bank in regulations, official circulars, bulletins, orders or written interpretations issued by the Office of the Comptroller of the Currency (OCC).

(b) This subpart does not cover the following activities:

(1) Activities conducted other than ''as principal,'' defined for purposes of this subpart as activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, or conducted as trustee, or in any substantially similar capacity. For example, this subpart does not cover acting solely as agent for the sale of insurance, securities, real estate, or travel services; nor does it cover acting as trustee, providing personal financial planning advice, or safekeeping services;

(2) Interests in real estate in which the real property is used or intended in good faith to be used within a reasonable time by an insured State bank or its subsidiaries as offices or related facilities for the conduct of its business or future expansion of its business or used as public welfare investments of a type permissible for national banks; and

(3) Equity investments acquired in connection with debts previously contracted (DPC) if the insured State bank does not hold the property for speculation and takes only such actions as would be permissible for a national bank's DPC. The bank must dispose of the property within the shorter of the period set by Federal law for national banks or the period allowed under State law. For real estate, national banks may not hold DPC for more than 10 years. For equity securities, national banks must generally divest DPC as soon as possible consistent with obtaining a reasonable return.

(c) A subsidiary of an insured State bank may not engage in real estate investment activities that are not permissible for a subsidiary of a national bank unless the bank does so through a subsidiary of which the bank is a majority owner, is in compliance with applicable capital standards, and the FDIC has determined that the activity poses no significant risk to the appropriate deposit insurance fund. This subpart provides standards for majority-owned subsidiaries of insured State banks engaging in real estate investment activities that are not permissible for a subsidiary of a national bank. Because of safety and soundness concerns relating to real estate investment activities, subpart B of this part reflects special rules for subsidiaries of insured State nonmember banks that engage in real estate investment activities of a type that are not permissible for a national bank, but may be otherwise permissible for a subsidiary of a national bank.

(d) The FDIC intends to allow insured State banks and their subsidiaries to undertake only safe and sound activities and investments that do not present significant risks to the deposit insurance funds and that are consistent with the purposes of Federal deposit insurance and other applicable law. This subpart does not authorize any insured State bank to make investments or to conduct activities that are not authorized or that are prohibited by either State or Federal law.

§362.2 Definitions.

For the purposes of this subpart, the following definitions will apply:

(a) *Bank, State bank, savings association, State savings association, depository institution, insured depository institution, insured State bank, Federal savings association,* and *insured State nonmember bank* shall each have the same respective meaning contained in section 3 of

the Federal Deposit Insurance Act (12 U.S.C. 1813).

(b) *Activity* means the conduct of business by a state-chartered depository institution, including acquiring or retaining an equity investment or other investment.

(c) *Change in control* means any transaction:

(1) By a State bank or its holding company for which a notice is required to be filed with the FDIC, or the Board of Governors of the Federal Reserve System (FRB), pursuant to 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 the FDIC's or FRB's regulations implementing section 7(j);

(2) As a result of which a State bank eligible for the exception described in § 362.3(a)(2)(iii) is acquired by or merged into a depository institution that is not eligible for the exception, or as a result of which its holding company is acquired by or merged into a holding company which controls one or more bank subsidiaries not eligible for the exception; or

(3) In which control of the State bank is acquired by a bank holding company in a transaction requiring FRB approval under 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.

(d) *Company* means any corporation, partnership, limited liability company, business trust, association, joint venture, pool, syndicate or other similar business organization.

(e) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting securities 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.

(f) *Convert its charter* means an insured State bank undergoes any transaction that causes the bank to operate under a different form of charter than it had as of December 19, 1991, except a change from mutual to stock form shall not be considered a charter conversion.

(g) *Equity investment* means an ownership interest in any company; any membership interest that includes a voting right in any company; any interest in real estate; any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction; and includes an equity security. The term ''equity investment'' does not include any of the foregoing if the interest is taken as security for a loan.

(h) *Equity security* means any stock (other than adjustable rate preferred stock, money market (auction rate) preferred stock, or other newly developed instrument determined by the FDIC to have the character of debt securities), 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.

(i) *Extension of credit, executive officer, director, principal shareholder,* and *related interest* each has the same respective meaning as is applicable for the purposes of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b) and § 337.3 of this chapter.

(j) *Institution* shall have the same meaning as ''state-chartered depository institution.''

(k) *Majority-owned subsidiary* means any corporation in which the parent insured State bank owns a majority of the outstanding voting stock.

(l) *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.

(m) *Real estate investment activity* means any interest in real estate (other than as security for a loan) held directly or indirectly that is not permissible for a national bank.

(n) *Residents of the state* includes individuals living in the State, individuals employed in the State, any person to whom the company provided insurance as principal without interruption since such person resided in or was employed in the State, and companies or partnerships incorporated in, organized under the laws of, licensed to do business in, or having an office in the State.

(o) *Security* has the same meaning as it has in part 344 of this chapter.

(p) *Significant risk to the deposit insurance fund* shall be understood to be present whenever the FDIC determines there is a high probability that any insurance fund administered by the FDIC may suffer a loss. Such risk may be present either when an activity contributes or may contribute to the decline in condition of a particular state-chartered depository institution or when a type of activity is found by the FDIC to contribute or potentially contribute to the deterioration of the overall condition of the banking system.

(q) *State-chartered depository institution* means any State bank or State savings association insured by the FDIC.

(r) *Subsidiary* means any company controlled by an insured depository institution.

(s) *Tier one capital* has the same meaning as set forth in part 325 of this chapter for an insured State nonmember bank. For other state-chartered depository institutions, the term ''tier one capital'' has the same meaning as set forth in the capital regulations adopted by the appropriate Federal banking agency.

(t) *Well-capitalized* has the same meaning set forth in part 325 of this chapter for an insured State nonmember bank. For other state-chartered depository institutions, the term ''well-capitalized'' has the same meaning as set forth in the capital regulations adopted by the appropriate Federal banking agency.

§362.3 Activities of insured State banks.

(a) *Equity investments.* (1) *Prohibited equity investments.* No insured State bank may directly or indirectly acquire or retain as principal any equity investment of a type that is not permissible for a national bank unless one of the exceptions in paragraph (a)(2) of this section applies.

(2) *Exceptions.* (i) *Equity investment in majority-owned subsidiaries.* An insured State bank may acquire or retain an equity investment in a subsidiary of which the bank is a majority owner, provided that the subsidiary is engaging in activities that are allowed pursuant to the provisions of or by application under §362.4(b).

(ii) *Investments in qualified housing projects.* An insured State bank may invest as a limited partner in a partnership, or as a noncontrolling interest holder of a limited liability company, the sole purpose of which is to invest in the acquisition, rehabilitation, or new construction of a qualified housing project, provided that the bank's aggregate investment (including legally binding commitments) does not exceed, when made, 2 percent of total assets as of the date of the bank's most recent consolidated report of condition prior to making the investment. For the purposes of this paragraph (a)(2)(ii), *Aggregate investment* means the total book value of the bank's investment in the real estate calculated in accordance with the instructions for the preparation of the consolidated report of condition. *Qualified housing project* means residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment including any project that has received an award of low income housing tax credits under section 42 of the Internal Revenue Code (26 U.S.C. 42) (such as a reservation or allocation of credits) from a State or local housing credit agency. A residential real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code will qualify under this exception if 50 percent or

more of the housing units are to be occupied by lower income persons. A project 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. *Lower income* has the same meaning as ''low income'' and ''moderate income'' as defined for the purposes of § 345.12(n)(1) and (2) of this chapter.

(iii) *Grandfathered investments in common or preferred stock; shares of investment companies.* (A) *General.* An insured State bank that is located in a State which as of September 30, 1991, authorized investment in:

(*1*)(*i*) Common or preferred stock listed on a national securities exchange (listed stock); or

(*ii*) Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (registered shares); and

(*2*) Which during the period beginning on September 30, 1990, and ending on November 26, 1991, made or maintained an investment in listed stock or registered shares, may retain whatever lawfully acquired listed stock or registered shares it held and may continue to acquire listed stock and/or registered shares, provided that the bank files a notice in accordance with section 24(f)(6) of the Federal Deposit Insurance Act in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122 of this chapter. Approval will be granted only if the FDIC determines that acquiring or retaining the stock or shares does not pose a significant risk to the appropriate deposit insurance fund. Approval may be subject to whatever conditions or restrictions the FDIC determines are necessary or appropriate.

(B) *Loss of grandfather exception.* The exception for grandfathered investments under paragraph (a)(2)(iii)(A) of this section shall no longer apply if the bank converts its charter or the bank or its parent holding company undergoes a change in control. If any of these events occur, the bank may retain its existing investments unless directed by the FDIC or other applicable authority to divest the listed stock or registered shares.

(C) *Maximum permissible investment.* A bank's aggregate investment in listed stock and registered shares under paragraph (a)(2)(iii)(A) of this section shall in no event exceed, when made, 100 percent of the bank's tier one capital as measured on the bank's most recent consolidated report of condition (call report) prior to making any such investment. The lower of the bank's cost as determined in accordance with call report instructions or the market value of the listed stock and shares shall be used to determine compliance. The FDIC may determine when acting upon a notice filed in accordance with paragraph (a)(2)(iii)(A)(*2*) of this section that the permissible limit for any particular insured State bank is something less than 100 percent of tier one capital.

(iv) *Stock investment in insured depository institutions owned exclusively by other banks and savings associations.* An insured State bank may acquire or retain the stock of an insured depository institution if the insured depository institution engages only in activities permissible for national banks; the insured depository institution is subject to examination and regulation by a State bank supervisor; the voting stock is owned by 20 or more insured depository institutions, but no one institution owns more than 15 percent of the voting stock; and the insured depository institution's stock (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees) is owned only by insured depository institutions.

(v) *Stock investment in insurance companies*—(A) *Stock of director and officer liability insurance company.* An insured State bank may acquire and retain up to 10 percent of the outstanding stock of a corporation that solely provides or reinsures directors', trustees', and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions.

(B) *Stock of savings bank life insurance company.* An insured State bank located in Massachusetts, New York, or

Connecticut may own stock in a savings bank life insurance company, provided that the savings bank life insurance company provides written disclosures to purchasers or potential purchasers of life insurance policies, other insurance products, and annuities that are consistent with the disclosures described in the Interagency Statement on the Retail Sale of Nondeposit Investment Products (FIL–9–94,[1] February 17, 1994) or any successor requirement which indicates that the policies, products, and annuities are not FDIC insured deposits, are not guaranteed by the bank and are subject to investment risks, including possible loss of the principal amount invested.

(b) *Activities other than equity investments*—(1) *Prohibited activities.* An insured State bank may not directly or indirectly engage as principal in any activity, that is not an equity investment, and is of a type not permissible for a national bank unless one of the exceptions in paragraph (b)(2) of this section applies.

(2) *Exceptions*—(i) *Consent obtained through application.* An insured State bank that meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency may conduct activities prohibited by paragraph (b)(1) of this section if the bank obtains the FDIC's prior written consent. Consent will be given only if the FDIC determines that the activity poses no significant risk to the affected deposit insurance fund. Applications for consent should be filed in accordance with § 303.121 of this chapter and will be processed under § 303.122(b) of this chapter. Approvals granted under § 303.122(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect 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 and other applicable law.

(ii) *Insurance underwriting*—(A) *Savings bank life insurance.* An insured State bank that is located in Massachusetts, New York or Connecticut may provide as principal savings bank life insurance through a department of the bank, provided that the department meets the core standards of paragraph (c) of this section or submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter, and the department provides purchasers or potential purchasers of life insurance policies, other insurance products and annuities written disclosures that are consistent with the disclosures described in the Interagency Statement on the Retail Sale of Nondeposit Investment Products (FIL–9–94, February 17, 1994) and any successor requirement which indicates that the policies, products and annuities are not FDIC insured deposits, are not guaranteed by the bank, and are subject to investment risks, including the possible loss of the principal amount invested.

(B) *Federal crop insurance.* Any insured State bank that was providing insurance as principal 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.

(C) *Grandfathered insurance underwriting.* A well-capitalized insured State bank that on November 21, 1991, was lawfully providing insurance as principal through a department of the bank may continue to provide the same types of insurance as principal to the residents of the State or States in which the bank did so on such date provided that the bank's department meets the core standards of paragraph (c) of this section, or submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter.

(iii) *Acquiring and retaining adjustable rate and money market preferred stock.* (A) An insured State bank's investment of up to 15 percent of the bank's tier one capital in adjustable rate preferred stock or money market (auction rate) preferred stock does not represent a significant risk to the deposit insurance funds. An insured State bank may

[1] Financial institution letters (FILs) are available in the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C. 20429.

conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(B) An insured State bank may acquire or retain other instruments of a type determined by the FDIC to have the character of debt securities and not to represent a significant risk to the deposit insurance funds. Such instruments shall be included in the 15 percent of tier one capital limit imposed in paragraph (b)(2)(iii)(A) of this section. An insured State bank may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(c) *Core standards.* For any insured State bank to be eligible to conduct insurance activities listed in paragraph (b)(2)(ii)(A) or (C) of this section, the bank must conduct the activities in a department that meets the following core separation and operating standards:

(1) The department is physically distinct from the remainder of the bank;

(2) The department maintains separate accounting and other records;

(3) The department has assets, liabilities, obligations and expenses that are separate and distinct from those of the remainder of the bank;

(4) The department is subject to State statute that requires its obligations, liabilities and expenses be satisfied only with the assets of the department; and

(5) The department informs its customers that only the assets of the department may be used to satisfy the obligations of the department.

§ 362.4 Subsidiaries of insured State banks.

(a) *Prohibition.* A subsidiary of an insured State bank may not engage as principal in any activity that is not of a type permissible for a subsidiary of a national bank, unless it meets one of the exceptions in paragraph (b) of this section.

(b) *Exceptions*—(1) *Consent obtained through application.* A subsidiary of an insured State bank may conduct otherwise prohibited activities if the bank obtains the FDIC's prior written consent and the insured State bank meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency. Consent will be given only if the FDIC determines that the activity poses no significant risk to the affected deposit insurance fund. Applications for consent should be filed in accordance with § 303.121 of this chapter and will be processed under § 303.122(b) of this chapter. Approvals granted under § 303.122(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect 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 and other applicable law.

(2) *Grandfathered insurance underwriting subsidiaries.* A subsidiary of an insured State bank may:

(i) Engage in grandfathered insurance underwriting if the insured State bank or its subsidiary on November 21, 1991, was lawfully providing insurance as principal. The subsidiary may continue to provide the same types of insurance as principal to the residents of the State or states in which the bank or subsidiary did so on such date provided that:

(A)(*1*) The bank meets the capital requirements of paragraph (e) of this section; and

(*2*) The subsidiary is an ''eligible subsidiary'' as described in paragraph (c)(2) of this section; or

(B) The bank submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter.

(ii) Continue to provide as principal title insurance, provided 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 neither the bank nor its parent holding company undergoes a change in control.

(iii) May continue to provide as principal insurance which is reinsured in whole or in part by the Federal Crop Insurance Corporation if the subsidiary was engaged in the activity on or before September 30, 1991.

(3) *Majority-owned subsidiaries' ownership of equity investments that represent a control interest in a company.* The FDIC has determined that investment in the following by a majority-owned subsidiary of an insured State bank does not represent a significant risk to the deposit insurance funds:

(i) Equity investment in a company engaged in real estate or securities activities authorized in paragraph (b)(5) of this section if the bank complies with the following restrictions and files a notice in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activity if the facts and circumstances warrant such action. If changes to the management or business plan of the company at any time result in material changes to the nature of the company's business or the manner in which its business is conducted, the insured State bank shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. Investment under this paragraph is authorized if:

(A) The majority-owned subsidiary controls the company;

(B) The bank meets the core eligibility criteria of paragraph (c)(1) of this section;

(C) The majority-owned subsidiary meets the core eligibility criteria of paragraph (c)(2) of this section (including any modifications thereof applicable under paragraph (b)(5)(i) of this section), or the company is a corporation meeting such criteria;

(D) The bank's transactions with the majority-owned subsidiary, and the bank's transactions with the company, comply with the investment and transaction limits of paragraph (d) of this section;

(E) The bank complies with the capital requirements of paragraph (e) of this section with respect to the majority-owned subsidiary and the company; and

(F) To the extent the company is engaged in securities activities authorized by paragraph (b)(5)(ii) of this section, the bank and the company comply with the additional requirements therein as if the company were a majority-owned subsidiary.

(ii) Equity securities of a company engaged in the following activities, if the majority-owned subsidiary controls the company or the company is controlled by insured depository institutions, and the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The FDIC consents that a majority-owned subsidiary may conduct such activity without first obtaining the FDIC's consent. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action:

(A) Any activity that is permissible for a national bank, including such permissible activities that may require the company to register as a securities broker;

(B) Acting as an insurance agency;

(C) Engaging in any activity permissible for an insured State bank under § 362.3(b)(2)(iii) to the same extent permissible for the insured bank thereunder, so long as instruments held under this paragraph (b)(3)(ii)(C), paragraph (b)(7) of this section, and § 362.3(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.3(b)(2)(iii);

(D) Engaging in any activity permissible for a majority-owned subsidiary of an insured State bank under paragraph (b)(6) of this section to the same extent and manner permissible for the majority-owned subsidiary thereunder; and

(4) *Majority-owned subsidiary's ownership of certain securities that do not represent a control interest*—(i) *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(a)(2)(iii) 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(a)(2)(iii) are met.

(ii) *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.

(5) *Majority-owned subsidiaries conducting real estate investment activities and securities underwriting.* The FDIC has determined that the following activities do not represent a significant risk to the deposit insurance funds, provided that the activities are conducted by a majority-owned subsidiary of an insured State bank in compliance with the core eligibility requirements listed in paragraph (c) of this section; any additional requirements listed in paragraph (b)(5) (i) or (ii) of this section; the bank complies with the investment and transaction limitations of paragraph (d) of this section; and the bank meets the capital requirements of paragraph (e) of this section. The FDIC consents that these listed activities may be conducted by a majority-owned subsidiary of an insured State bank if the bank files a notice in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activities if the facts and circumstances warrant such action. If changes to the management or business plan of the majority-owned subsidiary at any time result in material changes to the nature of the majority-owned subsidiary's business or the manner in which its business is conducted, the insured State bank shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. Such a majority-owned subsidiary may:

(i) *Real estate investment activities.* Engage in real estate investment activities. However, the requirements of paragraph (c)(2) (ii), (v), (vi), and (xi) of this section need not be met if the bank's investment in the equity securities of the subsidiary does not exceed 2 percent of the bank's tier one capital; the bank has only one subsidiary engaging in real estate investment activities; and the bank's total investment in the subsidiary does not include any extensions of credit from the bank to the subsidiary, any debt instruments issued by the subsidiary, or any other transaction originated by the bank that is used to benefit the subsidiary.

(ii) *Securities activities.* Engage in the public sale, distribution or underwriting of securities that are not permissible for a national bank under section 16 of the Banking Act of 1933 (12 U.S.C. 24 Seventh), provided that the following additional conditions are, and continue to be, met:

(A) The state-chartered depository institution adopts policies and procedures, including appropriate limits on exposure, to govern the institution's participation in financing transactions underwritten or arranged by an underwriting majority-owned subsidiary;

(B) The state-chartered depository institution may not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by a majority-owned subsidiary unless the state-chartered depository institution notifies the customer that the majority-owned subsidiary is underwriting or distributing the security;

(C) The majority-owned subsidiary is registered with the Securities and Exchange Commission, is a member in good standing with the appropriate self-regulatory organization, and promptly informs the appropriate regional director (DOS) in writing of any material actions taken against the majority-owned subsidiary or any of its employees by the State, the appropriate self-regulatory organizations or

the Securities and Exchange Commission; and

(D) The state-chartered depository institution does not knowingly purchase as principal or fiduciary during the existence of any underwriting or selling syndicate any securities underwritten by the majority-owned subsidiary unless the purchase is approved by the state-chartered depository institution's board of directors before the securities are initially offered for sale to the public.

(6) *Real estate leasing.* A majority-owned subsidiary of an insured State bank acting as lessor under a real property lease which is the equivalent of a financing transaction, meeting the lease criteria of paragraph (b)(6)(i) of this section and the underlying real estate requirements of paragraph (b)(6)(ii) of this section, does not represent a significant risk to the deposit insurance funds. A majority-owned subsidiary may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action.

(i) *Lease criteria*—(A) *Capital lease.* The lease must qualify as a capital lease as to the lessor under generally accepted accounting principles.

(B) *Nonoperating basis.* The bank and the majority-owned subsidiary shall not, directly or indirectly, provide or be obligated to provide servicing, repair, or maintenance to the property, except that the lease may include provisions permitting the subsidiary to protect the value of the leased property in the event of a change in circumstances that increases the subsidiary's exposure to loss, or the subsidiary may take reasonable and appropriate action to salvage or protect the value of the leased property in such circumstances.

(ii) *Underlying real property requirements*—(A) *Acquisition.* The majority-owned subsidiary may acquire specific real estate to be leased only after the subsidiary has entered into:

(*1*) A lease meeting the requirements of paragraph (b)(6)(i) of this section;

(*2*) A legally binding written commitment to enter into such a lease; or

(*3*) A legally binding written agreement that indemnifies the subsidiary against loss in connection with its acquisition of the property.

(B) *Improvements.* Any expenditures by the majority-owned subsidiary to make reasonable repairs, renovations, and improvements necessary to render the property suitable to the lessee shall not exceed 25 percent of the majority-owned subsidiary's full investment in the real estate.

(C) *Divestiture.* At the expiration of the initial lease (including any renewals or extensions thereof), the majority-owned subsidiary shall, as soon as practicable but in any event no less than two years, either:

(*1*) Re-lease the property under a lease meeting the requirement of paragraph (b)(6)(i)(B) of this section; or

(*2*) Divest itself of all interest in the property.

(7) *Acquiring and retaining adjustable rate and money market preferred stock and similar instruments.* The FDIC has determined it does not present a significant risk to the deposit insurance funds for a majority-owned subsidiary of an insured State bank to engage in any activity permissible for an insured State bank under § 362.3(b)(2)(iii), so long as instruments held under this paragraph, paragraph (b)(3)(ii)(C) of this section, and § 362.3(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.3(b)(2)(iii). A majority-owned subsidiary may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action.

(c) *Core eligibility requirements.* If specifically required by this part or by

FDIC order, any state-chartered depository institution that wishes to be eligible and continue to be eligible to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank must be an ''eligible depository institution'' and the subsidiary must be an ''eligible subsidiary''.

(1) A state-chartered depository institution is an ''eligible depository institution'' if it:

(i) Has been chartered and operating for three or more years, unless the appropriate regional director (DOS) finds that the state-chartered depository institution is owned by an established, well-capitalized, well-managed holding company or is managed by seasoned management;

(ii) Has an FDIC-assigned composite rating of 1 or 2 assigned under the Uniform Financial Institutions Rating System (UFIRS) (or such other comparable rating system as may be adopted in the future) as a result of its most recent Federal or State examination for which the FDIC assigned a rating;

(iii) Received a rating of 1 or 2 under the ''management'' component of the UFIRS as assigned by the institution's appropriate Federal banking agency;

(iv) Has a satisfactory or better Community Reinvestment Act rating at its most recent examination conducted by the institution's appropriate Federal banking agency;

(v) Has a compliance rating of 1 or 2 at its most recent examination conducted by the institution's appropriate Federal banking agency; and

(vi) Is not subject to a cease and desist order, consent order, prompt corrective action directive, formal or informal written agreement, or other administrative agreement with its appropriate Federal banking agency or chartering authority.

(2) A subsidiary of a state-chartered depository institution is an ''eligible subsidiary'' if it:

(i) Meets applicable statutory or regulatory capital requirements and has sufficient operating capital in light of the normal obligations that are reasonably foreseeable for a business of its size and character within the industry;

(ii) Is physically separate and distinct in its operations from the operations of the state-chartered depository institution, provided that this requirement shall not be construed to prohibit the state-chartered depository institution and its subsidiary from sharing the same facility if the area where the subsidiary conducts business with the public is clearly distinct from the area where customers of the state-chartered depository institution conduct business with the institution. The extent of the separation will vary according to the type and frequency of customer contact;

(iii) Maintains separate accounting and other business records;

(iv) Observes separate business entity formalities such as separate board of directors' meetings;

(v) Has a chief executive officer of the subsidiary who is not an employee of the institution;

(vi) Has a majority of its board of directors who are neither directors nor officers of the state-chartered depository institution;

(vii) 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 state-chartered depository institution and that the state-chartered depository institution is not responsible for and does not guarantee the obligations of the subsidiary;

(viii) Has only one business purpose within the types described in paragraphs (b)(2) and (b)(5) of this section;

(ix) Has a current written business plan that is appropriate to the type and scope of business conducted by the subsidiary;

(x) Has qualified management and employees for the type of activity contemplated, including all required licenses and memberships, and complies with industry standards; and

(xi) Establishes policies and procedures to ensure adequate computer, audit and accounting systems, internal risk management controls, and has necessary operational and managerial infrastructure to implement the business plan.

(d) *Investment and transaction limits*—(1) *General.* If specifically required by this part or FDIC order, the following conditions and restrictions apply to an

insured State bank and its subsidiaries that engage in and wish to continue to engage in activities which are not permissible for a national bank subsidiary.

(2) *Investment limits*—(i) *Aggregate investment in subsidiaries.* An insured state bank's aggregate investment in all subsidiaries conducting activities subject to this paragraph (d) shall not exceed 20 percent of the insured State bank's tier one capital.

(ii) *Definition of investment.* (A) For purposes of this paragraph (d), the term ''investment'' means:

(*1*) Any extension of credit to the subsidiary by the insured State bank;

(*2*) Any debt securities, as such term is defined in part 344 of this chapter, issued by the subsidiary held by the insured State bank;

(*3*) The acceptance by the insured State bank of securities issued by the subsidiary as collateral for an extension of credit to any person or company; and

(*4*) Any extensions of credit by the insured State bank to any third party for the purpose of making a direct investment in the subsidiary, making any investment in which the subsidiary has an interest, or which is used for the benefit of, or transferred to, the subsidiary.

(B) For the purposes of this paragraph (d), the term ''investment'' does not include:

(*1*) Extensions of credit by the insured State bank to finance sales of assets by the subsidiary which do not involve more than the normal degree of risk of repayment and are extended on terms that are substantially similar to those prevailing at the time for comparable transactions with or involving unaffiliated persons or companies;

(*2*) An extension of credit by the insured State bank to the subsidiary that is fully collateralized by government securities, as such term is defined in § 344.3 of this chapter; or

(*3*) An extension of credit by the insured State bank to the subsidiary that is fully collateralized by a segregated deposit in the insured State bank.

(3) *Transaction requirements*—(i) *Arm's length transaction requirement.* With the exception of giving the subsidiary immediate credit for uncollected items received in the ordinary course of business, an insured State bank may not carry out any of the following transactions with a subsidiary subject to this paragraph (d) unless the transaction is on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with unaffiliated parties:

(A) Make an investment in the subsidiary;

(B) Purchase from or sell to the subsidiary any assets (including securities);

(C) Enter into a contract, lease, or other type of agreement with the subsidiary;

(D) Pay compensation to a majority-owned subsidiary or any person or company who has an interest in the subsidiary; or

(E) Engage in any such transaction in which the proceeds thereof are used for the benefit of, or are transferred to, the subsidiary.

(ii) *Prohibition on purchase of low quality assets.* An insured State bank is prohibited from purchasing a low quality asset from a subsidiary subject to this paragraph (d). For purposes of this subsection, ''low quality asset'' means:

(A) An asset classified as ''substandard'', ''doubtful'', or ''loss'' or treated as ''other assets especially mentioned'' in the most recent report of examination of the bank;

(B) An asset in a nonaccrual status;

(C) An asset on which principal or interest payments are more than 30 days past due; or

(D) An asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(iii) *Insider transaction restriction.* Neither the insured State bank nor the subsidiary subject to this paragraph (d) may enter into any transaction (exclusive of those covered by § 337.3 of this chapter) with the bank's executive officers, directors, principal shareholders or related interests of such persons which relate to the subsidiary's activities unless:

(A) The transactions are on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with

persons not affiliated with the insured State bank; or

(B) The transactions are pursuant to a benefit or compensation program that is widely available to employees of the bank, and that does not give preference to the bank's executive officers, directors, principal shareholders or related interests of such persons over other bank employees.

(iv) *Anti-tying restriction.* Neither the insured State bank nor the majority-owned subsidiary may require a customer to either buy any product or use any service from the other as a condition of entering into a transaction.

(4) *Collateralization requirements.* (i) An insured State bank is prohibited from making an investment in a subsidiary subject to this paragraph (d) unless such transaction is fully-collateralized at the time the transaction is entered into. No insured State bank may accept a low quality asset as collateral. An extension of credit is fully collateralized if it is secured at the time of the transaction by collateral having a market value equal to at least:

(A) 100 percent of the amount of the transaction if the collateral is composed of:

(*1*) Obligations of the United States or its agencies;

(*2*) Obligations fully guaranteed by the United States or its agencies as to principal and interest;

(*3*) Notes, drafts, bills of exchange or bankers acceptances that are eligible for rediscount or purchase by the Federal Reserve Bank; or

(*4*) A segregated, earmarked deposit account with the insured State bank;

(B) 110 percent of the amount of the transaction if the collateral is composed of obligations of any State or political subdivision of any State;

(C) 120 percent of the amount of the transaction if the collateral is composed of other debt instruments, including receivables; or

(D) 130 percent of the amount of the transaction if the collateral is composed of stock, leases, or other real or personal property.

(ii) An insured State bank may not release collateral prior to proportional payment of the extension of credit; however, collateral may be substituted if there is no diminution of collateral coverage.

(5) *Investment and transaction limits extended to insured State bank subsidiaries.* For purposes of applying paragraphs (d)(2) through (d)(4) of this section, any reference to ''insured State bank'' means the insured State bank and any subsidiaries of the insured State bank which are not themselves subject under this part or FDIC order to the restrictions of this paragraph (d).

(e) *Capital requirements.* If specifically required by this part or by FDIC order, any insured State bank that wishes to conduct or continue to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank must:

(1) Be well-capitalized after deducting from its tier one capital the investment in equity securities of the subsidiary as well as the bank's pro rata share of any retained earnings of the subsidiary;

(2) Reflect this deduction on the appropriate schedule of the bank's consolidated report of income and condition; and

(3) Use such regulatory capital amount for the purposes of the bank's assessment risk classification under part 327 of this chapter and its categorization as a ''well-capitalized'', an ''adequately capitalized'', an ''undercapitalized'', or a ''significantly undercapitalized'' institution as defined in § 325.103(b) of this chapter, provided that the capital deduction shall not be used for purposes of determining whether the bank is ''critically undercapitalized'' under part 325 of this chapter.

§ 362.5 Approvals previously granted.

(a) *FDIC consent by order or notice.* An insured State bank that previously filed an application or notice under part 362 in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), and obtained the FDIC's consent to engage in an activity or to acquire or retain a majority-owned subsidiary engaging as principal in an activity or acquiring and retaining any investment that is prohibited under this subpart may continue that activity or retain that investment

without seeking the FDIC's consent, provided that the insured State bank and its subsidiary, if applicable, continue to meet the conditions and restrictions of the approval. An insured State bank which was granted approval based on conditions which differ from the requirements of § 362.4(c)(2), (d) and (e) will be considered to meet the conditions and restrictions of the approval relating to being an eligible subsidiary, meeting investment and transactions limits, and meeting capital requirements if the insured State bank and subsidiary meet the requirements of § 362.4(c)(2), (d) and (e). If the majority-owned subsidiary is engaged in real estate investment activities not exceeding 2 percent of the tier one capital of a bank and meeting the other conditions of § 362.4(b)(5)(i), the majority-owned subsidiary's compliance with § 362.4(c)(2) under the preceding sentence may be pursuant to the modifications authorized by § 362.4(b)(5)(i). Once an insured State bank elects to comply with § 362.4 (c)(2), (d), and (e), it may not revert to the corresponding provisions of the approval order.

(b) *Approvals by regulation*—(1) *Securities underwriting.* If an insured state nonmember bank engages in securities activities covered by § 362.4(b)(5)(ii), and prior to January 1, 1999, engaged in securities activities under and in compliance with the restrictions of § 337.4 (b) through (c), § 337.4(e), or § 337.4(h) of this chapter, having filed the required notice under § 337.4(d) of this chapter, the insured State bank may continue those activities if the bank and its majority-owned subsidiaries comply with the restrictions set forth in §§ 362.4(b)(5)(ii) and 362.4 (c), (d), and (e) by January 1, 2000. During the one-year period of transition between January 1, 1999, and January 1, 2000, the bank and its majority-owned subsidiary must meet the restrictions set forth in § 337.4 of this chapter until the requirements of §§ 362.4(b)(5)(ii) and 362.4 (c), (d) and (e) are met. If the bank will not meet these requirements, the bank must obtain the FDIC's consent to continue those activities under § 362.4(b)(1).

(2) *Grandfathered insurance underwriting.* An insured State bank which is directly providing insurance as principal pursuant to § 362.4(c)(2)(i) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), may continue that activity if it complies with the provisions of § 362.3(b)(2)(ii)(C) by April 1, 1999. An insured State bank indirectly providing insurance as principal through a subsidiary pursuant to § 362.3(b)(7) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), may continue that activity if it complies with the provisions of § 362.4(b)(2)(i) by April 1, 1999. During the ninety-day period of transition between January 1, 1999 and April 1, 1999, the bank and its majority-owned subsidiary must meet the restrictions set forth in § 362.4(c)(2)(i) or § 362.3(b)(7) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), as applicable, until the requirements of § 362.3(b)(2)(ii)(C) or § 362.4(b)(2)(i) are met. If the insured State bank or its subsidiary will not meet these requirements, as applicable, the insured State bank must submit an application in compliance with § 303.121 of this chapter and obtain the FDIC's consent in accordance with § 303.122(b) of this chapter.

(3) *Stock of certain corporations.* An insured State bank owning indirectly through a majority-owned subsidiary stock of a corporation that engages solely in activities permissible for a bank service corporation pursuant to § 362.4(c)(3)(iv)(C) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), or stock of a corporation which engages solely in activities which are not ''as principal'' pursuant to § 362.4(c)(3)(iv)(D) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), may continue that activity if it complies with the provisions of § 362.4(b)(3) by April 1, 1999. During the ninety-day period of transition between January 1, 1999 and April 1, 1999, the bank and its majority-owned subsidiary must meet the restrictions set forth in § 362.4(c)(3)(iv)(C) or § 362.4(c)(3)(iv)(D) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), as applicable, until the requirements of § 362.4(b)(3) are met. If the insured State bank or its subsidiary will not meet these requirements, as applicable, the insured State bank must

apply for the FDIC's consent under § 362.4(b)(1).

(4) [Reserved]

(5) [Reserved]

(6) *Adjustable rate or money market preferred stock.* An insured State bank owning adjustable rate or money market (auction rate) preferred stock pursuant to § 362.4(c)(3)(v) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), in excess of the amount limit in § 362.3(b)(2)(iii) may continue to hold any overlimit shares of such stock acquired before January 1, 1999, until redeemed or repurchased by the issuer, but such stock shall be included as part of the amount limit in § 362.3(b)(2)(iii) when determining whether the bank may acquire new stock thereunder.

(c) *Charter conversions.* (1) An insured State bank that has converted its charter from an insured state savings association may continue activities through a majority-owned subsidiary that were permissible prior to the time it converted its charter only if the insured State bank receives the FDIC's consent. Except as provided in paragraph (c)(2) of this section, the insured State bank should apply under § 362.4(b)(1), submit any notice required under § 362.4(b) (4) or (5), or comply with the provisions of § 362.4(b) (3), (6), or (7) if applicable, to continue the activity.

(2) *Exception for prior consent.* If the FDIC had granted consent to the savings association under section 28 of the Federal Deposit Insurance Act (12 U.S.C. 1831(e)) prior to the time the savings association converted its charter, the insured State bank may continue the activities without providing notice or making application to the FDIC, provided that the bank and its subsidiary as applicable are in compliance with:

(i) The terms of the FDIC approval order; and

(ii) The provisions of § 362.4(c)(2), (d), and (e) regarding operating as an ''eligible subsidiary'', ''investment and transaction limits'', and ''capital requirements'.

(3) *Divestiture.* An insured State bank that does not receive FDIC consent shall divest of the nonconforming investment as soon as practical but in no event later than two years from the date of charter conversion.

Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

§ 362.6 Purpose and scope.

This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter apply to certain banking practices that may have adverse effects on the safety and soundness of insured state nonmember banks. The FDIC intends to allow insured state nonmember banks and their subsidiaries to undertake only safe and sound activities and investments that would not present a significant risk to the deposit insurance fund and that are consistent with the purposes of Federal deposit insurance and other law. The following standards shall apply for insured state nonmember banks to conduct real estate investment activities through a subsidiary if those activities are permissible for a national bank subsidiary but are not permissible for the national bank parent itself. Additionally, the following standards shall apply to affiliates of insured state nonmember banks that are not affiliated with a bank holding company if those affiliates engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities.

§ 362.7 Definitions.

For the purposes of this subpart, the following definitions apply:

(a) *Affiliate* shall mean any company that directly or indirectly, through one or more intermediaries, controls or is under common control with an insured state nonmember bank, but does not include a subsidiary of an insured state nonmember bank.

(b) *Activity, company, control, equity security, insured state nonmember bank, real estate investment activity, security,* and *subsidiary* have the same meaning as provided in subpart A of this part.

§ 362.8 Restrictions on activities of insured state nonmember banks.

(a) *Real estate investment activities by subsidiaries of insured state nonmember*

banks. The FDIC has found that real estate investment activities may have adverse effects on the safety and soundness of insured state nonmember banks. Notwithstanding any interpretations, orders, circulars or official bulletins issued by the Office of the Comptroller of the Currency regarding activities permissible for subsidiaries of a national bank that are not permissible for the parent national bank itself under 12 CFR 5.34(f), insured state nonmember banks may not establish or acquire a subsidiary that engages in such real estate investment activities unless the insured state nonmember bank:

(1) Has an approval previously granted by the FDIC and continues to meet the conditions and restrictions of the approval; or

(2) Meets the requirements for engaging in real estate investment activities as set forth in § 362.4(b)(5), and submits a corresponding notice in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122(a) of this chapter; or submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedure in § 303.122(b) of this chapter.

(b) *Affiliation with securities companies.* The FDIC has found that an unrestricted affiliation between an insured state nonmember bank and a securities company may have adverse effects on the safety and soundness of insured state nonmember banks. An insured state nonmember bank which is affiliated with a company that is not treated as a bank holding company pursuant to section 4(f) of the Bank Holding Company Act (12 U.S.C. 1843(f)) is prohibited from becoming or remaining affiliated with any company that directly engages in the public sale, distribution or underwriting of stocks, bonds, debentures, notes, or other securities which is not permissible for a national bank unless it submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedure in § 303.122(b) of this chapter, or:

(1) The securities business of the affiliate is physically separate and distinct in its operations from the operations of the bank, provided that this requirement shall not be construed to prohibit the bank and its affiliate from sharing the same facility if the area where the affiliate conducts retail sales activity with the public is physically distinct from the routine deposit taking area of the bank;

(2) The affiliate has a chief executive officer who is not an employee of the bank;

(3) A majority of the affiliate's board of directors are not directors, officers, or employees of the bank;

(4) 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 the state-chartered depository institution is not responsible for and does not guarantee the obligations of the affiliate;

(5) The bank adopts policies and procedures, including appropriate limits on exposure, to govern its participation in financing transactions underwritten by an underwriting affiliate;

(6) The bank does not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by an affiliate unless it notifies the customer that the entity underwriting, making a market, distributing or dealing in the securities is an affiliate of the bank;

(7) The bank does not purchase as principal or fiduciary during the existence of any underwriting or selling syndicate any securities underwritten by the affiliate unless the purchase is approved by the bank's board of directors before the securities are initially offered for sale to the public;

(8) The bank does not condition any extension of credit to any company on the requirement that the company contract with, or agree to contract with, the bank's affiliate to underwrite or distribute the company's securities;

(9) The bank does not condition any extension of credit or the offering of any service to any person or company on the requirement that the person or company purchase any security underwritten or distributed by the affiliate; and

(10) The bank complies with the investment and transaction limitations

of § 362.4(d). For the purposes of applying these restrictions, references to the term ''subsidiary'' in § 362.4(d)(2), (3), and (4) shall be deemed to refer to the affiliate. For the purposes of applying these limitations, the term ''investment'' as defined in § 362.4(d)(2)(ii) shall also include any equity securities of the affiliate held by the insured State bank.

Subpart C—Activities of Insured State Savings Associations

§ 362.9 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart H of part 303 of this chapter, implements the provisions of section 28 of the Federal Deposit Insurance Act (12 U.S.C. 1831e) that restrict and prohibit insured state savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for Federal savings associations and their service corporations. The phrase ''activity permissible for a Federal savings association'' means any activity authorized for Federal savings associations under any statute including the Home Owners' Loan Act (HOLA, 12 U.S.C. 1464 *et seq.*), as well as activities recognized as permissible for a Federal savings association in regulations, official thrift bulletins, orders or written interpretations issued by the Office of Thrift Supervision (OTS), or its predecessor, the Federal Home Loan Bank Board.

(b) This subpart does not cover the following activities:

(1) Activities conducted by the insured state savings association other than ''as principal'', defined for purposes of this subpart as activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, or conducted as trustee, or in any substantially similar capacity. For example, this subpart does not cover acting solely as agent for the sale of insurance, securities, real estate, or travel services; nor does it cover acting as trustee, providing personal financial planning advice, or safekeeping services.

(2) Interests in real estate in which the real property is used or intended in good faith to be used within a reasonable time by an insured savings association or its service corporations as offices or related facilities for the conduct of its business or future expansion of its business or used as public welfare investments of a type and in an amount permissible for Federal savings associations.

(3) Equity investments acquired in connection with debts previously contracted (DPC) if the insured savings association or its service corporation takes only such actions as would be permissible for a Federal savings association's or its service corporation's DPC holdings.

(c) The FDIC intends to allow insured state savings associations and their service corporations to undertake only safe and sound activities and investments that do not present significant risks to the deposit insurance funds and that are consistent with the purposes of Federal deposit insurance and other applicable law. This subpart does not authorize any insured state savings association to make investments or conduct activities that are not authorized or that are prohibited by either Federal or state law.

§ 362.10 Definitions.

For the purposes of this subpart, the definitions provided in § 362.2 apply. Additionally, the following definitions apply to this subpart:

(a) *Affiliate* shall mean any company that directly or indirectly, through one or more intermediaries, controls or is under common control with an insured state savings association.

(b) *Corporate debt securities not of investment grade* means 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 HOLA (12 U.S.C. 1464(c)(1) (D), (E), (F)).

(c) *Insured state savings association* means any state-chartered savings association insured by the FDIC.

(d) *Qualified affiliate* means, in the case of a stock insured state savings association, an affiliate other than a subsidiary or an insured depository institution. In the case of a mutual savings association, ''qualified affiliate'' means a subsidiary other than an insured depository institution provided that all of the savings association's investments in, and extensions of credit to, the subsidiary are deducted from the savings association's capital.

(e) *Service corporation* means any corporation the capital stock of which is available for purchase by savings associations.

§ 362.11 Activities of insured state savings associations.

(a) *Equity investments*—(1) *Prohibited investments.* No insured state savings association may directly acquire or retain as principal any equity investment of a type, or in an amount, that is not permissible for a Federal savings association unless the exception in paragraph (a)(2) of this section applies.

(2) *Exception: Equity investment in service corporations.* An insured state savings association that is and continues to be in compliance with the applicable capital standards as prescribed by the appropriate Federal banking agency may acquire or retain an equity investment in a service corporation:

(i) Not permissible for a Federal savings association to the extent the service corporation is engaging in activities that are allowed pursuant to the provisions of or an application under § 362.12(b); or

(ii) Of a type permissible for a Federal savings association, but in an amount exceeding the investment limits applicable to Federal savings associations, if the insured state savings association obtains the FDIC's prior consent. Consent will be given only if the FDIC determines that the amount of the investment in a service corporation engaged in such activities does not present a significant risk to the affected deposit insurance fund. Applications should be filed in accordance with § 303.141 of this chapter and will be processed under § 303.142(b) of this chapter. Approvals granted under § 303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from significant risk, to prevent unsafe or unsound practices, and/or to ensure that the activity is consistent with the purposes of Federal deposit insurance and other applicable law.

(b) *Activities other than equity investments*—(1) *Prohibited activities.* An insured state savings association may not directly engage as principal in any activity, that is not an equity investment, of a type not permissible for a Federal savings association, and an insured state savings association shall not make nonresidential real property loans in an amount exceeding that described in section 5(c)(2)(B) of HOLA (12 U.S.C. 1464(c)(2)(B)), unless one of the exceptions in paragraph (b)(2) of this section applies. This section shall not be read to require the divestiture of any asset (including a nonresidential real estate loan), if the asset was acquired prior to August 9, 1989; however, any activity conducted with such asset must be conducted in accordance with this subpart. After August 9, 1989, an insured state savings association directly or through a subsidiary (other than, in the case of a mutual savings association, a subsidiary that is a qualified affiliate), may not acquire or retain any corporate debt securities not of investment grade.

(2) *Exceptions*—(i) *Consent obtained through application.* An insured state savings association that meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency may directly conduct activities prohibited by paragraph (b)(1) of this section if the savings association obtains the FDIC's prior consent. Consent will be given only if the FDIC determines that conducting the activity designated poses no significant risk to the affected deposit insurance fund. Applications should be filed in accordance with § 303.141 of this chapter and will be processed under § 303.142(b) of this chapter. Approvals granted under § 303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the

deposit insurance funds from significant risk, to prevent unsafe or unsound practices, and/or to ensure that the activity is consistent with the purposes of Federal deposit insurance and other applicable law.

(ii) *Nonresidential realty loans permissible for a Federal savings association conducted in an amount not permissible.* An insured state savings association that meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency may make nonresidential real property loans in an amount exceeding the amount described in section 5(c)(2)(B) of HOLA, if the savings association files a notice in compliance with § 303.141 of this chapter and the FDIC processes the notice without objection under § 303.142(a) of this chapter. Consent will be given only if the FDIC determines that engaging in such lending in the amount designated poses no significant risk to the affected deposit insurance fund.

(iii) *Acquiring and retaining adjustable rate and money market preferred stock.* (A) An insured state savings association's investment of up to 15 percent of the association's tier one capital in adjustable rate preferred stock or money market (auction rate) preferred stock does not represent a significant risk to the deposit insurance funds. An insured state savings association may conduct this activity without first obtaining the FDIC's consent, provided that the association meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(B) An insured state savings association may acquire or retain other instruments of a type determined by the FDIC to have the character of debt securities and not to represent a significant risk to the deposit insurance funds. Such instruments shall be included in the 15 percent of tier one capital limit imposed in paragraph (b)(2)(iii)(A) of this section. An insured state savings association may conduct this activity without first obtaining the FDIC's consent, provided that the association meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(3) *Activities permissible for a Federal savings association conducted in an amount not permissible.* Except as provided in paragraph (b)(2)(ii) of this section, an insured state savings association may engage as principal in any activity, which is not an equity investment of a type permissible for a Federal savings association, in an amount in excess of that permissible for a Federal savings association, if the savings association meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency, the institution has advised the appropriate regional director (DOS) under the procedure in § 303.142(c) of this chapter within thirty days before engaging in the activity, and the FDIC has not advised the insured state savings association that conducting the activity in the amount indicated poses a significant risk to the affected deposit insurance fund. This section shall not be read to require the divestiture of any asset if the asset was acquired prior to August 9, 1989; however, any activity conducted with such asset must be conducted in accordance with this subpart.

§ 362.12 Service corporations of insured state savings associations.

(a) *Prohibition.* A service corporation of an insured state savings association may not engage in any activity that is not permissible for a service corporation of a Federal savings association, unless it meets one of the exceptions in paragraph (b) of this section.

(b) *Exceptions*—(1) *Consent obtained through application.* A service corporation of an insured state savings association may conduct activities prohibited by paragraph (a) of this section if the savings association obtains the FDIC's prior written consent and the

insured state savings association meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency. Consent will be given only if the FDIC determines that the activity poses no significant risk to the affected deposit insurance fund. Applications for consent should be filed in accordance with § 303.141 of this chapter and will be processed under § 303.142(b) of this chapter. Approvals granted under § 303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect 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 and other applicable law.

(2) *Service corporations conducting unrestricted activities.* The FDIC has determined that the following activities do not represent a significant risk to the deposit insurance funds:

(i) A service corporation of an insured state savings association may acquire and retain equity securities of a company engaged in securities activities authorized in paragraph (b)(4) of this section if the bank complies with the following restrictions and files a notice in compliance with § 303.141 of this chapter and the FDIC processes the notice without objection under § 303.142(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activity if the facts and circumstances warrant such action. If changes to the management or business plan of the company at any time result in material changes to the nature of the company's business or the manner in which its business is conducted, the insured state savings association shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. Investment under this paragraph is authorized if:

(A) The service corporation controls the company;

(B) The savings association meets the core eligibility criteria of § 362.4(c)(1);

(C) The service corporation meets the core eligibility criteria of § 362.4(c)(2) (with references to the term ''subsidiary'' deemed to refer to the service corporation), or the company is a corporation meeting such criteria;

(D) The savings association's transactions with the service corporation comply with the investment and transaction limits of paragraph (c) of this section, and the savings association's transactions with the company comply with such limits as if it were a service corporation;

(E) The savings association complies with the capital requirements of paragraph (d) of this section with respect to the service corporation and the company; and

(F) The savings association and the company comply with the additional requirements of § 362.4(b)(5)(ii) (with references to the term ''majority-owned subsidiary'' deemed to refer to the company).

(ii) A service corporation of an insured state savings association may acquire and retain equity securities of a company engaged in the following activities, if the service corporation controls the company or the company is controlled by insured depository institutions, and the association continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The FDIC consents that such activity may be conducted by a service corporation of an insured state savings association without first obtaining the FDIC's consent. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(A) *Equity securities of a company that engages in permissible activities.* A service corporation may own the equity securities of a company that engages in any activity permissible for a Federal savings association.

(B) *Equity securities of a company that acquires and retains adjustable-rate and money market preferred stock.* A service corporation may own the equity securities of a company that engages in any activity permissible for an insured state savings association under § 362.11(b)(2)(iii) so long as instruments held under this paragraph (b)(2)(ii)(B), paragraph (b)(2)(iv) of this section, and

§ 362.11(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.11(b)(2)(iii).

(C) *Equity securities of a company acting as an insurance agency.* A service corporation may own the equity securities of a company that acts as an insurance agency.

(iii) *Activities that are not conducted ''as principal''.* A service corporation controlled by the insured state savings association may engage in activities which are not conducted ''as principal'' such as acting as an agent for a customer, acting in a brokerage, custodial, advisory, or administrative capacity, or acting as trustee, or in any substantially similar capacity.

(iv) *Acquiring and retaining adjustable-rate and money market preferred stock.* A service corporation may engage in any activity permissible for an insured state savings association under § 362.11(b)(2)(iii) so long as instruments held under this paragraph (b)(2)(iv), paragraph (b)(2)(ii)(B) of this section, and § 362.11(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.11(b)(2)(iii).

(3) [Reserved]

(4) *Service corporations conducting securities underwriting.* The FDIC has determined that it does not represent a significant risk to the deposit insurance funds for a service corporation to engage in the public sale, distribution or underwriting of securities provided that the activity is conducted by a service corporation of an insured state savings association in compliance with the core eligibility requirements listed in § 362.4(c); any additional requirements listed in § 362.4(b)(5)(ii); the savings association complies with the investment and transaction limitations of paragraph (c) of this section; and the savings association meets the capital requirements of paragraph (d) of this section. The FDIC consents that these listed activities may be conducted by a service corporation of an insured state savings association if the savings association files a notice in compliance with § 303.141 of this chapter and the FDIC processes the notice without objection under § 303.142(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activities if the facts and circumstances warrant such action. If changes to the management or business plan of the service corporation at any time result in material changes to the nature of the service corporation's business or the manner in which its business is conducted, the insured state savings association shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. For purposes of applying § 362.4 (b)(5)(ii) and (c) to this paragraph (b)(4), references to the terms ''subsidiary'' and ''majority-owned subsidiary'' in §§ 362.4(b)(5)(ii) and (c) shall be deemed to refer to the service corporation. For the purposes of applying § 362.4(c), references to the term ''eligible subsidiary'' in § 362.4(c) shall be deemed to refer to the eligible service corporation.

(c) Investment and transaction limits. The restrictions detailed in § 362.4(d) apply to transactions between an insured state savings association and any service corporation engaging in activities which are not permissible for a service corporation of a Federal savings association if specifically required by this part or FDIC order. For purposes of applying the investment limits in § 362.4(d)(2), the term ''investment'' includes only those items described in § 362.4(d)(2)(ii)(A) (*3*) and (*4*). For purposes of applying § 362.4(d) (2), (3), and (4) to this paragraph (c), references to the terms ''insured State bank'' and ''subsidiary'' in § 362.4(d)(2), (3), and (4), shall be deemed to refer, respectively, to the insured state savings association and the service corporation. For purposes of applying § 362.4(d)(5), references to the terms ''insured State bank'' and ''subsidiary'' in § 362.4(d)(5) shall be deemed to refer, respectively, to the insured state savings association and the service corporations or subsidiaries.

(d) *Capital requirements.* If specifically required by this part or by FDIC order, an insured state savings association that wishes to conduct as principal activities through a service corporation which are not permissible for a service corporation of a Federal savings association must:

(1) Be well-capitalized after deducting from its capital any investment in

the service corporation, both equity and debt.

(2) Use such regulatory capital amount for the purposes of the insured state savings association's assessment risk classification under part 327 of this chapter.

§362.13 Approvals previously granted.

FDIC consent by order or notice. An insured state savings association that previously filed an application and obtained the FDIC's consent to engage in an activity or to acquire or retain an investment in a service corporation engaging as principal in an activity or acquiring and retaining any investment that is prohibited under this subpart may continue that activity or retain that investment without seeking the FDIC's consent, provided the insured state savings association and the service corporation, if applicable, continue to meet the conditions and restrictions of approval. An insured state savings association which was granted approval based on conditions which differ from the requirements of §§362.4(c)(2) and 362.12 (c) and (d) will be considered to meet the conditions and restrictions of the approval if the insured state savings association and any applicable service corporation meet the requirements of §§362.4(c)(2) and 362.12 (c) and (d). For the purposes of applying §362.4(c)(2), references to the terms ''eligible subsidiary'' and ''subsidiary'' in §362.4(c)(2) shall be deemed to refer, respectively, to the eligible service corporation and the service corporation.

Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

§362.14 Purpose and scope.

This subpart implements section 18(m) of the Federal Deposit Insurance Act (12 U.S.C. 1828(m)) which requires that prior notice be given the FDIC when an insured savings association establishes or acquires a subsidiary or engages in any new activity in a subsidiary. For the purposes of this subpart, the term ''subsidiary'' does not include any insured depository institution as that term is defined in the Federal Deposit Insurance Act. Unless otherwise indicated, the definitions provided in §362.2 apply to this subpart.

§362.15 Acquiring or establishing a subsidiary; conducting new activities through a subsidiary.

No state or Federal insured savings association may establish or acquire a subsidiary, or conduct any new activity through a subsidiary, unless it files a notice in compliance with §303.142(c) of this chapter at least 30 days prior to establishment of the subsidiary or commencement of the activity and the FDIC does not object to the notice. This requirement does not apply to any Federal savings bank that was chartered prior to October 15, 1982, as a savings bank under State law or any savings association that acquired its principal assets from such an institution.

PART 363—ANNUAL INDEPENDENT AUDITS AND REPORTING REQUIREMENTS

Sec.
363.0 OMB control number.
363.1 Scope.
363.2 Annual reporting requirements.
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 report.* Such independent public accountant shall examine, attest to, and report separately on, the assertion of management concerning the institution's internal control structure and procedures for financial reporting. The attestation 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.

[58 FR 31335, June 2, 1993, as amended at 62 FR 63257, Nov. 28, 1997]

§ 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 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), 363.3(a), 363.2(b), and 363.3(b), respectively.

(b) *Public availability.* The annual report in paragraph (a) 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; 62 FR 63257, Nov. 28, 1997]

§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) in 1991.

The FDIC Board of Directors adopted 12 CFR part 363 of its rules and regulations (the Rule) to implement those provisions of section 36 that require rulemaking. The FDIC also approved these ''Guidelines and Interpretations'' (the Guidelines) and directed that they be published with the Rule to facilitate a better understanding of, and full compliance with, the provisions of section 36.

Although not contained in the Rule itself, 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.

Furthermore, upon adopting the Rule, the FDIC reiterated its belief 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 the Rule. It is recognized that reliance on the Guidelines may result in compliance with section 36 and the Rule which may vary from institution to institution. Terms which are not explained in the Guidelines have the meanings given them in the Rule, 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, or supplementally, sufficient information to enable the accountant to report on its assertion. 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 (the Designated Laws). Table 1 to this Appendix A lists the designated federal laws and regulations pertaining to insider loans and dividend restrictions that are applicable to each type of institution.

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[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 FDIC's 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; and 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,'' as amended by Statement of Auditing Standards No. 78; 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.

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 the Rule, whichever is earlier, two copies of the most recent peer review report, accompanied by any letter of comments and letter of response, should be filed by the independent public accountant (if not already on file) with the FDIC, Registration and Disclosure Section, 550 17th Street, NW., Washington, DC 20429, where they will be available for public inspection. All corrective action required under any qualified peer review report should have been taken before commencing services under this Rule.

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 Report.* The independent public accountant should provide the institution with an internal controls 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 management's assertions in one report, without reporting separately on each subsidiary covered by the Rule. The FDIC has determined that management letters are exempt from public disclosure.

19. *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.

20. *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.

21. *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)

22. *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, the Rule should be filed as follows:

(a) FDIC: Appropriate FDIC Regional Office (Supervision), i.e., the FDIC regional office in the FDIC region in which the institution is headquartered or, in the case of a subsidiary institution of a holding company, the FDIC regional office that is responsible for monitoring the consolidated company. A filing made on behalf of several covered institutions owned by the same parent holding company should be accompanied by a transmittal letter identifying all of the institutions covered.

[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*.

(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.

(e) State bank supervisor: The filing office of the appropriate State bank supervisor.

23. *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.

24. *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.

25. *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.

26. *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)

27. *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.

28. *''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.

29. *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.

30. *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.

31. *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.

32. *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.

33. *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).

34. *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.

35. *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

36. *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.

TABLE 1 TO APPENDIX A

		Designated Federal Laws and Regulations Applicable to			
		National banks	State member banks	State nonmember banks	Savings associations
Insider Loans—Parts and/or Sections of Title 12 of the United States Code					
375a	Loans to Executive Officers of Banks	✔	✔	(1)	(1)
375b	Prohibitions Respecting Loans and Extensions of Credit to Executive Officers and Directors of Banks, Political Campaign, Committees, etc.	✔	✔	(1)	(1)
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.	(2)		(3)	
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.	✔	✔	(4)	(5)
	Subpart B—Reports of Indebtedness of Executive Officers and Principal Shareholders of Insured Nonmember Banks.	✔	✔	(4)	(5)
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.				✔
Dividend Restrictions—Parts and/or Sections of Title 12 of the United States Code					
56	Prohibition on Withdrawal of Capital and Unearned Dividends.	✔	✔		
60	Dividends and Surplus Funds	✔	✔		
1467a(f)	Declaration of Dividends				✔
1831o	Prompt Corrective Action—Dividend Restrictions.	✔	✔	✔	✔
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				✔

[1] Subsections (g) and (h) only.
[2] Applies only to insured federal branches of foreign banks.
[3] Applies only to insured state branches of foreign banks.
[4] See 12 CFR parts 337.3 and 349.3.
[5] See 12 CFR part 563.43.

[58 FR 31335, June 2, 1993, as amended at 61 FR 6494, Feb. 21, 1996; 62 FR 63258, Nov. 28, 1997]

PART 364—STANDARDS FOR SAFETY AND SOUNDNESS

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APPENDIX A TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING STANDARDS FOR SAFETY AND SOUNDNESS
APPENDIX B TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING YEAR 2000 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.

(a) *General standards.* 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.

(b) *Year 2000 standards.* The Interagency Guidelines Establishing Year 2000 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 B 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.

[63 FR 55488, Oct. 15, 1998]

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

[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).

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 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

[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.

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.

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]

APPENDIX B TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING YEAR 2000 STANDARDS FOR SAFETY AND SOUNDNESS

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I. INTRODUCTION

The Interagency Guidelines Establishing Year 2000 Standards for Safety and Soundness (Guidelines) set forth safety and soundness standards pursuant to section 39 of the Federal Deposit Insurance Act (section 39) (12 U.S.C. 1831p-1) that are applicable to an insured depository institution's efforts to achieve Year 2000 readiness. The Guidelines, which also interpret the general standards in the Interagency Guidelines Establishing Standards for Safety and Soundness adopted in 1995, apply to all insured depository institutions.

A. Preservation of Existing Authority

Neither section 39 nor the Guidelines in any way limits the authority of the Federal banking agencies to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. The Federal banking agencies, in their sole discretion, may take appropriate actions so that insured depository institutions will be able to successfully continue business operations after January 1, 2000, including on a case-by-case basis requiring actions by dates that are later than the key dates set forth in the Guidelines. Action under section 39 and the Guidelines may be taken independently of, in conjunction with, or in addition to any other action, including enforcement action, available to the Federal banking agencies.

B. Definitions

1. *In general.* For purposes of the Guidelines the following definitions apply:

a. *Business resumption contingency plan* means a plan that describes how mission-critical systems of the insured depository institution will continue to operate in the event there are system failures in processing, calculating, comparing, or sequencing date or time data from, into, or between the 20th and 21st centuries; or the years 1999 and 2000; or with regard to leap year calculations.

b. *External system* means a system the renovation of which is not controlled by the insured depository institution, including systems provided by service providers and any interfaces with external third party suppliers and other material third parties.

c. *External third party supplier* means a service provider or software vendor that supplies services or products to insured depository institutions.

d. *Internal system* means a system the renovation of which is controlled by the insured depository institution, including software, operating systems, mainframe computers,

personal computers, readers/sorters, and proof machines. Internal system also may include a system controlled by the insured depository institution with embedded integrated circuits (e.g., heating and cooling systems, vaults, communications, security systems, and elevators).

e. *Mission-critical system* means an application or system that is vital to the successful continuance of a core business activity. An application or system may be mission-critical if it interfaces with a designated mission-critical system. Software products also may be mission-critical.

f. *Other material third party* means a third party, other than an external third party supplier, to whom an insured depository institution transmits data or from whom an insured depository institution receives data, including business partners (e.g., credit bureaus), other insured depository institutions, payment system providers, clearinghouses, customers, and utilities.

g. *Remediation contingency plan* means a plan that describes how the insured depository institution will mitigate the risks associated with the failure to successfully complete renovation, testing, or implementation of its mission-critical systems.

h. *Renovation* means code enhancements, hardware and software upgrades, system replacements, and other associated changes that ensure that the insured depository institution's mission-critical systems and applications are Year 2000 ready.

i. *Year 2000 ready or readiness* with respect to a system or application means the system or application accurately processes, calculates, compares, or sequences date or time data from, into, or between the 20th and 21st centuries; or the years 1999 and 2000; or with regard to leap year calculations.

II. Year 2000 Standards for Safety and Soundness

A. *Review of Mission-Critical Systems For Year 2000 Readiness.* Each insured depository institution shall in writing:

1. Identify all internal and external mission-critical systems that are not Year 2000 ready;

2. Establish priorities for accomplishing work and allocating resources to renovating internal mission-critical systems;

3. Identify the resource requirements and individuals assigned to the Year 2000 project on internal mission-critical systems;

4. Establish reasonable deadlines for commencing and completing the renovation of such internal mission-critical systems;

5. Develop and adopt a project plan that addresses the insured depository institution's Year 2000 renovation, testing, contingency planning, and management oversight process; and

6. Develop a due diligence process to monitor and evaluate the efforts of external third party suppliers to achieve Year 2000 readiness.

B. *Renovation of Internal Mission-Critical Systems.* Each insured depository institution shall commence renovation of all internal mission-critical systems that are not Year 2000 ready in sufficient time that testing of the renovation can be substantially completed by December 31, 1998.

C. *Renovation of External Mission-Critical Systems.* Each insured depository institution shall:

1. Determine the ability of external third party suppliers to renovate external mission-critical systems that are not Year 2000 ready and to complete the renovation in sufficient time to substantially complete testing by March 31, 1999;

2. Maintain written documentation of all its communications with external third party suppliers regarding their ability to renovate timely and effectively external mission-critical systems that are not Year 2000 ready; and

3. Develop in writing an ongoing due diligence process to monitor and evaluate the efforts of external third party suppliers to achieve Year 2000 readiness, including:

a. monitoring the efforts of external third party suppliers to achieve Year 2000 readiness on at least a quarterly basis and documenting communications with these suppliers; and

b. reviewing the insured depository institution's contractual arrangements with external third party suppliers to determine the parties' rights and obligations to achieve Year 2000 readiness.

D. *Testing of Mission-Critical Systems.* Each insured depository institution shall:

1. Develop and implement an effective written testing plan for both internal and external systems. Such a plan shall include the testing environment, testing methodology, testing schedules, budget projections, participants to be involved in testing, and the critical dates to be tested to achieve Year 2000 readiness;

2. Verify the adequacy of the testing process and validate the results of the tests with the assistance of the project manager responsible for Year 2000 readiness, the owner of the system tested, and an objective independent party (such as an auditor, a consultant, or a qualified individual from within or outside of the insured depository institution who is independent of the process under review);

3. Substantially complete testing of internal mission-critical systems by December 31, 1998;

4. Commence testing of external mission-critical systems by January 1, 1999;

5. Substantially complete testing of external mission-critical systems by March 31, 1999;

6. Commence testing with other material third parties by March 31, 1999; and

7. Complete testing of all mission-critical systems by June 30, 1999.

E. *Business Resumption Contingency Planning.* Each insured depository institution shall develop and implement an effective written business resumption contingency plan that, at a minimum:

1. Defines scenarios for mission-critical systems failing to achieve Year 2000 readiness;

2. Evaluates options and selects a reasonable contingency strategy for those systems;

3. Provides for the periodic testing of the business resumption contingency plan; and

4. Provides for independent testing of the business resumption contingency plan by an objective independent party, such as an auditor, consultant, or qualified individual from another area of the insured depository institution who was not involved in the formulation of the business resumption contingency plan.

F. *Remediation Contingency Planning.* Each insured depository institution that has failed to successfully complete renovation, testing, and implementation of a mission-critical system, or is in the process of remediation and is not on schedule with the key dates in section II.D, shall develop and implement an effective written remediation contingency plan that, at a minimum:

1. Outlines the alternatives available if remediation efforts are not successful, including the availability of alternative external third party suppliers, and selects a reasonable contingency strategy; and

2. Establishes trigger dates for activating the remediation contingency plan, taking into account the time necessary to convert to alternative external third party suppliers or to complete any other selected strategy.

G. *Customer Risk.* Each insured depository institution shall develop and implement a written due diligence process that:

1. Identifies customers, including fund providers, fund takers, and capital market/asset management counterparties, that represent material risk exposure to the institution;

2. Evaluates their Year 2000 preparedness;

3. Assesses their existing and potential Year 2000 risk to the institution; and 4. Implements appropriate risk controls, including controls for underwriting risk, to manage and mitigate their Year 2000 risk to the institution.

H. *Involvement of the Board of Directors and Management.*

1. During all stages of the renovation, testing, and contingency planning process, the board of directors and management of each insured depository institution shall:

a. be actively involved in managing efforts to plan, allocate resources, and monitor progress towards attaining Year 2000 readiness;

b. oversee the efforts of the insured depository institution to achieve Year 2000 readiness and allocate sufficient resources to resolve problems relating to the institution's Year 2000 readiness; and

c. evaluate the Year 2000 risk associated with any strategic business initiatives contemplated by the insured depository institution, including mergers and acquisitions, major systems development, corporate alliances, and system interdependencies.

2. In addition, the board of directors, at a minimum, shall require from management, and management shall provide to the board of directors, written status reports, at least quarterly and as otherwise appropriate to keep the directorate fully informed, of the insured depository institution's efforts in achieving Year 2000 readiness. Such written status reports shall, at a minimum, include:

a. The overall progress of the insured depository institution's efforts in achieving Year 2000 readiness;

b. The insured depository institution's interim progress in renovating, validating, and contingency planning measured against the insured depository institution's Year 2000 project plan as adopted under section II.A.5. of appendix B;

c. The status of efforts by key external third party suppliers and other material third parties in achieving Year 2000 readiness;

d. The results of the testing process;

e. The status of contingency planning efforts; and

f. The status of the ongoing assessment of customer risk.

[63 FR 55484, 55486, Oct. 15, 1998]

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 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:

[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).

• 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.

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

[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).

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.

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 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.
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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.

PART 368—GOVERNMENT SECURITIES SALES PRACTICES

Sec.

368.1 Scope.
368.2 Definitions.
368.3 Business conduct.
368.4 Recommendations to customers.
368.5 Customer information.
368.100 Obligations concerning institutional customers.

AUTHORITY: 15 U.S.C. 78o–5.

SOURCE: 62 FR 13287, Mar. 19, 1997, unless otherwise noted.

§368.1 Scope.

This part is applicable to state nonmember banks and insured state branches of foreign banks that have filed notice as, or are required to file notice as, government securities brokers or dealers pursuant to section 15C of the Securities Exchange Act (15 U.S.C. 78o–5) and Department of the Treasury rules under section 15C (17 CFR 400.1(d) and part 401).

§368.2 Definitions.

(a) *Bank that is a government securities broker or dealer* means a state nonmember bank or an insured state branch of a foreign bank that has filed notice, or

is required to file notice, as a government securities broker or dealer pursuant to section 15C of the Securities Exchange Act (15 U.S.C. 78o–5) and Department of the Treasury rules under section 15C (17 CFR 400.1(d) and part 401).

(b) *Customer* does not include a broker or dealer or a government securities broker or dealer.

(c) *Government security* has the same meaning as this term has in section 3(a)(42) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(42)).

(d) *Non-institutional customer* means any customer other than:

(1) A bank, savings association, insurance company, or registered investment company;

(2) An investment adviser registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3); or

(3) Any entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

§ 368.3 Business conduct.

A bank that is a government securities broker or dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business as a government securities broker or dealer.

§ 368.4 Recommendations to customers.

In recommending to a customer the purchase, sale or exchange of a government security, a bank that is a government securities broker or dealer shall have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to the customer's other security holdings and as to the customer's financial situation and needs.

§ 368.5 Customer information.

Prior to the execution of a transaction recommended to a non-institutional customer, a bank that is a government securities broker or dealer shall make reasonable efforts to obtain information concerning:

(a) The customer's financial status;

(b) The customer's tax status;

(c) The customer's investment objectives; and

(d) Such other information used or considered to be reasonable by such bank in making recommendations to the customer.

§ 368.100 Obligations concerning institutional customers.

(a) As a result of broadened authority provided by the Government Securities Act Amendments of 1993 (15 U.S.C. 78o–3 and 78o–5), the FDIC is adopting sales practice rules for the government securities market, a market with a particularly broad institutional component. Accordingly, the FDIC believes it is appropriate to provide further guidance to banks on their suitability obligations when making recommendations to institutional customers.

(b) The FDIC's suitability rule (§ 368.4) is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct. Banks' responsibilities include having a reasonable basis for recommending a particular security or strategy, as well as having reasonable grounds for believing the recommendation is suitable for the customer to whom it is made. Banks are expected to meet the same high standards of competence, professionalism, and good faith regardless of the financial circumstances of the customer.

(c) In recommending to a customer the purchase, sale, or exchange of any government security, the bank shall have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to the customer's other security holdings and financial situation and needs.

(d) The interpretation in this section concerns only the manner in which a bank determines that a recommendation is suitable for a particular institutional customer. The manner in which a bank fulfills this suitability obligation will vary, depending on the nature of the customer and the specific transaction. Accordingly, the interpretation in this section deals only with guidance regarding how a bank may fulfill

customer-specific suitability obligations under § 368.4.[1]

(e) While it is difficult to define in advance the scope of a bank's suitability obligation with respect to a specific institutional customer transaction recommended by a bank, the FDIC has identified certain factors that may be relevant when considering compliance with § 368.4. These factors are not intended to be requirements or the only factors to be considered but are offered merely as guidance in determining the scope of a bank's suitability obligations.

(f) The two most important considerations in determining the scope of a bank's suitability obligations in making recommendations to an institutional customer are the customer's capability to evaluate investment risk independently and the extent to which the customer is exercising independent judgement in evaluating a bank's recommendation. A bank must determine, based on the information available to it, the customer's capability to evaluate investment risk. In some cases, the bank may conclude that the customer is not capable of making independent investment decisions in general. In other cases, the institutional customer may have general capability, but may not be able to understand a particular type of instrument or its risk. This is more likely to arise with relatively new types of instruments, or those with significantly different risk or volatility characteristics than other investments generally made by the institution. If a customer is either generally not capable of evaluating investment risk or lacks sufficient capability to evaluate the particular product, the scope of a bank's customer-specific obligations under § 368.4 would not be diminished by the fact that the bank was dealing with an institutional customer. On the other hand, the fact that a customer initially needed help understanding a potential investment need not necessarily imply that the customer did not ultimately develop an understanding and make an independent investment decision.

(g) A bank may conclude that a customer is exercising independent judgement if the customer's investment decision will be based on its own independent assessment of the opportunities and risks presented by a potential investment, market factors and other investment considerations. Where the bank has reasonable grounds for concluding that the institutional customer is making independent investment decisions and is capable of independently evaluating investment risk, then a bank's obligations under § 368.4 for a particular customer are fulfilled.[2] Where a customer has delegated decision-making authority to an agent, such as an investment advisor or a bank trust department, the interpretation in this section shall be applied to the agent.

(h) A determination of capability to evaluate investment risk independently will depend on an examination of the customer's capability to make its own investment decisions, including the resources available to the customer to make informed decisions. Relevant considerations could include:

(1) The use of one or more consultants, investment advisers, or bank trust departments;

(2) The general level of experience of the institutional customer in financial markets and specific experience with the type of instruments under consideration;

(3) The customer's ability to understand the economic features of the security involved;

(4) The customer's ability to independently evaluate how market developments would affect the security; and

(5) The complexity of the security or securities involved.

(i) A determination that a customer is making independent investment decisions will depend on the nature of the relationship that exists between the bank and the customer. Relevant considerations could include:

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[1] The interpretation in this section does not address the obligation related to suitability that requires that a bank have '' * * * a 'reasonable basis' to believe that the recommendation could be suitable for at least some customers.'' *In the Matter of the Application of F.J. Kaufman and Company of Virginia and Frederick J. Kaufman, Jr.,* 50 SEC 164 (1989).

[2] See footnote 1 in paragraph (d) of this section.

(1) Any written or oral understanding that exists between the bank and the customer regarding the nature of the relationship between the bank and the customer and the services to be rendered by the bank;

(2) The presence or absence of a pattern of acceptance of the bank's recommendations;

(3) The use by the customer of ideas, suggestions, market views and information obtained from other government securities brokers or dealers or market professionals, particularly those relating to the same type of securities; and

(4) The extent to which the bank has received from the customer current comprehensive portfolio information in connection with discussing recommended transactions or has not been provided important information regarding its portfolio or investment objectives.

(j) Banks are reminded that these factors are merely guidelines that will be utilized to determine whether a bank has fulfilled its suitability obligation with respect to a specific institutional customer transaction and that the inclusion or absence of any of these factors is not dispositive of the determination of suitability. Such a determination can only be made on a case-by-case basis taking into consideration all the facts and circumstances of a particular bank/customer relationship, assessed in the context of a particular transaction.

(k) For purposes of the interpretation in this section, an institutional customer shall be any entity other than a natural person. In determining the applicability of the interpretation in this section to an institutional customer, the FDIC will consider the dollar value of the securities that the institutional customer has in its portfolio and/or under management. While the interpretation in this section is potentially applicable to any institutional customer, the guidance contained in this section is more appropriately applied to an institutional customer with at least $10 million invested in securities in the aggregate in its portfolio and/or under management.

PART 369—PROHIBITION AGAINST USE OF INTERSTATE BRANCHES PRIMARILY FOR DEPOSIT PRODUCTION

Sec.
369.1 Purpose and scope.
369.2 Definitions.
369.3 Loan-to-deposit ratio screen.
369.4 Credit needs determination.
369.5 Sanctions.

AUTHORITY: 12 U.S.C. 1819 (Tenth) and 1835a.

SOURCE: 62 FR 47737, Sept. 10, 1997, unless otherwise noted.

§ 369.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement section 109 (12 U.S.C. 1835a) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Interstate Act).

(b) *Scope.* (1) This part applies to any State nonmember bank that has operated a covered interstate branch for a period of at least one year.

(2) This part describes the requirements imposed under 12 U.S.C. 1835a, which requires the appropriate Federal banking agencies (the FDIC, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System) to prescribe uniform rules that prohibit a bank from using any authority to engage in interstate branching pursuant to the Interstate Act, or any amendment made by the Interstate Act to any other provision of law, primarily for the purpose of deposit production.

§ 369.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Bank* means, unless the context indicates otherwise:

(1) A State nonmember bank; and

(2) A foreign bank as that term is defined in 12 U.S.C. 3101(7) and 12 CFR 346.1(a).

(b) *Covered interstate branch* means any branch of a State nonmember bank, and any insured branch of a foreign bank licensed by a State, that:

(1) Is established or acquired outside the bank's home state pursuant to the interstate branching authority granted

by the Interstate Act or by any amendment made by the Interstate Act to any other provision of law; or

(2) Could not have been established or acquired outside of the bank's home state but for the establishment or acquisition of a branch described in paragraph (b)(1) of this section.

(c) *Home state* means:

(1) With respect to a state bank, the state that chartered the bank;

(2) With respect to a national bank, the state in which the main office of the bank is located; and

(3) With respect to a foreign bank, the home state of the foreign bank as determined in accordance with 12 U.S.C. 3103(c) and 12 CFR 346.1(j).

(d) *Host state* means a state in which a bank establishes or acquires a covered interstate branch.

(e) *Host state loan-to-deposit ratio* generally means, with respect to a particular host state, the ratio of total loans in the host state relative to total deposits from the host state for all banks (including institutions covered under the definition of ''bank'' in 12 U.S.C. 1813(a)(1)) that have that state as their home state, as determined and updated periodically by the appropriate Federal banking agencies and made available to the public.

(f) *State* means state as that term is defined in 12 U.S.C. 1813(a)(3).

(g) *Statewide loan-to-deposit ratio* means, with respect to a bank, the ratio of the bank's loans to its deposits in a state in which the bank has one or more covered interstate branches, as determined by the FDIC.

§369.3 Loan-to-deposit ratio screen.

(a) *Application of screen*. Beginning no earlier than one year after a bank establishes or acquires a covered interstate branch, the FDIC will consider whether the bank's statewide loan-to-deposit ratio is less than 50 percent of the relevant host state loan-to-deposit ratio.

(b) *Results of screen*. (1) If the FDIC determines that the bank's statewide loan-to-deposit ratio is 50 percent or more of the host state loan-to-deposit ratio, no further consideration under this part is required.

(2) If the FDIC determines that the bank's statewide loan-to-deposit ratio is less than 50 percent of the host state loan-to-deposit ratio, or if reasonably available data are insufficient to calculate the bank's statewide loan-to-deposit ratio, the FDIC will make a credit needs determination for the bank as provided in §369.4.

§369.4 Credit needs determination.

(a) *In general.* The FDIC will review the loan portfolio of the bank and determine whether the bank is reasonably helping to meet the credit needs of the communities in the host state that are served by the bank.

(b) *Guidelines.* The FDIC will use the following considerations as guidelines when making the determination pursuant to paragraph (a) of this section:

(1) Whether covered interstate branches were formerly part of a failed or failing depository institution;

(2) Whether covered interstate branches were acquired under circumstances where there was a low loan-to-deposit ratio because of the nature of the acquired institution's business or loan portfolio;

(3) Whether covered interstate branches have a high concentration of commercial or credit card lending, trust services, or other specialized activities, including the extent to which the covered interstate branches accept deposits in the host state;

(4) The Community Reinvestment Act (CRA) ratings received by the bank, if any, under 12 U.S.C. 2901 *et seq.*;

(5) Economic conditions, including the level of loan demand, within the communities served by the covered interstate branches;

(6) The safe and sound operation and condition of the bank; and

(7) The FDIC's Community Reinvestment regulations (12 CFR Part 345) and interpretations of those regulations.

§369.5 Sanctions.

(a) *In general.* If the FDIC determines that a bank is not reasonably helping to meet the credit needs of the communities served by the bank in the host state, and that the bank's statewide loan-to-deposit ratio is less than 50 percent of the host state loan-to-deposit ratio, the FDIC:

(1) May order that a bank's covered interstate branch or branches be closed unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank has an acceptable plan under which the bank will reasonably help to meet the credit needs of the communities served by the bank in the host state; and

(2) Will not permit the bank to open a new branch in the host state that would be considered to be a covered interstate branch unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank will reasonably help to meet the credit needs of the community that the new branch will serve.

(b) *Notice prior to closure of a covered interstate branch.* Before exercising the FDIC's authority to order the bank to close a covered interstate branch, the FDIC will issue to the bank a notice of the FDIC's intent to order the closure and will schedule a hearing within 60 days of issuing the notice.

(c) *Hearing.* The FDIC will conduct a hearing scheduled under paragraph (b) of this section in accordance with the provisions of 12 U.S.C. 1818(h) and 12 CFR part 308.