

(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 Verification 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 non-compliance.

#### **§ 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 non-compliance.

(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.

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337.2 Standby letters of credit.

337.3 Limits on extensions of credit to executive officers, directors, and principal shareholders of insured nonmember banks.

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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-1.

§ 337.1

12 CFR Ch. III (1–1–99 Edition)

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.<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> 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.

<sup>2</sup> 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

(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

participant in the same manner as in the case of a participated loan.

percent of the bank's capital and unimpaired surplus,<sup>3</sup> 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.

<sup>3</sup>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)).

(3) Any extension of credit that was outstanding on May 28, 1992 and that would if made on or after that date violate paragraph (c)(1) or paragraph (c)(2) of this §337.3 shall be reduced in amount by May 28, 1993 so that the extension of credit is in compliance with the lending limit set forth in paragraphs (c)(1) and (c)(2) of this section. Any renewal or extension of such an extension of credit on or after May 28, 1992 shall be made only on terms that will bring the extension of credit into compliance with the lending limit of paragraphs (c)(1) and (c)(2) of this section by May 28, 1993, however, any extension of credit made before May 28, 1992 that bears a specific maturity date of May 28, 1993 or later shall be repaid in accordance with its repayment schedule in existence on or before May 28, 1992.

(4) If an insured nonmember bank is unable to bring all extensions of credit outstanding as of May 28, 1992 into compliance as required by paragraph (c)(3) of this §337.3, the bank may at the discretion of the appropriate FDIC regional director (Division of Supervision) obtain, for good cause shown, not more than two additional one-year periods to come into compliance.

(5) For the purposes of paragraph (c) of this section, the definitions of the terms used in Federal Reserve Board Regulation O shall apply including the exclusion of executive officers of a bank's parent bank holding company and executive officers of any other subsidiary of that bank holding company from the definition of executive officer for the purposes of complying with the loan restrictions contained in section 22(g) of the Federal Reserve Act. For the purposes of complying with §215.5(d) of Federal Reserve Board Regulation O, the reference to "the amount specified for a category of credit in paragraph (c) of this section" shall be understood to refer to the amount specified in paragraph (c)(2) of this §337.3.

(Approved by the Office of Management and Budget under control number 3064-0108)

[47 FR 47003, Oct. 22, 1982, as amended at 48 FR 42971, Sept. 21, 1983; 57 FR 7649, Mar. 4, 1992; 57 FR 17850, Apr. 28, 1992; 57 FR 28457, June 25, 1992; 59 FR 66668, Dec. 28, 1994]

**§ 337.4 Securities activities of subsidiaries of insured nonmember banks: bank transactions with affiliated securities companies.**

(a) *Definitions:* for the purposes of this section,

(1) *Affiliate* shall mean any company that directly or indirectly, through one or more intermediaries, controls or is under common control with an insured nonmember bank.

(2) *Bona fide subsidiary* means a subsidiary of an insured nonmember bank that at a minimum: (i) is adequately capitalized; (ii) is physically separate and distinct in its operations from the operation of the bank;<sup>4</sup> (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;<sup>5</sup> (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.

<sup>4</sup>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.

<sup>5</sup>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 record-keeping, 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 non-member 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 non-member 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, 780-4) 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;<sup>6</sup>

(2) The bank and affiliate share no common officers;

(3) A majority of the board of directors of the bank is composed of persons

<sup>6</sup>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.

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.<sup>7</sup>

(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

<sup>7</sup>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;<sup>8</sup>

(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;<sup>9</sup>

(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

<sup>8</sup>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.

<sup>9</sup>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 Reserve 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.<sup>10</sup>

(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

<sup>10</sup>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.

affiliation with such a bank is governed by §337.4(c), which:

(i) Shares the same or a similar name or logo with the insured nonmember bank,

(ii) Conducts business in the same location in which the insured nonmember bank conducts business,

(iii) Advertises or promotes particular securities or solicits purchasers for particular securities in advertisements, promotions, solicitations or other similar communications in which the insured nonmember bank also advertises or promotes its services, or

(iv) Places or causes to be placed in communications from the insured nonmember bank to the bank’s customers advertisements, promotions or solicitations concerning particular securities, must comply with the disclosure requirements of paragraphs (h)(2) and (3) of this section in order for the subsidiary to meet the definition of a bona fide subsidiary and in order for the affiliation to be permissible.

Any insured nonmember bank that established or acquired a securities subsidiary or become affiliated with a securities company prior to December 28, 1984 and which as of December 14, 1987, conducted business in the same location as its securities subsidiary or affiliate or shared the same or a similar name or logo with its securities subsidiary or affiliate has until not later than June 1, 1988 to comply with paragraphs (h)(2) and (3) of this section.

(2) *Content of Disclosure.* Sections 337.4(a)(2)(viii) and 337.4(c)(5) notwithstanding, any subsidiary and/or affiliate of an insured nonmember bank described in paragraph (h)(1) of this section must disclose to its customers and prospective customers that securities recommended, offered or sold by or through the subsidiary and/or affiliate are not FDIC insured deposits (unless otherwise indicated), that such securities are not guaranteed by, nor are they obligations of, the bank, and that the subsidiary and/or affiliate and the bank are separate organizations. The following or a similar statement will satisfy the disclosure requirement:

[name of affiliate/subsidiary] is not a bank and securities offered by it are not backed or guaranteed by any bank nor are they insured by the FDIC.

(3) *Timing and Placement of Disclosure.* In order for any subsidiary or affiliate of an insured nonmember bank described in paragraph (h)(1) of this section, to comply with paragraph (h)(2) of this section, the subsidiary/affiliate must make disclosure to its customers prominently, in writing, in opening account documents and periodically (at least semiannually) in customer statements. Disclosure may be made in confirmations in lieu of customer statements. In the case of joint advertisements, promotions, or solicitations and advertisements, promotions, or solicitations placed in bank communications, the advertisement, promotion, or solicitation must carry the requisite disclosure. Disclosure may be in a form and manner consistent with the advertising or other media utilized. Television or radio advertisements which do not exceed 30 seconds in length need not contain disclosure. Disclosure in television advertisements may either be spoken or displayed. All disclosures must be prominent and clearly legible. Disclosure in opening account documents and periodic disclosure in customer statements or confirmations is only required for one year after the bank and its subsidiary/affiliate cease to jointly advertise, promote or solicit and for one year after advertisements, promotions, or solicitations are placed in bank communications with bank customers provided, however, that at least two semiannual disclosures must have been made during that one year period.

(4) It is considered an unsafe and unsound banking practice for an insured nonmember bank to:

(i) Share the same or a similar name or logo with a securities subsidiary that is required to be a bona fide subsidiary or an affiliate that is subject to the provisions contained in § 337.4(c);

(ii) Conduct business in the same location as any such subsidiary or affiliate;

(iii) Jointly advertise or promote its services in an advertisement, promotion, or solicitation concerning particular securities made by such a subsidiary or affiliate; or

(iv) Permit such a subsidiary or affiliate to place advertisements, promotions, or solicitations concerning par-

ticular 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*,<sup>11</sup> shall have the same meaning as to each insured depository institution as provided under regulations implementing section 38 of the Federal Deposit Insurance Act

<sup>11</sup>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.

issued by the appropriate federal banking agency for that institution.<sup>12</sup>

(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.<sup>13</sup>

(4) *Deposit* has the same meaning as provided under section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)).

(5) *Deposit broker.* (i) The term *deposit broker* means:

(A) Any person engaged in the business of placing deposits, or facilitating

<sup>12</sup>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.

<sup>13</sup>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 pre-arranged 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 det-

rimonial 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]