Code of Federal Regulations

12
Parts 300 to 499
Revised as of January 1, 2008

Banks and Banking

Containing a codification of documents of general applicability and future effect

As of January 1, 2008

With Ancillaries

Published by
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National Archives and Records Administration

A Special Edition of the Federal Register
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To cite the regulations in this volume use title, part and section number. Thus, 12 CFR 303.0 refers to title 12, part 303, section 0.
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The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

- Title 1 through Title 16 .............................................................. as of January 1
- Title 17 through Title 27 ................................................................. as of April 1
- Title 28 through Title 41 ................................................................. as of July 1
- Title 42 through Title 50 ............................................................. as of October 1

The appropriate revision date is printed on the cover of each volume.

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What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

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(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

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An index to the text of “Title 3—The President” is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the “Contents” entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.
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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.
January 1, 2008.
Title 12—BANKS AND BANKING is composed of seven volumes. The parts in these volumes are arranged in the following order: parts 1-199, 200-219, 220-299, 300-499, 500-599, part 600-899, and 900-end. The first volume containing parts 1-199 is comprised of chapter I—Comptroller of the Currency, Department of the Treasury. The second and third volumes containing parts 200-299 are comprised of chapter II—Federal Reserve System. The fourth volume containing parts 300-499 is comprised of chapter III—Federal Deposit Insurance Corporation and chapter IV—Export-Import Bank of the United States. The fifth volume containing parts 500-599 is comprised of chapter V—Office of Thrift Supervision, Department of the Treasury. The sixth volume containing parts 600-899 is comprised of chapter VI—Farm Credit Administration, chapter VII—National Credit Union Administration, chapter VIII—Federal Financing Bank. The seventh volume containing part 900-end is comprised of chapter IX—Federal Housing Finance Board, chapter XI—Federal Financial Institutions Examination Council, chapter XIV—Farm Credit System Insurance Corporation, chapter XV—Department of the Treasury, chapter XVII—Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development and chapter XVIII—Community Development Financial Institutions Fund, Department of the Treasury. The contents of these volumes represent all of the current regulations codified under this title of the CFR as of January 1, 2008.

For this volume, Elmer Barksdale was Chief Editor. The Code of Federal Regulations publication program is under the direction of Micheal L. White, assisted by Ann Worley.
Title 12—Banks and Banking

(This book contains parts 300 to 499)

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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.

(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.

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.

§ 303.2 Definitions.

Except as modified or otherwise defined in this part, terms used in this part that are defined in the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) have the meanings provided in the Federal Deposit Insurance Act. Additional definitions of terms used in this part are as follows:

(a) Act or FDIC 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
(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 designee 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 designee 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 and appropriate regional director mean, respectively, the FDIC region and the FDIC regional director 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 FDIC 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, and the appropriate regional director is the regional director for that region.

(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 FDIC 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, and the appropriate regional director is the regional director for that region.

(h) Associate director means any associate director of the Division of Supervision and Consumer Protection (DSC) or, in the event such title become obsolete, any official of equivalent authority within the division.

(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 and Consumer Protection (DSC) or, in the event such title become obsolete, any official of equivalent or higher authority within the division.

(n) Deputy regional director means any deputy regional director of the Division of Supervision and Consumer Protection (DSC) or, in the event such title become obsolete, any official of equivalent authority within the same FDIC region of DSC.

(o) Appropriate FDIC office means the office designated by the appropriate regional director or designee.

(p) DSC means the Division of Supervision and Consumer Protection or, in the event the Division of Supervision and Consumer Protection is reorganized, such successor division.

(q) Director means the Director of the Division of Supervision and Consumer Protection (DSC) or, in the event such title become obsolete, any official of...
equivalent or higher authority within the division.

(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 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)).

(aa) 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.

(bb) Regional director means any regional director in the Division of Supervision and Consumer Protection (DSC), or in the event such title become obsolete, any official of equivalent authority within the division.

(cc) [Reserved]

(dd) Standard conditions means the conditions that the FDIC 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) of this part), 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.

(ee) Tier 1 capital shall have the same meaning as provided in §325.2(v) of this chapter (12 CFR 325.2(v)).
§ 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 FDIC office 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
§ 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 §303.8(c). 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 FDIC office. The public file will be produced for review not more than one business day after receipt by the appropriate FDIC 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(f) 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, Attn: FOIA/Privacy Group, Legal Division, 550 17th Street, NW., Washington, DC 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 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 FDIC 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;

(iii) The FDIC determines that other good cause exists.

(3) Solicitation of comments. Whenever appropriate, the appropriate regional director 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 § 303.10 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 before the end of the comment period; or

(ii) To the appropriate regional director, 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.
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(c) Action on a hearing request. The appropriate regional director, 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, 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) The presiding officer shall be the regional director or designee or such other person as may be named by the Board or the Director. 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 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, 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.


(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 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 regional director 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. The resolution shall be made available for public inspection and copying in the Office of the General Counsel, Executive Secretary Section 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 General Counsel, Executive Secretary Section 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 FDIC 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 (International Banking), expedited processing will not be available for any filing that the appropriate regional director does not have delegated authority to approve.

(2) Removal of filing from expedited processing. The FDIC 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 determines that the filing presents a significant CRA or compliance concern;

(iii) For any filing, the appropriate regional director 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 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 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
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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), change in senior executive officer or board of directors (subpart F) or denial of an application pursuant to section 19 of the FDI Act (subpart L) 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) and (3) 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.

(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)-(5) [Reserved]

(6) Processing. The FDIC 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 § 303.11(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 filings—(1) Grounds for action. 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:

(i) 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

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

(iii) 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 § 303.11(g)(2)(ii), before taking action under this § 303.11(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 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 activity authorized by the filing may pose a threat to the interests of the depository institution's depositors or may threaten to impair
§ 303.15 Certain limited liability companies deemed incorporated under State law.

(a) For purposes of the definition of “State bank” in 12 U.S.C. 1813(a)(2) and this Chapter, a banking institution that is chartered as a limited liability company (LLC) under the law of any
State is deemed to be "incorporated" under the law of the State, if
(1) The institution is not subject to automatic termination, dissolution, or suspension upon the happening of some event (including, e.g., the death, disability, bankruptcy, expulsion, or withdrawal of an owner of the institution), other than the passage of time;
(2) The exclusive authority to manage the institution is vested in a board of managers or directors that is elected or appointed by the owners, and that operates in substantially the same manner as, and has substantially the same rights, powers, privileges, duties, responsibilities, as a board of directors of a bank chartered as a corporation in the State;
(3) Neither State law, nor the institution's operating agreement, bylaws, or other organizational documents provide that an owner of the institution is liable for the debts, liabilities, and obligations of the institution in excess of the amount of the owner's investment; and
(4) Neither State law, nor the institution's operating agreement, bylaws, or other organizational documents require the consent of any other owner of the institution in order for an owner to transfer an ownership interest in the institution, including voting rights.

(b) For purposes of the Federal Deposit Insurance Act and this Chapter,
(1) Each of the terms "stockholder" and "shareholder" includes an owner of any interest in a bank chartered as an LLC, including a member or participant;
(2) The term "director" includes a manager or director of a bank chartered as an LLC, or other person who has, with respect to such a bank, authority substantially similar to that of a director of a corporation;
(3) The term "officer" includes an officer of a bank chartered as an LLC, or other person who has, with respect to such a bank, authority substantially similar to that of an officer of a corporation; and
(4) Each of the terms "voting stock," "voting shares," and "voting securities" includes ownership interests in a bank chartered as an LLC, as well as any certificates or other evidence of such ownership interests.

[68 FR 7308, Feb. 13, 2003]

§§ 303.16–303.19  [Reserved]

Subpart B—Deposit Insurance

§ 303.20 Scope.

This subpart sets forth the procedures for applying for deposit insurance for a proposed depository institution or operating noninsured depository institution under section 5 of the FDIC 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.

§ 303.21 Filing procedures.

(a) Applications for deposit insurance shall be filed with the appropriate FDIC office. 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 director.

(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
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§ 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 FDIC office. 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.

§ 303.23 Public notice requirements.

(a) De novo institutions and operating uninsured 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 FDIC office. Comments by interested parties must be received by the appropriate regional director 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 FDIC office. 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 FDIC office. 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 FDIC 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.

§§ 303.26–303.39 [Reserved]

Subpart C—Establishment and Relocation of Domestic Branches and Offices

§ 303.40 Scope.

(a) General. This subpart sets forth the application requirements and procedures 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 FDIC 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 FDIC 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 FDIC 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 Marianas 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 FDIC 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 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. 1 FDIC Law, Regulations, Related Acts 5391; see §303.4 (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
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 FDIC office 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 (1 FDIC Law, Regulations, Related Acts 5185; see §303.4 (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 (1 FDIC Law, Regulations, Related Acts 5175).
§ 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(c) 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 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 FDIC office 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 FDIC office, 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 FDIC 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 FDIC 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.

§§ 303.46–303.59 [Reserved]

Subpart D—Merger Transactions

§ 303.60 Scope.

This subpart sets forth the application requirements and procedures for transactions subject to FDIC approval under the Bank Merger Act, section 18(c) of the FDIC Act (12 U.S.C. 1828(c)). Additional guidance is contained in the FDIC “Statement of Policy on Bank Merger Transactions” (1 FDIC Law, Regulations, Related Acts 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 FDIC 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) 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) 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” (1 FDIC Law, Regulations, Related Acts (FDIC) 5391; see § 303.4(a) and (b) of this chapter for availability.)

(4) Undercapitalized institutions. Applications for a merger transaction by applicants subject to section 38 of the FDI Act (12 U.S.C. 1831o) 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. 1831o and 1828(c)) may be filed concurrently or as a single application.

(5) 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 FDIC office. The appropriate forms and instructions may be obtained upon request from any FDIC regional director.

(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 of this subpart; 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 (12 CFR part 325); 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, 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.

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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.

Content of notice—

(2) 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.

Public comments. Comments must be received by the appropriate FDIC office 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 FDIC office within 10 days after the first publication.

§§303.66–303.79 [Reserved]

Subpart E—Change in Bank Control

Scope.

This subpart sets forth the procedures for submitting a notice to acquire control of an insured state nonmember bank or a parent company 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)).

[68 FR 50459, Aug. 21, 2003]

Definitions.

For purposes of this subpart:

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

(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 or a parent company, 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 a parent company, unless the acquisition is exempt under §303.83.

(d) Parent Company means any company that controls, directly or indirectly, an insured state nonmember bank.

(e) 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.

[68 FR 50459, Aug. 21, 2003]

§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 or any parent company, unless the acquisition is exempt under §303.83.

(b) Acquisition 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 shall give the FDIC 60 days prior written notice, as specified in §303.84, before acquiring control of an insured state nonmember bank or any parent company, unless the acquisition is exempt under §303.83.
§ 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 or a parent company by a person who:

(i) Held the power to vote 25 percent or more of any class of voting shares of the institution continuously since the later of March 9, 1979, or the date that the institution commenced business as an insured state nonmember bank or a parent company; 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 institution continuously since March 9, 1979;

(2) The acquisition of additional shares of a class of voting shares of an insured state nonmember bank or a parent company 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 or a parent company through a pro rata stock dividend;

(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 

§ 303.84 the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(9), (10), and (12)) and;
(8) The acquisition of voting shares of a depository institution holding company that either the Board of Governors of the Federal Reserve System or the Office of Thrift Supervision reviews pursuant to the Change in Bank Control Act (12 U.S.C. 1817(j)).

(b) Prior notice exemption. (1) The following acquisitions of voting shares of an insured state nonmember bank or a parent company, which otherwise would require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate FDIC office within 90 calendar days after the acquisition and provides any relevant information requested by the FDIC:
(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 acquirer of a defaulted loan secured by a controlling amount of a state nonmember bank’s voting securities or a parent company’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 or a parent company, which otherwise would require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate FDIC office within 90 calendar days after receiving notice of the acquisition and provides any relevant information requested by the FDIC:
(i) A percentage increase in ownership of voting shares resulting from a redemption of voting shares by the issuing bank or a parent company; 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 FDIC office 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 director.

(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 FDIC office immediately of any material changes in a notice submitted to the FDIC, 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 FDIC 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, additional information. The FDIC shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is accepted as substantially complete. The FDIC may request additional information at any time.

(b) Commencement of the 60-day notice period: consummation of acquisition. (1) The 60-day notice period specified in §303.82 shall commence on the day after the date of acceptance of a substantially complete notice by the appropriate regional director. The notificant(s) may consummate the proposed acquisition after the expiration of the 60-day notice period, unless the FDIC disapproves the proposed acquisition or extends the notice period.
§ 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. 1831o(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 FDIC office, 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
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§ 303.121 Filing procedures.

(a) Where to file. A notice or application required by subpart A, subpart B, or subpart E of part 362 of this chapter shall be submitted in writing to the appropriate FDIC office.

(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.

§§ 303.104–303.119 [Reserved]

Subpart G—Activities of Insured State Banks

§ 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 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. This subpart also sets forth procedures for complying with the notice requirements contained in subpart E of part 362 of this chapter, governing subsidiaries of insured state nonmember banks engaging in financial activities.
(b) Contents of filing. 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, B, or E 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 FDIC may request additional information to provide 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)(2), §362.4(b)(2)(I), §362.4(b)(2)(ii)(A), §362.4(b)(2)(ii)(C), §362.4(b)(1), §362.4(b)(4), §362.5(b)(2), or §362.8(b) 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.

§§ 303.123–303.139 [Reserved]

Subpart H—Activities of Insured Savings Associations

§ 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 FDIC office.

(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 part 362 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 FDIC 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)(ii) 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)(ii), § 362.11(b)(2)(ii), § 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) or § 362.15 of this chapter will be acknowledged in writing by the FDIC. The notice will be reviewed at the appropriate FDIC office, which will take such action as it deems necessary and appropriate.
§ 303.160 Scope.

This subpart sets forth the notice requirements and procedures 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 FDIC office 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 FDIC office 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 FDIC 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
§ 303.162 Waiver from compliance.

(a) General. An institution proposing to convert from mutual to stock form may file with the appropriate FDIC office 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 Deposit Insurance Fund, or to the public interest.

[67 FR 79247, Dec. 27, 2002, as amended at 71 FR 20526, Apr. 21, 2006]

§ 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.

§§ 303.164–303.179 [Reserved]

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.

§ 303.181 Definitions.

For the purposes of this subpart, the following definitions shall 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 supervisory rating (which rates risk management, operational controls, compliance, and asset quality) 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, 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 §347.202 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 an insured state nonmember bank.

(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 §347.117(a) of this chapter must be provided to the appropriate FDIC office no later than 30 days after taking such action. The notice
must 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 (NHHPA Amendments Act) (16 U.S.C. 470a-2). The FDIC 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 §347.117(a) of this chapter shall submit an application to the appropriate FDIC office.

(2) Content of filing. A complete letter application must 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 NHHPA Amendments Act;
   (ii) Details concerning any involvement in the proposal by an insider of the applicant, as defined in §303.2(u) of this part, 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 proposed activities of the branch and, to the extent any of the proposed activities are not authorized by §347.115 of this chapter, the applicant’s reasons why they should be approved.

(3) Additional information. The FDIC may request additional information to complete processing.

(c) Processing—(1) Expedited processing for eligible depository institutions. An application filed under §347.118(a) of this chapter by an eligible depository institution as defined in §303.2(r) of this part 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) of this part. 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 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.

(d) Closing. Notices of branch closing under §347.121 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 FDIC office no later than 30 days after the branch is closed.

[70 FR 17558, Apr. 6, 2005]

§ 303.183 Investment by insured state nonmember banks in foreign organization.

(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 §347.117(b) of this chapter shall be provided to the appropriate FDIC office no later than 30 days after taking such action. The FDIC 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 §347.117(b) of this chapter shall submit an application to the appropriate FDIC office.

(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 appli-
cant’s business plan with respect to the
foreign organization;

(v) A brief description of any business
or activities which the foreign organi-
zation will conduct directly or indi-
rectly in the United States, and to the
extent such activities are not author-
ized by subpart A of part 347, the appli-
cant’s reasons why they should be ap-
proved;

(vi) A brief description of the foreign
organization’s activities, and to the ex-
tent such activities are not authorized
by subpart A of part 347, the appli-
cant’s reasons why they should be ap-
proved;

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

(3) Additional information. The FDIC
may request additional information to
complete processing.

(c) Processing—(1) Expedited proc-
essing for eligible depository institu-
tions. An application filed under
§ 347.118(b) of this chapter by an eligible
depository institution as defined in
§ 303.2(r) of this part seeking to make
direct or indirect investments in a for-
eign organization will be acknowledged
in writing by the FDIC and will receive
expedited processing, unless the appli-
cant is notified in writing to the con-
trary and provided with the basis for
that decision. The FDIC may remove
the application from expedited proc-
essing for any of the reasons set forth
in § 303.11(c)(2) of this part. Absent such
removal, an application processed
under expedited processing is deemed
approved 45 days after receipt of a sub-
stantially complete application by the
FDIC, or on such earlier date author-
ized by the FDIC in writing.

(2) Standard processing. For those ap-
lications which are not processed pur-
suant 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 con-
trolling the foreign organization di-
vests itself of such ownership or con-
trol, 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
FDIC office no later than 30 days after
the divestiture.

§ 303.184 Moving an insured branch of
a foreign bank.

(a) Filing procedures—(1) Where and
when to file. An application by an in-
sured branch of a foreign bank seeking
the FDIC’s consent to move from one
location to another, as required by sec-
tion 18(d)(1) of the FDI Act (12 U.S.C.
1828(d)(1)), shall be submitted in writ-
ting to the appropriate FDIC office on
the date the notice required by para-
graph (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 involve-
ment 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 con-
struction 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 appli-
cable provisions of the NEPA, and the
FDIC “Statement of Policy on NEPA”
(1 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 AStatement of Policy on NHPA” (1 F D I C 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 FDIC 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) of this part will be acknowledged in writing by the FDIC and will receive expedited processing if the applicant is proposing to move within the same state, 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) of this part. 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 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) Other approval criteria. (1) The FDIC may approve an application under this section if the criteria in paragraphs (d)(1)(i) through (d)(1)(vi) of this section is 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 or designee 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 FDIC, other than the standard conditions defined in §303.2(dd) which may be imposed without the applicant’s written consent.

(e) Relocation of insured branch from one state to another. If the foreign bank proposes to relocate an insured state branch to a state that is outside the state where the branch is presently located, in addition to meeting the approval criteria contained in paragraph (d) of this section, the foreign bank must:

(i) Comply with any applicable state laws or regulations of the states affected by the proposed relocation; and
(ii) Obtain any required regulatory approvals from the appropriate state licensing authority of the state to which the insured branch proposes to relocate before relocating the existing branch operations and surrendering its existing license to the appropriate state licensing authority of the state from which the branch is relocating.

§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 in which any insured depository institution becomes directly liable for obligations which will, after the merger transaction, be treated as deposits under section 313(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 requirements for a state branch of a foreign bank.

(a) Filing procedures—(1) Where to file. An application by a foreign bank for consent to operate as a noninsured state branch, as permitted by §347.215(b) of this chapter, shall be submitted in writing to the appropriate FDIC office.

(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.

§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 in which any insured depository institution becomes directly liable for obligations which will, after the merger transaction, be treated as deposits under section 313(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.

(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 313(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 requirements for a state branch of a foreign bank.

(a) Filing procedures—(1) Where to file. An application by a foreign bank for consent to operate as a noninsured state branch, as permitted by §347.215(b) of this chapter, shall be submitted in writing to the appropriate FDIC office.

(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.
(3) Additional information. The FDIC may request additional information to complete processing.

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

[67 FR 79247, Dec. 27, 2002, as amended at 70 FR 17559, Apr. 6, 2005]

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

(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 §347.212(a) of this chapter, shall be submitted in writing to the appropriate FDIC office.

(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 sections 347.209 and 347.210 of this chapter;

(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 Deposit 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 FDIC 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 §347.212(e) of this chapter, shall be submitted in writing to the appropriate FDIC office.

(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 FDIC may request additional information to complete processing.

[67 FR 79247, Dec. 27, 2002, as amended at 70 FR 17559, Apr. 6, 2005; 71 FR 20526, Apr. 21, 2006]

§§ 303.188–303.199 [Reserved]

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. 1833), 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
§ 303.201  Filing procedures.

Applications shall be filed with the appropriate FDIC office. 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 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. 1831a).

§ 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. 1831a).

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

(a) Scope. Any insured state nonmember bank or insured branch of a
§ 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

plain how the activity would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831a):

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;

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.

§§ 303.208–303.219 [Reserved]

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

plain how the activity would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831a):

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;

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.

§§ 303.208–303.219 [Reserved]

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

plain how the activity would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831a):

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;

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.

§§ 303.208–303.219 [Reserved]

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

plain how the activity would further the purposes of section 38 of the FDI Act (12 U.S.C. 1831a):

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;

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.
§ 303.221 Filing procedures.

(a) Where to file. An application under section 19 of the FDI Act shall be filed with the appropriate FDIC office.

(b) Contents of filing. Application forms may be obtained from any FDIC regional director. 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 306 of this chapter.

§§ 303.224–303.239 [Reserved]

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) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

(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. 1831o) are set forth in subpart K (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 30 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 when the decision is rendered.

§ 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 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) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

(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 §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.

§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
§ 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 Deposit Insurance Fund. 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) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

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

(1) The basis for requesting a waiver; and
(2) Certification and documentation as to each of the points cited in § 359.4(a)(4).

(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.


§ 303.245 Waiver of liability for commonly controlled depository institutions.
§ 303.246 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 non-member 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) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

(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.

[67 FR 79247, Dec. 27, 2002. Redesignated at 71 FR 20526, Apr. 21, 2006]

§ 303.247 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) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

(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.

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

[67 FR 79247, Dec. 27, 2002. Redesignated at 71 FR 20526, Apr. 21, 2006]

§ 303.248 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 FDIC office or 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 for reconsideration and provide the applicant with written notification of its determination within 60 days of its receipt of the request for reconsideration.

(e) 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 FDIC office for reconsideration of such request in accordance with the procedures set forth in §303.11(f).

[67 FR 79247, Dec. 27, 2002. Redesignated at 71 FR 20526, Apr. 21, 2006]

§ 303.249 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 (12 CFR part 348).

(b) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

(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.

[67 FR 79247, Dec. 27, 2002. Redesignated at 71 FR 20526, Apr. 21, 2006]

§ 303.250 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) Where to file. Applicants should submit a letter application to the appropriate FDIC regional director.

(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.

[67 FR 79247, Dec. 27, 2002. Redesignated at 71 FR 20526, Apr. 21, 2006]

§ 303.251 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) Where to file. Applicants shall submit a letter application to the appropriate FDIC office.

(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
§§ 303.252–303.259

of the final action as soon as the decision is rendered.

[67 FR 79247, Dec. 27. Redesignated at 71 FR 20526, Apr. 21, 2006]

§§ 303.252–303.259 [Reserved]

PART 304—FORMS, INSTRUCTIONS, AND REPORTS

Sec. 304.1 Purpose.
304.2 Where to obtain forms and instructions.
304.3 Reports.


SOURCE: 67 FR 18793, Apr. 17, 2002, unless otherwise noted.

§ 304.1 Purpose.

Part 304 informs the public where it may obtain forms and instructions for reports, applications, and other submittals used by the FDIC, and also describes certain forms that are not described elsewhere in FDIC regulations.

§ 304.2 Where to obtain forms and instructions.

Forms and instructions used in connection with applications, reports, and other submittals used by the FDIC can be obtained by contacting the FDIC Public Information Center (801 17th Street, NW., Washington, DC 20434; telephone: 800–276–6003 or 202–416–6940), except as noted below in § 304.3. In addition, many forms and instructions can be obtained from FDIC regional offices. A list of FDIC regional offices can be obtained from the FDIC Public Information Center or found at the FDIC’s web site at http://www.fdic.gov, or in the directory of FDIC Law, Regulations and Related Acts published by the FDIC.

§ 304.3 Reports.

(a) Consolidated Reports of Condition and Income, Forms FFIEC 031 and 041. Pursuant to section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. 1817(a)), every national bank, state member bank, and insured state nonmember bank is required to file Consolidated Reports of Condition and Income (also known as the Call Report) in accordance with the instructions for these reports. 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. The FDIC uses Call Report data to calculate deposit insurance assessments and monitor the condition, performance, and risk profile of individual banks and the banking industry. 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. The report forms and instructions can be obtained from the Division of Supervision and Consumer Protection (DSC), FDIC, Washington, DC 20429.

(Approved by the Office of Management and Budget under control number 3064–0052)

(b) Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, Form FFIEC 002. Pursuant to section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. 1817(a)), every insured U.S. branch of a foreign bank is required to file a Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks in accordance with the instructions for the report. All assets and liabilities, including contingent assets and liabilities, must be reported in, or otherwise taken into account in the preparation of the report. The FDIC uses the reported data to calculate deposit insurance assessments and monitor the condition, performance, and risk profile of individual insured branches and the banking industry. 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. Because the Board of Governors of the Federal Reserve System collects and processes this report on behalf of the FDIC, the report forms and instructions can be obtained from Federal Reserve District Banks or through the web site of the Federal Financial Institutions Examination Council, http://www.ffiec.gov/.

(Approved by the Office of Management and Budget under control number 7100–0032)

(c) Summary of Deposits, Form FDIC 8020/05. Form 8020/05 is a report on the
§ 307.1 Scope and purpose.
(a) Scope. This Part applies to all insured depository institutions, as defined in section 3(c)(2) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1813(c)(2)).
(b) Purpose. This Part sets forth the rules governing:
(1) The time and manner for providing certification to the FDIC regarding the assumption of all of the deposit liabilities of an insured depository institution by one or more insured depository institutions; and
(2) The notification that an insured depository institution shall provide its depositors when a depository institution's insured status is being voluntarily terminated without its deposits being assumed by one or more insured depository institutions.

§ 307.2 Certification of assumption of deposit liabilities.
(a) When certification is required. Whenever all of the deposit liabilities of an insured depository institution are assumed by one or more insured depository institutions by merger, consolidation, other statutory assumption, or by contract, the transferring insured depository institution, or its legal successor, shall provide an accurate written certification to the FDIC that its deposit liabilities have been assumed. No certification shall be required when deposit liabilities are assumed by an operating insured depository institution from an insured depository institution in default, as defined in section 3(x)(1) of the FDI Act (12 U.S.C. 1813(x)(1)), and that has been placed under FDIC receivership.
(b) Certification requirements. The certification required by paragraph (a) of this section shall be provided on official letterhead of the transferring insured depository institution or its legal successor, signed by a duly authorized official, and state the date the assumption took effect. The certification shall

APPENDIX B TO PART 307—INSTITUTION LETTERHEAD

A. AUTHORITY: 12 U.S.C. 1818(a)(6); 1818(q); and 1819(a) [Tenth].
B. SOURCE: 71 FR 8791, Feb. 21, 2006, unless otherwise noted.
§ 307.3 Notice to depositors when insured status is voluntarily terminated and deposits are not assumed.

(a) Notice required. An insured depositary institution that has obtained authority from the FDIC to terminate its insured status under sections 8(a), 8(p) or 18(i)(3) of the FDI Act without its deposit liabilities being assumed by one or more insured depositary institutions shall provide to each of its depositors, at the depositor’s last known address of record on the books of the institution, prior written notification of the date the institution’s insured status shall terminate.

(b) Prior approval of notice. The insured depositary institution shall provide the appropriate Regional Director of the FDIC’s Division of Supervision and Consumer Protection, as defined in 12 CFR 303.2(g), a copy of the proposed notice for approval. After being approved, the notice shall be provided to depositors by the insured depositary institution at the time and in the manner specified by the appropriate Regional Director.

(c) Form of notice. The notice to depositors required by paragraph (a) of this section shall be provided on the official letterhead of the insured depositary institution as of the date of receipt by the FDIC of satisfactory evidence of such assumption, pursuant to section 8(q) of the FDI Act and this regulation. Generally, no order shall be issued, under this paragraph, and insured status shall be cancelled by operation of law:

(1) If the charter of the transferring institution has been cancelled, revoked, rescinded, or otherwise terminated by operation of applicable state or federal statutes or regulations, or by action of the chartering authority for the transferring institution essentially contemporaneously, that is, generally within five business days after all deposits have been assumed; or

(2) If the transferring institution is an insured depositary institution in default and for which the FDIC has been appointed receiver.
APPENDIX A TO PART 307—TRANSFER- 
RING INSTITUTION LETTERHEAD

[Date]
[Name and Address of appropriate FDIC Regional Director]

SUBJ: ECT: Certification of Total Assumption of Deposits

This certification is being provided pursuant to 12 U.S.C. 1818(q) and 12 CFR 307.2. On [state the date the deposit assumption took effect], [state the name of the depository institution assuming the deposit liabilities] assumed all of the deposits of [state the name and location of the transferring institution whose deposits were assumed]. [If applicable, state the date and method by which the transferring institution’s authority to engage in banking was or will be terminated.] Please contact the undersigned, at [telephone number], if additional information is needed.

Sincerely,

By: [Name and Title of Authorized Representative]

APPENDIX B TO PART 307—INSTITUTION LETTERHEAD

[Date]
[Name and Address of Depositor]

SUBJ: ECT: Notice to Depositor of Voluntary Termination of Insured Status

The insured status of [name of insured depository institution], under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on [state the date] (“termination date”). Insured deposits in the [name of insured depository institution] on the termination date, less all withdrawals from such deposits made subsequent to that date, will continue to be insured by the Federal Deposit Insurance Corporation, to the extent provided by law, until [state the date]. The Federal Deposit Insurance Corporation will not insure any new deposits or additions to existing deposits made by you after the termination date.

This Notice is being provided pursuant to 12 CFR 307.3.

Please contact [name of institution official in charge of depositor inquiries], at [name and address of insured depository institution] if additional information is needed regarding this Notice or the insured status of your account(s).

Sincerely,

By: [Name and Title of Authorized Representative]
Pt. 308

308.105 Custodian of the record.
308.106 Written testimony in lieu of oral hearing.
308.107 Document discovery.

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

308.108 Sanctions.
308.109 Suspension and disbarment.

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

308.110 Scope.
308.111 Grounds for disapproval.
308.112 Notice of disapproval.
308.113 Answer to notice of disapproval.
308.114 Burden of proof.

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.
308.116 Assessment of penalties.
308.117 Effective date of, and payment under, an order to pay.
308.118 Collection of penalties.

Subpart F—Rules and Procedures Applicable to Proceedings Relating to Involuntary Termination of Insured Status

308.119 Scope.
308.120 Grounds for termination of insurance.
308.121 Notification to primary regulator.
308.122 Notice of intent to terminate.
308.123 Notice to depositors.
308.124 Involuntary termination of insured status for failure to receive deposits.
308.125 Temporary suspension of deposit insurance.
308.126 Special supervisory associations.

Subpart G—Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders

308.127 Scope.
308.128 Grounds for cease-and-desist orders.
308.129 Notice to state supervisory authority.
308.130 Effective date of order and service on bank.


308.131 Temporary cease-and-desist order.

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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); and
(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. 1817(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(2)(F);
(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;
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(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)); (g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under that subsection; and (h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 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) Decisinal 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));
§ 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 part;

(5) To prepare and present to the Board of Directors a recommended decision as provided herein;
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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 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.

§ 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
§ 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.


§ 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;
§ 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.


§ 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.

(ii) 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:
§ 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.

§ 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.
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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.
§ 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) 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.

§ 308.26 Document subpoenas to non-parties.

(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 a document subpoena, the administrative law judge shall not issue the subpoena without first giving the party that applied for the issuance of the subpoena an opportunity to be heard in opposition to the application.

(b) Service. A party shall serve a document subpoena on the person to whom the subpoena is addressed and on all other parties.

(c) Enforcement. A party shall be entitled to seek enforcement of a document subpoena in accordance with the provisions of §308.23.

(d) Protection. Any party may object to a document subpoena on the ground that the document sought is protected by privilege or law. The administrative law judge shall promptly rule on such objections.

(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 administration 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.

§308.26 Document subpoenas to non-parties.

(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) 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.

(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 a document subpoena, the administrative law judge shall not issue the subpoena without first giving the party that applied for the issuance of the subpoena an opportunity to be heard in opposition to the application.

(b) Service. A party shall serve a document subpoena on the person to whom the subpoena is addressed and on all other parties.

(c) Enforcement. A party shall be entitled to seek enforcement of a document subpoena in accordance with the provisions of §308.23.

(d) Protection. Any party may object to a document subpoena on the ground that the document sought is protected by privilege or law. The administrative law judge shall promptly rule on such objections.

(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.

§ 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
§ 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
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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;
§ 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 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.

(b) 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, 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.

§ 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.

(b) 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.

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§ 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.

(b) 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.
§ 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
§ 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.

§ 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 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.


§ 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,
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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 ar-
gument 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 ad-
ministrative law judge's recommenda-
tions to which that party takes excep-
tion.
(2) All exceptions and briefs in sup-
port 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 ref-
erences 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 Di-
rectors. When the Executive Secretary
determines that the record in the pro-
ceeding is complete, the Executive Sec-
retary shall serve notice upon the par-
ties that the proceeding has been sub-
mitted 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 re-
quest of any party filed with the Exec-
utive Secretary within the time for fil-
ing exceptions, the Board of Directors
may order and hear oral argument on
the recommended findings, conclu-
sions, decision, and order of the admin-
istrative law judge. A written request
by a party must show good cause for
oral argument and state reasons why
arguments cannot be presented ade-
quately in writing. A denial of a re-
quest 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 em-
ployees 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 ar-
guments 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 argu-
ment, whichever is later, unless the
Board of Directors orders that the ac-
tion or any aspect thereof be remanded
to the administrative law judge for fur-
ther proceedings. Copies of the final de-
cision and order of the Board of Direc-
tors shall be served upon each party to
the proceeding, upon other persons re-
quired 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 Di-
rectors or a reviewing court, operate as
a stay of any order issued by the FDIC.
The Board of Directors may, in its dis-
cretion, and on such terms as it finds
just, stay the effectiveness of all or any
part of its order pending a final deci-
sion 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 admin-
istrative enforcement proceedings ini-
tiated by the FDIC as set forth in
§ 308.01 of the Uniform Rules.
(b) Except as otherwise specifically
provided, the Uniform Rules and sub-
part B of the Local Rules shall not
apply to subparts D through T of the
Local Rules.
§ 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.

(1) 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.

(2) Pursuant to authority delegated by the Board of Directors, the Executive Secretary and Assistant Executive Secretary, upon the advice and recommendation of the Assistant General Counsel, Trial Litigation Section, may issue rulings in proceedings under sections 7(j), 8, 18(j), 19, 29, 32 and 38 of the FDIA (12 U.S.C. 1817(j), 1818, 1828(j), 1829, 1831i and 1831o concerning:

(i) Denials of requests for private hearing;

(ii) Interlocutory appeals;

(iii) Stays pending judicial review;

(iv) Reopenings of the record and/or remands of the record to the ALJ;

(v) Supplementation of the evidence in the record;

(vi) All remands from the courts of appeals not involving substantive issues;

(vii) Extensions of stays of orders terminating deposit insurance; and

(viii) All matters, including final decisions, in proceedings under section 8(g) of the FDIA (12 U.S.C. 1818(g)).

§ 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
§ 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;
§ 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 contumacious 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, 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 no sooner than one year after the suspension or disbarment, and thereafter, a new request for reinstatement may be made no sooner than one year after the counsel's most recent reinstatement application. The application must comply with the requirements of §303.3 of this chapter. 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 the burden of providing the grounds supporting the application, 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 contumacious conduct. A finding by the administrative law judge of contumacious 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
§ 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 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 Deposit Insurance Fund.

[56 FR 37975, Aug. 9, 1991, as amended at 71 FR 20526, Apr. 21, 2006]

§ 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)). 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 December 31, 2004:

(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 $6,500 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 $32,500 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—$1,250,000 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 $1,250,000 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.

§ 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. 1819(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. 1819(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 OrderSuspending Insurance is issued pursuant to section 8(a)(8) of the
§ 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, 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
§ 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) ________

The status of the (Name of depository institution or branch) (Address), 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.

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 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 (Name of depository institution or branch) (Address), 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.

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 sections 8 and 50 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), and section 50 of the FDIA, 12 U.S.C. 1831aa.

(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. 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) Service on banks. In cases where the bank is not the respondent, the cease-and-desist order shall also be served upon the bank.
section 8(c)(2) of the F D I A (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 F D I A (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 F D I C 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.


§ 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 F D I A (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 F D I A (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 F D I A (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 $2,200 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)(ii) 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 December 31, 2004, the maximum Tier Two penalty amount will increase to $27,500 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 $2,200 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 December 31, 2004, the maximum Tier Two penalty amount will increase to $27,500 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 $1,250,000 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 December 31, 2004, the maximum Tier Three penalty amount will increase to the lesser of $1,250,000 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 Improvement Act. Pursuant to section 31001(s) of the Debt Collection Improvement Act, for violations which occur after December 31, 2004, 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 $6,500 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 $32,500 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 $1,250,000 or, in the case of any insured depository institution, an amount not to exceed the lesser of $1,250,000 or 1 percent of the total assets of such institution for each day during which the violation, practice, or breach continues.

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 2,200 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 $27,000 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 $1,250,000 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 $6,500 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 timely pay assessment.

(A) In General.—Subject to paragraph (c)(3)(v)(C) of this section, any insured depository institution which fails or refuses to pay any assessment shall be subject to a penalty in an amount of not more than 1 percent of the amount of the assessment due for each day that such violation continues.

(B) Exception In Case Of Dispute.—Paragraph (A) of this section shall not apply if—

(1) The failure to pay an assessment is due to a dispute between the insured depository institution and the Corporation over the amount of such assessment; and

(2) The insured depository institution deposits security satisfactory to the Corporation for payment upon final determination of the issue.

(C) Special Rule For Small Assessment Amounts.—If the amount of the assessment which an insured depository institution fails or refuses to pay is less than $10,000 at the time of such failure or refusal, the amount of any penalty to which such institution is subject under paragraph (A) of this section shall not exceed $100 for each day that such violation continues.

(D) Authority To Modify Or Remit Penalty.—The Corporation, in the sole discretion of the Corporation, may compromise, modify or remit any penalty which the Corporation may assess or has already assessed under paragraph (c)(3)(v)(A) of this section upon a finding that good cause prevented the timely payment of an assessment.

(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 willfully 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 $6,500 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 $32,500 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 $1,100 for each day during which the violation continues or, in the case of any person other than an insured depository institution, an amount not to exceed the lesser of $1,250,000 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 secures, 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 the 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.

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 $130,000 for a natural person or $625,000 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 $6,500 per claim or statement 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 (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 $385 per violation, and not to exceed a total of $125,000 annually.

§ 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 functions 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.


§ 308.138 Scope.

The rules and procedures of this subpart 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. 78l, 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.
§ 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.

(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
§ 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 and Consumer Protection (DSC), the Director of the Division of Depositor and Asset Services, or their respective designees as set forth at § 303.272 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.

§ 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, 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 § 308.6 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 §308.8 of the Uniform Rules; and

(e) Witness fees shall be paid in accordance with §308.14 of the Uniform Rules.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62100, Nov. 16, 1999]

§ 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) and § 303.102 of this chapter for the consent of the FDIC to add 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:

(a) The bank is not in compliance with all minimum capital requirements applicable to it as determined by the FDIC on the basis of such institution’s most recent report of condition or report of examination or inspection;

(b) The bank is in a troubled condition as defined in §303.101(c) of this chapter; or

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

[64 FR 62100, Nov. 16, 1999]

§ 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 is 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 indicates 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.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62101, Nov. 16, 1999]
§ 308.153 Procedures where notice of disapproval issues pursuant to § 303.103(c) of this chapter.

(a) The Notice of Disapproval shall be served upon the insured state non-member 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).

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62101, Nov. 16, 1999]

§ 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 §§ 308.6 through 308.12, 308.15 through 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.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62101, Nov. 16, 1999]

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/or an individual, who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering 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 or money laundering:
§ 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

2(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.

(64 FR 62101, Nov. 16, 1999)
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 §§ 308.6 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 subpart, 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.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62101, Nov. 16, 1999]
Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

SOURCE: 72 FR 67235, Nov. 28, 2007, unless otherwise noted.

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following:

(a) Proceedings 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 any depository institution, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12), where the individual is the subject of any state or federal information, indictment, or complaint, involving the commission of, or participation in:

(1) A crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or federal law; or
(2) A criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31.

(b) Proceedings to remove from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of any depository institution without the consent of the Board of Directors or its designee where:

(1) A judgment of conviction or an agreement to enter a pre-trial diversion or other similar program has been entered against such party in connection with a crime described in paragraph (a)(2) of this section.

§ 308.162 Relevant considerations.

(a)(1) In proceedings under §308.161(a) and (b) for a notice of suspension or prohibition, or a 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 the alleged offense is a criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31; and

(iii) Whether continued service or participation by the institution-affiliated party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12).

(b) The question of whether an institution-affiliated party is guilty of the subject crime shall not be tried or considered in a proceeding under this subpart.

§ 308.163 Notice of suspension or prohibition, 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 any depository institution 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 any depository institution...
§ 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 filed pursuant to §308.163. Upon the request of the institution-affiliated party, 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 §§308.6 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 institution-affiliated party 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 institution-affiliated party 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.

that the subject of the action is affiliated with at the time the notice is issued.

(2) 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 any depository institution an institution-affiliated party, when a final judgment of conviction not subject to further appellate review is entered against the institution-affiliated party for a crime referred to in §308.161(a)(1) and continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12).

(2) An order of removal or prohibition shall be entered if a judgment of conviction is entered against the institution-affiliated party for a crime described in §308.161(a)(2).

(c) The notice of suspension or prohibition or the order of removal or prohibition shall:

(1) 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 or order; and

(2) Summarize or cite to the relevant considerations specified in §308.162 of this subpart.
Federal Deposit Insurance Corporation

§ 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):

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.
§ 308.168 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 shall be filed with the Executive Secretary within 30 days after service of the final order of the Board of Directors in disposition of the proceeding whenever:

(1) The applicant seeks an award pursuant to 5 U.S.C. 504(a)(1) as the prevailing party in the adversary adjudication or in a discrete significant substantive portion of the proceeding; or

(2) The applicant, in an adversary adjudication arising from an action to enforce compliance with a statutory or regulatory requirement, asserts pursuant to 5 U.S.C. 504(a)(4) that the demand by the FDIC is substantially in excess of the decision of the administrative law judge and is unreasonable when compared with such decision under the facts and circumstances of the case.

(b) Content. The application and related documents shall conform to the requirements of § 308.10(b) and (c) 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 with regard to an application filed pursuant to 5 U.S.C. 504(a)(3), 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 applicant may file a reply with regard to an application filed pursuant to 5 U.S.C. 504(a)(4), if the FDIC has addressed in its answer any of the following issues: the applicant has committed a willful violation of law or otherwise acted in bad faith, that the FDIC's demand is reasonable when compared to the decision of the administrative law judge 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 30 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. Additional filings in the nature of pleadings may be submitted only by leave of the administrative law judge.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999]

§308.172 Eligibility of applicants.

(a) General 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.

(3) For purposes of an application filed pursuant to 5 U.S.C. 504(a)(4), a small entity as defined in 5 U.S.C. 601.

(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.
§ 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) For applications filed pursuant to 5 U.S.C. 504(a)(1), 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.

(b) For applications filed pursuant to 5 U.S.C. 504(a)(4), an applicant may receive an award unless the demand by the FDIC was reasonable when compared with the decision of the administrative law judge, the applicant has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.
§ 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 $125 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. Fees and expenses awarded under 5 U.S.C. 504(a)(4) related to defending against an excessive demand shall be paid only as a consequence of appropriations paid in advance.

(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.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999]

§ 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) For applications filed pursuant to 5 U.S.C. 504(a)(1), 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) For applications filed pursuant to 5 U.S.C. 504(a)(4), a showing that the demand by the FDIC is substantially in excess of the decision of the administrative law judge and is unreasonable when compared with such decision under the facts and circumstances of the case;

(4) A statement of the amount of fees and expenses for which an award is sought;

(5) For applications filed pursuant to 5 U.S.C. 504(a)(4), a statement of the amount of fees and expenses which constitute appropriations paid in advance;

(6) If the applicant is not an individual, a statement of the number of its employees on the date the proceeding was initiated;

(7) A description of any affiliated individuals or entities, as defined in § 308.172(c)(5), or a statement that none exist;

(8) 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;

(9) For applications filed pursuant to 5 U.S.C. 504(a)(1), a statement whether the applicant is a small entity as defined in 5 U.S.C. 601; and

(10) 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.

[56 FR 37975, Aug. 9, 1991, as amended at 64 FR 62102, Nov. 16, 1999]

§ 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 copy to the administrative law judge 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 30 days, and further extensions may be granted by the administrative law judge upon the joint
§ 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

§ 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
§ 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. The bank shall have such time to respond to a proposed directive as provided by the FDIC under paragraph (c) of this section.

(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
§ 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) Hearing procedures. (1) 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...
§ 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.
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§ 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.


§ 308.204 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 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.
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 in appendix A and the Interagency Guidelines Establishing Standards for Safeguarding Customer Information in appendix B 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.
§ 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.

Subpart T—Program Fraud Civil Remedies and Procedures

SOURCE: 66 FR 9189, Feb. 7, 2001, unless otherwise noted.
§ 308.500 Basis, purpose, and scope.


(b) Purpose. This subpart:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present false, fictitious, or fraudulent claims or written statements to the FDIC or to its agents; and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

(c) Scope. This subpart applies only to persons who make, submit, or present false, fictitious, or fraudulent claims or written statements to the FDIC or to its agents; and

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present false, fictitious, or fraudulent claims or written statements to the FDIC or to its agents; and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 308.501 Definitions.

For purposes of this subpart:


(b) Authority means the Federal Deposit Insurance Corporation (FDIC).

(c) Authority head or Board means the Board of Directors of the FDIC, which is herein designated by the Chairman of the FDIC to serve as head of the FDIC for PFCRA matters.

(d) Benefit means, in the context of "statement" as defined in 31 U.S.C. 3801(a)(9), any financial assistance received from the FDIC that amounts to $150,000 or less. The term does not include the FDIC’s deposit insurance program.

(e) Claim means any request, demand, or submission:

(1) Made to the FDIC for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from the FDIC or to a party to a contract with the FDIC;

(i) For property or services if the United States:

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services;

(C) Will reimburse such recipient or party for the purchase of such property or services;

(ii) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States:

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand;

(2) Made to the FDIC that has the effect of decreasing an obligation to pay or account for property, services, or money.

(f) Complaint means the administrative complaint served by the reviewing official on the defendant under §308.506 of this subpart.

(g) Corporation means the Federal Deposit Insurance Corporation.

(h) Defendant means any person alleged in a complaint under §308.506 of this subpart to be liable for a civil penalty or assessment under §308.502 of this subpart.

(i) Government means the United States Government.

(j) Individual means a natural person.
§ 308.502 Basis for civil penalties and assessments.

(a) Claims. (1) A person who makes a false, fictitious, or fraudulent claim to the FDIC is subject to a civil penalty of up to $5,000 per claim. A claim is false, fictitious, or fraudulent if the person making the claim knows, or has reason to know, that:
   (i) The claim includes, or is supported by, a written statement that asserts a material fact which is false, fictitious or fraudulent; or
   (ii) The claim includes, or is supported by, a written statement that:
       (A) Omits a material fact; and
       (B) Is false, fictitious, or fraudulent as a result of that omission; and
   (iii) The claim includes a duty to include the material fact; or
   (iv) The claim seeks payment for providing property or services that the person has not provided as claimed.
(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(k) Initial decision means the written decision of the ALJ required by § 308.509 or § 308.536 of this subpart, and includes a revised initial decision following a remand or a motion for consideration.

(l) Investigating official means the Inspector General of the FDIC, or an officer or employee of the Inspector General designated by the Inspector General. The investigating official must serve in a position that has a rate of basic pay under the pay scale utilized by the FDIC that is equal to or greater than 120 percent of the minimum rate of basic pay for grade 15 under the federal government’s General Schedule.

(m) Knows or has reason to know, means that a person, with respect to a claim or statement:
   (1) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
   (2) Acts in deliberate ignorance of the truth or falsity of the claim or statement;
   (3) Acts in reckless disregard of the truth or falsity of the claim or statement.

(n) Makes, wherever it appears, includes the terms “presents”, “submits”, and “causes to be made, presented, or submitted.” As the context requires, “making” or “made” likewise includes the corresponding forms of such terms.

(o) Person means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

(p) Representative means an attorney, who is a member in good standing of the bar of any state, territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, and designated by a party in writing.

(q) Reviewing official means the General Counsel of the FDIC or his designee who is:
   (1) Not subject to supervision by, or required to report to, the investigating official;
   (2) Not employed in the organizational unit of the FDIC in which the investigating official is employed; and
   (3) Serving in a position that has a rate of basic pay under the pay scale utilized by the FDIC that is equal to or greater than 120 percent of the minimum rate of basic pay for grade 15 under the federal government’s General Schedule.

(r) Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:
   (1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or
   (2) With respect to (including relating to eligibility for):
      (i) A contract with, or a bid or proposal for a contract with; or
      (ii) A grant, loan, or benefit received, directly or indirectly, from the FDIC, or any state, political subdivision of a state, or other party, if the United States government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the government will reimburse such state, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.
§ 308.503 Investigations.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted:

(1) The subpoena will identify the person to whom it is addressed and the authority under which the subpoena is issued and will identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and
(3) The person receiving such subpoena will be required to provide the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available, and the reasons therefore, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the PFCRA may be warranted, the investigating official will submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section will preclude or limit an investigating official’s discretion to refer allegations directly to the United States Department of Justice (DOJ) for suit under the False Claims Act (31 U.S.C. 3729 et seq.) or other civil relief, or to preclude or limit the investigating official’s discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 308.504 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 308.503(b) of this subpart, the reviewing official determines that there is adequate evidence to believe that a person is liable under § 308.502 of this subpart, the reviewing official will transmit to the Attorney General a written notice of the reviewing official’s intention to issue a complaint under § 308.506 of this subpart.

(b) Such notice will include:

(1) A statement of the reviewing official’s reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 308.502 of this subpart;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Such a statement may be based upon information then known, or upon an absence of any information indicating that the person may be unable to pay such amount.

§ 308.505 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 308.506 of this subpart only if:

(1) The DOJ approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 308.502(a) of this subpart with respect to a claim (or a group of related claims submitted at the same time as defined in paragraph (b) of this section) the reviewing official determines that the amount of money or the value of property or services demanded or requested does not exceed $150,000.

(b) For the purposes of this section, a group of related claims submitted at the same time will include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section will be construed to limit the reviewing official’s authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 308.506 Complaint.

(a) On or after the date the DOJ approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 308.507 of this subpart.

(b) The complaint will state:
(1) The allegations of liability against the defendant, including the statutory basis for liability, or identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer and to request a hearing, including a specific statement of the defendant’s right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in §308.509 of this subpart.

(c) At the same time the reviewing official serves the complaint, he or she will provide the defendant with a copy of this subpart.

§ 308.507 Service of complaint.

(a) Service of a complaint will be made by certified or registered mail or by delivery in any manner authorized by rule 4(c) of the Federal Rules of Civil Procedure (28 U.S.C. App.). Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 308.508 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer will be deemed to be a request for hearing.

(b) In the answer, the defendant:

(1) Must admit or deny each of the allegations of liability made in the complaint;

(2) Must state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Must state the name, address, and telephone number of the person authorized by the defendant to act as defendant’s representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided:

(1) The defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section.

(2) The reviewing official will file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in §308.510 of this subpart.

(3) For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 308.509 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in §308.508(a) of this subpart, the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ will promptly serve on the defendant in the manner prescribed in §308.507 of this subpart, a notice that an initial decision will be issued under this section.

(c) If the defendant fails to answer, the ALJ will assume the facts alleged in the complaint to be true, and, if such facts establish liability under §308.502 of this subpart, the ALJ will issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and
§ 308.510 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official will file the complaint and answer with the ALJ. The reviewing official will include the name, address, and telephone number of a representative of the Corporation.

§ 308.511 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ will promptly serve a notice of hearing upon the defendant in the manner prescribed by § 308.507 of this subpart. At the same time, the ALJ will send a copy of such notice to the representative of the Corporation.

(b) The notice will include:

1. The tentative time, date, and place, and the nature of the hearing;
2. The legal authority and jurisdiction under which the hearing is to be held;
3. The matters of fact and law to be asserted;
4. A description of the procedures for the conduct of the hearing;
5. The name, address, and telephone number of the representative of the Corporation and of the defendant, if any; and
6. Other matters as the ALJ deems appropriate.

§ 308.512 Parties to the hearing.

(a) The parties to the hearing will be the defendant and the Corporation.

(b) Pursuant to the False Claims Act (31 U.S.C. 3730(c)(5)), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 308.513 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the FDIC who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

1. Participate in the hearing as the ALJ;
2. Participate or advise in the initial decision or the review of the initial decision by the Board, except as a witness or a representative in public proceedings; or

assessments imposed under paragraph (c) of this section, and the initial decision will become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision will be stayed pending the ALJ’s decision on the motion.

(f) If, in the motion to reopen under paragraph (e) of this section, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ will withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and will grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant’s motion to reopen under paragraph (e) of this section is not subject to reconsideration under § 308.537 of this subpart.

(h) The decision denying the motion to reopen under paragraph (e) of this section may be appealed by the defendant to the Board by filing a notice of appeal with the Board within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal will stay the initial decision until the Board decides the issue.

(i) If the defendant files a timely notice of appeal with the Board, the ALJ will forward the record of the proceeding to the Board.

(j) The Board will decide whether extraordinary circumstances excuse the defendant’s failure to file a timely answer based solely on the record before the ALJ.

(k) If the Board decides that extraordinary circumstances excuse the defendant’s failure to file a timely answer, the Board will remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Board decides that the defendant’s failure to file a timely answer is not excused, the Board will reinstate the initial decision of the ALJ, which will become final and binding upon the parties 30 days after the Board issues such decision.
§ 308.517 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ will dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case will be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Board may determine the matter only as part of the Board's review of the initial decision upon appeal, if any.

§ 308.516 Rights of parties.

Except as otherwise limited by this subpart, all parties may:

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law which will be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law.

§ 308.515 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. An affidavit alleging conflict of interest or other reason for disqualification must accompany the motion.

(c) Such motion and affidavit must be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections will be deemed waived.

(d) Such affidavit must state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. The representative of record must certify that the affidavit is made in good faith and this certification must accompany the affidavit.

(e) Upon the filing of such a motion and affidavit, the ALJ will proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

§ 308.514 Ex parte contacts.

No party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 308.517 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;
(7) Regulate the scope and timing of discovery;
(8) Regulate the course of the hearing and the conduct of representatives and parties;
(9) Examine witnesses;
(10) Receive, rule on, exclude, or limit evidence;
(11) Upon motion of a party, take official notice of facts, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;
(12) Conduct any conference, argument, or hearing on motions in person or by telephone; and
(13) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this subpart.

(c) The ALJ does not have the authority to make any determinations regarding the validity of federal statutes or regulations or of directives, rules, resolutions, policies, orders or other such general pronouncements issued by the Corporation.

§ 308.519 Disclosure of documents.
(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 308.503(b) of this subpart are based, unless such documents are subject to a privilege under federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.
(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.
(c) The notice sent to the Attorney General from the reviewing official as described in § 308.504 of this subpart is not discoverable under any circumstances.
(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 308.508 of this subpart.

§ 308.520 Discovery.
(a) The following types of discovery are authorized:
(1) Requests for production of documents for inspection and copying;
(2) Requests for admission of the authenticity of any relevant document or of the truth of any relevant fact;
(3) Written interrogatories; and
§ 308.522

(4) Depositions.
(b) For the purpose of this section and §§ 308.521 and 308.522 of this subpart, the term documents includes information, documents, reports, answers, records, accounts, papers, and other data or documentary evidence. Nothing contained in this subpart will be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ will regulate the timing of discovery.

(d) Motions for discovery. (1) A party seeking discovery may file a motion with the ALJ and a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition, must accompany such motions.

(2) Within 10 days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 308.523 of this subpart.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought:
   (i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;
   (ii) Is not unduly costly or burdensome;
   (iii) Will not unduly delay the proceeding; and
   (iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 308.523 of this subpart.

(e) Dispositions. (1) If a motion for deposition is granted, the ALJ will issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena will specify the time, date, and place at which the deposition will be held.

(2) The party seeking to depose must serve the subpoena in the manner prescribed in § 308.507 of this subpart.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within 10 days of service.

(4) The party seeking to depose must provide for the taking of a verbatim transcript of the deposition, and must make the transcript available to all other parties for inspection and copying.

(f) Each party must bear its own costs of discovery.

§ 308.521 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties must exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 308.532(b) of this subpart. At the time such documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, must provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided in paragraph (a) of this section unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

§ 308.522 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena must file a written request not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request must specify any documents to
be produced and must designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena must specify the time, date, and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena must serve it in the manner prescribed in §308.507 of this subpart. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

§ 308.523 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

1. That the discovery will not be conducted;
2. That the discovery will be conducted only on specified terms and conditions, including a designation of the time or place;
3. That the discovery will be conducted only through a method of discovery other than that requested;
4. That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;
5. That discovery be conducted with no one present except persons designated by the ALJ;
6. That the contents of discovery or evidence be sealed or otherwise kept confidential;
7. That a deposition after being sealed be opened only by order of the ALJ;
8. That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way;
9. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 308.524 Witness fees.

The party requesting a subpoena must pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage must accompany the subpoena when served, except that when a subpoena is issued on behalf of the FDIC, a check for witness fees and mileage need not accompany the subpoena.

§ 308.525 Form, filing, and service of papers.

(a) Form. (1) Documents filed with the ALJ must include an original and two copies.
(2) Every pleading and paper filed in the proceeding must contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).
(3) Every pleading and paper must be signed by, and must contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.
(4) Papers are considered filed when they are mailed by certified or registered mail. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.
(b) Service. A party filing a document with the ALJ must, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in §308.507 of this subpart must be made by delivering a copy or by placing a copy of the document in the
United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service must be made upon such representative in lieu of the actual party. The ALJ may authorize facsimile transmission as an acceptable form of service.

(c) Proof of service. A certificate by the individual serving the document by personal delivery or by mail, setting forth the manner of service, will be proof of service.

§ 308.526 Computation of time.
(a) In computing any period of time under this subpart or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the federal government will be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response.

§ 308.527 Motions.
(a) Any application to the ALJ for an order or ruling must be by motion. Motions must state the relief sought, the authority relied upon, and the facts alleged, and must be filed with the ALJ and served on all other parties. Motions may include, without limitation, motions for summary judgment.

(b) Except for motions made during a prehearing conference or at the hearing, all motions must be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or any other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ will make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 308.528 Sanctions.
(a) The ALJ may sanction a person, including any party or representative for:
(1) Failing to comply with an order, rule, or procedure governing the proceeding;
(2) Failing to prosecute or defend an action; or
(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to, those listed in paragraphs (c), (d), and (e) of this section, must reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:
(1) Draw an inference in favor of the requesting party with regard to the information sought;
(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;
(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and
(4) Strike any part of the related pleading or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this subpart commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief, or other document which is not filed in a timely fashion.

§ 308.529 The hearing and burden of proof.
(a) The ALJ will conduct a hearing on the record in order to determine whether the defendant is liable for a
§ 308.530 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Board, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Board in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

1. The number of false, fictitious, or fraudulent claims or statements;
2. The time period over which such claims or statements were made;
3. The degree of the defendant's culpability with respect to the misconduct;
4. The amount of money or the value of the property, services, or benefit falsely claimed;
5. The value of the government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;
6. The relationship of the amount imposed as civil penalties to the amount of the government's loss;
7. The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of government programs and operations, including particularly the impact on the intended beneficiaries of such programs;
8. Whether the defendant has engaged in a pattern of the same or similar misconduct;
9. Whether the defendant attempted to conceal the misconduct;
10. The degree to which the defendant has involved others in the misconduct or in concealing it;
11. Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;
12. Whether the defendant cooperated in or obstructed an investigation of the misconduct;
13. Whether the defendant assisted in identifying and prosecuting other wrongdoers;
14. The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in a similar transaction;
15. Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a state, directly or indirectly; and
16. The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section will be construed to limit the ALJ or the Board from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(d) Civil money penalties that are assessed pursuant to this subpart are subject to adjustment on a four-year basis to account for inflation as required by section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (codified at 28 U.S.C. 2461, note) (see also 12 CFR 308.132(c)(3)(xv)).

§ 308.531 Location of hearing.

(a) The hearing may be held:
§ 308.533 Evidence.

(a) The ALJ will determine the admissibility of evidence.
(b) Except as provided in this subpart, the ALJ will not be bound by the Federal Rules of Evidence (28 U.S.C. App.). However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.
(c) The ALJ will exclude irrelevant and immaterial evidence.
(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.
(e) Although relevant, evidence may be excluded if it is privileged under federal law.
(f) Evidence concerning offers of compromise or settlement will be inadmissible to the extent provided in rule 408 of the Federal Rules of Evidence.
(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.
(h) All documents and other evidence offered or taken for the record must be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 308.523 of this subpart.
§ 308.534 The record.
(a) The hearing will be recorded by audio or videotape and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.
(b) The transcript of testimony, exhibits, and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Board.
(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 308.523 of this subpart.

§ 308.535 Post-hearing briefs.
The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 308.536 Initial decision.
(a) The ALJ will issue an initial decision based only on the record, which will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.
(b) The findings of fact will include a finding on each of the following issues:
(1) Whether the claims or statements identified in the complaint, or any portions of such claims or statements, violate § 308.502 of this subpart; and
(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 308.530 of this subpart.
(c) The ALJ will promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ will at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal to the Board. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.
(d) Unless the initial decision of the ALJ is timely appealed to the Board, or a motion for reconsideration of the initial decision is timely filed, the initial decision will constitute the final decision of the Board and will be final and binding on the parties 30 days after it is issued by the ALJ.

§ 308.537 Reconsideration of initial decision.
(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service is made by mail, receipt will be presumed to be 5 days from the date of mailing in the absence of proof to the contrary.
(b) Every motion for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion must be accompanied by a supporting brief.
(c) Responses to the motions will be allowed only upon order of the ALJ.
(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.
(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.
(f) If the ALJ denies a motion for reconsideration, the initial decision will constitute the final decision of the FDIC and will be final and binding on all parties 30 days after the ALJ denies the motion, unless the final decision is timely appealed to the Board in accordance with § 308.538 of this subpart.

(g) If the ALJ issues a revised initial decision, that decision will constitute the final decision of the FDIC and will be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Board in accordance with § 308.538 of this subpart.
§ 308.541 Judicial review.

Section 3805 of Title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Board imposing penalties or assessments under this subpart and specifies the procedures for such review.
§ 308.542 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of Title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this subpart and specify the procedures for such actions.

§ 308.543 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 308.541 or § 308.542 of this subpart, or any amount agreed upon in a compromise or settlement under § 308.545 of this subpart, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of federal taxes, then or later owing by the United States to the defendant.

§ 308.544 Deposit in Treasury of United States.

All amounts collected pursuant to this subpart will be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 308.545 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this subpart at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The Board has exclusive authority to compromise or settle a case under this subpart at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 308.542 of this subpart or during the pendency of any action to collect penalties and assessments under § 308.542 of this subpart.

(d) The Attorney General has exclusive authority to compromise or settle a case under this subpart during the pendency of any review under § 308.541 of this subpart or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the Board, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Board, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 308.546 Limitations.

(a) The notice of hearing with respect to a claim or statement will be served in the manner specified in § 308.507 of this subpart within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 308.509(b) of this subpart will be deemed a notice of a hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

Subpart U—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

SOURCE: 68 FR 48270, Aug. 13, 2003, unless otherwise noted.

§ 308.600 Scope.

This subpart, which implements section 36(g)(4) of the FDIA (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured depository institutions for which the FDIC is the appropriate Federal banking agency.

§ 308.601 Definitions.

As used in this subpart, the following terms shall have the meaning given below unless the context requires otherwise:

(a) Accounting firm means a corporation, proprietorship, partnership, or other business firm providing audit services.
Federal Deposit Insurance Corporation § 308.602

(b) Audit services means any service required to be performed by an independent public accountant by section 36 of the FDIA and 12 CFR part 363, including attestation services.

(c) Independent public accountant (accountant) means any individual who performs or participates in providing audit services.

§ 308.602 Removal, suspension, or debarment.

(a) Good cause for removal, suspension, or debarment—(1) Individuals. The Board of Directors may remove, suspend, or debar an independent public accountant under section 36 of the FDIA from performing audit services for insured depository institutions if, after service of a notice of intention and opportunity for hearing in the matter, the Board of Directors finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745 (2002)) (Sarbanes-Oxley Act) and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the FDIC or any officer or employee of the FDIC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or state agency regulating the banking, insurance, or securities industries, other than by an action listed in §308.603, on grounds relevant to the provision of audit services; or

(vii) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any state, possession, commonwealth, or the District of Columbia.

(2) Accounting firms. If the Board of Directors determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Board of Directors also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar an accounting firm or an office thereof, and the term of any sanction against an accounting firm under this section, the Board of Directors may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm’s conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act;

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) Limited scope orders. An order of removal, suspension (including an immediate suspension), or debarment
may, at the discretion of the Board of Directors, be made applicable to a limited number of insured depository institutions for which the FDIC is the appropriate Federal banking agency.

(4) Remedies not exclusive. The remedies provided in this subpart are in addition to any other remedies the FDIC may have under any other applicable provision of law, rule, or regulation.

(b) Proceedings to remove, suspend or debar—(1) Initiation of formal removal, suspension, or debarment proceedings. The Board of Directors may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) Hearings under paragraph (b) of this section. An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations contained in the notice. Hearings conducted under this paragraph shall be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 308, subpart A) (Uniform Rules).

(c) Immediate suspension from performing audit services—(1) In general. If the Board of Directors serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Board of Directors may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency if the Board of Directors:

(i) Has a reasonable basis to believe that the accountant or accounting firm has engaged in conduct (specified in the notice served upon the accountant or accounting firm under paragraph (b)(1) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) Procedures. An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Board of Directors dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Board of Directors to the respondent.

(3) Petition to stay. Any accountant or accounting firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file a petition with the Executive Secretary for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the immediate suspension shall remain in effect.

(4) Hearing on petition. Upon receipt of a stay petition, the Executive Secretary will designate a presiding officer who will fix a place and time (not more than 10 calendar days after receipt of the petition, unless extended at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any FDIC employee engaged in investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the FDIC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses also may be presented. Enforcement counsel may represent the agency at the hearing. In hearings held pursuant to this paragraph there shall be no discovery, and the provisions of §§308.6 through 308.12, §308.16, and §308.21 of the Uniform Rules will apply.
§ 308.604 Notice of removal, suspension, or debarment.

(a) Notice to the public. Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the FDIC will make the order publicly available and provide notice of the order to other Federal banking agencies.

(b) Notice to the FDIC by accountants and firms. An accountant or accounting firm that provides audit services to any insured depository institution for which the FDIC is the appropriate Federal banking agency must provide the FDIC with written notice of:

1. any currently effective order or other action described in §§ 308.602(a)(1)(vi) through (a)(1)(vii) or §§ 308.603(a)(2) through (a)(3); and
2. any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) Timing of notice. Written notice required by this paragraph shall be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or accounting firm accepts an engagement to provide audit services, whichever date is earlier.

§ 308.603 Automatic removal, suspension, and debarment.

(a) An independent public accountant or accounting firm may not perform audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency if the accountant or firm:

1. is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision under section 36 of the FDDA;
2. is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or
3. is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(b) Upon written request, the FDIC, for good cause shown, may grant written permission to such accountant or firm to perform audit services for insured depository institutions for which the FDIC is the appropriate Federal banking agency. The written request must comply with the requirements of §303.3 of this chapter.

§ 308.602(a)(1)(vi) through (a)(1)(vii) or §§ 308.603(a)(2) through (a)(3).
§ 308.605 Application for reinstatement.

(a) Form of petition. Unless otherwise ordered by the Board of Directors, an application for reinstatement by an independent public accountant, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 308.602 may be made in writing at any time. The application must comply with the requirements of § 303.3 of this chapter.

(b) Procedure. An applicant for reinstatement under this section may, in the sole discretion of the Board of Directors, be afforded a hearing. In reinstatement proceedings, the person seeking reinstatement shall bear the burden of going forward with an application and proving the grounds asserted in support of the application, and the Board of Directors may, in its sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment shall continue until the Board of Directors, for good cause shown, has reinstated the applicant or until the suspension period has expired. The filing of an application for reinstatement will not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

PART 309—DISCLOSURE OF INFORMATION

§ 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. 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, 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 Deputy 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]

§309.4 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.

§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.
§ 309.5 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 redaction 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]
section, the FOIA/PA Group, Legal Division 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 FOIA/PA Group actually receives the request.

(d) Processing requests—(1) Receipt of requests. Upon receipt of any request that satisfies paragraph (b) of this section, the FOIA/PA Group, Legal Division 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 FOIA/PA Group 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 FOIA/PA Group, 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 Group 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;

(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
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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 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 FOIA/PA Group, Legal Division (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.
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(2) Chargeable fees by category of requester. (i) Commercial use requesters shall be charged search, duplication and review costs.

(ii) Educational institutions, non-commercial 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. The FDIC may 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.

(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 FOIA/PA Group, Legal Division, 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
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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;
   (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 FOIA/PA Group, Legal Division, 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

\(^1\) 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.
§ 309.6 Disclosure of exempt records.

(a) Disclosure prohibited. Except as provided in paragraph (b) of this section or by 12 CFR part 310, 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 FOIA/PA Group 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 FOIA/PA Group. 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

The procedures for disclosing records under the Privacy Act are separately set forth in 12 CFR part 310.
exempt records, or designee, may in his or her discretion and for good cause, disclose to any authorized officer or employee of any state banking or securities department or agency, copies of any exempt records to the extent the records pertain to a state-chartered depository institution supervised by the agency or authority, or where the exempt records are requested in writing for a legitimate depository institution supervisory or regulatory purpose.

(3) Disclosure to federal financial institutions supervisory agencies and certain other agencies. The Director of the Corporation's Division having primary authority over the exempt records, or designee, may in his or her discretion and for good cause, disclose to any authorized officer or employee of any federal financial institution supervisory agency including the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Securities and Exchange Commission, the National Credit Union Administration, or any other agency included in section 1101(7) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et. seq.) (RFPA), any exempt records for a legitimate depository institution supervisory or regulatory purpose. The Director, or designee, may in his or her discretion and for good cause, disclose exempt records, including customer financial records, to certain other federal agencies as referenced in section 1113 of the RFPA for the purposes and to the extent permitted therein, or to any foreign bank regulatory or supervisory authority as provided, and to the extent permitted, by section 206 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 3109).

(4) Disclosure to prosecuting or investigatory agencies or authorities. (i) Reports of Apparent Crime pertaining to suspected violations of law, which may contain customer financial records, may be disclosed to federal or state prosecuting or investigatory authorities without giving notice to the customer, as permitted in the relevant exceptions of the RFPA.

(ii) The Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose to the proper federal or state prosecuting or investigatory authorities, or to any authorized officer or employee of such authority, copies of exempt records pertaining to irregularities discovered in depository institutions which are believed to constitute violations of any federal or state civil or criminal law, or unsafe or unsound banking practices, provided that customer financial records may be disclosed without giving notice to the customer, only as permitted by the relevant exceptions of the RFPA. Unless such disclosure is initiated by the FDIC, customer financial records shall be disclosed only in response to a written request which:

(A) Is signed by an authorized official of the agency making the request;
(B) Identifies the record or records to which access is requested; and
(C) Gives the reasons for the request.

(iii) When notice to the customer is required to be given under the RFPA, the Director of the Corporation's Division having primary authority over the exempt records, or designee, may disclose customer financial records to any federal or state prosecuting or investigatory agency or authority, provided, that:

(A) The General Counsel, or designee, has determined that disclosure is authorized or required by law; or
(B) Disclosure is pursuant to a written request that indicates the information is relevant to a legitimate law enforcement inquiry within the jurisdiction of the requesting agency and:

(1) The Director of the Corporation's Division having primary authority over the exempt records, or designee, certifies pursuant to section 1112(a) of the RFPA that the records are believed

\[3\] 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.
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)\(^4\) 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 record 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 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

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\(^4\)The form of notice generally is as follows. Additional information may be added:

Dear Mr., Ms.____:

Copies of, or information contained in, your financial records lawfully in the possession of the Federal Deposit Insurance Corporation have been furnished to (agency or department) pursuant to the Right to Financial Privacy Act of 1978 for the following purpose:

[Insert purpose here]. 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.
disclosed and the reasons why disclosure is necessary.

(iii) Any subsidiary depository institution of a bank holding company or a savings and loan holding company may reproduce and furnish a copy of any report of examination of the subsidiary depository institution to the parent holding company without prior approval of the Director of the Division having primary authority over the exempt records and any depository institution may reproduce and furnish a copy of any report of examination of the disclosing depository institution to a majority shareholder if the following conditions are met:

(A) The parent holding company or shareholder owns in excess of 50% of the voting stock of the depository institution or subsidiary depository institution;

(B) The board of directors of the depository institution or subsidiary depository institution at least annually by resolution authorizes the reproduction and furnishing of reports of examination (the resolution shall specifically name the shareholder or parent holding company, state the address to which the reports are to be sent, and indicate that all reports furnished pursuant to the resolution remain the property of the Federal Deposit Insurance Corporation and are not to be disclosed or made public in any manner without the prior written approval of the Director of the Corporation’s Division having primary authority over the exempt records as provided in paragraph (b) of this section;

(C) A copy of the resolution authorizing disclosure of the reports is sent to the shareholder or parent holding company; and

(D) The minutes of the board of directors of the depository institution or subsidiary depository institution for the meeting immediately following disclosure of a report state:

(1) That disclosure was made;

(2) The date of the report which was disclosed;

(3) To whom the report was sent; and

(4) The date the report was disclosed.

(iv) With respect to any disclosure that is authorized under this paragraph (b)(7), the Director of the Corporation’s Division having primary authority over the exempt records, or designee, shall only permit disclosure of records upon determining that good cause exists. If the exempt record contains information derived from depository institution customer financial records, disclosure is to be authorized only upon the condition that the requesting party and the party releasing the records comply with any applicable provision of the RFPA. Before authorizing the disclosure, the Director (or designee) may require that both the party having custody of a copy of a Corporation exempt record and the party seeking access to the record agree to such limitations as the Director (or designee) deems necessary to protect the confidential nature of the record, the financial integrity of any depository institution to which the record relates and the legitimate privacy interests of any persons named in such record.

(b)(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. Such request shall specify the information sought with reasonable particularity and shall be accompanied by

6This 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

Continued
a statement with supporting documentation showing in detail the relevance of such exempt information to the litigation, justifying good cause for disclosure, and a commitment to be bound by a protective order. Failure to exhaust such administrative request prior to service of a subpoena or other legal process may, in the General Counsel's discretion, serve as a basis for objection to such subpoena or legal process. Customer financial records may not be disclosed to any federal agency that is not a federal financial supervisory agency pursuant to this paragraph unless notice to the customer and certification as required by the RFPA have been given except where disclosure is subject to the relevant exceptions set forth in the RFPA.

(ii) The General Counsel, or designee, may in his or her discretion and for good cause, disclose or authorize disclosure of any exempt record or testimony by a current or former officer, director, employee, agent of the Corporation, or third party, sought in connection with any civil or criminal hearing, proceeding or investigation without the service of a judicial subpoena, or other legal process requiring such disclosure or testimony, if he or she determines that the records or testimony are relevant to the hearing, proceeding or investigation and that disclosure is in the best interests of justice and not otherwise prohibited by Federal statute. Customer financial records shall not be disclosed to any federal agency pursuant to this paragraph that is not a federal financial supervisory agency, unless the records are sought under the Federal Rules of Civil Procedure (28 U.S.C. appendix) or the Federal Rules of Criminal Procedure (18 U.S.C. appendix) or comparable rules of other courts and in connection with litigation to which the receiving federal agency, employee, officer, director, or agent, and the customer are parties, or disclosure is otherwise subject to the relevant exceptions in the RFPA.

(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...
§ 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 Public Affairs, 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 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 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.

[60 FR 61465, Nov. 30, 1995, as amended at 67 FR 71071, Nov. 29, 2002]
§ 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.”


§ 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 Freedom of Information Act/Privacy Act Group, Legal Division (“FOIA/PA Group”), Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 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 Group.


§ 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 FOIA/PA Group, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, N.W., 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
§ 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
§ 310.8 Agency review of request for amendment of record.

(a) Requests by individuals for the amendment of records will be acknowledged by the Senior Attorney, FOIA/PA Group, 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 Senior Attorney, FOIA/PA Group 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 67 FR 71071, Nov. 29, 2002]

§ 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 FOIA/PA Group, Legal Division, 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.

§ 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
§ 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:

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.
30–64–0009—Examiner training and education records.
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 systems 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.

§ 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.

§ 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;
§311.4 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
§ 311.6 Expedited procedure for announcing and closing certain meetings.

(a) Scope. Since a majority of its meetings may properly be closed pursuant to paragraphs (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 subparagaphs. 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...
§ 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.


§ 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 portion 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
Federal Deposit Insurance Corporation

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 offices 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 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.


PART 313—PROCEDURES FOR CORPORATE DEBT COLLECTION

Subpart A—Scope, Purpose, Definitions and Delegations of Authority

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Source: 67 FR 48527, July 25, 2002, unless otherwise noted.

Subpart A—Scope, Purpose, Definitions and Delegations of Authority

§ 313.1 Scope.

This part establishes FDIC procedures for the collection of certain debts owed to the United States. (a) This part applies to collections by the FDIC from:

(1) Federal employees who are indebted to the FDIC;

(2) Employees of the FDIC who are indebted to other agencies; and

(3) Other persons, organizations, or entities that are indebted to the FDIC, except those excluded in paragraph (b)(3) of this section.

(b) This part does not apply:

(1) To debts or claims arising under the Internal Revenue Code of 1986 (Title 26, U.S. Code), the Social Security Act (42 U.S.C. 301 et seq.), or the tariff laws of the United States;

(2) To a situation to which the Contract Disputes Act (41 U.S.C. 601 et seq.) applies; or

(3) In any case where collection of a debt is explicitly provided for or prohibited by another statute.

(c) This part applies only to:

(1) Debts owed to and payments made by the FDIC acting in its corporate capacity, that is, in connection with employee matters such as travel-related claims and erroneous overpayments, contracting activities involving corporate operations, debts related to requests to the FDIC for documents under the Freedom of Information Act (FOIA), or where a request for an offset is received by the FDIC from another federal agency; and

(2) Criminal restitution debt owed to the FDIC in either its corporate capacity or its receivership capacity.

(3) With the exception of criminal restitution debt noted in paragraph (c)(2) of this section, this part does not apply to debts owed to or payments made by the FDIC in connection with the FDIC’s liquidation, supervision, enforcement, or insurance responsibilities, nor does it limit or affect the FDIC’s authority with respect to debts and/or claims pursuant to 12 U.S.C. 1819(a) and 1820(a).

(d) Nothing in this part 313 precludes the compromise, suspension, or termination of collection actions, where appropriate, under: standards implementing the Debt Collection Improvement Act (DCIA) (31 U.S.C. 3711 et seq.), the Federal Claims Collection Standards (FCCS) (31 CFR chapter IX and parts 900 through 904); or any other applicable law.


§ 313.2 Purpose.

(a) The purpose of this part is to implement federal statutes and regulatory standards authorizing the FDIC to collect debts owed to the United States. This part is consistent with the following federal statutes and regulations:

(1) DCIA at 31 U.S.C. 3711 (collection and compromise of claims); section 3716
§ 313.3 Definitions.

Except where the context clearly indicates otherwise or where the term is defined elsewhere in this subpart, the following definitions shall apply to this subpart.

(a) Agency means a department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of government, including government corporations.

(b) Board means the Board of Directors of the FDIC.

(c) Centralized administrative offset means the mandatory referral to the Secretary of the Treasury by a creditor agency of a past due debt which is more than 180 days delinquent, for the purpose of collection under the Treasury’s centralized offset program.

(d) Certification means a written statement transmitted from a creditor agency to a paying agency for purposes of administrative or salary offset, to FMS for offset or to the Secretary of the Treasury for centralized administrative offset. The certification confirms the existence and amount of the debt and verifies that required procedural protections have been afforded the debtor. Where the debtor requests a hearing on a claimed debt, the decision by a hearing official or administrative law judge constitutes a certification.

(e) Chairman means the Chairman of the FDIC.

(f) Compromise means the settlement or forgiveness of a debt under 31 U.S.C. 3711, in accordance with standards set forth in the FCCS and applicable federal law.

(g) Creditor agency means an agency of the federal government to which the debt is owed, or a debt collection center when acting on behalf of a creditor agency to collect a debt.

(h) Debt means an amount owed to the United States from loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, restitution, fines and forfeitures, and all other similar sources. For purposes of this part, a debt owed to the FDIC constitutes a debt owed to the United States.

(i) Debt collection center means the Department of the Treasury or other government agency or division designated by the Secretary of the Treasury with authority to collect debts on behalf of creditor agencies in accordance with 31 U.S.C. 3711(g).

(j) Director means the Director of the Division of Finance (DOF), the Director of the Division of Administration (DOA), or the Director of the Division of Resolutions and Receiverships (DRR), as applicable, or the applicable Director’s delegate.

(k) Disposable pay means that part of current adjusted basic pay, special pay, incentive pay, retired pay, retainer pay, and, in the case of an employee not entitled to adjusted basic pay, other authorized pay, remaining for each pay period after the deduction of any amount required by law to be withheld. The FDIC shall allow the following deductions in determining the amount of disposable pay that is subject to salary offset:

(1) Federal employment taxes;

(2) Federal, state, or local income taxes to the extent authorized or required by law, but no greater than would be the case if the employee
claimed all dependents to which he or she is entitled and such additional amounts for which the employee presents evidence of a tax obligation supporting the additional withholding;

(3) Medicare deductions;

(4) Health insurance premiums;

(5) Normal retirement contributions, including employee contributions to the Thrift Savings Plan or the FDIC 401(k) Plan;

(6) Normal life insurance premiums (e.g., Serviceman’s Group Life Insurance and “Basic Life” Federal Employee’s Group Life Insurance premiums), not including amounts deducted for supplementary coverage;

(7) Amounts mandatorily withheld for the United States Soldiers’ and Airmen’s Home;

(8) Fines and forfeiture ordered by a court-martial or by a commanding officer.

(1) Division of Administration (DOA) means the Division of Administration of the FDIC.

(m) Division of Finance (DOF) means the Division of Finance of the FDIC.

(n) Division of Resolutions and Receiverships (DRR) means the Division of Resolutions and Receiverships of the FDIC.

(o) Federal Claims Collection Standards (FCCS) means standards published at 31 CFR chapter IX and parts 900 through 904.

(p) Garnishment means the process of withholding amounts from the disposable pay of a person employed outside the federal government, and the paying of those amounts to a creditor in satisfaction of a withholding order.

(q) Hearing official means an administrative law judge or other individual authorized to conduct a hearing and issue a final decision in response to a debtor’s request for hearing. A hearing official may not be under the supervision or control of the Chairman or FDIC Board when the FDIC is the creditor agency.

(r) Notice of Intent to Offset or Notice of Intent means a written notice from a creditor agency to an employee, organization, entity, or restitution debtor that claims a debt and informs the debtor that the creditor agency intends to collect the debt by administrative offset. The notice also informs the debtor of certain procedural rights with respect to the claimed debt and offset.

(s) Notice of Salary Offset means a written notice from a paying agency to its employee informing the employee that salary offset to collect a debt due to the creditor agency will begin at the next officially established pay interval. The paying agency transmits this notice to its employee after receiving a certification from the creditor agency.

(t) Paying agency means the agency of the federal government that employs the individual who owes a debt to an agency of the federal government. The same agency may be both the creditor agency and the paying agency.

(u) Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

(v) Waiver means the cancellation, remission, forgiveness or non-recovery of a debt allegedly owed by an employee to an agency, as authorized or required by 5 U.S.C. 5584 or any other law.

(w) Withholding order means any order for withholding or garnishment of pay issued by an agency, or judicial or administrative body. For purposes of administrative wage garnishment, the terms “wage garnishment order” and “garnishment order” have the same meaning as “withholding order.”


§ 313.4 Delegations of authority.

Authority to conduct the following activities to collect debt, other than criminal restitution debt, on behalf of the FDIC in its corporate capacity is delegated to the Director of DOA or Director of DOF, as applicable; and authority to collect criminal restitution debt on behalf of the FDIC in either its receivership or corporate capacity is delegated to the Director of DRR; or to the applicable Director’s delegate; to:

(a) Initiate and carry out the debt collection process on behalf of the FDIC, in accordance with the FCCS;

(b) Accept or reject compromise offers and suspend or terminate collection actions to the full extent of the
§ 313.24

FDIC’s legal authority under 12 U.S.C. 1819(a) and 1820(a), 31 U.S.C. 3711(a)(2), and any other applicable statute or regulation, provided, however, that no such claim shall be compromised or collection action terminated, except upon the concurrence of the FDIC General Counsel or his or her designee;

(c) Report to consumer reporting agencies certain data pertaining to delinquent debts, where appropriate;

(d) Use administrative offset procedures, including salary offset, to collect debts; and

(e) Take any other action necessary to promptly and effectively collect debts owed to the United States in accordance with the policies contained herein and as otherwise provided by law.


§§ 313.5–313.19 [Reserved]

Subpart B—Administrative Offset

§ 313.20 Applicability and scope.

The provisions of this subpart apply to the collection of debts owed to the United States arising from transactions with the FDIC. Administrative offset is authorized under the DCIA. This subpart is consistent with the FCCS on administrative offset issued by the Department of Justice.

§ 313.21 Definitions.

(a) Administrative offset means withholding funds payable by the United States to, or held by the United States for, a person to satisfy a debt.

(b) Person includes a natural person or persons, profit or nonprofit corporation, partnership, association, trust, estate, consortium, or other entity which is capable of owing a debt to the United States Government except that agencies of the United States, or any state or local government shall be excluded.

§ 313.22 Collection.

(a) The Director may collect a claim from a person by administrative offset of monies payable by the Government only after:

(1) Providing the debtor with due process required under this part; and

(2) Providing the paying agency with written certification that the debtor owes the debt in the amount stated and that the FDIC, as creditor agency, has complied with this part.

(b) Prior to initiating collection by administrative offset, the Director should determine that the proposed offset is within the scope of this remedy, as set forth in 31 CFR 901.3(a). Administrative offset under 31 U.S.C. 3716 may not be used to collect debts more than 10 years after the federal government’s right to collect the debt first accrued, except as otherwise provided by law. In addition, administrative offset may not be used when a statute explicitly prohibits its use to collect the claim or type of claim involved.

(c) Unless otherwise provided, debts or payments not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under common law, or any other applicable statutory authority.

§ 313.23 Offset prior to completion of procedures.

The FDIC may collect a debt by administrative offset prior to the completion of the procedures described in § 313.25, if:

(a) Failure to offset a payment would substantially prejudice the FDIC’s ability to collect the debt; and

(b) The time before the payment is to be made does not reasonably permit completion of the procedures described in § 313.25. Such prior offsetting shall be followed promptly by the completion of the procedures described in § 313.25.

§ 313.24 Omission of procedures.

The FDIC shall not be required to follow the procedures described in § 313.25 where:

(a) The offset is in the nature of a recoupment (i.e., the FDIC may offset a payment due to the debtor when both the payment due to the debtor and the debt owed to the FDIC arose from the same transaction); or

(b) The debt arises under a contract as set forth in Cecile Industries, Inc. v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993), which provides that procedural protections under administrative offset do not supplant or restrict established
§ 313.25 Debtor’s rights.

Unless the procedures described in §313.23 are used, prior to collecting any claim by administrative offset or referring such claim to another agency for collection through administrative offset, the Director shall provide the debtor with the following:

(a) Written notification of the nature and amount of the claim, the intention of the Director to collect the claim through administrative offset, and a statement of the rights of the debtor under this paragraph;

(b) An opportunity to inspect and copy the records of the FDIC with respect to the claim, unless such records are exempt from disclosure;

(c) An opportunity to have the FDIC’s determination of indebtedness reviewed by the Director:

(1) Any request by the debtor for such review shall be in writing and shall be submitted to the FDIC within 30 calendar days of the date of the notice of the offset. The Director may waive the time limit for requesting review for good cause shown by the debtor;

(2) Upon acceptance of a request for review by the debtor, the FDIC shall provide the debtor with a reasonable opportunity for an oral hearing when the determination turns on an issue of credibility or veracity, or the Director determines that the question of the indebtedness cannot be resolved by review of the documentary evidence alone. Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary hearing, although the Director shall document all significant matters discussed at the hearing. In cases where an oral hearing is not required by this section, the Director shall make his determination based on a documentary hearing consisting of a review of the written record; and

(d) An opportunity to enter into a written agreement for the voluntary repayment of the amount of the claim at the discretion of the Director.

§ 313.26 Interest.

Pursuant to 31 U.S.C. 3717, the FDIC shall assess interest, penalties and administrative costs on debts owed to the United States. The FDIC is authorized to assess interest and related charges on debts that are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

§ 313.27 Refunds.

Amounts recovered by administrative offset but later found not to be owed to the Government shall be promptly refunded. Unless required by law or contract, such refunds shall not bear interest.

§ 313.28 No requirement for duplicate notice.

Where the Director has previously given a debtor any of the required notice and review opportunities with respect to a particular debt, the Director is not required to duplicate such notice and review opportunities prior to initiating administrative offset.

§ 313.29 Requests for offset to other federal agencies.

The Director may request that a debt owed to the FDIC be administratively offset against funds due and payable to a debtor by another federal agency. In requesting administrative offset, the FDIC, as the creditor agency, will certify in writing to the federal agency holding funds payable to the debtor:

(a) That the debtor owes the debt;

(b) The amount and basis of the debt; and

(c) That the FDIC has complied with the requirements of its own administrative offset regulations and the applicable provisions of 31 U.S.C. 3716 with respect to providing the debtor with due process, unless otherwise provided.
§ 313.30 Requests for offset from other federal agencies.

Any federal agency may request that funds due and payable to its debtor by the FDIC be administratively offset by the FDIC in order to collect a debt owed to such agency by the debtor. The FDIC shall initiate the requested offset only upon:

(a) Receipt of written certification from the creditor agency stating:
   (1) That the debtor owes the debt;
   (2) The amount and basis of the debt; and
   (3) That the agency has complied with its own administrative offset regulations and with the applicable provisions of 31 CFR 901.3, including providing any required hearing or review.

(b) A determination by the creditor agency that collection by offset against funds payable by the FDIC would be in the best interest of the United States and that such offset would not otherwise be contrary to law.

§§ 313.31–313.39 [Reserved]

Subpart C—Salary Offset

§ 313.40 Scope.

These salary offset regulations are issued in compliance with 5 U.S.C. 5514 and 5 CFR part 550, subpart K, and apply to the collection of debts owed by employees of the FDIC or other federal agencies. These salary offset procedures do not apply where an employee consents to the recovery of a debt from his current pay account. These procedures do not apply to debts arising under the Internal Revenue Code, the tariff laws of the United States or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g., travel advances under 5 U.S.C. 5705 and employee training expenses under 5 U.S.C. 4108). These procedures do not preclude an employee from requesting waiver of an erroneous payment under 5 U.S.C. 5584, or in any way questioning the amount or validity of a debt, in the manner specified by law or these agency regulations. This section also does not preclude an employee from requesting waiver of the collection of a debt under any other applicable statutory authority.

When possible, salary offset through centralized administrative offset procedures should be attempted before seeking salary offset from a paying agency different than the creditor agency.

§ 313.41 Notice requirement where FDIC is creditor agency.

Where the FDIC seeks salary offset under 5 U.S.C. 5514 as the creditor agency, the FDIC shall first provide the employee with a written Notice of Intent to Offset at least 30 calendar days before salary offset is to commence. The Notice of Intent to Offset shall include the following information and statements:

(a) That the Director has determined that a debt is owed to the FDIC and intends to collect the debt by means of deduction from the employee's current disposable pay account until the debt and all accumulated interest is paid in full or otherwise resolved;

(b) The amount of the debt and the factual basis for the debt;

(c) A salary offset schedule stating the frequency and amount of each deduction, stated as a fixed dollar amount or percentage of disposable pay (not to exceed 15%);

(d) That in lieu of salary offset, the employee may propose a voluntary repayment plan to satisfy the debt on terms acceptable to the FDIC, which must be documented in writing signed by the employee and the Director or the Director's designee, and documented in the FDIC's files;

(e) The FDIC's policy concerning interest, penalties, and administrative costs, and a statement that such assessments must be made, unless excused in accordance with the FCCS;

(f) That the employee has the right to inspect and copy FDIC records not exempt from disclosure relating to the debt claimed, or to receive copies of such records if the employee or the employee's representative is unable personally to inspect the records, due to geographical or other constraints:

(1) That such requests be made in writing, and identify by name and address the Director or other designated individual to whom the request should be sent; and
(2) That upon receipt of such a request, the Director or the Director's designee shall notify the employee of the time and location where the records may be inspected and copied;

(g) That the employee has a right to request a hearing regarding the existence and amount of the debt claimed or the salary offset schedule proposed by the FDIC, provided that the employee files a request for such a hearing with the FDIC in accordance with §313.42 that such a hearing will be conducted by an impartial official who is an administrative law judge or other hearing official not under the supervision or control of the Board;

(h) The procedure and deadline for requesting a hearing, including the name, address, and telephone number of the Director or other designated individual to whom a request for hearing must be sent;

(i) That a request for hearing must be received by the FDIC on or before the 30th calendar day following receipt of the Notice of Intent, and that filing of a request for hearing will stay the collection proceedings;

(j) That the FDIC will initiate salary offset procedures not less than 30 days from the date of the employee's receipt of the Notice of Intent to Offset, unless the employee files a timely request for a hearing;

(k) That if a hearing is held, the administrative law judge or other hearing official will issue a decision at the earliest practical date, but not later than 60 days after the filing of the request for the hearing, unless the employee requests a delay in the proceedings which is granted by the hearing official;

(l) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. chapter 75, 5 CFR part 752, or any other applicable statutes or regulations;

(2) Penalties under the False Claims Act, 31 U.S.C. 3729 through 3731, or under any other applicable statutory authority; or

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002 or under any other applicable statutory authority;

(m) That the employee also has the right to request waiver of overpayment pursuant to 5 U.S.C. 5584, and may exercise any other rights and remedies available under statutes or regulations governing the program for which the collection is being made; and

(n) That amounts paid on or deducted from debts that are later waived or found not to be owed to the United States will be promptly refunded to the employee, unless there are applicable contractual or statutory provisions to the contrary.

§ 313.42 Procedures to request a hearing.

(a) To request a hearing, an employee must send a written request to the Director. The request must be received by the Director within 30 calendar days after the employee's receipt of the Notice of Intent.

(b) The request must be signed by the employee and must fully identify and explain with reasonable specificity all the facts, evidence, and witnesses, if any, that the employee believes support his or her position. The request for hearing must state whether the employee is requesting an oral or documentary hearing. If an oral hearing is requested, the request shall explain why the matter cannot be resolved by a review of documentary evidence alone.

§ 313.43 Failure to timely submit request for hearing.

If the Director does not receive an employee's request for hearing within the 30-day period set forth in §313.42(a), the employee shall not be entitled to a hearing. However, the Director may accept an untimely request for hearing if the employee can show that the delay was the result of circumstances beyond his or her control or that he or she failed to receive actual notice of the filing deadline.

§ 313.44 Procedure for hearing.

(a) Obtaining the services of a hearing official. When the FDIC is the creditor agency and the debtor is an FDIC employee, the FDIC shall designate an administrative law judge or contact any agent of another agency designated in
§ 313.44

appendix A to 5 CFR part 581 to arrange for a hearing official. When the FDIC is the creditor agency and the debtor is not an FDIC employee (i.e., the debtor is employed by another federal agency, also known as the paying agency), and the FDIC cannot provide a prompt and appropriate hearing before an administrative law judge or a hearing official furnished pursuant to a lawful arrangement, the FDIC may contact an agent of the paying agency designated in appendix A to 5 CFR part 581 to arrange for a hearing official. The paying agency must cooperate with the FDIC to provide a hearing official, as required by the FCCS.

(b) Notice and format of hearing—(1) Notice. The hearing official shall determine whether the hearing shall be oral or documentary and shall notify the employee of the form of the hearing. If the hearing will be oral, the notice shall set forth the date, time, and location of the hearing, which must be held within 30 calendar days after the request is received, unless the employee requests that the hearing be delayed. If the hearing will be documentary, the employee shall be notified to submit evidence and written arguments in support of his or her case to the hearing official within 30 calendar days.

(2) Oral hearing. The hearing official may grant a request for an oral hearing if he or she determines that the issues raised by the employee cannot be resolved by review of documentary evidence alone (e.g., where credibility or veracity are at issue). An oral hearing is not required to be an adversarial adjudication, and the hearing official is not required to apply rules of evidence. Witnesses who testify in oral hearings shall do so under oath or affirmation. Oral hearings may take the form of, but are not limited to:

(i) Informal conferences with the hearing official in which the employee and agency representative are given full opportunity to present evidence, witnesses, and argument;

(ii) Informal meetings in which the hearing examiner interviews the employee; or

(iii) Formal written submissions followed by an opportunity for oral presentation.

(3) Documentary hearing. If the hearing official determines that an oral hearing is not necessary, he or she shall decide the issues raised by the employee based upon a review of the written record.

(4) Record. The hearing official shall maintain a summary record of any hearing conducted under this section.

(c) Rescheduling of the hearing date. The hearing official shall reschedule a hearing if requested to do so by both parties, who shall be given reasonable notice of the time and place of this new hearing.

(d) Failure to appear. In the absence of good cause, an employee who fails to appear at a hearing shall be deemed, for the purpose of this subpart, to admit the existence and amount of the debt as described in the Notice of Intent. If the representative of the creditor agency fails to appear, the hearing official shall proceed with the hearing as scheduled, and issue a decision based upon the oral testimony presented and the documentation submitted by both parties.

(e) Date of decision. The hearing official shall issue a written decision based upon the evidence and information developed at the hearing, as soon as practicable after the hearing, but not later than 60 calendar days after the date on which the request for hearing was received by the FDIC, unless the hearing was delayed at the request of the employee. In the event of such a delay, the 60-day decision period shall be extended by the number of days by which the hearing was postponed. The decision of the hearing official shall be final.

(f) Content of decision. The written decision shall include:

(1) A summary of the facts concerning the origin, nature, and amount of the debt;

(2) The hearing official's findings, analysis, and conclusions; and

(3) The terms of the repayment schedule, if applicable.

(g) Official certification of debt. The hearing official's decision shall constitute an official certification regarding the existence and amount of the debt for purposes of executing salary offset under 5 U.S.C. 5514. Where the FDIC is the creditor agency but not the
current paying agency, the FDIC may make a certification regarding the existence and amount of the debt owed to the FDIC, based on the hearing official's certification. The FDIC may make this certification to: the Secretary of the Treasury so that Treasury may offset the employee's current pay account by means of centralized administrative offset (5 CFR 550.1108); or to the current paying agency (5 CFR 550.1109). If the hearing official determines that a debt may not be collected through salary offset but the FDIC as the creditor agency determines that the debt is still valid, the FDIC may seek collection of the debt through other means, including administrative offset of other federal payments or litigation.

§ 313.45 Certification of debt by FDIC as creditor agency.

The Director may also issue a certification of the debt where there has not been a hearing, if the employee has admitted the debt, or failed to contest the existence and amount of the debt in a timely manner (e.g., by failing to request a hearing). The certification shall be in writing and shall state:

(a) The amount and basis of the debt owed by the employee;
(b) The date the FDIC's right to collect the debt first accrued;
(c) That the FDIC's debt collection regulations have been approved by OPM pursuant to 5 CFR part 550, subpart K;
(d) If the collection is to be made by lump-sum payment, the amount and date such payment will be collected;
(e) If the collection is to be made in installments through salary offset, the number of installments to be collected, the amount of each installment, and the date of the first installment, if a date other than the next officially established pay period; and
(f) The date the employee was notified of the debt, the action(s) taken pursuant to the FDIC's regulations, and the dates such actions were taken.

§ 313.46 Notice of salary offset where FDIC is the paying agency.

(a) Upon issuance of a proper certification by the Director for debts owed to the FDIC, or upon receipt of a proper certification from a creditor agency, the Director shall send the employee a written notice of salary offset. Such notice shall advise the employee:

(1) That certification has been issued by the Director or received from another creditor agency;
(2) Of the amount of the debt and of the deductions to be made; and
(3) Of the initiation of salary offset at the next officially established pay interval or as otherwise provided for in the certification.

(b) Where appropriate, the Director shall provide a copy of the notice to the creditor agency and advise such agency of the dollar amount to be offset and the pay period when the offset will begin.

§ 313.47 Voluntary repayment agreements as alternative to salary offset where the FDIC is the creditor agency.

(a) In response to a Notice of Intent, an employee may propose to voluntarily repay the debt through scheduled voluntary payments, in lieu of salary offset. An employee who wishes to repay a debt in this manner shall submit to the Director a written agreement proposing a repayment schedule. This proposal must be received by the Director within 30 calendar days after receipt of the Notice of Intent.

(b) The Director shall notify the employee whether the employee's proposed voluntary repayment agreement is acceptable. It is within the discretion of the Director whether to accept or reject the debtor's proposal, or whether to propose to the debtor a modification of the proposed repayment agreement:

(1) If the Director decides that the proposed repayment agreement is unacceptable, he or she shall notify the employee and the employee shall have 30 calendar days from the date he or she received notice of the decision in which to file a request for a hearing on the proposed repayment agreement, as provided in § 313.42; or
(2) If the Director decides that the proposed repayment agreement is acceptable or the debtor agrees to a modification proposed by the Director, the agreement shall be put in writing.
§ 313.48 Special review of repayment agreement or salary offset due to changed circumstances.

(a) An employee subject to a voluntary repayment agreement or salary offset payable to the FDIC as creditor agency may request a special review by the Director of the amount of the salary offset or voluntary repayment, based on materially changed circumstances, including, but not limited to, catastrophic illness, divorce, death, or disability. A request for special review may be made at any time.

(b) In support of a request for special review, the employee shall submit to the Director a detailed statement and supporting documents for the employee, his or her spouse, and dependents indicating:

(1) Income from all sources;
(2) Assets;
(3) Liabilities;
(4) Number of dependents;
(5) Monthly expenses for food, housing, clothing, and transportation;
(6) Medical expenses; and
(7) Exceptional expenses, if any.

(c) The employee shall also file an alternative proposed offset or payment schedule and a statement, with supporting documents, showing why the current salary offset or payments result in extreme financial hardship to the employee.

(d) The Director shall evaluate the statement and supporting documents and determine whether the original salary offset or repayment schedule imposes extreme financial hardship on the employee, for example, by preventing the employee from meeting essential subsistence expenses such as food, housing, clothing, transportation, and medical care. The Director shall notify the employee in writing within 30 calendar days of his or her determination.

(e) If the special review results in a revised salary offset or repayment schedule, the Director shall provide a new certification to the paying agency.

§ 313.49 Coordinating salary offset with other agencies.

(a) Responsibility of the FDIC as the creditor agency. Upon completion of the procedures established in § 313.40 through § 313.45, the Director shall take the following actions:

(1) Submit a debt claim to the paying agency, containing the information described in paragraphs (a)(2) and (a)(3) of this section, together with the certification of debt or an installment agreement (or other instruction regarding the payment schedule, if applicable).

(2) If the collection must be made in installments, inform the paying agency of the amount or percentage of disposable pay to be collected in each installment. The Director may also inform the paying agency of the commencement date and number of installments to be paid, if a date other than the next officially established pay period is required.

(3) Unless the employee has consented to the salary offset in writing or has signed a statement acknowledging receipt of the required procedures and the written consent or statement is forwarded to the paying agency, the Director must also advise the paying agency of the actions the FDIC has taken under 5 U.S.C. 5514 and state the dates such action was taken.

(4) If the employee is in the process of separating from employment, the Director shall submit the debt claim to the employee's paying agency for collection by lump-sum deduction from the employee's final check. The paying agency shall certify the total amount of its collection and furnish a copy of the certification to the FDIC and to the employee.

(5) If the employee is already separated and all payments due from his or her former paying agency have been paid, the Director may, unless otherwise prohibited, request that money due and payable to the employee from the federal government, including payments from the Civil Service Retirement and Disability Fund (5 CFR 831.1801), be administratively offset to collect the debt.

(6) In the event an employee transfers to another paying agency, the Director shall not repeat the procedures described in § 313.40 through § 313.45 in
order to resume collecting the debt. Instead, the FDIC shall review the debt upon receiving the former paying agency’s notice of the employee’s transfer and shall ensure that collection is resumed by the new paying agency. The FDIC must submit a properly certified claim to the new paying agency before collection can be resumed.

(b) Responsibility of the FDIC as the paying agency—(1) Complete claim. When the FDIC receives a properly certified claim from a creditor agency, the employee shall be given written notice of the certification, the date salary offset will begin, and the amount of the periodic deductions. The FDIC shall schedule deductions to begin at the next officially established pay interval or as otherwise provided for in the certification.

(2) Incomplete claim. When the FDIC receives an incomplete certification of debt from a creditor agency, the FDIC shall return the debt claim with notice that procedures under 5 U.S.C. 5514 and 5 CFR 550.1104 must be followed and that a properly certified debt claim must be received before action will be taken to collect from the employee’s current pay account.

(3) Review. The FDIC is not authorized to review the merits of the creditor agency’s determination with respect to the amount or validity of the debt certified by the creditor agency.

(4) Employees who transfer from one paying agency to another agency. If, after the creditor agency has submitted the debt claim to the FDIC, the employee transfers to a different paying agency before the debt is collected in full, the FDIC must certify the total amount collected on the debt. One copy of the certification shall be furnished to the employee, and one copy shall be sent to the creditor agency along with notice of the employee’s transfer. If the FDIC is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the requirements set forth herein and in the OPM’s regulation (5 CFR part 550, subpart K) have been fully met.

§ 313.50 Interest, penalties, and administrative costs.

Where the FDIC is the creditor agency, it shall assess interest, penalties, and administrative costs pursuant to 31 U.S.C. 3717 and 31 CFR parts 900 through 904.

§ 313.51 Refunds.

(a) Where the FDIC is the creditor agency, it shall promptly refund any amount deducted under the authority of 5 U.S.C. 5514 when the debt is compromised or otherwise found not to be owing to the United States, or when an administrative or judicial order directs the FDIC to make a refund.

(b) Unless required by law or contract, such refunds shall not bear interest.

§ 313.52 Request from a creditor agency for services of a hearing official.

(a) The FDIC may provide a hearing official upon request of the creditor agency when the debtor is employed by the FDIC and the creditor agency cannot provide a prompt and appropriate hearing before a hearing official furnished pursuant to another lawful arrangement.

(b) The FDIC may provide a hearing official upon request of a creditor agency when the debtor works for the creditor agency and that agency cannot arrange for a hearing official.

(c) The Director shall arrange for qualified personnel to serve as hearing officials.

(d) Services rendered under paragraph (a) of this section shall be provided on a fully reimbursable basis pursuant to 31 U.S.C. 1535.

§ 313.53 Non-waiver of rights by payments.

A debtor’s payment, whether voluntary or involuntary, of all or any portion of a debt being collected pursuant to this section shall not be construed as a waiver of any rights that the debtor may have under any statute, regulation, or contract except as otherwise provided by law or contract.

§ 313.54 Exception to due process procedures.

(a) The procedures set forth in this subpart shall not apply to routine
intra-agency salary adjustments of pay, including the following:

(1) Any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less;

(2) A routine adjustment of pay that is made to correct an overpayment attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred within the four pay periods preceding the adjustment and, at the time of such adjustment or as soon thereafter as is practical, the individual is provided written notice of the nature and amount of the adjustment and the point of contact for contesting such adjustment; or

(3) Any adjustment to collect a debt amount to $50 or less, if, at the time of such adjustment, or as soon thereafter as is practical, the individual is provided written notice of the nature and amount of the adjustment and the point of contact for contesting such adjustment.

(b) The procedure for notice to the employee and collection of such adjustments is set forth in §313.55.

§ 313.55 Salary adjustments.

Any negative adjustment to pay arising out of an employee's election of coverage, or a change in coverage, under a federal benefits program requiring periodic deductions from pay shall not be considered collection of a "debt" for the purposes of this section if the amount to be recovered was accumulated over four pay periods or less. In such cases, the FDIC shall not apply this subpart C, but will provide a clear and concise statement in the employee's earnings statement advising the employee of the previous overpayment at the time the adjustment is made.

§ 313.82 Debtor's rights.

The FDIC shall afford the debtor the opportunity:

(a) To inspect and copy records related to the debt;

(b) The FDIC's intention to initiate proceedings to collect the debt through deductions from the debtor's pay until the debt and all accumulated interest penalties and administrative costs are paid in full;

(c) An explanation of the debtor's rights as set forth in §313.82(c); and

(d) The time frame within which the debtor may exercise these rights. The FDIC shall retain a stamped copy of the notice indicating the date the notice was mailed.

§ 313.81 Notice.

At least 30 days before the initiation of garnishment proceedings, the Director will send, by first class mail to the debtor's last known address, a written notice informing the debtor of:

(a) The nature and amount of the debt;

(b) The FDIC's intention to initiate proceedings to collect the debt through deductions from the debtor's pay until the debt and all accumulated interest penalties and administrative costs are paid in full;

(c) An explanation of the debtor's rights as set forth in §313.82(c); and

(d) The time frame within which the debtor may exercise these rights. The FDIC shall retain a stamped copy of the notice indicating the date the notice was mailed.

§ 313.80 Scope and purpose.

(a) These administrative wage garnishment regulations are issued in compliance with 31 U.S.C. 3720D and 31 CFR 285.11(f). The subpart provides procedures for the FDIC to collect money from a debtor's disposable pay by means of administrative wage garnishment. The receipt of payments pursuant to this subpart does not preclude the FDIC from pursuing other debt collection remedies, including the offset of federal payments. The FDIC may pursue such debt collection remedies separately or in conjunction with administrative wage garnishment. This subpart does not apply to the collection of delinquent debts from the wages of federal employees from their federal employment. Federal pay is subject to the federal salary offset procedures set forth in 5 U.S.C. 5534 and other applicable laws.
§ 313.83  Form of hearing.

(a) If the debtor submits a timely written request for a hearing as provided in § 313.82(c), the FDIC will afford the debtor a hearing, which at the FDIC’s option may be oral or written. The FDIC will provide the debtor with a reasonable opportunity for an oral hearing when the Director determines that the issues in dispute cannot be resolved by review of the documentary evidence, for example, when the validity of the claim turns on the issue of credibility or veracity.

(b) If the FDIC determines that an oral hearing is appropriate, the time and location of the hearing shall be established by the FDIC. An oral hearing may, at the debtor’s option, be conducted either in person or by telephone conference. All travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor. All telephonic charges incurred during the hearing will be the responsibility of the agency.

(c) In cases when it is determined that an oral hearing is not required by this section, the FDIC will accord the debtor a “paper hearing,” that is, the FDIC will decide the issues in dispute based upon a review of the written record.

§ 313.84  Effect of timely request.

If the FDIC receives a debtor’s written request for hearing within 15 business days of the date the FDIC mailed its notice of intent to seek garnishment, the FDIC shall not issue a withholding order until the debtor has been provided the requested hearing, and a decision in accordance with § 313.88 and § 313.89 has been rendered.

§ 313.85  Failure to timely request a hearing.

If the FDIC receives a debtor’s written request for hearing after 15 business days of the date the FDIC mailed its notice of intent to seek garnishment, the FDIC shall provide a hearing to the debtor. However, the FDIC will not delay issuance of a withholding order unless it determines that the untimely filing of the request was caused by factors over which the debtor had no control, or the FDIC receives information that the FDIC believes justifies a delay or cancellation of the withholding order.

§ 313.86  Hearing official.

A hearing official may be any qualified individual, as determined by the FDIC, including an administrative law judge.

§ 313.87  Procedure.

After the debtor requests a hearing, the hearing official shall notify the debtor of:

(a) The date and time of a telephonic hearing;

(b) The date, time, and location of an in-person oral hearing; or

(c) The deadline for the submission of evidence for a written hearing.

§ 313.88  Format of hearing.

The FDIC will have the burden of proof to establish the existence or amount of the debt. Thereafter, if the debtor disputes the existence or amount of the debt, the debtor must prove by a preponderance of the evidence that no debt exists, or that the amount of the debt is incorrect. In addition, the debtor may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the debtor, or that collection of the debt may not be pursued due to operation of law. The hearing official shall maintain a record of any hearing held under this section. Hearings are not required to be formal, and evidence may be offered without
§ 313.89 Date of decision.

The hearing official shall issue a written opinion stating his or her decision as soon as practicable, but not later than sixty (60) days after the date on which the request for such hearing was received by the FDIC. If the FDIC is unable to provide the debtor with a hearing and decision within sixty (60) days after the receipt of the request for such hearing:

(a) The FDIC may not issue a withholding order until the hearing is held and a decision rendered; or

(b) If the FDIC had previously issued a withholding order to the debtor's employer, the withholding order will be suspended beginning on the 61st day after the date the FDIC received the hearing request and continuing until a hearing is held and a decision is rendered.

§ 313.90 Content of decision.

The written decision shall include:

(a) A summary of the facts presented;

(b) The hearing official's findings, analysis and conclusions; and

(c) The terms of any repayment schedule, if applicable.

§ 313.91 Finality of agency action.

Unless the FDIC on its own initiative orders review of a decision by a hearing official pursuant to 17 CFR 201.431(c), a decision by a hearing official shall become the final decision of the FDIC for the purpose of judicial review under the Administrative Procedure Act.

§ 313.92 Failure to appear.

In the absence of good cause shown, a debtor who fails to appear at a scheduled hearing will be deemed as not having timely filed a request for a hearing.

§ 313.93 Wage garnishment order.

(a) Unless the FDIC receives information that it believes justifies a delay or cancellation of the withholding order, the FDIC will send by first class mail a withholding order to the debtor's employer within 30 days after the debtor fails to make a timely request for a hearing (i.e., within 15 business days after the mailing of the notice of the FDIC's intent to seek garnishment) or, if a timely request for a hearing is made by the debtor, within 30 days after a decision to issue a withholding order becomes final.

(b) The withholding order sent to the employer will be in the form prescribed by the Secretary of the Treasury, on the FDIC's letterhead, and signed by the head of the agency or delegate. The order will contain all information necessary for the employer to comply with the withholding order, including the debtor's name, address, and social security number, as well as instructions for withholding and information as to where payments should be sent.

(c) The FDIC will keep a stamped copy of the order indicating the date it was mailed.

§ 313.94 Certification by employer.

Along with the withholding order, the FDIC will send to the employer a certification in a form prescribed by the Secretary of the Treasury. The employer shall complete and return the certification to the FDIC within the time frame prescribed in the instructions to the form. The certification will address matters such as information about the debtor's employment status and disposable pay available for withholding.

§ 313.95 Amounts withheld.

(a) Upon receipt of the garnishment order issued under this section, the employer shall deduct from all disposable pay paid to the debtor during each pay period the amount of garnishment described in paragraphs (b) through (d) of this section.

(b) Subject to the provisions of paragraphs (c) and (d) of this section, the amount of garnishment shall be the lesser of:

(1) The amount indicated on the garnishment order up to 15% of the debtor's disposable pay; or

(2) The amount set forth in 15 U.S.C. 1673(a)(2). The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which the debtor's disposable pay exceeds an amount equivalent to thirty times the minimum wage. See 29 CFR 870.10.
§ 313.96 Exclusions from garnishment.

The FDIC will not garnish the wages of a debtor it knows has been involuntarily separated from employment until the debtor has been re-employed continuously for at least 12 months. The debtor has the burden of informing the FDIC of the circumstances surrounding an involuntary separation from employment.

§ 313.97 Financial hardship.

(a) A debtor whose wages are subject to a wage withholding order under this section, may, at any time, request a review by the FDIC of the amount garnished, based on materially changed circumstances such as disability, divorce, or catastrophic illness which result in financial hardship.

(b) A debtor requesting a review under this section shall submit the basis for claiming that the current amount of garnishment results in a financial hardship to the debtor, along with supporting documentation.

(c) If a financial hardship is found, the FDIC will downwardly adjust, by an amount and for a period of time agreeable to the FDIC, the amount garnished to reflect the debtor’s financial condition. The FDIC will notify the employer of any adjustments to the amounts to be withheld.

§ 313.98 Ending garnishment.

(a) Once the FDIC has fully recovered the amounts owed by the debtor, including interest, penalties, and administrative costs consistent with the FCCS, the FDIC will send the debtor’s employer notification to discontinue wage withholding.

(b) At least annually, the FDIC will review its debtors’ accounts to ensure that garnishment has been terminated for accounts that have been paid in full.
§ 313.99 Prohibited actions by employer.

The DCIA prohibits an employer from discharging, refusing to employ, or taking disciplinary action against the debtor due to the issuance of a withholding order under this subpart.

§ 313.100 Refunds.

(a) If a hearing official determines that a debt is not legally due and owing to the United States, the FDIC shall promptly refund any amount collected by means of administrative wage garnishment.

(b) Unless required by federal law or contract, refunds under this section shall not bear interest.

§ 313.101 Right of action.

The FDIC may sue any employer for any amount that the employer fails to withhold from wages owed and payable to its employee in accordance with this subpart. However, a suit will not be filed before the termination of the collection action involving a particular debtor, unless earlier filing is necessary to avoid expiration of any applicable statute of limitations. For purposes of this subpart, "termination of the collection action" occurs when the agency has terminated collection action in accordance with the FCCS (31 CFR 903.1 through 903.5) or other applicable standards. In any event, termination of the collection action will have been deemed to occur if the FDIC has not received any payments to satisfy the debt from the particular debtor whose wages were subject to garnishment, in whole or in part, for a period of one (1) year.

§§ 313.102–313.119 [Reserved]

Subpart E—Tax Refund Offset

§ 313.120 Scope.

The provisions of 26 U.S.C. 6402(d) and 31 U.S.C. 3720A authorize the Secretary of the Treasury to offset a delinquent debt owed to the United States Government from the tax refund due a taxpayer when other collection efforts have failed to recover the amount due. In addition, the FDIC is authorized to collect debts by means of administrative offset under 31 U.S.C. 3716 and, as part of the debt collection process, to notify the Financial Management Service (FMS), a bureau of the Department of the Treasury, of the amount of such debt for collection by tax refund offset.

§ 313.121 Definitions.

For purposes of this subpart E:

(a) Debt or claim means an amount of money, funds or property which has been determined by the FDIC to be due to the United States from any person, organization, or entity, except another federal agency.

(b) Debtor means a person who owes a debt or a claim. The term "person" includes any individual, organization or entity, except another federal agency.

(c) Tax refund offset means withholding or reducing a tax refund payment by an amount necessary to satisfy a debt owed by the payee(s) of a tax refund payment.

(d) Tax refund payment means any overpayment of federal taxes to be refunded to the person making the overpayment after the Internal Revenue Service (IRS) makes the appropriate credits.

§ 313.122 Notification of debt to FMS.

The FDIC shall notify FMS of the amount of any past due, legally enforceable non-tax debt owed to it by a person, for the purpose of collecting such debt by tax refund offset. Notification and referral to FMS of such debts does not preclude FDIC's use of any other debt collection procedures, such as wage garnishment, either separately or in conjunction with tax refund offset.

§ 313.123 Certification and referral of debt.

When the FDIC refers a past-due, legally enforceable non-tax debt owed to it by a person, for the purpose of collecting such debt by tax refund offset, it will certify to FMS that:

(a) The debt is past due and legally enforceable in the amount submitted to FMS and that the FDIC will ensure that collections are properly credited to the debt;

(b) Except in the case of a judgment debt or as otherwise allowed by law, the debt is referred for offset within
§ 313.124 Pre-offset notice and consideration of evidence.
(a) For purposes of § 313.123(c)(2), the FDIC has made a reasonable effort to notify the debtor if it uses the current address information contained in its records related to the debt. The FDIC may, but is not required to, obtain address information from the IRS pursuant to 26 U.S.C. 6103(m)(2). (4), (5).
(b) For purposes of § 313.123(c)(3), if evidence presented by a debtor is considered by an agent of the FDIC, or other entities or persons acting on behalf of the FDIC, the debtor must be accorded at least 30 days from the date the agent or other entity or person determines that all or part of the debt is past-due and legally enforceable to request review by an officer or employee of the FDIC of any unresolved dispute. The FDIC must then notify the debtor of its decision.

§ 313.125 No requirement for duplicate notice.
Where the director has previously given a debtor any of the required notice and review opportunities with respect to a particular debt, the Director is not required to duplicate such notice and review opportunities prior to initiating tax refund offset.

[71 FR 75661, Dec. 18, 2006]

§ 313.126 Referral of past-due, legally enforceable debt.
The FDIC shall submit past-due, legally enforceable debt information for tax refund offset to FMS, as prescribed by FMS. For each debt, the FDIC will include the following information:
(a) The name and taxpayer identification number (as defined in 26 U.S.C. 6109) of the debtor;
(b) The amount of the past-due and legally enforceable debt;
(c) The date on which the debt became past-due; and
(d) The designation of FDIC as the agency referring the debt.


§ 313.127 Correcting and updating referral.
If, after referring a past-due legally enforceable debt to FMS as provided in § 313.125, the FDIC determines that an error has been made with respect to the information transmitted to FMS, or if the FDIC receives a payment or credits a payment to the account of the debtor referred to FMS for offset, or if the debt amount is otherwise incorrect, the FDIC shall promptly notify FMS and make the appropriate correction of the FDIC's records. The FDIC will provide certification as required under § 323.123 for any increases to amounts owed. In the event FMS rejects an FDIC certification for failure to comply with § 323.123, the FDIC may resubmit the debt with a corrected certification.


§ 313.128 Disposition of amounts collected.
FMS will transmit amounts collected for past-due, legally enforceable debts, less fees charged under this section, to the FDIC’s account. The FDIC will reimburse FMS and the IRS for the cost of administering the tax refund offset program. FMS will deduct the fees from amounts collected prior to disposition and transmit a portion of the fees deducted to reimburse the IRS for
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its share of the cost of administering the tax refund offset program. To the extent allowed by law, the FDIC may add the offset fees to the debt.


§§ 313.129–313.139 [Reserved]

Subpart F—Civil Service Retirement and Disability Fund Offset

§ 313.140 Future benefits.

Unless otherwise prohibited by law, the FDIC may request that a debtor’s anticipated or future benefit payments under the Civil Service Retirement and Disability Fund (Fund) be administratively offset in accordance with regulations at 5 CFR 831.1801 through 831.1808.

§ 313.141 Notification to OPM.

When making a request for administrative offset under § 313.140, the FDIC shall provide OPM with a written certification that:

(a) The debtor owes the FDIC a debt, including the amount of the debt;

(b) The FDIC has complied with the applicable statutes, regulations, and procedures of OPM; and

(c) The FDIC has complied with the requirements of 31 CFR parts 900 through 904, including any required hearing or review.

§ 313.142 Request for administrative offset.

The Director shall request administrative offset under § 313.140, as soon as practical after completion of the applicable procedures in order to help ensure that offset be initiated prior to expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor shall be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust.

§ 313.143 Cancellation of deduction.

If the FDIC collects part or all of the debt by other means before deductions are made or completed pursuant to § 313.140, the FDIC shall act promptly to modify or terminate its request for such offset.

Subpart G—Mandatory Centralized Administrative Offset

§ 313.160 Treasury notification.

(a) In accordance with 31 U.S.C. 3716, the FDIC as a creditor agency must notify the Secretary of the Treasury of all debts that are delinquent (over 180 days past due), as defined in the FCCS, to enable the Secretary to seek collection by centralized administrative offset. This includes debts the FDIC seeks to recover from the pay account of an employee of another agency by means of salary offset.

(b) For purposes of centralized administrative offset, a claim or debt is not delinquent if:

(1) It is in litigation or foreclosure;

(2) It will be disposed of under an asset sale program within one year after becoming eligible for sale;

(3) It has been referred to a private collection contractor for collection;

(4) It has been referred to a debt collection center;

(5) It will be collected under internal offset, if such offset is sufficient to collect the claim within three years after the date the debt or claim is first delinquent; and

(6) It is within a specific class of claims or debts which the Secretary of the Treasury has determined to be exempt, at the request of an agency.

§ 313.161 Certification of debt.

Prior to referring a delinquent debt to the Secretary of the Treasury, the Director must have complied with the requirements of 5 U.S.C. 5514, and 5 CFR part 550, subpart K, governing salary offset, and the FDIC regulations. The Director shall certify, in a form acceptable to the Secretary, that:

(a) The debt is past due and legally enforceable; and

(b) The FDIC has complied with all due process requirements under 31 U.S.C. 3716 and the FDIC’s administrative offset regulations.
§ 313.162 Compliance with 31 CFR part 285.

The Director shall also comply with applicable procedures for referring a delinquent debt for purposes of centralized offset which are set forth at 31 CFR part 285 and the FCCS.

§ 313.163 Notification of debts of 180 days or less.

The Director, in his discretion, may also notify the Secretary of the Treasury of debts that have been delinquent for 180 days or less, including debts the FDIC seeks to recover by means of salary offset.

§§ 313.164–313.180 [Reserved]
SUBCHAPTER B—REGULATIONS AND STATEMENTS OF GENERAL POLICY

PART 323—APPRaisalS

§ 323.1 Authority, purpose, and scope.

(a) Authority. This part is issued under 12 U.S.C. 1818, 1819, 1819 (“Seventh” and “Tenth”), and 3331–3352.

(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;
§ 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:
§ 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.

§ 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.

§ 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
§ 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

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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 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) Credit-enhancing interest-only strip means an on-balance sheet asset that, in form or in substance:
(i) Represents the contractual right to receive some or all of the interest due on transferred assets; and
(ii) Exposes the bank to credit risk directly or indirectly associated with the transferred assets that exceeds a pro rata share of the bank's claim on the assets, whether through subordination provisions or other credit enhancement techniques.

(2) Reservation of authority. In determining whether a particular interest cash flow functions, directly or indirectly, as a credit-enhancing interest-only strip, the FDIC will consider the economic substance of the transaction. The FDIC, through the Director of Supervision, or other designated FDIC official reserves the right to identify other interest cash flows or related assets as credit-enhancing interest-only strips.

(h) Face amount means the notional principal, or face value, amount of an off-balance sheet item; the amortized cost of an asset not held for trading purposes; and the fair value of a trading asset.

(i)(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.

(j) 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:

(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.

(k) 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.)

(l) 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.”

(m) Leverage ratio means the ratio of Tier 1 capital to total assets, as calculated under this part.

(n) 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.

(o) 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.

(p) 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.

(q) 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,
of the bank's current credit standing, including but not limited to, auction rate, money market and marketable preferred stock, are excluded from this definition of noncumulative perpetual preferred stock, regardless of whether the dividends are cumulative or noncumulative.

(r) 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.

(s) 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).

(t) 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.

(u) 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.

(v) 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)), minus credit-enhancing interest-only strips that are not eligible for inclusion in core capital pursuant to §325.5(f), minus deferred tax assets in excess of the limit set forth in §325.5(g), minus classified loss and any other assets that are deducted in determining Tier 1 capital, and minus the amount of the total adjusted carrying value of nonfinancial equity investments that is subject to a deduction from Tier 1 capital as set forth in section II.B.(6) of appendix A to this part.

(w) 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).

(x) 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)), minus credit-enhancing interest-only strips that are not eligible for inclusion in core capital pursuant to §325.5(f), minus deferred tax assets in excess of the limit set forth in §325.5(g), minus assets classified loss and any other assets that are deducted in determining Tier 1 capital, and minus the amount of the total adjusted carrying value of nonfinancial equity investments that is subject to a deduction from Tier 1 capital as set forth in section II.B.(6) of appendix A to this part. 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.

(y) 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).

(z) 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)).

§ 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 an insufficient volume of assets classified substandard, doubtful 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 CAMELS 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 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
§ 325.4 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 if it finds that the applicant has committed to 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)). 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

(Approved by the Office of Management and Budget under control number 3064-0075 for use through December 31, 1993)

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 and Consumer Protection (DSC) 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, nonmortgage servicing assets, and credit-enhancing interest-only strips.

For purposes of determining 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 “Reports of Income and Condition” (Call Reports).

(3) Tier 1 capital limitations. (i) 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:

(A) 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, any disallowed credit-enhancing interest-only strips, any disallowed deferred tax assets, and any nonfinancial equity investments; or

(B) 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.

(ii) The maximum allowable amount of credit-enhancing interest-only strips, whether purchased or retained, will be limited to the lesser of:

(A) 25 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, any disallowed credit-enhancing interest-only strips, any disallowed deferred tax assets, and any nonfinancial equity investments; or
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(B) The sum of the face amounts of all credit-enhancing interest-only strips.

(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 the aggregate of purchased credit card relationships and nonmortgage servicing assets will be limited to the lesser of:

(i) 25 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, any disallowed credit-enhancing interest-only strips, any disallowed deferred tax assets, and any nonfinancial equity investments; 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) 10 percent of the amount ofTier 1 capital that exists before the deduction of any disallowed mortgage servicing assets, any disallowed nonmortgage servicing assets, any disallowed purchased credit card relationships, any disallowed credit-enhancing interest-only strips, any disallowed deferred tax assets, and any nonfinancial equity investments.

(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 first three sentences in this paragraph, 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.
§ 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...
§ 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 of capital directives in accordance with the FDI Act.

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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]
§ 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).

§ 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...
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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 CAMELS 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) Maintains the pledge of assets required under § 347.209 of this chapter; and
(ii) Maintains the eligible assets prescribed under § 347.210 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) 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 § 347.209 of this chapter or to maintain an average ratio of eligible assets pursuant to § 347.210 of this chapter.
(2) Adequately capitalized if the insured branch:
(i) Maintains the pledge of assets required under § 347.209 of this chapter; and
(ii) Maintains the eligible assets prescribed under § 347.210 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 § 347.209 of this chapter; or
(ii) Fails to maintain the eligible assets prescribed under § 347.210 of this chapter at 104 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 § 347.210 of this chapter at 102 percent or more of the preceding quarter’s average book value of the insured branch’s third-party liabilities.
§ 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 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.
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 banks. (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:


(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;

(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.

The framework set forth in this statement of policy consists of (1) a definition of capital for risk-based capital purposes, and (2) a system for calculating risk-weighted assets by assigning assets and off balance sheet items to broad risk categories. 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). 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, such banks are required to 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-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 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 a case-by-case basis.
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 or acquisitions, or provisions that are inconsistent with safe and sound banking practices, 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

1. 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);
2. Noncumulative perpetual preferred stock, including any related surplus; and
3. Minority interests in the equity capital accounts of consolidated subsidiaries.

(a) 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 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)), minus credit-enhancing interest-only strips.

(b) 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.

### 2. Preferred stock issues

Preferred stock issues where the dividend is reset periodically, 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. Intangible assets

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.
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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.

(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 instruments, 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 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.

(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.

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

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4 Allocated transfer risk reserves 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, 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.

5 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.
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;

(ii) Has a maturity of at least five years; or

(iii) 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 and Consumer Protection (DSC) 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 characteristics 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. These assets include:

1. All intangible assets other than mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships. These disallowed intangibles are deducted from the core capital (Tier 1) elements.

2. Investments in unconsolidated banking and finance subsidiaries. This includes any equity or debt capital investments in bank holding or finance subsidiaries if the subsidiaries are not consolidated for regulatory capital requirements. Generally, these investments include equity and debt capital securities 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.

Any assets deducted from capital when computing the numerator of the risk-based capital ratio will also be excluded from risk-related assets when computing the denominator of the ratio.

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.
3. The existence of a market of sufficient depth to provide liquidity for the intangible asset.

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. Alternatively, the FDIC may 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.

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.
II. PROCEDURES FOR COMPUTING RISK-WEIGHTED ASSETS

A. General Procedures

1. 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 relevant, 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, comprises the denominator of the risk-based capital ratio. The adjustment factor for any off-balance sheet item to assets or off-balance sheet items explicitly treated in sections II.B and II.C of this appendix A, as well as other relevant factors.

2. 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.

3. The Director of the Division of Supervision and Consumer Protection (DSC) may, on a case-by-case basis, determine the appropriate risk weight for any asset or credit equivalent amount that does not fit wholly within one of the risk categories set forth in this Appendix A or that imposes risks on a bank that are not commensurate with the prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment.

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 the stated investment objectives set forth in its prospectus. The bank may, at its option, assign the investment on a pro rata basis to different risk categories according to the investment limits in the fund’s prospectus, but in no case will indirect holdings through shares in any mutual fund be assigned to a risk weight less than 20 percent. If the bank chooses to assign its investment on a pro rata basis, and the sum of the investment limits in the fund’s prospectus exceeds 100 percent, the bank must assign risk weights in descending order. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally be disregarded in determining the risk category to which the bank’s holdings in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk-weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk-weighting of the mutual fund investment. Nonetheless, if the fund engages in any activities that appear speculative in nature or 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. 11 U.S.

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11 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...
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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. depositary institutions, foreign banks, and qualifying OECD-based securities firms 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 original maturity.12

5. Recourse, Direct Credit Substitutes, Residual Interests and Mortgage- and Asset-Backed Securities. For purposes of this appendix A, the following definitions will apply.

(a) Definitions—(1) Credit derivative means a contract that allows one party (the “protection purchaser”) to transfer the credit risk of an asset or off-balance sheet credit exposure to another party (the “protection provider”). The value of a credit derivative is dependent, at least in part, on the credit performance of the “reference asset.”

(b) Credit-enhancing interest only strip is defined in §325.2g).

(c) Credit-enhancing representations and warranties means representations and warranties that are made or assumed in connection with a transfer of assets (including loan servicing assets) and that obligate the bank to protect investors from losses arising from credit risk in the assets transferred or the loans serviced. Credit-enhancing representations and warranties include promises to protect a party from losses resulting from the default or nonperformance of another party or from an insufficiency in the value of the collateral. Credit-enhancing representations and warranties do not include:

(i) Early default clauses and similar warranties that permit the return of, or premium refund clauses covering, family residential first mortgage loans that qualify for a 50 percent risk weight for a period not to exceed 120 days from the date of transfer. These warranties may cover only those loans that were originated within 1 year of the date of transfer;

(ii) Premium refund clauses that cover assets guaranteed, in whole or in part, by the U.S. Government, a U.S. Government agency or a government-sponsored enterprise, provided the premium refund clauses are for a period not to exceed 120 days from the date of transfer; or

(iii) Warranties that permit the return of assets in instances of misrepresentation, fraud or incomplete documentation.

(d) Direct credit substitute means an arrangement in which a bank assumes, in form or in substance, credit risk associated with an on- or off-balance sheet credit exposure that was not previously owned by the bank (third-party asset) and the risk assumed by the bank exceeds the pro rata share of the bank’s interest in the third-party asset. If the bank has no claim on the third-party asset, then the bank’s assumption of any credit risk

12Through year-end 1992, remaining rather than original maturity may be used for determining term to maturity for commitments.
with respect to the third party asset is a direct credit substitute. Direct credit substitutes include, but are not limited to:

(i) Financial standby letters of credit, which include a letter of credit or similar arrangement, however named or described, that support financial claims on a third party that exceed a bank’s pro rata share of losses in the financial claim;

(ii) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims;

(iii) Purchased subordinated interests or securities that absorb more than their pro rata share of credit losses from the underlying assets;

(iv) Credit derivative contracts under which the bank assumes more than its pro rata share of credit risk on a third party asset or exposure;

(v) Loans or lines of credit that provide credit enhancement for the financial obligations of an account party;

(vi) Purchased loan servicing assets if the servicer:

(A) is responsible for credit losses with the loans being serviced,

(B) is responsible for making servicer cash advances (unless the advances are not direct credit substitutes because they meet the conditions specified in section II.B.5(a)(9) of this Appendix A), or

(C) Makes or assumes credit-enhancing representations and warranties with respect to the loans serviced;

(vii) Clean-up calls on third party assets. Clean-up calls that are exercisable at the option of the bank (as servicer or as an affiliate of the servicer) when the pool balance is 10 percent or less of the original pool balance are not direct credit substitutes; and

(viii) Liquidity facilities that provide liquidity support to ABCP (other than eligible ABCP liquidity facilities).

(5) Eligible ABCP liquidity facility means a liquidity facility supporting ABCP, in form or in substance, that is subject to an asset quality test at the time of draw that excludes funding against assets that are 90 days or more past due or in default. In addition, if the assets that an eligible ABCP liquidity facility is required to fund against are externally rated assets or exposures at the inception of the facility, the facility can be used to fund only those assets or exposures that are externally rated investment grade at the time of funding. Notwithstanding the eligibility requirements set forth in the two preceding sentences, a liquidity facility will be considered an eligible ABCP liquidity facility if the assets that are funded under the liquidity facility and which do not meet the eligibility requirements are guaranteed, either conditionally or unconditionally, by the U.S. government or its agencies, or by the central government of an OECD country.

(6) Externally rated means that an instrument or obligation has received a credit rating from a nationally recognized statistical rating organization.

(7) Face amount means the notional principal, or face value, amount of an off-balance sheet item; the amortized cost of an asset not held for trading purposes; and the fair value of a trading asset.

(8) Financial asset means cash or other monetary instrument, evidence of debt, evidence of an ownership interest in an entity, or a contract that conveys a right to receive or exchange cash or another financial instrument from another party.

(9) Financial standby letter of credit means a letter of credit or similar arrangement that represents an irrevocable obligation to a third-party beneficiary:

(i) To receive money borrowed by, or advanced to, or advanced to, or for the account of, a second party (the account party), or

(ii) To make payment on behalf of the account party, in the event that the account party fails to fulfill its obligation to the beneficiary.

(10) Liquidity facility means a legally binding commitment to provide liquidity support to ABCP by lending to, or purchasing assets from, any structure, program, or conduit in the event that funds are required to repay maturing ABCP.

(11) Mortgage servicer cash advance means funds that a residential mortgage servicer advances to ensure an uninterrupted flow of payments, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the loan. A mortgage servicer cash advance is not a recourse obligation or a direct credit substitute if:

(i) The mortgage servicer is entitled to full reimbursement and this right is not subordinated to other claims on the cash flows from the underlying asset pool; or

(ii) For any one loan, the servicer's obligation to make nonreimbursable advances is contractually limited to an insignificant amount of the outstanding principal of that loan.

(12) Nationally recognized statistical rating organization (NRSRO) means an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (or any successor Division) (Commission) as a nationally recognized statistical rating organization for various purposes, including the Commission’s uniform net capital requirements for brokers and dealers (17 CFR 240.15c-3).

(13) Recourse means an arrangement in which a bank retains, in form or in substance, any credit risk directly or indirectly associated with an asset it has sold (in accordance with generally accepted accounting principles) that exceeds a pro rata share of the bank’s claim on the asset. If a bank
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has no claim on an asset it has sold, then the retention of any credit risk is recourse. A recourse obligation typically arises when an institution transfers assets in a sale and retains an obligation to repurchase the assets or absorb losses due to a default of principal or interest or any other deficiency in the performance of the underlying obligor or security of any party. Recourse may exist implicitly where a bank provides credit enhancement beyond any contractual obligation to support assets it has sold. The following are examples of recourse arrangements:

(i) Credit-enhancing representations and warranties made on the transferred assets;
(ii) Loan servicing assets retained pursuant to an agreement under which the bank:
   (A) Is responsible for losses associated with the loans being serviced, or
   (B) Is responsible for making mortgage servicer cash advances (unless the advances are not a recourse obligation because they meet the conditions specified in section II.B.5(a)(11) of this Appendix A);
(iii) Retained subordinated interests that absorb more than their pro rata share of losses from the underlying assets;
(iv) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;
(v) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;
(vi) Credit derivative contracts under which the bank retains more than its pro rata share of credit risk on transferred assets;
(vii) Clean-up calls at inception that are greater than 10 percent of the balance of the original pool of transferred loans. Clean-up calls that are 10 percent or less of the original pool balance that are exercisable at the option of the bank are not recourse arrangements; and
(viii) Liquidity facilities that provide liquidity support to ABCP (other than eligible ABCP liquidity facilities).

Residual interest means any on-balance sheet asset that represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with generally accepted accounting principles (GAAP)) of financial assets, whether through a securitization or otherwise that exposes a bank to credit risk directly or indirectly associated with the transferred assets that exceeds a pro rata share of the bank’s claim on the assets, whether through subordination provisions or other credit enhancement techniques. Residual interests generally include credit-enhancing IOs, spread accounts, cash collateral accounts, retained subordinated interests, other forms of over-collateralization, and similar assets that function as a credit enhancement. Residual interests further include those exposures that, in substance, cause the bank to retain the credit risk of an asset or exposure that had qualified as residual interest before it was sold. Residual interests generally do not include interests purchased from a third party, except that purchased credit-enhancing IOs are residual interests for purposes of the risk-based capital treatment in this appendix.

Risk participation means a participation in which the originating party remains liable to the beneficiary for the full amount of an obligation (e.g., a direct credit substitute) notwithstanding that another party has acquired a participation in that obligation.

Securitization means the pooling and re-packaging by a special purpose entity of assets or other credit exposures into securities that can be sold to investors. Securitization includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments.

Sponsor means a bank that establishes an ABCP program; approves the sellers permitted to participate in the program; approves the asset pools to be purchased by the program; or administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program’s credit and investment policy.

Structured finance program means a program where receivable interests and asset-backed securities issued by multiple participants are purchased by a special purpose entity that repackages those exposures into securities that can be sold to investors. Structured finance programs allocate credit risks generally, between the participants and credit enhancement provided to the program.

Traded position means a position that is externally raised and is retained, assumed or issued in connection with an asset securitization, where there is a reasonable expectation that, in the near future, the rating will be relied upon by unaffiliated investors to purchase the position; or an unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

(a) Credit equivalent amounts and risk weights of recourse obligations and direct credit substitutes—(1) General rule for determining the credit-equivalent amount. Except as otherwise provided, the credit-equivalent amount for a recourse obligation or direct credit substitute is the full amount of the credit-enhanced assets for which the bank directly or indirectly retains or assumes credit risk multiplied by a 100% conversion factor. Thus, a bank that extends a partial direct credit substitute, e.g., a financial standby
the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. For a direct credit substitute that is an on-balance sheet asset, e.g., a purchased subordinated security, a bank must calculate risk-weighted assets using the amount of the direct credit substitute and the full amount of the assets it supports, i.e., all the more senior positions in the structure. The treatment covered in this paragraph (b) is subject to the low-level exposure rule provided in section II.B.5(h)(1) of this appendix A.

(c) Credit equivalent amount and risk weight of participations in, and syndications of, direct credit substitutes. Subject to the low-level exposure rule provided in section II.B.5(h)(1) of this appendix A, the credit equivalent amount for a participation interest in, or syndication of, a direct credit substitute (excluding purchased credit-enhancing interest-only strips) is calculated and risk weighted as follows:

(1) Treatment for direct credit substitutes for which a bank has conveyed a risk participation.

In the case of a direct credit substitute in which a bank has conveyed a risk participation, the full amount of the assets that are supported by the direct credit substitute is converted to a credit equivalent amount using a 100% conversion factor. However, the pro rata share of the credit equivalent amount that has been conveyed through a risk participation is then assigned to which ever risk-weight category is lower: the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. For example, the pro rata share of the full amount of the assets supported, in whole or in part, by a direct credit substitute conveyed as a risk participation to a U.S. domestic depository institution or an OECD bank is assigned to the 20 percent risk category.

(2) Treatment for direct credit substitutes in which the bank has acquired a risk participation. In the case of a direct credit substitute in which the bank has acquired a risk participation, the acquiring bank’s pro rata share of the direct credit substitute is multiplied by the full amount of the assets that are supported by the direct credit substitute and converted using a 100% credit conversion factor. The resulting credit equivalent amount is then assigned to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(3) Treatment for direct credit substitutes related to syndications. In the case of a direct credit substitute that takes the form of a syndication where each party is obligated only for its pro rata share of the risk and there is no recourse to the originating entity, each bank’s credit equivalent amount will be calculated by multiplying only its pro rata share of the assets supported by the direct credit substitute by a 100% conversion factor. The resulting credit equivalent amount is then assigned to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(d) Externally rated positions: credit-equivalent amounts and risk weights.—(1) Traded positions. With respect to a recourse obligation, direct credit substitute, residual interest (other than a credit-enhancing interest-only strip) or mortgage- or asset-backed security that is a “traded position” and that has received an external rating on a long-term position that is one grade below investment grade or better or a short-term position that is investment grade, the bank may multiply the face amount of the position by the appropriate risk weight, determined in accordance with Table A or B of this appendix A, as appropriate.

If a traded position receives more than one external rating, the lowest rating will apply.

| Table A |
|-----------------|-----------------|-----------------|
| Long-term rating category | Examples | Risk weight (In percent) |
| Highest or second highest investment grade | AAA, AA | 20 |
| Third highest investment grade | A | 50 |

13A risk participation with a remaining maturity of one year or less that is conveyed to a non-OECD bank is also assigned to the 20 percent risk category.

14Stripped mortgage-backed securities and similar instruments, such as interest-only strips that are not credit-enhancing and principal-only strips, must be assigned to the 100% risk category.
TABLE A—Continued

<table>
<thead>
<tr>
<th>Long-term rating category</th>
<th>Examples</th>
<th>Risk weight (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lowest investment grade</td>
<td>BBB</td>
<td>100</td>
</tr>
<tr>
<td>One category below invest grade</td>
<td>BB</td>
<td>200</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Short-term rating category</th>
<th>Examples</th>
<th>Risk weight (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest investment grade</td>
<td>A–1, P–1</td>
<td>20</td>
</tr>
<tr>
<td>Second highest investment grade</td>
<td>A–2, P–2</td>
<td>50</td>
</tr>
<tr>
<td>Lowest investment grade</td>
<td>A–3, P–3</td>
<td>100</td>
</tr>
</tbody>
</table>

(2) Non-traded positions. A recourse obligation, direct credit substitute, residual interest (but not a credit-enhancing interest-only strip) or mortgage- or asset-backed security extended in connection with a securitization that is not a “traded position” may be assigned a risk weight in accordance with section II.B.5(d)(1) of this appendix A if:

(i) It has been externally rated by more than one NRSRO;

(ii) It has received an external rating on a long-term position that is one category below investment grade or better or a short-term position that is investment grade by all NRSROs providing a rating;

(iii) The ratings are publicly available; and

(iv) The ratings are based on the same criteria used to rate traded positions. If the ratings are different, the lowest rating will determine the risk category to which the recourse obligation, direct credit substitute, residual interest, or mortgage- or asset-backed security will be assigned.

(e) Senior positions not externally rated. For a recourse obligation, direct credit substitute, residual interest or mortgage- or asset-backed security that is not externally rated but is senior in all features to a traded position (including collateralization and maturity), a bank may apply a risk weight to the face amount of the senior position in accordance with section II.B.5(d)(1) of this appendix A, based upon the risk weight of the traded position, subject to any current or prospective supervisory guidance and the bank satisfying the FDIC that this treatment is appropriate. This section will apply only if the traded position provides substantial credit support for the entire life of the unrated position.

(f) Residual interests—(1) Concentration limit on credit-enhancing interest-only strips. In addition to the capital requirement provided by section II.B.5(f)(2) of this appendix A, a bank must deduct from Tier 1 capital the face amount of all credit-enhancing interest-only strips in excess of 25 percent of Tier 1 capital in accordance with §325.5(f)(3).

(2) Credit-enhancing interest-only strip capital requirement. After applying the concentration limit to credit-enhancing interest-only strips in accordance with §325.5(f)(3), a bank must maintain risk-based capital for a credit-enhancing interest-only strip, equal to the remaining face amount of the credit-enhancing interest-only strip (net of the remaining proportional amount of any existing associated deferred tax liability recorded on the balance sheet), even if the amount of risk-based capital required to be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred credit-enhancing interest-only strip will be treated as if the credit-enhancing interest-only strip was retained by the bank and not transferred.

(3) Other residual interests capital requirement. Except as otherwise provided in section II.B.5(d) or (e) of this appendix A, a bank must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest (net of any existing associated deferred tax liability recorded on the balance sheet), even if the amount of risk-based capital required to be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred residual interest will be treated as if the residual interest was retained by the bank and not transferred.

(4) Residual interests and other recourse obligations. Where the aggregate capital requirement for residual interests (including credit-enhancing interest-only strips) and recourse obligations arising from the same transfer of assets exceed the full risk-based capital requirement for assets transferred, a bank must maintain risk-based capital equal to the greater of the risk-based capital requirement for the residual interest as calculated under sections II.B.5(f)(2) through (3) of this
appendix A or the full risk-based capital requirement for the assets transferred.

(g) Positions that are not rated by an NRSRO. A bank’s position (other than a residual interest) in a securitization or structured finance program that is not rated by an NRSRO may be risk-weighted based on the bank’s determination of the credit rating of the position, as specified in Table C of this appendix A, multiplied by the face amount of the position. In order to qualify for this treatment, the bank’s system for determining the credit ratings of positions must meet one of the three alternative standards set out in section II.B.5(g)(1) through (3) of this appendix A.

<table>
<thead>
<tr>
<th>Rating category</th>
<th>Examples</th>
<th>Risk Weight (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment grade</td>
<td>BBB or better</td>
<td>100</td>
</tr>
<tr>
<td>One category below investment grade</td>
<td>BB</td>
<td>200</td>
</tr>
</tbody>
</table>

(i) The internal credit risk rating system is an integral part of the bank’s risk management system that explicitly incorporates the full range of risks arising from a bank’s participation in securitization activities.

(ii) Internal credit ratings are linked to measurable outcomes, such as the probability that the position will experience any loss, the position’s expected loss given default, and the degree of variance in losses given default on that position.

(iii) The internal credit risk rating system must separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of a particular securitization transaction.

(iv) The internal credit risk rating system identifies gradations of risk among ‘pass’ assets and other risk positions.

(v) The internal credit risk rating system must have clear, explicit criteria (including for subjective factors), that are used to classify assets into each internal risk grade.

(vi) The bank must have independent credit risk management or loan review personnel assigning or reviewing the credit risk ratings.

(vii) An internal audit procedure should periodically verify that internal risk ratings are assigned in accordance with the bank’s established criteria.

(viii) The bank must monitor the performance of the internal credit risk ratings assigned to nonrated, nontraded direct credit substitutes over time to determine the appropriateness of the initial credit risk rating assignment and adjust individual credit risk ratings, or the overall internal credit risk rating system, as needed; and

(ix) The internal credit risk rating system must make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(2) Program Ratings. A bank extends a direct credit substitute or retains a recourse obligation (but not a residual interest) in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the bank may apply the rating category applicable to the option that corresponds to the bank’s position. In order to rely on a program rating, the bank must demonstrate to the FDIC’s satisfaction that the criteria under the NRSRO’s assignment of ratings for the program are satisfied for the particular position issued by the bank. If a bank participates in a securitization sponsored by another party, the FDIC may authorize the bank to use this approach based on a program rating obtained by the sponsor of the program.

(3) Computer Program. A bank is using an acceptable credit assessment computer program that has been developed by an NRSRO to determine the rating of a direct credit substitute or recourse obligation (but not a residual interest) extended in connection with a structured finance program. In order
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According to the Federal Deposit Insurance Corporation (FDIC), to rely on the rating determined by the computer program, the bank must demonstrate to the FDIC's satisfaction that ratings under the program correspond credibly and reliably with the bank's capital level. The bank must also demonstrate to the FDIC's satisfaction the credibility of the program in financial markets, the reliability of the program in assessing credit risk, the applicability of the program to the bank's position, and the proper implementation of the program.

(h) Limitations on risk-based capital requirements—(1) Low-level exposure rule. If the maximum exposure to loss retained or assumed by a bank in connection with a recourse obligation, a direct credit substitute, or a residual interest is less than the effective risk-based capital requirement for the credit-enhanced assets, the risk-based capital required under this appendix A is limited to the bank's maximum contractual exposure, less any recourse liability account established in accordance with generally accepted accounting principles. This limitation does not apply when a bank provides credit enhancement beyond any contractual obligation to support assets it has sold.

(2) Mortgage-related securities or participation certificates retained in a mortgage loan swap. If a bank holds a mortgage-related security or a participation certificate as a result of a mortgage loan swap with recourse, capital is required to support the recourse obligation plus the percentage of the mortgage-related security or participation certificate that is not covered by the recourse obligation. The total amount of capital required for the on-balance sheet asset and the recourse obligation, however, is limited to the capital requirement for the underlying loans, calculated as if the bank continued to hold these loans as an on-balance sheet asset.

(3) Related on-balance sheet assets. If a recourse obligation or direct credit substitute also appears as a balance sheet asset, the asset is risk-weighted only under this section II.B.5 of this appendix A, except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, the on-balance sheet servicing assets and the related recourse obligations or direct credit substitutes must both be separately risk weighted and incorporated into the risk-based capital calculation.

(i) Alternative Capital Calculation for Small Business Obligations—(1) Definitions. For purposes of this section II.B.5(i),

(i) Qualified bank means a bank that:

(A) Is well capitalized as defined in §325.103(b)(1) without applying the capital treatment described in this section II.B.5(i) and has received written permission by order of the FDIC to apply the capital treatment described in this section II.B.5(i).

(ii) A bank that ceases to be qualified or that exceeds aggregate limit. If a bank ceases to be a qualified bank or exceeds the aggregate limit in section II.B.5(i)(3) of this appendix A, the bank may continue to apply the capital treatment described in section II.B.5(i)(2) of this appendix A to transfers of small business loans and leases to small businesses of personal property that occurred when the bank was qualified and did not exceed the limit.

(2) Capital and reserve requirements. Notwithstanding the risk-based capital treatment outlined in any other paragraph (other than paragraph (i) of this section II.B.5), with respect to a transfer with recourse of a small business loan or a lease to a small business of personal property that is a sale under generally accepted accounting principles, and for which the bank establishes and maintains a non-capital reserve under generally accepted accounting principles sufficient to meet the reasonable estimated liability of the bank under the recourse arrangement; a qualified bank may elect to include only the face amount of its recourse in its risk-weighted assets for purposes of calculating the bank's risk-based capital ratio.

(3) Limit on aggregate amount of recourse. The total outstanding amount of recourse retained by a qualified bank with respect to transfers of small business loans and leases to small businesses of personal property and included in the risk-weighted assets of the bank as described in section II.B.5(i)(2) of this appendix A may not exceed 15 percent of the bank's total risk-based capital, unless the FDIC specifies a greater amount by order.

(4) Bank that ceases to be qualified or that exceeds aggregate limit. If a bank ceases to be a qualified bank or exceeds the aggregate limit in section II.B.5(i)(3) of this appendix A, the bank may continue to apply the capital treatment described in section II.B.5(i)(2) of this appendix A to transfers of small business loans and leases to small businesses of personal property that occurred when the bank was qualified and did not exceed the limit.

(5) Prompt correction action not affected. (i) A bank shall compute its capital without regard to this section II.B.5(i) for purposes of prompt corrective action (12 U.S.C. 1831o) unless the bank is a well capitalized bank (without applying the capital treatment described in this section II.B.5(i)) and, after applying the capital treatment described in this section II.B.5(i), the bank would be well capitalized.

(ii) A bank shall compute its capital without regard to this section II.B.5(i) for purposes of 12 U.S.C. 1831o(g) regardless of the bank's capital level.

(6) Nonfinancial equity investments. (i) General. A bank must deduct from its Tier 1 capital the sum of the appropriate percentage
of 1958 (15 U.S.C. 682(b)); under the portfolio investment company (SBIC) under section II.B.(6), investments held by a bank in indirect subsidiaries. For purposes of this section, (as determined below) of the adjusted carrying value of all nonfinancial equity investments held by the bank or by its direct or indirect subsidiaries. For purposes of this section II.B.(6), investments held by a bank include all investments held directly or indirectly by the bank or any of its subsidiaries.

(ii) Scope of nonfinancial equity investments. A nonfinancial equity investment means any equity investment held by the bank in a nonfinancial company: through a small business investment company (SBIC) under section 302(b) of the Small Business Investment Act of 1958 (15 U.S.C. 622(b)); under the portfolio investment provisions of Regulation K issued by the Board of Governors of the Federal Reserve System (12 CFR 221.8(c)(3); or under section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a), other than an investment held in accordance with section 24(f) of that Act. A nonfinancial company is an entity that engages in any activity that has not been determined to be permissible for the bank to conduct directly, or to be financial in nature or incidental to financial activities under section 4(k) of the Bank Holding Company Act (12 U.S.C. 1842(k)).

(A) The bank must deduct from its Tier 1 capital the sum of the appropriate percentages, as set forth in the table following this paragraph, of the adjusted carrying value of all nonfinancial equity investments held by the bank. The amount of the percentage deduction increases as the aggregate amount of nonfinancial equity investments held by the bank increases as a percentage of the bank’s Tier 1 capital.

### DEDUCTION FOR NONFINANCIAL EQUITY INVESTMENTS

<table>
<thead>
<tr>
<th>Aggregate adjusted carrying value of all nonfinancial equity investments held directly or indirectly by the bank (as a percentage of the Tier 1 capital of the bank)</th>
<th>Deduction from Tier 1 Capital (as a percentage of the adjusted carrying value of the investment)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 15 percent</td>
<td>8 percent.</td>
</tr>
<tr>
<td>15 percent to 24.99 percent</td>
<td>12 percent.</td>
</tr>
<tr>
<td>25 percent and above</td>
<td>25 percent.</td>
</tr>
</tbody>
</table>

(B) These deductions are applied on a marginal basis to the portions of the adjusted carrying value of nonfinancial equity investments that fall within the specified ranges of the parent bank’s Tier 1 capital. For example, if the adjusted carrying value of all nonfinancial equity investments held by a bank equals 20 percent of the Tier 1 capital of the bank, then the amount of the deduction would be 8 percent of the adjusted carrying value of all investments up to 15 percent of the bank’s Tier 1 capital, and 12 percent of the adjusted carrying value of all investments in excess of 15 percent of the bank’s Tier 1 capital.

(C) The total adjusted carrying value of any nonfinancial equity investment that is subject to deduction under this paragraph is excluded from the bank’s risk-weighted assets for purposes of computing the denominator of the bank’s risk-based capital ratio and from total assets for purposes of calculating the denominator of the leverage ratio.

(D) This Appendix establishes minimum risk-based capital ratios and banks are at all times expected to maintain capital commensurate with the level and nature of the risks to which they are exposed. The risk to a bank from nonfinancial equity investments...
increases with its concentration in such investments and strong capital levels above the minimum requirements are particularly important when a bank has a high degree of concentration in nonfinancial equity investments (e.g., in excess of 50 percent of Tier 1 capital). The FDIC intends to monitor banks and apply heightened supervision to equity investment activities as appropriate, including where the bank has a high degree of concentration in nonfinancial equity investments, to ensure that each bank maintains capital levels that are appropriate in light of its equity investment activities. The FDIC also reserves authority to impose a higher capital charge in any case where the circumstances, such as the level of risk of the particular investment or portfolio of investments, the risk management systems of the bank, or other information, indicate that a higher minimum capital requirement is appropriate.

(iv) SBIC investments. (A) No deduction is required for nonfinancial equity investments that are held by a bank through one or more SBICs that are consolidated with the bank or in one or more SBICs that are not consolidated with the bank to the extent that all such investments, in the aggregate, do not exceed 15 percent of the bank’s Tier 1 capital. Any nonfinancial equity investment that is held through an SBIC or in an SBIC and that is not required to be deducted from Tier 1 capital under this section II.B.(6)(iv) will be assigned a 100 percent risk-weight and included in the bank’s consolidated risk-weighted assets. ¹⁹

¹⁹ If a bank has an investment in a SBIC that is consolidated for accounting purposes but that is not wholly owned by the bank, the adjusted carrying value of the bank’s nonfinancial equity investments through the SBIC is equal to the bank’s proportionate share of the adjusted carrying value of the SBIC’s investments in nonfinancial companies. The remainder of the SBIC’s adjusted carrying value (i.e., the minority interest holders’ proportionate share) is excluded from the risk-weighted assets of the bank. If a bank has an investment in a SBIC that is not consolidated for accounting purposes and has current information that identifies the percentage of the SBIC’s assets that are equity investments in nonfinancial companies, the bank may reduce the adjusted carrying value of its investment in the SBIC proportionately to reflect the percentage of the adjusted carrying value of the SBIC’s assets that are equity investments in nonfinancial companies. If a bank reduces the adjusted carrying value of its investment in a non-consolidated SBIC to reflect financial investments of the SBIC, the amount of the adjustment will be risk weighted at 100 percent and included in the bank’s risk-weighted assets.

(B) To the extent the adjusted carrying value of all nonfinancial equity investments that a bank holds through one or more SBICs that are consolidated with the bank or in one or more SBICs that are not consolidated with the bank exceeds, in the aggregate, 15 percent of the bank’s Tier 1 capital, the appropriate percentage of such amounts (as set forth in the table in section II.B.(6)(iii)(A)) must be deducted from the bank’s common stockholders’ equity in determining the bank’s Tier 1 capital. In addition, the aggregate adjusted carrying value of all nonfinancial equity investments held by a bank through a consolidated SBIC and in a nonconsolidated SBIC (including any investments for which no deduction is required) must be included in determining, for purposes of the table in section II.B.(6)(iii)(A), the total amount of nonfinancial equity investments held by the bank in relation to its Tier 1 capital.

(v) Transition provisions. No deduction under this section II.B.(6) is required to be made with respect to the adjusted carrying value of any nonfinancial equity investment (or portion of such an investment) that was made by the bank prior to March 13, 2000, or that was made by the bank after such date pursuant to a binding written commitment,²⁰ entered into prior to March 13, 2000, provided that in either case the bank has continuously held the investment since the relevant investment date.²¹ For purposes of this section II.B.(6)(v) a nonfinancial equity investment made prior to March 13, 2000, includes...
any shares or other interests received by the bank through a stock split or stock dividend on an investment made prior to March 13, 2000, provided the bank provides no consideration for the shares or interests received and the transaction does not materially increase the bank’s proportional interest in the company. The exercise on or after March 13, 2000, of options or warrants acquired prior to March 13, 2000, is not considered to be an investment made prior to March 13, 2000, if the bank provides any consideration for the shares or interests received upon exercise of the options or warrants. Any nonfinancial equity investment (or portion thereof) that is not required to be deducted from Tier 1 capital under this section II.B.(6)(v) must be included in determining the total amount of nonfinancial equity investments held by the bank in relation to its Tier 1 capital for purposes of the table in section II.B.(6)(iii)(A). In addition, any nonfinancial equity investment (or portion thereof) that is not required to be deducted from Tier 1 capital under this section II.B.(6)(v) will be assigned a 100-percent risk weight and included in the bank’s consolidated risk-weighted assets.

(vi) Adjusted carrying value. (A) For purposes of this section II.B.(6), the “adjusted carrying value” of investments is the aggregate value at which the investments are carried on the balance sheet of the bank reduced by any unrealized gains on those investments that are reflected in such carrying value but excluded from the bank’s Tier 1 capital and associated deferred tax liabilities. For example, for equity investments held as available-for-sale (AFS), the adjusted carrying value of the investments would be the aggregate carrying value of those investments (as reflected on the consolidated balance sheet of the bank) less any unrealized gains on those investments that are included in other comprehensive income and not reflected in Tier 1 capital, and associated deferred tax liabilities.

made pursuant to a binding written commitment entered into before March 13, 2000, the adjusted carrying value of the additional investment would be subject to a deduction under this section II.B.(6). In addition, if the bank sold and repurchased, after March 13, 2000, 40 shares of the company, the adjusted carrying value of those 40 shares would be subject to a deduction under this section II.B.(6).

Unrealized gains on available-for-sale equity investments may be included in Tier 2 capital to the extent permitted under section I.A.(2)(f) of this appendix A. In addition, the net unrealized losses on available-for-sale equity investments are deducted from Tier 1 capital in accordance with section I.A.(1) of this appendix A. (B) As discussed above with respect to consolidated SBICs, some equity investments may be in companies that are consolidated for accounting purposes. For investments in a nonfinancial company that is consolidated for accounting purposes under generally accepted accounting principles, the bank’s adjusted carrying value of the investment is determined under the equity method of accounting (net of any intangibles associated with the investment that are deducted from the bank’s core capital in accordance with section I.A.(1) of this appendix A). Even though the assets of the nonfinancial company are consolidated for accounting purposes, these assets (as well as the credit equivalent amounts of the company’s off-balance sheet items) should be excluded from the bank’s risk-weighted assets for regulatory capital purposes.

(vii) Equity investments. For purposes of this section II.B.(6), an equity investment means any equity instrument (including common stock, preferred stock, partnership interests, interests in limited liability companies, trust certificates and warrants and call options that give the holder the right to purchase an equity instrument), any equity feature of a debt instrument (such as a warrant or call option), and any debt instrument that is convertible into equity where the instrument or feature is held under one of the legal authorities listed in section II.B.(6)(ii) of this appendix A. An investment in any other instrument (including subordinated debt) may be treated as an equity investment if, in the judgment of the FDIC, the instrument is the functional equivalent of equity or exposes the bank to essentially the same risks as an equity instrument.

6. Asset-backed commercial paper programs. A. An asset-backed commercial paper (ABCP) program means a program that primarily issues externally rated commercial paper backed by assets or other exposures held in a bankruptcy-remote, special purpose entity.

b. A bank that qualifies as a primary beneficiary and must consolidate an ABCP program that is defined as a variable interest entity under GAAP may exclude the consolidated ABCP program assets from risk-weighted assets provided that the bank is the sponsor of the ABCP program. If a bank excludes such consolidated ABCP program assets, the bank must assess the appropriate risk-based capital charge against any exposures of the bank arising in connection with such ABCP programs, including direct credit substitutes, recourse obligations, residual interests, liquidity facilities, and loans, in accordance with sections II.B.5., II.C. and II.D. of this appendix.

c. If a bank has multiple overlapping exposures (such as a program-wide credit enhancement and multiple pool-specific liquidity facilities) to an ABCP program that is
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not consolidated for risk-based capital purposes, the bank is not required to hold capital under duplicative risk-based capital requirements under this appendix against the overlapping position. Instead, the bank should apply to the overlapping position the applicable risk-based capital treatment that results in the highest capital charge.

C. Risk Weights for Balance Sheet Assets (see Table I)

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. a. 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.23

b. The zero percent risk category also includes direct claims24 (including securities, loans, and leases) on, and the portions of claims that are unconditionally guaranteed by, OECD central governments25 and U.S. Government agencies.26 Federal Reserve Bank stock also is included in this category.

c. This category also includes claims on, and claims guaranteed by, qualifying securities firms incorporated in the United States or other members of the OECD-based group of countries that are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States or OECD central governments (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank’s exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

Category 2—20 Percent Risk Weight. a. This category includes short-term claims (including demand deposits) on, and portions of short-term claims that are guaranteed27 by, U.S. depository institutions28 and foreign governments of countries that do not belong to the OECD-based group of countries.

26 Federal Reserve Bank stock also is included in this category.

27 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 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.

28 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.

22 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 are not members of the OECD-based group of countries. Non-OECD central governments are 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 are not members of the OECD-based group of countries.

23 All other bullion holdings are to be assigned to the 100 percent risk weight category.

24 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.

25 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 are not members of the OECD-based group of countries. Non-OECD central governments are 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 are not members of the OECD-based group of countries.

26 Federal Reserve Bank stock also is included in this category.

27 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.

28 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 and building and loan associations, cooperative banks, credit unions, international
banks; 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 guaranteed by, U.S. depository institutions and OECD banks. This category also includes a claim on, or guaranteed by, qualifying securities firms incorporated in the United States or other member of the OECD-based group of countries.

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.

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.

A long-term claim 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.

Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirements are not eligible for this risk weight.

With regard to securities firms incorporated in the United States, qualifying securities firms are those securities firms that are broker-dealers registered with the Securities and Exchange Commission (SEC) and are in compliance with the SEC’s net capital rule, 17 CFR 240.15c3-1. With regard to securities firms incorporated in any other country in the OECD-based group of countries, qualifying securities firms are those securities firms that a bank is able to demonstrate are subject to consolidated supervision and regulation (covering their direct and indirect subsidiaries, but not necessarily their parent organizations) comparable to that imposed on banks in OECD countries. Such regulation must include risk-based capital requirements comparable to those applied to banks under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1996) (Basel Accord). Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirements are not eligible for this risk weight and are generally assigned to at least a 100 percent risk weight. In addition, certain claims on qualifying securities firms are eligible for a zero percent risk weight if the claims are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States or OECD central governments (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in the bank’s exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code, respectively (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(6) of the Federal Deposit Insurance Act (12 U.S.C.
b. This category also includes claims on, or portions of claims guaranteed by, U.S. Government-sponsored agencies; 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, 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.

c. 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. In addition, this category includes claims on the International Bank for Reconstruction and Development (World Bank), 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.

d. This category also includes recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset- or mortgage-backed securities rated in the highest or second highest investment grade category, e.g., AAA, AA, in the case of long-term ratings, or the highest rating category, e.g., A–1, P–1, in the case of short-term ratings.

a. Category 3—50 Percent Risk Weight. This category includes loans fully secured by first liens 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, and provided that the loans are not past due 90 days or more or carried in nonaccrual status. 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

37 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.

38 If a bank holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transactions are treated as a single loan secured by a first lien for purposes of determining the loan-to-value ratio and assigning a risk weight.

39 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.

30 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.
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 and, has a firm written commitment for permanent financing of the home upon completion), provided the following criteria are met:

By order of the Board of Directors.

(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.

b. This category also includes loans fully secured by first liens on multifamily residential properties, provided that:

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, from the standpoint of the selling bank, when a multifamily residential property loan is sold subject to a pro rata loss sharing arrangement which 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, that portion of the loan is not subject to the risk-based capital standards. In connection with sales of multifamily residential property loans in which the purchaser of the loan shares in any loss incurred on the loan with the selling bank on other than a pro rata basis, the selling bank must treat these other loss sharing arrangements in accordance with section II.B.3 of this appendix A.

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.

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 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.

The loan must be amortized over a period of not more than thirty years.

b. This category also includes recourse obligations (other than a credit-enhancing interest-only strip) and asset- or mortgage-
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backed securities rated in the third highest investment grade category, e.g., A, in the case of long-term ratings, or the second highest rating category, e.g., A–2, P–2, in the case of short-term ratings.

Category 4—100 Percent Risk Weight. (a) All assets not included in the categories above in section II.C of this appendix A, except the assets specifically included in the 200 percent category below in section II.C of this appendix A and assets that are otherwise risk weighted in accordance with section II.B.5 of this appendix A, are assigned to this category, which comprises standard risk assets. The bulk of the assets typically found in a loan portfolio would be assigned to the 100 percent category.

(b) This category includes:

(1) Long-term claims on, and the portions of long-term claims that are guaranteed by, non-OECD banks, and all claims on non-OECD central governments that entail some degree of transfer risk; 43

(2) All claims on foreign and domestic private-sector obligors not included in the categories above in section II.C of this appendix A (including loans to nondepository financial institutions and bank holding companies);

(3) Claims on commercial firms owned by the public sector;

(4) Customer liabilities to the bank on acceptances outstanding involving standard risk claims;

(5) Investments in fixed assets, premises, and other real estate owned;

(6) Common and preferred stock of corporations, including stock acquired for debts previously contracted;

(7) Commercial and consumer loans (except those assigned to lower risk categories due to recognized guarantees or collateral and loans secured by residential property that qualify for a lower risk weight);

(8) Recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip) and asset- or mortgage-backed securities rated in the lowest investment grade category, e.g., BBB, as well as certain positions (but not residual interests) which the bank rates pursuant to section II.B.5(g) of this appendix A;

(9) Industrial-development bonds and similar obligations issued under the auspices of states or political subdivisions of the OECD-based group of countries for the benefit of a private party or enterprise where that party or enterprise, not the government entity, is obligated to pay the principal and interest;

(10) All obligations of states or political subdivisions of countries that do not belong to the OECD-based group; and

(11) Stripped mortgage-backed securities and similar instruments, such as interest-only strips that are not credit-enhancing and principal-only strips.

(12) Claims representing capital of a qualifying securities firm.

(c) The following assets also are assigned a risk weight of 100 percent if they have not already been deducted from capital: investments in unconsolidated companies, joint ventures, or associated companies; instruments that qualify as capital issued by other banks; deferred tax assets; and mortgage servicing assets, nonmortgage servicing assets, and purchased credit card relationships.

Category 5—200 Percent Risk Weight. This category includes:

(a) Externally rated recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip), and asset- and mortgage-backed securities that are rated one category below the lowest investment grade category, e.g., BB, to the extent permitted in section II.B.5(d) of this appendix A; and

(b) A position (but not a residual interest) in a securitization or structured finance program that is not rated by an NRSRO for which the bank determines that the credit risk is equivalent to one category below investment grade, e.g., BB, to the extent permitted in section II.B.5(g) of this appendix A.

D. Conversion Factors for Off-Balance Sheet Items (see Table III)

The face amount of an off-balance sheet item is generally incorporated into the risk-weighted assets in two steps. The face amount is first multiplied by a credit conversion factor, except as otherwise specified in section II.B.5 of this appendix A for direct credit substitutes and recourse obligations. The resultant credit equivalent amount is assigned to the appropriate risk category according to the obligor or, if relevant, the

43 Such assets include all non-local currency claims on, and the portions of claims that are guaranteed by, 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.

44 Customer liabilities on acceptances outstanding involving nonstandard 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 claims. Portions of acceptances conveyed as risk participations to U.S. depository institutions or foreign banks are assigned to the 20 percent risk category appropriate to short-term claims guaranteed by U.S. depository institutions and foreign banks.
guarantor, the nature of any collateral, or external credit ratings.\(^45\)

1. Items With a 100 Percent Conversion Factor. (a) Except as otherwise provided in section II.B.5 of this appendix A, the full amount of an asset or transaction supported, in whole or in part, by a direct credit substitute or a recourse obligation. Direct credit substitutes and recourse obligations are defined in section II.B.5 of this appendix A.

(b) Sale and repurchase agreements, if not already included on the balance sheet, and forward agreements. Forward agreements are legally binding contractual obligations to purchase assets with drawdown which is certain at a specified future date. Such obligations include forward purchases, forward forward deposits placed,\(^46\) and partly-paid shares and securities; they do not include commitments to make residential mortgage loans or forward foreign exchange contracts.

(c) Securities lent by a bank are treated in one of two ways, depending upon whether the lender is exposed to risk of loss. If a bank, as agent for a customer, lends the customer’s securities and does not indemnify the customer against loss, then the securities transaction is excluded from the risk-based capital calculation. On the other hand, if a bank lends its own securities or, acting as agent for a customer, lends the customer’s securities and indemnifies 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 the independent custodian acting on the lending bank’s behalf.

2. Items With a 50 Percent Conversion Factor. a. 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 non-financial obligation. Thus, performance standby letters of credit represent obligations backing the performance of non-financial 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.

b. The unused portion of commitments with an original maturity exceeding one year, 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,\(^47\) 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.

c. i. Commitments are defined as any legally binding 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, eligible ABCP liquidity facilities, 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 weighted-risk 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 solely for its pro rata share, only the bank’s proportional share of the syndicated commitment is taken into account in calculating the risk-based capital ratio.

\(^45\) 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.5 of this appendix A.

\(^46\) Forward forward deposits accepted are treated as interest rate contracts.

\(^47\) 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.
ii. Banks that are subject to the market risk rules in appendix C to part 325 are required to convert the notional amount of eligible ABCP liquidity facilities, in form or in substance, with an original maturity of one year or less that are carried in the trading account at 50 percent to determine the appropriate credit equivalent amount even though those facilities are structured or characterized as derivatives.

These include unused portions of commitments if the bank, in accordance with applicable law, has the unconditional option to cancel the credit line at any time.

5. Items With a Zero Percent Conversion Factor. These include unused portions of commitments, with the exception of eligible ABCP liquidity facilities, with an original maturity of one year or less, or which are unconditionally cancelable 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).

   (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 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, if positive, and is sometimes referred to as the replacement cost) of the contract; and

(ii) An estimate of the potential future credit exposure.

(b) The current exposure is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current exposure is equal to that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero.

(c) The potential future credit exposure of a contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal amount of the contract by a credit conversion factor. Banks should, subject to examiner review, use the effective rather than the apparent or stated notional amount in this calculation. The credit conversion factors are:

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<th>Conversion Factor Matrix</th>
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<tbody>
<tr>
<td>Remaining maturity</td>
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<tr>
<td>One year or less</td>
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<tr>
<td>More than one year to five years</td>
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<td>More than five years</td>
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(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 reflect changes in both underlying rates, prices and indices, and counterparty credit quality.
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

(iii) 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.

(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) (i) 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.\(^{40}\)

(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 zero or negative, then the net current exposure is equal to that sum. If the net sum of the mark-to-market values is positive, then the net current exposure is equal to the sum of the net current exposures of all individual contracts subject to the netting contract, adjusted to take into account the effects of the netting contract.

(f) The effects of the bilateral netting contract on the gross potential future exposure for all individual contracts are recognized through application of a formula, resulting in an adjusted add-on amount \((A_{\text{add}})\). The formula, which employs the ratio of net current exposure to gross current exposure \((\text{NGR})\), is expressed as:

\[
A_{\text{add}} = (0.4 \times A_{\text{gross}}) + 0.6 \times \text{NGR} \times A_{\text{gross}}
\]

The effect of this formula is that \(A_{\text{add}}\) is the weighted average of \(A_{\text{gross}}\) and \(A_{\text{gross}}\) adjusted by the NGR.

(g) The NGR may be calculated in either 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.

\(^{40}\)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.

\(^{50}\)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.
(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

Subject to section II.B.5. of this appendix A, banks generally will be expected to meet a minimum ratio of qualifying total capital to risk-weighted assets of 8 percent, of which at least 4 percentage points should be in the form of core capital (Tier 1). Any bank that does not meet the minimum risk-based capital ratio, or whose capital is otherwise considered inadequate, generally will be expected to develop and implement a capital plan for achieving an adequate level of capital, consistent with the provisions of this risk-based capital framework and §325.104, the specific circumstances affecting the individual bank, and the requirements of any related agreements between the bank and the FDIC.

### Table I—Definition of Qualifying Capital

<table>
<thead>
<tr>
<th>Components</th>
<th>Minimum requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) CORE CAPITAL (Tier 1)</td>
<td>Must equal or exceed 4% of weighted-risk assets.</td>
</tr>
<tr>
<td>(a) Common stockholders’ equity</td>
<td>No limit.</td>
</tr>
<tr>
<td>(b) Noncumulative perpetual preferred stock and any related surplus.</td>
<td>No limit.</td>
</tr>
<tr>
<td>(c) Minority interest in equity accounts of consolidated subsidiaries</td>
<td>No limit.</td>
</tr>
<tr>
<td>(d) Less: All intangible assets other than certain mortgage servicing assets, nonmortgage servicing assets and purchased credit card relationships.</td>
<td>(f)</td>
</tr>
<tr>
<td>(e) Less: Certain credit-enhancing interest-only strips and nonfinancial equity investments required to be deducted from capital.</td>
<td>(f)</td>
</tr>
<tr>
<td>(f) Less: Certain deferred tax assets</td>
<td>(f)</td>
</tr>
<tr>
<td>(2) SUPPLEMENTARY CAPITAL (Tier 2)</td>
<td>Total of tier 2 is limited to 100% of tier 1.</td>
</tr>
<tr>
<td>(a) Allowance for loan and lease losses</td>
<td>Limited to 1.25% of weighted-risk assets.</td>
</tr>
<tr>
<td>(b) Unrealized gains on certain equity securities</td>
<td>Limited to 45% of pretax net unrealized gains.</td>
</tr>
<tr>
<td>(c) Cumulative perpetual and long-term preferred stock (original maturity of 20 years or more) and any related surplus.</td>
<td>No limit within tier 2; long-term preferred is amortized for capital purposes as it approaches maturity.</td>
</tr>
<tr>
<td>(d) Auction rate and similar preferred stock (both cumulative and non-cumulative).</td>
<td>No limit within Tier 2.</td>
</tr>
<tr>
<td>(e) Hybrid capital instruments (including mandatory convertible debt securities).</td>
<td>No limit within Tier 2.</td>
</tr>
<tr>
<td>(f) Term subordinated debt and intermediate-term preferred stock (original weighted average maturity of five years or more).</td>
<td>Term subordinated debt and intermediate-term preferred stock are limited to 50% of Tier 1 and amortized for capital purposes as they approach maturity.</td>
</tr>
<tr>
<td>(3) DEDUCTIONS (from sum of tier 1 and tier 2)</td>
<td>On a case-by-case basis or as a matter of policy after formal consideration of relevant issues.</td>
</tr>
<tr>
<td>(a) Investments in banking and finance subsidiaries that are not consolidated for regulatory capital purposes</td>
<td></td>
</tr>
<tr>
<td>(b) Intentional, reciprocal cross-holdings of capital securities issued by banks</td>
<td></td>
</tr>
<tr>
<td>(c) Other deductions (such as investment in other subsidiaries or joint ventures) as determined by supervisory authority.</td>
<td></td>
</tr>
<tr>
<td>(4) TOTAL CAPITAL</td>
<td>Must equal or exceed 8% of weighted-risk assets.</td>
</tr>
</tbody>
</table>

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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 assets, nonmortgage servicing assets 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 The amounts of credit-enhancing interest-only strips that can be recognized for purposes of calculating Tier 1 capital are subject to the limitations set forth in section II.B.6(i) of appendix A to part 325.

4 Deferred tax assets are subject to the capital limitations set forth in §325.5(g).

5 Amounts in excess of limitations are permitted but do not qualify as capital.

6 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.
Federal Deposit Insurance Corporation

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, 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 that 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.
7. Claims on, or guaranteed by, qualifying securities firms incorporated in the United States or other members of the OECD-based group of countries that are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States or OECD central governments (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank’s exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

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, 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.
6. Portions of loans and other claims (including repurchase agreements) collateralized 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 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.

1For 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.

2Degree of collateralization is determined by current market value.
(10) Portions of claims collateralized\(^1\) 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) Investments in shares of mutual funds whose portfolios are permitted to hold only assets that qualify for the zero or 20 percent risk categories.

(12) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset- or mortgage-backed securities rated in either of the two highest investment grade categories, e.g., AAA or AA, in the case of long-term ratings, or the highest rating category, e.g., A–1, P–1, in the case of short-term ratings.

(13) Claims on, and claims guaranteed by, qualifying securities firms incorporated in the United States or other member of the OECD-based group of countries provided that:

a. The qualifying securities firm has a rating in one of the top three investment grade rating categories from a nationally recognized statistical rating organization; or

b. The claim is guaranteed by a qualifying securities firm’s parent company with such a rating.

(14) Certain collateralized claims on qualifying securities firms in the United States or other member of the OECD-based group of countries, without regard to satisfaction of the rating standard, provided that the claim arises under a contract that:

a. Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed under standard industry documentation;

b. Is collateralized by liquid and readily marketable debt or equity securities;

c. Is marked to market daily;

d. Is subject to a daily margin maintenance requirement under the standard documentation; and

e. Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant country.

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) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset- or mortgage-backed securities rated in the third-highest investment grade category, e.g., A, in the case of long-term ratings, or the second highest rating category, e.g., A–2, P–2, in the case of short-term ratings.

(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) Recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips) and asset- or mortgage-backed securities rated in the lowest investment grade category, e.g., BBB, as well as certain positions (but not residual interests) which the bank rates pursuant to section II.B.5(g) of this appendix A.

(10) All other assets, including any intangible assets that are not deducted from capital, and the credit equivalent amounts\(^4\) of

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\(^1\)In general, 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.

\(^4\)In general, 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.
off-balance sheet items not assigned to a different risk category. 

Category 5—200 Percent Risk Weight.

(1) Externally rated recourse obligations, direct credit substitutes, residual interests (other than credit-enhancing interest-only strips), and asset- and mortgage-backed securities that are rated one category below the lowest investment grade category, e.g., B8, to the extent permitted in section II.B.5(d) of this appendix A; and

(2) A position (but not a residual interest) extended in connection with a securitization or structured financing program that is not rated by an NRSRO for which the bank determines that the credit risk is equivalent to one category below investment grade, e.g., BB, to the extent permitted in section II.B.5(g) of this appendix A.

[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, which appears in the Finding Aids section of the printed volume and on GPO Access.

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 CAMELS 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, 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 on 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 memorandum 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 institution’s 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 the 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.

The guidance in this section III is not intended to preclude the FDIC from taking Section 8(a) or other enforcement action against
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 and acquisitions of portions or segments of another institution’s business, such as branch offices, mortgage servicing portfolios, and credit card portfolios.

Notwithstanding the authority to report all intangible assets in the Consolidated Reports of Condition and Income, §325.2(v) 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. 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 and Consumer Protection (DSC) 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 balance sheets and consolidated statements will reflect an investment in a tangible asset even though such investment will, in fact, be represented by a large volume of intangible assets. In any such situation where this is material, the bank’s investment in the unconsolidated subsidiary will be divided into a tangible and an intangible portion based on the percentage of intangible assets to total assets in the subsidiary. The intangible portion of the investment will be treated as if it were an intangible asset on the bank’s books in the calculation of Tier 1 capital. However, intangible assets in the form of mortgage servicing 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.

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1Although 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 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.

2This 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.
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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 deposit-

itory institution’s ability to absorb losses shall be deducted from capital. An example involves certain types of minority interests in consolidated subsidiaries. Minority inter-

ests 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 trans-

actions have been structured where a bank forms a subsidiary by transferring essen-

tially risk-free or low-risk assets to the sub-

sidiary in exchange for common stock of the subsidiary. The subsidiary then sells pre-

ferred stock to third parties.

The preferred stock becomes a minority in-

terest in a consolidated subsidiary but, in ef-

fect, represents an essentially risk-free or low-risk investment for the preferred stock-
holders. 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 addi-
tion, certain minority interests are not subst-

antly equivalent to permanent equity in that the interests must be paid off on speci-
fied 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 effec-
tively absorb losses. Capital instruments or transactions of this nature which fail to ab-
sorb 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 instru-
mants. The maturity of these instru-

ments must be 12 years or less and the in-

struments must also meet the other criteria set forth in appendix A to part 325. Manda-

tory convertible debt is excluded from Tier 1 capital but, for risk-based capital purposes, is included in Tier 2 capital as a “hybrid cap-

ital 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 spec-

cifically 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 limi-
tations 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(b) 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 leveragex 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 507). 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, and (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.

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. 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 (on a worldwide consolidated basis) equals:

(i) 10 percent or more of total assets;
(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.

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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 opt to comply with this appendix as early as January 1, 1997.

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 and commodity positions, whether or not in the trading account. Positions include on-balance-sheet assets and liabilities and off-balance-sheet items. Securities subject to repurchase and lending agreements are included as if they are still owned by the lender. Covered positions exclude all positions in a bank’s trading account that, in form or in substance, act as liquidity facilities that provide liquidity support to asset-backed commercial paper. Such excluded positions are subject to the risk-based capital requirements set forth in appendix A of this part.

(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, foreign exchange rates, and commodity prices.

(2) Specific market risk means changes in the market value of covered positions resulting from changes in the level of one or more market variables, such as changes in interest rates, foreign exchange rates, and commodity prices, which do not constitute general market risk as defined above.

(3) 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).
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:

(i) 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 and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(A) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(B) The transaction is marked to market daily,

(C) The transaction is subject to daily margin maintenance requirements, and

(D) The securities borrowing agreement 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.

Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 403-407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401-4407), or the Board’s Regulation EE (12 CFR Part 231); or

(b) Specific risk means changes in the market value of specific positions due to factors other than broad market movements and includes event and default risk as well as idiosyncratic variations.

(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.

Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 403-407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401-4407), or the Board’s Regulation EE (12 CFR Part 231); or

(f) If the transaction does not meet the criteria set forth in paragraph (iv)(A) of this section, then either:

(i) The bank has conducted sufficient legal review to reach a well-founded conclusion that:

(A) The securities borrowing agreement executed in connection with the transaction provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of counterparty default, including in a bankruptcy, insolvency, or other similar proceeding of the counterparty; and

(B) Under applicable law of the relevant jurisdiction, its rights under the agreement are legal, valid, binding, and enforceable and any exercise of rights under the agreement will not be stayed or avoided; or

(ii) The transaction is either overnight or unconditionally cancelable at any time by the bank, and the bank has conducted sufficient legal review to reach a well-founded conclusion that:

(A) The previous day’s VAR measure; or

(iii) 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;

(B) The specific risk add-on (if any), and the capital charge for de minimis exposures (if any).
(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)(2) of this section).*

(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).*

(ii) Term subordinated debt (and intermediate-term preferred stock and related surplus) included in Tier 2 capital (both allocated and excess) may not exceed 50 percent of Tier 1 capital (both allocated and excess).

(4) Numerator calculation. Add Tier 1 capital (both allocated and excess), Tier 2 capital (both allocated and excess), and Tier 3 capital (allocated under paragraph (b)(2) of this section). The resulting sum is the bank’s risk-based capital ratio numerator.

Section 4. Internal Models

(a) General. For risk-based capital purposes, a bank subject to this appendix must use its internal model to measure its daily VAR, in accordance with the requirements of this section.

A bank may not allocate Tier 3 capital to support credit risk (as calculated under appendix A of this part).

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.

A bank’s internal model may use any generally accepted measurement techniques, 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. 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 the following:

(i) Interest rate risk.

(ii) Equity price risk.

(iii) Foreign exchange rate risk.

(iv) 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 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.

(2) 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.

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.
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 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 with the corresponding daily VAR measures generated for internal risk measurement purposes and calibrated to a one-day holding period and a 99 percent, one-tailed confidence level.

(2) Once each quarter, the bank must identify the number of exceptions, that is, the number of business days for which the magnitude of the actual daily net trading loss, if any, exceeds the corresponding daily VAR measure.

(3) A bank must use the multiplication factor indicated in Table 1 of this appendix in determining its capital charge for market risk in accordance with section 3(a)(2)(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.

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.

(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 equal to the previous day’s specific risk portion.

(3) If the model is capable of valid separation of 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 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 sum of the components for covered debt and equity positions. If a bank models, in accordance with paragraph (a) or (b) of this section, the specific risk of covered debt positions but not covered equity positions (or vice versa), then the bank’s specific risk add-on charge for the
Covered debt positions not modeled is the component for covered debt or 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)(ii) 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)(i)(ii) 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>
<thead>
<tr>
<th>Category</th>
<th>Remaining maturity (contractual)</th>
<th>Weighting factor (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government</td>
<td>N/A</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>6 months or less</td>
<td>0.25</td>
</tr>
<tr>
<td></td>
<td>Over 6 months to 24 months</td>
<td>1.00</td>
</tr>
<tr>
<td></td>
<td>Over 24 months</td>
<td>1.60</td>
</tr>
<tr>
<td>Qualifying</td>
<td>N/A</td>
<td>8.00</td>
</tr>
</tbody>
</table>

(A) The government category includes all debt instruments of central governments of OECD-based countries, 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. 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 agencies;

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) Covered equity positions that are derivatives, a bank must risk-weight (as described in paragraph (c)(2)(ii) of this section) the market value of the effective notional amount of the underlying equity instrument or 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)(i)(ii) of this section) the market value of the effective notional amount of the underlying equity instrument or index multiplied by the option’s delta.

14 Organization for Economic Cooperation and Development (OECD)-based countries is defined in appendix A of this part.
(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 0.5 percent, or by 1.0 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 the 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.

(iv) The specific risk capital charge component for covered equity positions is the sum of the weighted values.


16 A bank may also net positions in depositary 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.
PART VIII Disclosure

Asset Calculation

Incorporation of Operational Risk Mitigants

in 12 CFR 325.6(c).

dures in the same manner and to the same
FDIC will apply notice and response proce-
determination under this paragraph, the
profile, or scope of operations. In making a
determination under this paragraph, the FDIC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in 12 CFR 325.6(c).

(2) Specific risk-weighted asset amounts. (i) If the FDIC determines that the risk-weighted asset amount calculated under this appendix by the bank for one or more exposures is not commensurate with the risks associated with those exposures, the FDIC may require the bank to assign a different risk-weighted asset amount to the exposures, to assign differ-
ent risk parameters to the exposures (if the exposures are wholesale or retail expo-
sures), or to use different model assumptions for the exposures (if relevant), all as speci-
fied by the FDIC.

(ii) If the FDIC determines that the risk-weighted asset amount calculated under this appendix to one or more exposures is not commensurate with the operational risks of the bank, the FDIC may require the bank to assign a different risk-weighted asset amount for operational risk, to change elements of its operational risk analytical framework, including distributional and de-
pendence assumptions, or to make other
changes to the bank’s operational risk man-
agement processes, data and assessment sys-
tems, or quantification systems, all as speci-
fied by the FDIC.

(3) Other supervisory authority. Nothing in this appendix limits the authority of the FDIC under any other provision of law or regulation to take supervisory or enforce-
ment action, including action to address un-
safe or unsound practices or conditions, defi-
cient capital levels, or violations of law.

(d) Principle of conservatism. Notwith-
standing the requirements of this appendix, a bank may choose not to apply a provision of this appendix to one or more exposures, provided that:

(1) The bank can demonstrate on an ongo-
ing basis to the satisfaction of the FDIC that not applying the provision would, in all cir-
cumstances, unambiguously generate a risk-
based capital requirement for each such ex-
posure greater than that which would other-
wise be required under this appendix;

(2) The bank appropriately manages the
risk of each such exposure;

(3) The bank notifies the FDIC in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the bank ap-
plies this principle are not, in the aggregate, material to the bank.
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Section 2. Definitions

Advanced internal ratings-based (IRB) systems means a bank’s internal risk rating and segmentation system; risk parameter quantification system; data management and maintenance system; and control, oversight, and validation system for credit risk of wholesale and retail exposures.

Advanced systems means a bank’s advanced IRB systems, operational risk management processes, operational risk data and assessment systems, operational risk quantification systems, and, to the extent the bank uses the following systems, the internal models methodology, double default synthetic correlation detection process, IMA for equity exposures, and IAA for securitization exposures to ABCP programs.

Affiliate with respect to a company means any company that controls, is controlled by, or is under common control with, the company.

Applicable external rating means:
(1) With respect to an exposure that has multiple external ratings assigned by NRSROs, the lowest solicited external rating assigned to the exposure by any NRSRO; and
(2) With respect to an exposure that has a single external rating assigned by an NRSRO, the external rating assigned to the exposure by the NRSRO.

Applicable inferred rating means:
(1) With respect to an exposure that has multiple inferred ratings, the lowest inferred rating based on a solicited external rating; and
(2) With respect to an exposure that has a single inferred rating, the inferred rating.

Asset-backed commercial paper (ABCP) program means a program that primarily issues commercial paper that:
(1) Has an external rating; and
(2) Is backed by underlying exposures held in a bankruptcy-remote SPE.

Asset-backed commercial paper (ABCP) program sponsor means a bank that:
(1) Establishes an ABCP program;
(2) Approves the sellers permitted to participate in an ABCP program;
(3) Approves the exposures to be purchased by an ABCP program; or
(4) Administers the ABCP program by monitoring the underlying exposures, underwriting or otherwise arranging for the placement of debt or other obligations issued by the program, compiling monthly reports, or ensuring compliance with the program documents and with the program’s credit and investment policy.

Backtesting means the comparison of a bank’s internal estimates with actual outcomes during a sample period not used in model development. In this context, backtesting is one form of out-of-sample testing.

Bank holding company is defined in section 2 of the Bank Holding Company Act (12 U.S.C. 1841).

Benchmarking means the comparison of a bank’s internal estimates with relevant internal and external data or with estimates based on other estimation techniques.

Business environment and internal control factors means the indicators of a bank’s operational risk profile that reflect a current and forward-looking assessment of the bank’s underlying business risk factors and internal control environment.

Carrying value means, with respect to an asset, the value of the asset on the balance sheet of the bank, determined in accordance with GAAP.

Clean-up call means a contractual provision that permits an originating bank or servicer to call securitization exposures before their stated maturity or call date. See also eligible clean-up call.

Commodity derivative contract means a commodity-linked swap, purchased commodity-linked option, forward commodity-linked contract, or any other instrument linked to commodities that gives rise to similar counterparty credit risks.

Company means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization.

Control. A person or company controls a company if it:
(1) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or
(2) Consolidates the company for financial reporting purposes.

Controlled early amortization provision means an early amortization provision that meets all the following conditions:
(1) The originating bank has appropriate policies and procedures to ensure that it has sufficient capital and liquidity available in the event of an early amortization;
(2) Throughout the duration of the securitization (including the early amortization period), there is the same pro rata sharing of interest, principal, expenses, losses, fees, recoveries, and other cash flows from the underlying exposures based on the originating bank’s and the investors’ relative shares of the underlying exposures outstanding measured on a consistent monthly basis;
(3) The amortization period is sufficient for at least 90 percent of the total underlying exposures outstanding at the beginning of the early amortization period to be repaid or recognized as in default; and
(4) The schedule for repayment of investor principal is not more rapid than would be allowed by straight-line amortization over an 18-month period.
Credit derivative means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure) to another party (the protection provider). See also eligible credit derivative.

Credit-enhancing interest-only strip (CEIO) means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder’s claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

Credit-enhancing representations and warranties mean representations and warranties that are made or assumed in connection with a transfer of underlying exposures (including loan servicing assets) and that obligate a bank to protect another party from losses arising from the credit risk of the underlying exposures. Credit-enhancing representations and warranties include provisions to protect a party from losses resulting from the default or nonperformance of the obligors of the underlying exposures or from an insufficiency in the value of the collateral backing the underlying exposures. Credit-enhancing representations and warranties do not include:

(1) Early default clauses and similar warranties that permit the return of, or premium refund clauses that cover, first-lien residential mortgage exposures for a period not to exceed 120 days from the date of transfer; or

(2) Premium refund clauses that cover underlying exposures guaranteed, in whole or in part, by the U.S. government, a U.S. government agency, or a U.S. government sponsored enterprise, provided that the clauses are for a period not to exceed 120 days from the date of transfer; or

(3) Warranties that permit the return of underlying exposures in instances of misrepresentation, fraud, or incomplete documentation.

Credit risk mitigant means collateral, a credit derivative, or a guarantee.

Credit-risk-weighted assets means 1.06 multiplied by the sum of:

(1) Total wholesale and retail risk-weighted assets; and

(2) Risk-weighted assets for securitization exposures; and

(3) Risk-weighted assets for equity exposures.

Current exposure means, with respect to a netting set, the larger of zero or the market value of a transaction or portfolio of transactions within the netting set that would be lost upon default of the counterparty, assuming no recovery on the value of the transactions. Current exposure is also called replacement cost.

Default—(1) Retail. (i) A retail exposure of a bank is in default if:

(A) The exposure is 180 days past due, in the case of a residential mortgage exposure or revolving exposure;

(B) The exposure is 120 days past due, in the case of all other retail exposures; or

(C) The bank has taken a full or partial charge-off, write-down of principal, or material negative fair value adjustment of principal on the exposure for credit-related reasons.

(ii) Notwithstanding paragraph (1)(i) of this definition, for a retail exposure held by a non-U.S. subsidiary of the bank that is subject to an internal ratings-based approach to capital adequacy consistent with the Basel Committee on Banking Supervision’s “International Convergence of Capital Measurement and Capital Standards: A Revised Framework” in a non-U.S. jurisdiction, the bank may elect to use the definition of default that is used in that jurisdiction, provided that the bank has obtained prior approval from the FDIC to use the definition of default in that jurisdiction.

(iii) A retail exposure in default remains in default until the bank has reasonable assurance of repayment and performance for all contractual principal and interest payments on the exposure.

(2) Wholesale. (i) A bank’s wholesale obligor is in default if:

(A) The bank determines that the obligor is unlikely to pay its credit obligations to the bank in full, without recourse by the bank to actions such as realizing collateral (if held); or

(B) The obligor is past due more than 90 days on any material credit obligation(s) to the bank.

(ii) An obligor in default remains in default until the bank has reasonable assurance of repayment and performance for all contractual principal and interest payments on all exposures of the bank to the obligor (other than exposures that have been fully written-down or charged-off).

Dependence means a measure of the association among operational losses across and within units of measure.

1 Overdrafts are past due once the obligor has breached an advised limit or been advised of a limit smaller than the current outstanding balance.
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Depository institution is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Derivative contract means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivatives, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days.

Early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating bank (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by obligors on the underlying exposures even after the provision is triggered.

Economic downturn conditions means, with respect to an exposure held by the bank, those conditions in which the aggregate default rates for that exposure’s wholesale or retail exposure subcategory (or subdivision of such subcategory selected by the bank) in the exposure’s national jurisdiction (or subdivision of such jurisdiction selected by the bank) are significantly higher than average.

Effective maturity \( M \) (of a wholesale exposure) means:

(1) For wholesale exposures other than repo-style transactions, eligible margin loans, and OTC derivative contracts described in paragraph (2) or (3) of this definition:

(i) The weighted-average remaining maturity (measured in years, whole or fractional) of the expected contractual cash flows from the exposure, using the undiscounted amounts of the cash flows as weights; or

(ii) The nominal remaining maturity (measured in years, whole or fractional) of the exposure.

(2) For repo-style transactions, eligible margin loans, and OTC derivative contracts subject to a qualifying master netting agreement for which the bank does not apply the internal models approach in paragraph (d) of section 32 of this appendix, the weighted-average remaining maturity (measured in years, whole or fractional) of the individual transactions subject to the qualifying master netting agreement, with the weight of each individual transaction set equal to the notional amount of the transaction.

(3) For repo-style transactions, eligible margin loans, and OTC derivative contracts for which the bank applies the internal models approach in paragraph (d) of section 32 of this appendix, the value determined in paragraph (d)(4) of section 32 of this appendix.

Effective notional amount means, for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant and the EAD of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant. For example, the effective notional amount of an eligible guarantee that covers, on a pro rata basis, 40 percent of any losses on a $100 bond would be $40.

Eligible clean-up call means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating bank or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3) (i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

Eligible credit derivative means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by the FDIC, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Bankruptcy, insolvency, or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;
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(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provides that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the bank records net payments received on the swap as net income, the bank records offsetting deterioration in the value of the hedged exposure (either through reductions in fair value or by an addition to reserves).

Eligible credit reserves means all general allowances that have been established through a charge against earnings to absorb credit losses associated with on- or off-balance sheet wholesale and retail exposures, including the allowance for loan and lease losses (ALLL) associated with such exposures but excluding allocated transfer risk reserves established pursuant to 12 U.S.C. 3904 and other specific reserves created against recognized losses.

Eligible double default guarantor, with respect to a guarantee or credit derivative obtained by a bank, means:

(1) U.S.-based entities. A depository institution, a bank holding company, a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company’s activities are permissible for a financial holding company under 12 U.S.C. 1843(k), a securities broker or dealer registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78b et seq.), or an insurance company in the business of providing credit protection (such as a monoline bond insurer or re-insurer) that is subject to supervision by a State insurance regulator, if:

(i) At the time the guarantor issued the guarantee or credit derivative or at any time thereafter, the bank assigned a PD to the guarantor’s rating grade that was equal to or lower than the PD associated with a long-term external rating in the third-highest investment-grade rating category; and

(ii) The bank currently assigns a PD to the guarantor’s rating grade that is equal to or lower than the PD associated with a long-term external rating in the lowest investment-grade rating category; or

(2) Non-U.S.-based entities. A foreign bank (as defined in §211.2 of the Federal Reserve Board’s Regulation K (12 CFR 211.2)), a non-U.S.-based securities firm, or a non-U.S.-based insurance company in the business of providing credit protection, if:

(i) The bank demonstrates that the guarantor is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies (as the case may be), or has issued and outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating of at least investment grade;

(ii) At the time the guarantor issued the guarantee or credit derivative or at any time thereafter, the bank assigned a PD to the guarantor’s rating grade that was equal to or lower than the PD associated with a long-term external rating in the third-highest investment-grade rating category; and

(iii) The bank currently assigns a PD to the guarantor’s rating grade that is equal to or lower than the PD associated with a long-term external rating in the lowest investment-grade rating category.

Eligible guarantee means a guarantee that:

(1) Is written and unconditional;

(2) Covers all or a pro rata portion of all contractual payments of the obligor on the reference exposure;

(3) Gives the beneficiary a direct claim against the protection provider;

(4) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(5) Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(6) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guaranty) of the obligor on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(7) Does not increase the beneficiary’s cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure; and

(8) Is not provided by an affiliate of the bank, unless the affiliate is an insured depository institution, bank, securities broker or dealer, or insurance company that:

(i) Does not control the bank; and

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(ii) Is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies (as the case may be).

Eligible margin loan means an extension of credit where:

(1) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, gold, or conforming residential mortgages;

(2) The collateral is marked to market daily, and the transaction is subject to daily margin maintenance requirements;

(3) The collateral is in default and is liquidated or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;

(4) The bank has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

Eligible operational risk offsets means amounts, not to exceed expected operational loss, that:

(1) Are generated by internal business practices to absorb highly predictable and reasonably stable operational losses, including reserves calculated consistent with GAAP; and

(2) Are available to cover expected operational losses with a high degree of certainty over a one-year horizon.

Eligible purchased wholesale exposure means a purchased wholesale exposure that:

(1) The bank or securitization SPE purchased from an unaffiliated seller and did not directly or indirectly originate;

(2) Was generated on an arm’s-length basis between the seller and the obligor (intercompany accounts receivable and receivables subject to contra-accounts between firms that buy and sell to each other do not satisfy this criterion);

(3) Provides the bank or securitization SPE with a claim on all proceeds from the exposure or a pro rata interest in the proceeds from the exposure;

(4) Has an M of less than one year; and

(5) When consolidated by obligor, does not represent a concentrated exposure relative to the portfolio of purchased wholesale exposures.

Eligible securitization guarantor means:

(1) A sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, a Federal Housing Enterprise, a Federal Home Loan Bank, Federal Agricultural Mortgage Corporation (Farmer Mac), a multilateral development bank, a depository institution, a bank holding company, a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company’s activities are permissible for a financial holding company under 12 U.S.C. 1843(k), a foreign bank (as defined in §211.2 of the Federal Reserve Board’s Regulation K (12 CFR 211.2)), or a securities firm;

(2) Any other entity (other than a securitization SPE) that has issued and outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating in one of the three highest investment-grade rating categories; or

(3) Any other entity (other than a securitization SPE) that has a PD assigned by the bank that is lower than or equal to the PD associated with a long-term external rating in the third highest investment-grade rating category.

Eligible servicer cash advance facility means a servicer cash advance facility in which:

(1) The servicer is entitled to full reimbursement of advances, except that a servicer may be obligated to make non-reimbursable advances for a particular underlying exposure if any such advance is contractually limited to an insignificant amount of the outstanding principal balance of that exposure;

(2) The servicer’s right to reimbursement is senior in right of payment to all other claims on the cash flows from the underlying exposures of the securitization; and

(3) The servicer has no legal obligation to, and does not, make advances to the securitization if the servicer concludes the advances are unlikely to be repaid.

Equity derivative contract means an equity-linked swap, purchased equity-linked option, forward equity-linked contract, or any other instrument linked to equities that gives rise to similar counterparty credit risks.

Equity exposure means:

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2 This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute "securities contracts" under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1852(e)(8)), or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board’s Regulation EE (12 CFR part 231).
(1) A security or instrument (whether voting or non-voting) that represents a direct or indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the bank under GAAP;

(ii) The bank is required to deduct the ownership interest from tier 1 or tier 2 capital under this appendix;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure.

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

Expected credit loss (ECL) means:

(1) For a wholesale exposure to a non-defaulted obligor or segment of non-defaulted retail exposures that is carried at fair value with gains and losses flowing through earnings or that is classified as held-for-sale and is carried at the lower of cost or fair value with losses flowing through earnings, zero.

(2) For all other wholesale exposures to non-defaulted obligors or segments of non-defaulted retail exposures, the product of PD times LGD times EAD for the exposure or segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, the bank’s impairment estimate for the exposure or segment.

(4) Total ECL is the sum of expected credit losses for all wholesale and retail exposures other than exposures for which the bank has applied the double default treatment in section 34 of this appendix.

Expected exposure (EE) means the expected value of the probability distribution of non-negative credit risk exposures to a counterparty at any specified future date before the maturity date of the longest term transaction in the netting set. Any negative market values in the probability distribution of market values to a counterparty at a specified future date are set to zero to convert the probability distribution of market values to the probability distribution of credit risk exposures.

Expected operational loss (EOL) means the expected value of the distribution of potential aggregate operational losses, as generated by the bank’s operational risk quantification system using a one-year horizon.

Expected positive exposure (EPE) means the weighted average over time of expected (non-negative) exposures to a counterparty where the weights are the proportion of the time interval that an individual expected exposure represents. When calculating risk-based capital requirements, the average is taken over a one-year horizon.

Exposure at default (EAD). (1) For the on-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the bank determines EAD under section 32 of this appendix), EAD means:

(i) If the exposure or segment is a security classified as available-for-sale, the bank’s carrying value (including net accrued but unpaid interest and fees) for the exposure or segment less any allocated transfer risk reserve for the exposure or segment;

(ii) If the exposure or segment is not a security classified as available-for-sale, the bank’s carrying value (including net accrued but unpaid interest and fees) for the exposure or segment less any allocated transfer risk reserve for the exposure or segment.

(2) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the bank determines EAD under section 32 of this appendix) in the form of a loan commitment, line of credit, trade-related letter of credit, or transaction-
related contingency, EAD means the bank’s best estimate of net additions to the outstanding amount owed the bank, including estimated future additional draws of principal and fees, that are likely to occur over a one-year horizon assuming the wholesale exposure or the retail exposures in the segment were to go into default. This estimate of net additions must reflect what would be expected during economic downturn conditions. Trade-related letters of credit are short-term, self-liquidating instruments that are used to finance the movement of goods and are collateralized by the underlying goods. Transaction-related contingencies relate to a particular transaction and include, among other things, performance bonds and performance-based letters of credit.

(3) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the bank determines EAD under section 32 of this appendix) in the form of anything other than a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the notional amount of the exposure or segment.

(4) EAD for OTC derivative contracts is calculated as described in section 32 of this appendix. A bank also may determine EAD for repo-style transactions and eligible margin loans as described in section 32 of this appendix.

(5) For wholesale or retail exposures in which only the drawn balance has been securitized, the bank must reflect its share of the exposures’ undrawn balances in EAD. Undrawn balances of revolving exposures for which the drawn balances have been securitized must be allocated between the seller’s and investors’ interests on a pro rata basis, based on the proportions of the seller’s and investors’ shares of the securitized drawn balances.

Exposure category means any of the wholesale, retail, securitization, or equity exposure categories.

External operational loss event data means, with respect to a bank, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at organizations other than the bank.

External rating means a credit rating that is assigned by an NRSRO to an exposure, provided:

(1) The credit rating fully reflects the entire amount of credit risk with regard to all payments owed to the holder of the exposure. If a holder is owed principal and interest on an exposure, the credit rating must fully reflect the credit risk associated with timely repayment of principal and interest. If a holder is owed only principal on an exposure, the credit rating must fully reflect only the credit risk associated with timely repayment of principal; and

(2) The credit rating is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of positions rated by the NRSRO.

Financial collateral means collateral:

(1) In the form of:
   (i) Cash on deposit with the bank (including cash held for the bank by a third-party custodian or trustee);
   (ii) Gold bullion;
   (iii) Long-term debt instruments that have an applicable external rating of at least investment grade;
   (iv) Short-term debt instruments that have an applicable external rating of one category below investment grade or higher;
   (v) Equity securities that are publicly traded;
   (vi) Convertible bonds that are publicly traded;
   (vii) Money market mutual fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; or
   (viii) Conforming residential mortgages; and

(2) In which the bank has a perfected, first priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit and notwithstanding the prior security interest of any custodial agent).

GAAP means generally accepted accounting principles as used in the United States.

Gain-on-sale means an increase in the equity capital (as reported on Schedule RC of the Call Report) of a bank that results from the bank’s receipt of cash in connection with the securitization.

Guarantee means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to another party (protection provider). See also eligible guarantee.

High volatility commercial real estate (HVCRE) exposure means a credit facility that finances or has financed the acquisition, development, or construction (ADC) of real property, unless the facility finances:

(1) One- to four-family residential properties; or

(2) Commercial real estate projects in which:

   (i) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio in the FDIC’s real estate lending standards at 12 CFR part 355, Appendix A.
sures to the originating bank.

(ii) The borrower has contributed capital to the project in the form of cash or unencumbered readily marketable assets (or has paid development expenses out-of-pocket) of at least 15 percent of the real estate’s appraised “as completed” value; and

(iii) The borrower contributed the amount of capital required by paragraph (2)(ii) of this definition before the bank advances funds under the credit facility, and the capital contributed by the borrower, or internally generated by the project, is contractually required to remain in the project throughout the life of the project. The life of a project concludes only when the credit facility is converted to permanent financing or is sold or paid in full. Permanent financing may be provided by the bank that provided the ADC facility as long as the permanent financing is subject to the bank’s underwriting criteria for long-term mortgage loans.

Inferred rating. A securitization exposure has an inferred rating equal to the external rating referenced in paragraph (2)(i) of this definition if:

(1) The securitization exposure does not have an external rating; and

(2) Another securitization exposure issued by the same issuer and secured by the same underlying exposures:

(i) Has an external rating;

(ii) Is subordinated in all respects to the unrated securitization exposure;

(iii) Does not benefit from any credit enhancement that is not available to the unrated securitization exposure; and

(iv) Has an effective remaining maturity that is equal to or longer than that of the unrated securitization exposure.

Interest rate derivative contract means a single-currency interest rate swap, basis swap, forward rate agreement, purchased interest rate option, when-issued securities, or any other instrument linked to interest rates that gives rise to similar counterparty credit risks.

Internal operational loss event data means, with respect to a bank, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at the bank.

Investing bank means, with respect to a securitization, a bank that assumes the credit risk of a securitization exposure (other than an originating bank of the securitization). In the typical synthetic securitization, the investing bank sells credit protection on a pool of underlying exposures to the originating bank.

Investment fund means a company:

(1) All or substantially all of the assets of which are financial assets; and

(2) That has no material liabilities.

Investors’ interest EAD means, with respect to a securitization, the EAD of the underlying exposures multiplied by the ratio of:

(1) The total amount of securitization exposures issued by the securitization SPE to investors; divided by

(2) The outstanding principal amount of underlying exposures.

Loss given default (LGD) means:

(1) For a wholesale exposure, the greatest of:

(i) Zero;

(ii) The bank’s empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the bank would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the bank to the exposure) were to default within a one-year horizon during economic downturn conditions; or

(iii) The bank’s empirically based best estimate of the economic loss, per dollar of EAD, the bank would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the bank to the exposure) were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(2) For a segment of retail exposures, the greatest of:

(i) Zero;

(ii) The bank’s empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the bank would expect to incur if the exposures in the segment were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The bank’s empirically based best estimate of the economic loss, per dollar of EAD, the bank would expect to incur if the exposures in the segment were to default within a one-year horizon during economic downturn conditions.

(3) The economic loss on an exposure in the event of default is all material credit-related losses on the exposure (including accrued but unpaid interest or fees, losses on the sale of collateral, direct workout costs, and an appropriate allocation of indirect workout costs). Where positive or negative cash flows on a wholesale exposure to a defaulted obligor or a defaulted retail exposure (including proceeds from the sale of collateral, workout costs, additional extensions of credit to facilitate repayment of the exposure, and draw-downs of unused credit lines) occur after the date of default, the economic loss must reflect the net present value of cash flows as of the default date using a discount rate appropriate to the risk of the defaulted exposure.

Main index means the Standard & Poor’s 500 Index, the FTSE All-World Index, and any other index for which the bank can demonstrate to the satisfaction of the FDIC that the equities represented in the index have comparable liquidity, depth of market, and size of bid-ask spreads as equities in the
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Standard & Poor's 500 Index and FTSE All-World Index.

Multilateral development bank means the International Bank for Reconstruction and Development, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which the FDIC determines poses comparable credit risk.


Netting set means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement or qualifying cross-product master netting agreement. For purposes of the internal models methodology in paragraph (d) of section 32 of this appendix, each transaction that is not subject to such a master netting agreement is its own netting set.

Nth-to-default credit derivative means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

Obligor means the legal entity or natural person contractually obligated on a wholesale exposure, except that a bank may treat the following exposures as having separate obligors:

(1) Exposures to the same legal entity or natural person denominated in different currencies;
(2) An income-producing real estate exposure for which all or substantially all of the repayment of the exposure is reliant on the cash flows of the real estate serving as collateral for the exposure; the bank, in economic substance, does not have recourse to the borrower beyond the real estate collateral; and no cross-default or cross-acceleration clauses are in place other than clauses obtained solely out of an abundance of caution;
(3) Other credit exposures to the same legal entity or natural person; and
(4) A wholesale exposure authorized under section 364 of the U.S. Bankruptcy Code (11 U.S.C. 364) to a legal entity or natural person who is a debtor-in-possession for purposes of Chapter 11 of the Bankruptcy Code; and
(5) Other credit exposures to the same legal entity or natural person.

Operational loss means a loss (excluding insurance or tax effects) resulting from an operational loss event. Operational loss includes all expenses associated with an operational loss event except for opportunity costs, forgone revenue, and costs related to risk management and control enhancements implemented to prevent future operational losses.

Operational loss event means an event that results in loss and is associated with any of the following seven operational loss event type categories:

(1) Internal fraud, which means the operational loss event type category that comprises operational losses resulting from an act involving at least one internal party of a type intended to defraud, misappropriate property, or circumvent regulations, the law, or company policy, excluding diversity- and discrimination-type events.
(2) External fraud, which means the operational loss event type category that comprises operational losses resulting from an act by a third party of a type intended to defraud, misappropriate property, or circumvent the law. Retail credit card losses arising from non-contractual, third-party initiated fraud (for example, identity theft) are external fraud operational losses. All other third-party initiated credit losses are to be treated as credit risk losses.
(3) Employment practices and workplace safety, which means the operational loss event type category that comprises operational losses resulting from an act inconsistent with employment, health, or safety laws or agreements, payment of personal injury claims, or payment arising from diversity- and discrimination-type events.
(4) Clients, products, and business practices, which means the operational loss event type category that comprises operational losses resulting from the nature or design of a product or from an unintentional or negligent failure to meet a professional obligation to specific clients (including fiduciary and suitability requirements).
(5) Damage to physical assets, which means the operational loss event type category that comprises operational losses resulting from the loss of or damage to physical assets from natural disaster or other events.
(6) Business disruption and system failures, which means the operational loss event type category that comprises operational losses resulting from disruption of business or system failures.
(7) Execution, delivery, and process management, which means the operational loss event type category that comprises operational losses resulting from failed transaction processing or process management or losses arising from relations with trade counterparties and vendors.
Operational risk means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

Operational risk exposure means the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the bank’s operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk offsets or qualifying operational risk mitigants).

Originating bank, with respect to a securitization, means a bank that:
(1) Directly or indirectly originated or securitized the underlying exposures included in the securitization; or
(2) Serves as an ABCP program sponsor to the securitization.

Other retail exposure means an exposure (other than a securitization exposure, an equity exposure, a residential mortgage exposure, an excluded mortgage exposure, a qualifying revolving exposure, or the residual value portion of a lease exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is either:
(1) An exposure to an individual for non-business purposes; or
(2) An exposure to an individual or company for business purposes if the bank’s consolidated business credit exposure to the individual or company is $1 million or less.

Over-the-counter (OTC) derivative contract means a derivative contract that is not traded on an exchange that requires the daily netting of derivative contracts; eligible markets by either guaranteeing trades or counterparty’s default, provided that:
(1) The underlying financial transactions are OTC derivative contracts, eligible margin loans, or repo-style transactions; and
(2) The bank obtains a written legal opinion verifying the validity and enforceability of the agreement under applicable law of the relevant jurisdictions if the counterparty fails to perform upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding.

Qualifying master netting agreement means any written, legally enforceable bilateral agreement, provided that:
(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default, including bankruptcy, insolvency, or similar proceeding, of the counterparty.
(2) The agreement provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;
(3) The bank has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that:
   (i) The agreement meets the requirements of paragraph (2) of this definition; and
   (ii) In the event of a legal challenge (including one resulting from default or from bankruptcy, insolvency, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions; or
(4) The bank establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition; and
(5) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it would make otherwise under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement).

Qualifying revolving exposure (QRE) means an exposure (other than a securitization exposure or equity exposure) to an individual that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and:
(1) Is revolving (that is, the amount outstanding fluctuates, determined largely by the borrower’s decision to borrow and repay, up to a pre-established maximum amount);
(2) Is unsecured and unconditionally cancelable by the bank to the fullest extent permitted by Federal law; and
(3) Has a maximum exposure amount (drawn plus undrawn) of up to $100,000.

Repo-style transaction means a repurchase or reverse repurchase transaction, or a secured borrowing or securities lending transaction, including a transaction in which the bank acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, gold, or conforming residential mortgages;
(2) The transaction is marked-to-market daily and subject to daily margin maintenance requirements;
(3)(i) The transaction is a “securities contract” or “repurchase agreement” under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 12(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board’s Regulation EE (12 CFR part 231); or
(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:
   (A) The transaction is executed under an agreement that provides the bank the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; or
   (B) The transaction is:
      (1) Either overnight or unconditionally cancelable at any time by the bank; and
      (2) Executed under an agreement that provides the bank the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and
(4) The bank has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

Residential mortgage exposure means an exposure (other than a securitization exposure, equity exposure, or excluded mortgage exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is:
(1) An exposure that is primarily secured by a first or subsequent lien on one-to-four family residential property; or
(2) An exposure with an original and outstanding amount of $1 million or less that is primarily secured by a first or subsequent lien on residential property that is not one to four family.

Retail exposure means a residential mortgage exposure, a qualifying revolving exposure, or an other retail exposure.
Retail exposure subcategory means the residential mortgage exposure, qualifying revolving exposure, or other retail exposure subcategory.

Risk parameter means a variable used in determining risk-based capital requirements for wholesale and retail exposures, specifically probability of default (PD), loss given default (LGD), exposure at default (EAD), or effective maturity (M).

Scenario analysis means a systematic process of obtaining expert opinions from business managers and risk management experts to derive reasoned assessments of the likelihood and loss impact of plausible high-severity operational losses. Scenario analysis may include the well-reasoned evaluation and use of external operational loss event data, adjusted as appropriate to ensure relevance to a bank’s operational risk profile and control structure.

SEC means the U.S. Securities and Exchange Commission.

Securitization means a traditional securitization or a synthetic securitization.

Securitization exposure means an on-balance sheet or off-balance sheet credit exposure that arises from a traditional or synthetic securitization (including credit-enhancing representations and warranties).

Securitization special purpose entity (securitization SPE) means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the credit risk of the seller of the underlying exposures to the entity.

Senior securitization exposure means a securitization exposure that has a first priority claim on the cash flows from the underlying exposures. When determining whether a securitization exposure has a first priority claim on the cash flows from the underlying exposures, a bank is not required to consider amounts due under interest rate or currency derivative contracts, fees due, or other similar payments. Both the most senior and any other commercial paper issued by an ABCP program and a liquidity facility that supports the ABCP program may be senior securitization exposures if the liquidity facility provider’s right to reimbursement of the drawn amounts is senior to all claims on the cash flows from the underlying exposures except amounts due under interest rate or currency derivative contracts, fees due, or other similar payments.

Servicer cash advance facility means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures. See also eligible servicer cash advance facility.

Sovereign entity means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

Sovereign exposure means:

1. A direct exposure to a sovereign entity; or
2. An exposure directly and unconditionally backed by the full faith and credit of a sovereign entity.

Subsidiary means, with respect to a company, a company controlled by that company.

Synthetic securitization means a transaction in which:

1. All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual retail exposure);
2. The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;
3. Performance of the securitization exposures depends upon the performance of the underlying exposures; and
4. All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

Tier 1 capital is defined in 12 CFR part 325, Appendix A, as modified in part II of this appendix.

Tier 2 capital is defined in 12 CFR part 325, Appendix A, as modified in part II of this appendix.

Total qualifying capital means the sum of tier 1 capital and tier 2 capital, after all deductions required in this appendix.

Total risk-weighted assets means:

1. The sum of:
   (i) Credit risk-weighted assets; and
   (ii) Risk-weighted assets for operational risk; minus
2. Excess eligible credit reserves not included in tier 2 capital.

Total wholesale and retail risk-weighted assets means the sum of risk-weighted assets for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures; risk-weighted assets for wholesale exposures to defaulted obligors and segments of defaulted retail exposures; risk-weighted assets for assets not defined by an exposure category; and risk-weighted assets for non-material portfolios of exposures (all as determined in section 31 of this appendix) and
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risk-weighted assets for unsettled transactions (as determined in section 35 of this appendix) minus the amounts deducted from capital pursuant to 12 CFR part 325, Appendix A (excluding those deductions reversed in section 12 of this appendix).

Traditional securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) The underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24E(eleventh).

The FDIC may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction’s leverage, risk profile, or economic substance.

The FDIC may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction’s leverage, risk profile, or economic substance.

Tranche means all securitization exposures associated with a securitization that have the same seniority level.

Underlying exposures means one or more exposures that have been securitized in a securitization transaction.

Unexpected operational loss (UOL) means the difference between the bank’s operational risk exposure and the bank’s expected operational loss.

Unit of measure means the level (for example, organizational unit or operational loss event type) at which the bank’s operational risk quantification system generates a separate distribution of potential operational losses.

Value-at-Risk (VaR) means the estimate of the maximum amount that the value of one or more exposures could decline due to market price or rate movements during a fixed holding period within a stated confidence interval.

Wholesale exposure means a credit exposure to a company, natural person, sovereign entity, or governmental entity (other than a securitization exposure, retail exposure, excluded mortgage exposure, or equity exposure). Examples of a wholesale exposure include:

(1) A non-tranched guarantee issued by a bank on behalf of a company;

(2) A repo-style transaction entered into by a bank with a company and any other transaction in which a bank posts collateral to a company and faces counterparty credit risk;

(3) An exposure that a bank treats as a covered position under 12 CFR part 325, Appendix C for which there is a counterparty credit risk capital requirement;

(4) A sale of corporate loans by a bank to a third party in which the bank retains full recourse;

(5) An OTC derivative contract entered into by a bank with a company;

(6) An exposure to an individual that is not managed by a bank as part of a segment of exposures with homogeneous risk characteristics; and

(7) A commercial lease.

Wholesale exposure subcategory means the HVCRE or non-HVCRE wholesale exposure subcategory.

Section 3. Minimum Risk-Based Capital Requirements

(a) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each bank must meet a minimum ratio of:

1. Total qualifying capital to total risk-weighted assets of 8.0 percent; and

2. Tier 1 capital to total risk-weighted assets of 4.0 percent.

(b) Each bank must hold capital commensurate with the level and nature of all risks to which the bank is exposed.

(c) When a bank subject to 12 CFR part 325, Appendix C calculates its risk-based capital requirements under this appendix, the bank must also refer to 12 CFR part 325, Appendix C for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

Part II. Qualifying Capital

Section 11. Additional Deductions

(a) General. A bank that uses this appendix must make the same deductions from its tier 1 capital and tier 2 capital required in 12 CFR part 325, Appendix A, except that:
(1) A bank is not required to deduct certain equity investments and CEIOs (as provided in section 12 of this appendix); and

(2) A bank also must make the deductions from capital required by paragraphs (b) and (c) of this section.

(a) Deduction of CEIOs. A bank is not required to make the deductions from capital for CEIOs in 12 CFR part 325, Appendix A, section II.B.5.

(b) Deduction for certain equity investments. A bank is not required to make the deductions from capital for nonfinancial equity investments in 12 CFR part 325, Appendix A, section II.B.5.

Section 13. Eligible Credit Reserves

(a) Comparison of eligible credit reserves to expected credit losses—(1) Shortfall of eligible credit reserves. If a bank’s eligible credit reserves are less than the bank’s total expected credit losses, the bank must deduct the shortfall amount.

(b) Excess eligible credit reserves. If a bank’s eligible credit reserves exceed the bank’s total expected credit losses, the bank must deduct the excess amount.

(c) Treatment of allowance for loan and lease losses. Regardless of any provision in 12 CFR part 325, Appendix A, the ALLL is included in tier 2 capital only to the extent provided in paragraphs (a)(2) of this section and in section 24 of this appendix.

PART III. QUALIFICATION

Section 21. Qualification Process

(a) Timing. (1) A bank that is described in paragraph (b)(1) of section 1 of this appendix must adopt a written implementation plan not later than six months after the later of April 1, 2008, or the date the bank meets a criterion in that section. The implementation plan must incorporate an explicit first floor period start date no later than 36 months after the later of April 1, 2008, or the date the bank meets at least one criterion under paragraph (b)(1) of section 1 of this appendix. The FDIC may extend the first floor period start date.

(2) A bank that elects to be subject to this appendix under paragraph (b)(2) of section 1 of this appendix must adopt a written implementation plan.

(b) Implementation plan. (1) The bank’s implementation plan must address in detail how the bank complies, or plans to comply, with the qualification requirements in section 22 of this appendix. The bank also must maintain a comprehensive and sound planning and governance process to oversee the
implementation efforts described in the plan. At a minimum, the plan must:

(i) Comprehensively address the qualification requirements in section 22 of this appendix and the bank and each consolidated subsidiary (U.S. and foreign-based) of the bank with respect to all portfolios and exposures of the bank and each of its consolidated subsidiaries:

(ii) Justify and support any proposed temporary or permanent exclusion of business lines, portfolios, or exposures from application of the advanced approaches in this appendix (which business lines, portfolios, and exposures must be, in the aggregate, immaterial to the bank);

(iii) Include the bank’s self-assessment of:

(A) The bank’s current status in meeting the qualification requirements in section 22 of this appendix; and

(B) The consistency of the bank’s current practices with the FDIC’s supervisory guidance on the qualification requirements;

(iv) Based on the bank’s self-assessment, identify and describe the areas in which the bank proposes to undertake additional work to comply with the qualification requirements in section 22 of this appendix or to improve the consistency of the bank’s current practices with the FDIC’s supervisory guidance on the qualification requirements (gap analysis);

(v) Describe what specific actions the bank will take to address the areas identified in the gap analysis required by paragraph (b)(1)(iv) of this section;

(vi) Identify objective, measurable milestones, including delivery dates and a date when the bank’s implementation of the methodologies described in this appendix will be fully operational;

(vii) Describe resources that have been budgeted and are available to implement the plan; and

(viii) Receive approval of the bank’s board of directors.

(2) The bank must submit the implementation plan, together with a copy of the minutes of the board of directors’ approval, to the FDIC at least 60 days before the bank proposes to begin its parallel run, unless the FDIC waives prior notice.

(c) Parallel run. Before determining its risk-based capital requirements under this appendix and following adoption of the implementation plan, the bank must conduct a satisfactory parallel run. A satisfactory parallel run is a period of no less than four consecutive calendar quarters during which the bank complies with the qualification requirements in section 22 of this appendix to the satisfaction of the FDIC. During the parallel run, the bank must report to the FDIC on a calendar quarterly basis its risk-based capital ratios using 12 CFR part 325, Appendix A and the risk-based capital requirements described in this appendix. During this period, the bank is subject to 12 CFR part 325, Appendix A.

(d) Approval to calculate risk-based capital requirements under this appendix. The FDIC will notify the bank of the date that the bank may begin its first floor period if the FDIC determines that:

(1) The bank fully complies with all the qualification requirements in section 22 of this appendix;

(2) The bank has conducted a satisfactory parallel run under paragraph (c) of this section; and

(3) The bank has an adequate process to ensure ongoing compliance with the qualification requirements in section 22 of this appendix.

(e) Transitional floor periods. Following a satisfactory parallel run, a bank is subject to three transitional floor periods.

(1) Risk-based capital ratios during the transitional floor periods—(i) Tier 1 risk-based capital ratio. During a bank’s transitional floor periods, the bank’s tier 1 risk-based capital ratio is equal to the lower of:

(A) The bank’s floor-adjusted tier 1 risk-based capital ratio; or

(B) The bank’s advanced approaches tier 1 risk-based capital ratio.

(ii) Total risk-based capital ratio. During a bank’s transitional floor periods, the bank’s total risk-based capital ratio is equal to the lower of:

(A) The bank’s floor-adjusted total risk-based capital ratio; or

(B) The bank’s advanced approaches total risk-based capital ratio.

(2) Floor-adjusted risk-based capital ratios. (i) A bank’s floor-adjusted tier 1 risk-based capital ratio during a transitional floor period is equal to the bank’s tier 1 capital as calculated under 12 CFR part 325, Appendix A, divided by the product of:

(A) The bank’s total risk-weighted assets as calculated under 12 CFR part 325, Appendix A; and

(B) The appropriate transitional floor percentage in Table 1.

(ii) A bank’s floor-adjusted total risk-based capital ratio during a transitional floor period is equal to the sum of the bank’s tier 1 and tier 2 capital as calculated under 12 CFR part 325, Appendix A, divided by the product of:

(A) The bank’s total risk-weighted assets as calculated under 12 CFR part 325, Appendix A; and

(B) The appropriate transitional floor percentage in Table 1.

(iii) A bank that meets the criteria in paragraph (b)(1) or (b)(2) of section 1 of this appendix as of April 1, 2008, must use 12 CFR part 325, Appendix A during the parallel run and as the basis for its transitional floors.
Section 22. Qualification Requirements

(a) Process and systems requirements. (1) A bank must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(2) The systems and processes used by a bank for risk-based capital purposes under this appendix must be consistent with the bank’s internal risk management processes and management information reporting systems.

(3) Each bank must have an appropriate infrastructure with risk measurement and management processes that meet the qualification requirements of this section and are appropriate given the bank’s size and level of complexity. Regardless of whether the systems and models that generate the risk parameters necessary for calculating a bank’s risk-based capital requirements are located at any affiliate of the bank, the bank itself must ensure that the risk parameters and reference data used to determine its risk-based capital requirements are representative of its own credit risk and operational risk exposures.

(b) Risk rating and segmentation systems for wholesale and retail exposures. (1) A bank must have an internal risk rating and segmentation system that accurately and reliably differentiates among degrees of credit risk for the bank’s wholesale and retail exposures.

(2) For wholesale exposures:

(i) A bank must have an internal risk rating system that accurately and reliably assigns each obligor to a single rating grade (reflecting the obligor’s likelihood of default). A bank may elect, however, not to assign to a rating grade an obligor to whom the bank extends credit based solely on the financial strength of a guarantor, provided that all of the bank’s exposures to the obligor are fully covered by eligible guarantees, the bank applies the PD substitution approach in paragraph (c)(1) of section 33 of this appendix to all exposures to that obligor, and the bank immediately assigns the obligor to a rating grade if a guarantee can no longer be recognized under this appendix. The bank’s wholesale obligor rating system must have at least seven discrete rating grades for non-defaulted obligors and at least one rating grade for defaulted obligors.

(ii) Unless the bank has chosen to directly assign LGD estimates to each wholesale exposure, the bank must have an internal risk rating system that accurately and reliably assigns each wholesale exposure to a loss severity rating grade (reflecting the bank’s estimate of the LGD of the exposure). A bank employing loss severity rating grades must have a sufficiently granular loss severity grading system to avoid grouping together exposures with widely ranging LGDs.

(3) For retail exposures, a bank must have an internal system that groups retail exposures into the appropriate retail exposure subcategory, groups the retail exposures in each retail exposure subcategory into separate segments with homogeneous risk characteristics, and assigns accurate and reliable PD and LGD estimates for each segment on a consistent basis. The bank’s system must identify and group in separate segments by

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<th>Transitional floor period</th>
<th>Transitional floor percentage</th>
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<tbody>
<tr>
<td>First floor period</td>
<td>95 percent</td>
</tr>
<tr>
<td>Second floor period</td>
<td>90 percent</td>
</tr>
<tr>
<td>Third floor period</td>
<td>85 percent</td>
</tr>
</tbody>
</table>

(3) Advanced approaches risk-based capital ratios. (i) A bank’s advanced approaches tier 1 risk-based capital ratio equals the bank’s total risk-based capital ratio as calculated under this appendix (other than this section on transitional floor periods).

(ii) A bank’s advanced approaches total risk-based capital ratio equals the bank’s tier 1 risk-based capital ratio as calculated under this appendix (other than this section on transitional floor periods).

(iii) A bank must report to the FDIC on a calendar quarterly basis both floor-adjusted risk-based capital ratios and both advanced approaches risk-based capital ratios.

(iv) A bank may exit a transitional floor period unless it provides a public report explaining its reasoning.

(v) The bank’s wholesale obligor rating system no longer be recognized under this appendix to all exposures to that obligor, and the bank immediately assigns the obligor to a single rating grade (reflecting the obligor’s likelihood of default). A bank may elect, however, not to assign to a rating grade an obligor to whom the bank extends credit based solely on the financial strength of a guarantor, provided that all of the bank’s exposures to the obligor are fully covered by eligible guarantees, the bank applies the PD substitution approach in paragraph (c)(1) of section 33 of this appendix to all exposures to that obligor, and the bank immediately assigns the obligor to a rating grade if a guarantee can no longer be recognized under this appendix. The bank’s wholesale obligor rating system must have at least seven discrete rating grades for non-defaulted obligors and at least one rating grade for defaulted obligors.

(vi) Unless the bank has chosen to directly assign LGD estimates to each wholesale exposure, the bank must have an internal risk rating system that accurately and reliably assigns each wholesale exposure to a loss severity rating grade (reflecting the bank’s estimate of the LGD of the exposure). A bank employing loss severity rating grades must have a sufficiently granular loss severity grading system to avoid grouping together exposures with widely ranging LGDs.

<table>
<thead>
<tr>
<th>Transitional floor period</th>
<th>Transitional floor percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>First floor period</td>
<td>95 percent</td>
</tr>
<tr>
<td>Second floor period</td>
<td>90 percent</td>
</tr>
<tr>
<td>Third floor period</td>
<td>85 percent</td>
</tr>
</tbody>
</table>
subcategories exposures identified in paragraphs (c)(2)(ii) and (iii) of section 31 of this appendix.

(4) The bank’s internal risk rating policy for wholesale exposures must describe the bank’s rating philosophy (that is, must describe how wholesale obligor rating assignments are affected by the bank’s choice of the range of economic, business, and industry conditions that are considered in the obligor rating process).

(5) The bank’s internal risk rating system for wholesale exposures must provide for the review and update (as appropriate) of each obligor rating and (if applicable) each loss severity rating whenever the bank receives new material information, but no less frequently than annually. The bank’s retail exposure segmentation system must provide for the review and update (as appropriate) of assignments of retail exposures to segments whenever the bank receives new material information, but generally no less frequently than quarterly.

(c) Quantification of risk parameters for wholesale and retail exposures. (1) The bank must have a comprehensive risk parameter quantification process that produces accurate, timely, and reliable estimates of the risk parameters for the bank’s wholesale and retail exposures.

(2) Data used to estimate the risk parameters must be relevant to the bank’s actual wholesale and retail exposures, and of sufficient quality to support the determination of risk-based capital requirements for the exposures.

(3) The bank’s risk parameter quantification process must produce approximately conservative risk parameter estimates where the bank has limited relevant data, and any adjustments that are part of the quantification process must not result in a pattern of bias toward lower risk parameter estimates.

(4) The bank’s risk parameter estimation process should not rely on the possibility of U.S. government financial assistance, except for the financial assistance that the U.S. government has a legally binding commitment to provide.

(5) Where the bank’s quantifications of LGD directly or indirectly incorporate estimates of the effectiveness of its credit risk management practices in reducing its exposure to troubled obligors prior to default, the bank must support such estimates with empirical analysis showing that the estimates are consistent with its historical experience in dealing with such exposures during economic downturn conditions.

(6) PD estimates for wholesale obligors and retail segments must be based on at least five years of default data. LGD estimates for wholesale exposures must be based on at least seven years of loss severity data, and EAD estimates for wholesale exposures must be based on at least seven years of exposure amount data, and EAD estimates for retail segments must be based on at least five years of exposure amount data.

(7) Default, loss severity, and exposure amount data must include periods of economic downturn conditions, or the bank must adjust its estimates of risk parameters to compensate for the lack of data from periods of economic downturn conditions.

(8) The bank’s PD, LGD, and EAD estimates must be based on the definition of default in this appendix.

(9) The bank must review and update (as appropriate) its risk parameters and its risk parameter quantification process at least annually.

(10) The bank must at least annually conduct a comprehensive review and analysis of reference data to determine relevance of reference data to the bank’s exposures, quality of reference data to support PD, LGD, and EAD estimates, and consistency of reference data to the definition of default contained in this appendix.

(d) Counterparty credit risk model. A bank must obtain the prior written approval of the FDIC under section 32 of this appendix to use the internal models methodology for counterparty credit risk.

(e) Double default treatment. A bank must obtain the prior written approval of the FDIC under section 34 of this appendix to use the double default treatment.

(f) Securitization exposures. A bank must obtain the prior written approval of the FDIC under section 34 of this appendix to use the double default treatment.

(g) Equity exposures model. A bank must obtain the prior written approval of the FDIC under section 33 of this appendix to use the Internal Models Approach for equity exposures.

(h) Operational risk. (1) Operational risk management processes. A bank must:

(i) Have an operational risk management function that:

(A) Is independent of business line management; and

(B) Is responsible for designing, implementing, and overseeing the bank’s operational risk data and assessment systems, operational risk quantification systems, and related processes;

(ii) Have and document a process (which must capture business environment and internal control factors affecting the bank’s operational risk profile) to identify, measure, monitor, and control operational risk in bank products, activities, processes, and systems; and

(iii) Report operational risk exposures, operational loss events, and other relevant operational risk information to business unit management, senior management, and the
board of directors (or a designated committee of the board).

(2) Operational risk data and assessment systems. A bank must have operational risk data and assessment systems that capture operational risks to which the bank is exposed. The bank’s operational risk data and assessment systems must:

(i) Be structured in a manner consistent with the bank’s current business activities, risk profile, technological processes, and risk management processes; and

(ii) Include credible, transparent, systematic, and verifiable processes that incorporate the following elements on an ongoing basis:

(A) Internal operational loss event data. The bank must have a systematic process for capturing and using internal operational loss event data in its operational risk data and assessment systems.

(B) External operational loss event data. The bank must demonstrate that its estimate of operational risk exposure, but the review and update must occur no less frequently than annually.

(iii) With the prior written approval of the FDIC, a bank may generate an estimate of its operational risk exposure using an alternative approach to that specified in paragraph (h)(3)(i) of this section. A bank proposing to use such an alternative operational risk quantification system must submit a proposal to the FDIC. In determining whether to approve a bank’s proposal to use an alternative operational risk quantification system, the FDIC will consider the following principles:

(A) Use of the alternative operational risk quantification system will be allowed only on an exception basis, considering the size, complexity, and risk profile of the bank;

(B) The bank must demonstrate that its estimate of its operational risk exposure generated under the alternative operational risk quantification system is appropriate and can be supported empirically; and

(C) A bank must not use an allocation of operational risk capital requirements that includes entities other than depository institutions or the benefits of diversification across entities.

(i) Data management and maintenance. (1) A bank must have data management and maintenance systems that adequately support all aspects of its advanced systems and the timely and accurate reporting of risk-based capital requirements,
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(2) A bank must retain data using an electronic format that allows timely retrieval of data for analysis, validation, reporting, and disclosure purposes.

(3) A bank must retain sufficient data related to key risk drivers to permit adequate monitoring, validation, and refinement of its advanced systems.

(a) Control, oversight, and validation mechanisms. (1) The bank’s senior management must ensure that all components of the bank’s advanced systems function effectively and comply with the qualification requirements in this section.

(b) The bank’s board of directors (or a designated committee of the board) must at least annually review the effectiveness of, and approve, the bank’s advanced systems.

(c) A bank must have an effective system of controls and oversight that:

(i) Ensures ongoing compliance with the qualification requirements in this section;

(ii) Maintains the integrity, reliability, and accuracy of the bank’s advanced systems; and

(iii) Includes adequate governance and project management processes.

(d) The bank must validate, on an ongoing basis, its advanced systems. The bank’s validation process must be independent of the advanced systems’ development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the advanced systems;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking; and

(iii) An outcomes analysis process that includes back-testing.

(e) The bank must have an internal audit function independent of business-line management that at least annually assesses the effectiveness of the controls supporting the bank’s advanced systems and reports its findings to the bank’s board of directors (or a committee thereof).

(f) The bank must periodically stress test its advanced systems. The stress testing must include a consideration of how economic cycles, especially downturns, affect risk-based capital requirements (including migration across rating grades and segments and the credit risk mitigation benefits of double default treatment).

(g) Documentation. The bank must adequately document all material aspects of its advanced systems.

Section 23. Ongoing Qualification

(a) Changes to advanced systems. A bank must meet all the qualification requirements in section 22 of this appendix on an ongoing basis. A bank must notify the FDIC when the bank makes any change to an advanced system that would result in a material change in the bank’s risk-weighted asset amount for an exposure type, or when the bank makes any significant change to its modeling assumptions.

(b) Failure to comply with qualification requirements. (1) If the FDIC determines that a bank that uses this appendix and has conducted a satisfactory parallel run fails to comply with the qualification requirements in section 22 of this appendix, the FDIC will notify the bank in writing of the bank’s failure to comply.

(2) The bank must establish and submit a plan satisfactory to the FDIC to return to compliance with the qualification requirements.

(3) In addition, if the FDIC determines that the bank’s risk-based capital requirements are not commensurate with the bank’s credit, market, operational, or other risks, the FDIC may require such a bank to calculate its risk-based capital requirements:

(i) Under 12 CFR part 325, Appendix A; or

(ii) Under this appendix with any modifications provided by the FDIC.

Section 24. Merger and Acquisition Transitional Arrangements

(a) Mergers and acquisitions of companies without advanced systems. If a bank merges with or acquires a company that does not calculate its risk-based capital requirements using advanced systems, the bank may use 12 CFR part 325, Appendix A to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company’s exposures for up to 24 months after the calendar quarter during which the merger or acquisition consummates. The FDIC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the bank must submit to the FDIC an implementation plan for using its advanced systems for the acquired company. During the period when 12 CFR part 325, Appendix A apply to the merged or acquired company, any ALLL, net of allocated transfer risk, reserves established pursuant to 12 U.S.C. 3904, associated with the merged or acquired company’s exposures may be included in the acquiring bank’s tier 2 capital up to 1.25 percent of the acquired company’s risk-weighted assets. All general allowances of the merged or acquired company must be excluded from the bank’s eligible credit reserves. In addition, the risk-weighted assets of the merged or acquired company are not included in the bank’s credit-risk-weighted assets but are included in total risk-weighted assets. If a bank relies on this paragraph, the bank must disclose publicly the amounts of risk-weighted assets and qualifying capital calculated under this appendix for the acquiring bank and under 12
CFR part 325, Appendix A for the acquired company.

(b) Mergers and acquisitions of companies with advanced systems—(1) If a bank merges with or acquires a company that calculates its risk-based capital requirements using advanced systems, the bank may use the acquired company’s advanced systems to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company’s exposures for up to 24 months after the calendar quarter during which the acquisition or merger consummates. The FDIC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the bank must submit to the FDIC an implementation plan for using its advanced systems for the merged or acquired company.

(2) If the acquiring bank is not subject to the advanced approaches in this appendix at the time of acquisition or merger, during the period when 12 CFR part 325, Appendix A apply to the acquiring bank, the ALLL associated with the exposures of the merged or acquired company may not be directly included in tier 2 capital. Rather, any excess eligible credit reserves associated with the merged or acquired company’s exposures may be included in the bank’s tier 2 capital up to 0.6 percent of the credit-risk-weighted assets associated with those exposures.

PART IV. RISK-WEIGHTED ASSETS FOR GENERAL CREDIT RISK

Section 31. Mechanics for Calculating Total Wholesale and Retail Risk-Weighted Assets

(a) Overview. A bank must calculate its total wholesale and retail risk-weighted asset amount in four distinct phases:

(1) Phase 1—categorization of exposures;
(2) Phase 2—assignment of wholesale obligors and exposures to rating grades and segmentation of retail exposures;
(3) Phase 3—assignment of risk parameters to wholesale exposures and segments of retail exposures; and
(4) Phase 4—calculation of risk-weighted asset amounts.

(b) Phase 1—Categorization. The bank must determine which of its exposures are wholesale exposures, retail exposures, securitization exposures, or equity exposures. The bank must categorize each retail exposure as a residential mortgage exposure, a QRE, or another retail exposure. The bank must identify which wholesale exposures are HVCRE exposures, sovereign exposures, OTC derivative contracts, repo-style transactions, eligible margin loans, eligible purchased wholesale exposures, unsettled transactions to which section 35 of this appendix applies, and eligible guarantees or eligible credit derivatives that are used as credit risk mitigants. The bank must identify any on-balance sheet asset that does not meet the definition of a wholesale, retail, equity, or securitization exposure, as well as any non-material portfolio of exposures described in paragraph (e)(4) of this section.

(c) Phase 2—Assignment of wholesale obligors and exposures to rating grades and retail exposures to segments—(1) Assignment of wholesale obligors and exposures to rating grades:

(i) The bank must assign each obligor of a wholesale exposure to a single obligor rating grade and must assign each wholesale exposure to which it does not directly assign an LGD estimate to a loss severity rating grade.
(ii) The bank must identify which of its wholesale obligors are in default.

(ii) Segmentation of retail exposures. (i) The bank must group the retail exposures in each retail subcategory into segments that have homogeneous risk characteristics.

(ii) The bank must identify which of its retail exposures are in default. The bank must segment defaulted retail exposures separately from non-defaulted retail exposures.

(iii) If the bank determines the EAD for eligible margin loans using the approach in paragraph (b) of section 32 of this appendix, the bank must identify which of its retail exposures are eligible margin loans for which the bank uses this EAD approach and must segment such eligible margin loans separately from other retail exposures.

(3) Eligible purchased wholesale exposures. A bank may group its eligible purchased wholesale exposures into segments that have homogeneous risk characteristics. A bank must use the wholesale exposure formula in Table 2 in this section to determine the risk-based capital requirement for each segment of eligible purchased wholesale exposures.

(d) Phase 3—Assignment of risk parameters to wholesale exposures and segments of retail exposures—(1) Quantification process. Subject to the limitations in this paragraph (d), the bank must:

(i) Associate a PD with each wholesale obligor rating grade;
(ii) Associate an LGD with each wholesale loss severity rating grade or assign an LGD to each wholesale exposure;
(iii) Assign an EAD and M to each wholesale exposure; and
(iv) Assign a PD, LGD, and EAD to each segment of retail exposures.

(2) Floor on PD assignment. The PD for each wholesale obligor or retail segment may not be less than 0.03 percent, except for exposures to or directly and unconditionally guaranteed by a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Commission, the European Central Bank, or a multilateral development bank, to which the bank assigns a rating grade associated with a PD of less than 0.03 percent.
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(3) Floor on LGD estimation. The LGD for each segment of residential mortgage exposures (other than segments of residential mortgage exposures for which all or substantially all of the principal of each exposure is directly and unconditionally guaranteed by the full faith and credit of a sovereign entity) may not be less than 10 percent.

(A) Eligible purchased wholesale exposures. A bank must assign a PD, LGD, EAD, and M to each segment of eligible purchased wholesale exposures. If the bank can estimate ECL (but not PD or LGD) for a segment of eligible purchased wholesale exposures, the bank must assume that the LGD of the segment equals 100 percent and that the PD of the segment equals ECL divided by EAD. The estimated ECL must be calculated for the exposures without regard to any assumption of recourse or guarantees from the seller or other parties.

(5) Credit risk mitigation—credit derivatives, guarantees, and collateral. (i) A bank may take into account the risk reducing effects of eligible guarantees and eligible credit derivatives in support of a wholesale exposure by applying the PD substitution or LGD adjustment treatment to the exposure as provided in section 33 of this appendix or, if applicable, applying double default treatment to the exposure as provided in section 34 of this appendix. A bank may decide separately for each wholesale exposure that qualifies for the double default treatment under section 34 of this appendix whether to apply the double default treatment or to use the PD substitution or LGD adjustment treatment without recognizing double default effects.

(ii) A bank may take into account the risk reducing effects of guarantees and credit derivatives in support of retail exposures in a segment when quantifying the PD and LGD of the segment.

(iii) Except as provided in paragraph (d)(6) of this section, a bank may take into account the risk reducing effects of collateral in support of a wholesale exposure when quantifying the LGD of the exposure and may take into account the risk reducing effects of collateral in support of retail exposures when quantifying the PD and LGD of the segment.

(6) EAD for OTC derivative contracts, repo-style transactions, and eligible margin loans. (i) A bank must calculate its EAD for an OTC derivative contract as provided in paragraphs (c) and (d) of section 32 of this appendix. A bank may take into account the risk reducing effects of financial collateral in support of a repo-style transaction or eligible margin loan and of any collateral in support of a repo-style transaction that is included in the bank's VaR-based measure under 12 CFR part 325, Appendix C through an adjustment to EAD as provided in paragraphs (b) and (d) of section 32 of this appendix. A bank that takes collateral into account through such an adjustment to EAD under section 32 of this appendix may not reflect such collateral in LGD.

(ii) A bank may attribute an EAD of zero to:

(A) Derivative contracts that are publicly traded on an exchange that requires the daily receipt and payment of cash-variation margin;

(B) Derivative contracts and repo-style transactions that are outstanding with a qualifying central counterparty (but not for those transactions that a qualifying central counterparty has rejected); and

(C) Credit risk exposures to a qualifying central counterparty in the form of clearing deposits and posted collateral that arise from transactions described in paragraph (d)(6)(iii)(B) of this section.

(7) Effective maturity. An exposure’s M must be no greater than five years and no less than one year, except that an exposure’s M must be no less than one day if the exposure has an original maturity of less than one year and is not part of a bank’s ongoing financing of the obligor. An exposure is not part of a bank’s ongoing financing of the obligor if the bank:

(i) Has a legal and practical ability not to renew or roll over the exposure in the event of credit deterioration of the obligor;

(ii) Makes an independent credit decision at the inception of the exposure and at every renewal or roll over; and

(iii) Has no substantial commercial incentive to continue its credit relationship with the obligor in the event of credit deterioration of the obligor.

(e) Phase 4—Calculation of risk-weighted assets—(2) Non-defaulted exposures. (i) A bank must calculate the dollar risk-based capital requirement for each of its wholesale exposures to a non-defaulted obligor (except eligible guarantees and eligible credit derivatives that hedge another wholesale exposure and exposures to which the bank applies the double default treatment in section 34 of this appendix) and segments of non-defaulted retail exposures by inserting the assigned risk parameters for the wholesale obligor and exposure or retail segment into the appropriate risk-based capital formula specified in Table 2 and multiplying the output of the formula (K) by the EAD of the exposure or segment. Alternatively, a bank may apply a 300 percent risk weight to the EAD of an eligible margin loan if the bank is not able to meet the agencies’ requirements for estimation of PD and LGD for the margin loan.
Table 2 – IRB Risk-Based Capital Formulas for Wholesale Exposures to Non-Defaulted Obligors and Segments of Non-Defaulted Retail Exposures

<table>
<thead>
<tr>
<th>Capital Requirement (K)</th>
<th>Retail</th>
<th>Correlation Factor (R)</th>
<th>Wholesale</th>
<th>Correlation Factor (R)</th>
<th>Maturity Adjustment (b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Defaulted Exposures</td>
<td></td>
<td>For residential mortgage exposures: $R = 0.15$</td>
<td>For HVCRE exposures: $R = 0.12 + 0.18 \times e^{-\ln(PD)}$</td>
<td>For wholesale exposures other than HVCRE exposures: $R = 0.12 + 0.12 \times e^{-\ln(PD)}$</td>
<td>$b = (0.11852 - 0.05478 \times \ln(PD))^2$</td>
</tr>
<tr>
<td></td>
<td></td>
<td>For qualifying revolving exposures: $R = 0.04$</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>For other retail exposures: $R = 0.03 + 0.13 \times e^{-30 \times PD}$</td>
<td></td>
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<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$K = \left[ LGD \times N \left( N^{-1}(PD) + \frac{\sqrt{R \times N^{-1}(0.999)}}{\sqrt{1 - R}} \right) \right] \times \left( LGD \times PD \right)$</td>
<td>$K = \left[ LGD \times N \left( N^{-1}(PD) + \frac{\sqrt{R \times N^{-1}(0.999)}}{\sqrt{1 - R}} \right) \right] \times \left( LGD \times PD \right)$</td>
<td>$K = \left[ LGD \times N \left( N^{-1}(PD) + \frac{\sqrt{R \times N^{-1}(0.999)}}{\sqrt{1 - R}} \right) \right] \times \left( LGD \times PD \right)$</td>
<td>$b = (0.11852 - 0.05478 \times \ln(PD))^2$</td>
<td></td>
</tr>
</tbody>
</table>

$N(\cdot)$ means the cumulative distribution function for a standard normal random variable. $N^{-1}(\cdot)$ means the inverse cumulative distribution function for a standard normal random variable. The symbol $e$ refers to the base of the natural logarithms, and the function $\ln(\cdot)$ refers to the natural logarithm of the expression within parentheses. The formulas apply when PD is greater than zero. If PD equals zero, the capital requirement $K$ is set equal to zero.

(ii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a non-defaulted obligor and segment of non-defaulted retail exposures calculated in paragraph (e)(1)(i) of this section and in paragraph (e) of section 34 of this appendix equals the total dollar risk-based capital requirement for those exposures and segments.

(iii) The aggregate risk-weighted asset amount for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(3)(i) of this section multiplied by 12.5.

(2) Wholesale exposures to defaulted obligors and segments of defaulted retail exposures. (i) The dollar risk-based capital requirement for each wholesale exposure to a defaulted obligor equals 0.08 multiplied by the EAD of the exposure.

(ii) The dollar risk-based capital requirement for a segment of defaulted retail exposures equals 0.08 multiplied by the EAD of the segment.

(iii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a defaulted obligor calculated in paragraph (e)(2)(i) of this section plus the dollar risk-based capital requirements for each segment of defaulted retail exposures
calculated in paragraph (e)(2)(ii) of this section equals the total dollar risk-based capital requirement for those exposures and segments.

(ii) The aggregate risk-weighted asset amount for wholesale exposures to defaulted obligors and segments of defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(2)(iii) of this section multiplied by 12.5.

(iii) Assets not included in a defined exposure category, (i) A bank may assign a risk-weighted asset amount of zero to cash owned and held in all offices of the bank or in transit and for gold bullion held in the bank’s own vaults, or held in another bank’s vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities.

(ii) The risk-weighted asset amount for the residual value of a retail lease exposure equals such residual value.

(iii) The risk-weighted asset amount for any other on-balance-sheet asset that does not meet the definition of a wholesale, retail, securitization, or equity exposure equals the carrying value of the asset.

(iv) Non-material portfolios of exposures. The risk-weighted asset amount of a portfolio of exposures for which the bank has demonstrated to the FDIC’s satisfaction that the portfolio (when combined with all other portfolios of exposures that the bank seeks to treat under this paragraph) is not material to the bank is the sum of the carrying values of on-balance sheet exposures plus the notional amounts of off-balance sheet exposures in the portfolio. For purposes of this paragraph (e)(4), the notional amount of an OTC derivative contract that is not a credit derivative is the EAD of the derivative as calculated in section 32 of this appendix.

Section 32. Counterparty Credit Risk of Repo-Style Transactions, Eligible Margin Loans, and OTC Derivative Contracts

(a) In General. (1) This section describes two methodologies—a collateral haircut approach and an internal models methodology—that a bank may use instead of an LGD estimation methodology to recognize the benefits of financial collateral in mitigating the counterparty credit risk of repo-style transactions, eligible margin loans, collateralized OTC derivative contracts, and single product netting sets of such transactions and to recognize the benefits of any collateral in mitigating the counterparty credit risk of repo-style transactions that are included in a bank’s VaR-based measure under 12 CFR part 325, Appendix C. A third methodology, the simple VaR methodology, is available for single product netting sets of repo-style transactions and eligible margin loans.

(b) This section also describes the methodology for calculating EAD for an OTC derivative contract or a set of OTC derivative contracts subject to a qualifying master netting agreement. A bank also may use the internal models methodology to estimate EAD for qualifying cross-product master netting agreements.

(ii) For netting sets only, the simple VaR methodology described in paragraph (b)(3) of this section; or

(iii) The internal models methodology described in paragraph (d) of this section.

(ii) A bank may only use the standard supervisory haircut approach with a minimum 10-business-day holding period to recognize in EAD the benefits of conforming residential mortgage collateral that secures repo-style transactions included in the bank’s VaR-based measure under 12 CFR part 325, Appendix C, eligible margin loans, and OTC derivative contracts.

(iii) A bank may use any combination of the three methodologies for collateral recognition; however, it must use the same methodology for similar exposures.

(b) EAD for eligible margin loans and repo-style transactions—(1) General. A bank may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, or single-product netting set of such transactions by factoring the collateral into its LGD estimates for the exposure. Alternatively, a bank may estimate an unsecured LGD for the exposure, as well as for any repo-style transaction that is included in the bank’s VaR-based measure under 12 CFR part 325, Appendix C, and determine the EAD of the exposure using:

(i) The collateral haircut approach described in paragraph (b)(2) of this section;

(ii) For netting sets only, the simple VaR methodology described in paragraph (b)(3) of this section; or

(iii) The internal models methodology described in paragraph (d) of this section.

(ii) Collateral haircut approach—(1) EAD equation. A bank may determine EAD for an eligible margin loan, repo-style transaction, or netting set by setting EAD equal to max (0, [(ΣE – ΣC) + (ΣEs × Hs) + (ΣEf × Hf)]), where:

(A) ΣE equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the bank has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set));

(B) ΣC equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the bank has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(C) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in a given instrument or in gold equals the sum of the current market values of the instrument or gold the bank has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of the instrument or gold the bank has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction));
market values of that same instrument or gold the bank has borrowed, purchased subject to resale, or taken as collateral from the counterparty;
(b) $H_s$ equals the market price volatility haircut appropriate to the instrument or gold referenced in $Es$;
(c) $H_{fx}$ equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current market values of any instruments or cash in the currency the bank has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of any instruments or cash in the currency the bank has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and
(F) $H_{fx}$ equals the haircut appropriate to the mismatch between the currency referenced in $E_{fx}$ and the settlement currency.
(ii) Standard supervisory haircuts. (A) Under the standard supervisory haircuts approach:
(i) A bank must use the haircuts for market price volatility ($H_s$) in Table 3, as adjusted in certain circumstances as provided in paragraph (b)(2)(ii)(A)(3) and (4) of this section;

<table>
<thead>
<tr>
<th>Applicable external rating grade category for debt securities</th>
<th>Residual maturity for debt securities</th>
<th>Issuers exempt from the 3 basis point floor</th>
<th>Other issuers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two highest investment-grade rating categories for long-term ratings/highest investment-grade rating category for short-term ratings</td>
<td>≤ 1 year ................................</td>
<td>0.005</td>
<td>0.01</td>
</tr>
<tr>
<td></td>
<td>&gt; 1 year, ≤ 5 years ...</td>
<td>0.02</td>
<td>0.04</td>
</tr>
<tr>
<td></td>
<td>&gt; 5 years ...</td>
<td>0.04</td>
<td>0.08</td>
</tr>
<tr>
<td>Two lowest investment-grade rating categories for both short- and long-term ratings</td>
<td>≤ 1 year ................................</td>
<td>0.01</td>
<td>0.02</td>
</tr>
<tr>
<td></td>
<td>&gt; 1 year, ≤ 5 years ...</td>
<td>0.02</td>
<td>0.06</td>
</tr>
<tr>
<td></td>
<td>&gt; 5 years ...</td>
<td>0.06</td>
<td>0.12</td>
</tr>
<tr>
<td>One rating category below investment grade ...</td>
<td>All ......................................</td>
<td>0.15</td>
<td>0.25</td>
</tr>
<tr>
<td>Main index equities (including convertible bonds) and gold ...</td>
<td></td>
<td>0.15</td>
<td></td>
</tr>
<tr>
<td>Other publicly traded equities (including convertible bonds), conforming residential mortgages, and nonfinancial collateral</td>
<td></td>
<td>0.25</td>
<td></td>
</tr>
<tr>
<td>Mutual funds ...................................................................</td>
<td>Highest haircut applicable to any security in which the fund can invest.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash on deposit with the bank (including a certificate of deposit issued by the bank)</td>
<td></td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

1 The market price volatility haircuts in Table 3 are based on a ten-business-day holding period.

(2) For currency mismatches, a bank must use a haircut for foreign exchange rate volatility ($H_{fx}$) of 8 percent, as adjusted in certain circumstances as provided in paragraph (b)(2)(ii)(A)(3) and (4) of this section.

(3) For repo-style transactions, a bank may multiply the supervisory haircuts provided in paragraphs (b)(2)(ii)(A)(1) and (2) of this section by the square root of 1/2 (which equals 0.707107).

(4) A bank must adjust the supervisory haircuts upward on the basis of a holding period longer than ten business days (for eligible margin loans) or five business days (for repo-style transactions) where and as appropriate to take into account the illiquidity of an instrument.

(iii) Own internal estimates for haircuts. With the prior written approval of the FDIC, a bank may use its own internal estimates of the volatilities of market prices and foreign exchange rates.

(A) To receive FDIC approval to use its own internal estimates, a bank must satisfy the following minimum quantitative standards:
(i) A bank must use a 99th percentile one-tailed confidence interval.
(2) The minimum holding period for a repo-style transaction is five business days and for an eligible margin loan is ten business days. When a bank calculates an own-estimated haircut on a $T_M$-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut ($H_M$) is calculated using the following square root of time formula:

$$H_M = H_s \sqrt{\frac{T_M}{T_N}},$$

where

(i) $T_M$ equals 5 for repo-style transactions and 10 for eligible margin loans;
(ii) $T_N$ equals the holding period used by the bank to derive $H_M$;
(iii) $H_s$ equals the haircut based on the holding period $T_N$. 

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(3) A bank must adjust holding periods upwards where and as appropriate to take into account the illiquidity of an instrument.

(4) The historical observation period must be at least one year.

(5) A bank must update its data sets and recompute haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(B) With respect to debt securities that have an applicable external rating of investment grade, a bank may calculate haircuts for categories of securities. For a category of securities, the bank must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities that is in that category that the bank has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the bank must at a minimum take into account:

(1) The type of issuer of the security;
(2) The applicable external rating of the security;
(3) The maturity of the security; and
(4) The interest rate sensitivity of the security.

(C) With respect to debt securities that have an applicable external rating of below investment grade and equity securities, a bank must calculate a separate haircut for each individual security.

(D) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the bank must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(E) A bank's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

(3) Simple VaR methodology. With the prior written approval of the FDIC, a bank may estimate EAD for a netting set using a VaR model that meets the requirements in paragraph (b)(3)(ii) of this section. In such event, the bank must set EAD equal to max (0, $\{\Sigma E - \Sigma C \} + \text{PFE}$), where:

(i) $\Sigma E$ equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the bank has lent, sold subject to repurchase, or posted as collateral to the counterparty under the netting set);

(ii) $\Sigma C$ equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the bank has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the netting set); and

(iii) PFE (potential future exposure) equals the bank's empirically based best estimate of the 99th percentile, one-tailed confidence interval for an increase in the value of ($\Sigma E - \Sigma C$) over a five-business-day holding period for repo-style transactions or over a ten-business-day holding period for eligible margin loans using a minimum one-year historical observation period of price data representing the instruments that the bank has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. The bank must validate its VaR model, including by establishing and maintaining a rigorous and regular back-testing regime.

(c) EAD for OTC derivative contracts. (1) A bank must determine the EAD for an OTC derivative contract that is not subject to a qualifying master netting agreement using the current exposure methodology in paragraph (c)(5) of this section or using the internal models methodology described in paragraph (d) of this section.

(2) A bank must determine the EAD for multiple OTC derivative contracts that are subject to a qualifying master netting agreement using the current exposure methodology in paragraph (c)(6) of this section or using the internal models methodology described in paragraph (d) of this section.

(3) Counterparty credit risk for credit derivatives. Notwithstanding the above, (i) A bank that purchases a credit derivative that is recognized under section 33 or 34 of this appendix as a credit risk mitigant for an exposure that is not a covered position under 12 CFR part 325, Appendix C need not compute a separate counterparty credit risk capital requirement under this section so long as the bank does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(ii) A bank that is the protection provider in a credit derivative must treat the credit derivative as a wholesale exposure to the reference obligor and need not compute a counterparty credit risk capital requirement for the credit derivative under this section, so long as it does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties.
counterparties for risk-based capital purposes (unless the bank is treating the credit derivative as a covered position under 12 CFR part 325, Appendix C, in which case the bank must compute a supplemental counterparty credit risk capital requirement under this section).

(4) Counterparty credit risk for equity derivatives. A bank must treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for the equity derivative contract under part VI (unless the bank is treating the contract as a covered position under 12 CFR part 325, Appendix C). In addition, if the bank is treating the contract as a covered position under 12 CFR part 325, Appendix C and in certain other cases described in section 55 of this appendix, the bank must also calculate a risk-based capital requirement for the counterparty credit risk of an equity derivative contract under this part.

(5) Single OTC derivative contract. Except as modified by paragraph (c)(7) of this section, the EAD for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the bank’s current credit exposure and potential future credit exposure (PFE) on the derivative contract.

(i) Current credit exposure. The current credit exposure for a single OTC derivative contract is the greater of the mark-to-market value of the derivative contract or zero.

(ii) PFE. The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative mark-to-market value, is calculated by multiplying the notional principal amount of the derivative contract by the appropriate conversion factor in Table 4. For purposes of calculating either the PFE under this paragraph or the gross PFE under paragraph (c)(6) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency. For any OTC derivative contract that does not fall within one of the specified categories in Table 4, the PFE must be calculated using the “other” conversion factors. A bank must use an OTC derivative contract’s effective notional principal amount (that is, its apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than its apparent or stated notional principal amount in calculating PFE. PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.
TABLE 4.—CONVERSION FACTOR MATRIX FOR OTC DERIVATIVE CONTRACTS

<table>
<thead>
<tr>
<th>Remaining maturity</th>
<th>Interest rate</th>
<th>Foreign exchange rate and gold</th>
<th>Credit (investment-grade referent obligation)</th>
<th>Credit (non-investment-grade referent obligation)</th>
<th>Equity</th>
<th>Precious metals (except gold)</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>One year or less</td>
<td>0.00</td>
<td>0.01</td>
<td>0.05</td>
<td>0.10</td>
<td>0.06</td>
<td>0.07</td>
<td>0.10</td>
</tr>
<tr>
<td>Over one to five years</td>
<td>0.005</td>
<td>0.05</td>
<td>0.05</td>
<td>0.10</td>
<td>0.08</td>
<td>0.07</td>
<td>0.12</td>
</tr>
<tr>
<td>Over five years</td>
<td>0.015</td>
<td>0.075</td>
<td>0.05</td>
<td>0.10</td>
<td>0.10</td>
<td>0.08</td>
<td>0.15</td>
</tr>
</tbody>
</table>

1 For an OTC derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

2 For an OTC derivative contract that is structured such that on-specified dates any outstanding exposure is settled and the terms are reset so that the market value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

3 A bank must use the column labeled “Credit (investment-grade reference obligor)” for a credit derivative whose reference obligor has an outstanding unsecured long-term debt security without credit enhancement that has a long-term applicable external rating of at least investment grade. A bank must use the column labeled “Credit (non-investment-grade reference obligor)” for all other credit derivatives.
(6) Multiple OTC derivative contracts subject to a qualifying master netting agreement. Except as modified by paragraph (c)(7) of this section, the EAD for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE exposure for all OTC derivative contracts subject to the qualifying master netting agreement.

(i) Net current credit exposure. The net current credit exposure is the greater of:

(A) The net sum of all positive and negative mark-to-market values of the individual OTC derivative contracts subject to the qualifying master netting agreement; or

(B) zero.

(ii) Adjusted sum of the PFE. The adjusted sum of the PFE, Anet, is calculated as Anet = (0.4 Agross) + (0.6 NGR Agross), where:

(A) Agross = the gross PFE (that is, the sum of the PFE amounts as determined under paragraph (c)(3)(i) of this section) for each individual OTC derivative contract subject to the qualifying master netting agreement; and

(B) NGR = the net to gross ratio (that is, the ratio of the net current credit exposure to the gross current credit exposure). In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (c)(5)(i) of this section) of all individual OTC derivative contracts subject to the qualifying master netting agreement.

(7) Collateralized OTC derivative contracts. A bank may recognize the credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or single-product netting set of OTC derivatives by factoring the collateral into its LGD estimates for the contract or netting set. Alternatively, a bank may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set in its LGD for the contract or netting set and adjust the EAD calculated under paragraph (c)(5) or (c)(6) of this section using the collateral haircut approach in paragraph (b)(2) of this section. The bank must substitute the EAD calculated under paragraph (c)(5) or (c)(6) of this section for EE in the equation in paragraph (b)(2)(i) of this section and must use a ten-business-day minimum holding period. The bank must set

\[
T_{26} = 10.
\]

(d) Internal models methodology. (1) With prior written approval from the FDIC, a bank may use the internal models methodology in this paragraph (d) to determine EAD for counterparty credit risk for OTC derivative contracts (collateralized or uncollateralized) and single-product netting sets thereof, for eligible margin loans and single-product netting sets thereof, and for repo-style transactions and single-product netting sets thereof. A bank that uses the internal models methodology for a particular transaction type (OTC derivative contracts, eligible margin loans, or repo-style transactions) must use the internal models methodology for all transactions of that transaction type. A bank may choose to use the internal models methodology for one or two of these three types of exposures and not the other types. A bank may also use the internal models methodology for OTC derivative contracts, eligible margin loans, and repo-style transactions subject to a qualifying cross-product netting agreement if:

(i) The bank effectively integrates the risk mitigating effects of cross-product netting into its risk management and other information technology systems; and

(ii) The bank obtains the prior written approval of the FDIC. A bank that uses the internal models methodology for a transaction type must receive approval from the FDIC to cease using the methodology for that transaction type or to make a material change to its internal model.

(2) Under the internal models methodology, a bank uses an internal model to estimate the expected exposure (EE) for a netting set and then calculates EAD based on that EE.

(i) The bank must use its internal model’s probability distribution for changes in the market value of a netting set that are attributable to changes in market variables to determine EE.

(ii) Under the internal models methodology, EAD = α x effective EPE, or, subject to FDIC approval as provided in paragraph (d)(7), a more conservative measure of EAD.

\[
\text{EffectiveEPE}_k = \sum \text{EffectiveEE}_k \times M_k
\]

that is, effective EPE is the time-weighted average of effective EE where the weights are the proportion that an individual effective EE represents in a one-year time interval where:

(1) Effective EE = max (Effective EE_\text{net}, EE_\text{repo}) (that is, for a specific date, effective EE is the greater of EE at that date or the effective EE at the previous date); and

(2) \text{k} represents the kth future time period in the model and there are n time periods represented in the model over the first year; and

\[
\alpha = 1.4 \text{ except as provided in paragraph (d)(6), or when the FDIC has determined that the bank must set } \alpha \text{ higher based on the bank's specific characteristics of counterparty credit risk.}
\]

(iii) A bank may include financial collateral currently posted by the counterparty as collateral (but may not include other forms of collateral) when calculating EE.
(iv) If a bank hedges some or all of the counterparty credit risk associated with a netting set using an eligible credit derivative, the bank may take the reduction in exposure to the counterparty into account when estimating EE. If the bank recognizes this reduction in exposure to the counterparty in its estimate of EE, it must also use its internal model to estimate a separate EAD for the bank’s exposure to the protection provider of the credit derivative.

(3) To obtain FDIC approval to calculate the distributions of exposures upon which the EAD calculation is based, the bank must demonstrate to the satisfaction of the FDIC that it has been using for at least one year an internal model that broadly meets the following minimum standards, with which the bank must maintain compliance:

(i) The model must have the systems capability to estimate the expected exposure to the counterparty on a daily basis (but is not expected to estimate or report expected exposure on a daily basis).

(ii) The model must estimate expected exposure at enough future dates to reflect accurately all the future cash flows of contracts in the netting set.

(iii) The model must account for the possible non-normality of the exposure distribution, where appropriate.

(iv) The bank must measure, monitor, and control current counterparty exposure and the exposure to the counterparty over the whole life of all contracts in the netting set.

(v) The bank must be able to measure and manage current exposures gross and net of collateral held, where appropriate. The bank must estimate expected exposures for OTC derivative contracts both with and without the effect of collateral agreements.

(vi) The bank must have procedures to identify, monitor, and control specific wrong-way risk throughout the life of an exposure. Wrong-way risk in this context is the risk that future exposure to a counterparty will be high when the counterparty’s probability of default is also high.

(vii) The model must use current market data to compute current exposures. When estimating model parameters based on historical data, at least three years of historical data that cover a wide range of economic conditions must be used and must be updated quarterly or more frequently if market conditions warrant. The bank should consider using model parameters based on forward-looking measures, where appropriate.

(viii) A bank must subject its internal model to an initial validation and annual model review process. The model review should consider whether the inputs and risk factors, as well as the model outputs, are appropriate.

(4) Maturity. (i) If the remaining maturity of the exposure or the longest-dated contract in the netting set is greater than one year, the bank must set M for the exposure or netting set equal to the lower of five years or M(EPE), where:

\[ (A) \quad M(EPE) = 1 + \frac{\sum_{t_k > 1 \text{ year}} \text{EE}_k \times \Delta t_k \times df_k}{\sum_{t_k \leq 1 \text{ year}} \text{effectiveEE}_k \times \Delta t_k \times df_k} \]

(B) df_k is the risk-free discount factor for future time period t_k; and

(C) \( \Delta t_k = t_k - t_{k-1} \).

(ii) If the remaining maturity of the exposure or the longest-dated contract in the netting set is one year or less, the bank must set M for the exposure or netting set equal to one year, except as provided in paragraph (d)(7) of section 31 of this appendix.

(5) Collateral agreements. A bank may capture the effect on EAD of a collateral agreement that requires receipt of collateral when exposure to the counterparty increases but may not capture the effect on EAD of a collateral agreement that requires receipt of collateral when the counterparty credit quality deteriorates. For this purpose, a collateral agreement means a legal contract that specifies the time when, and circumstances under which, the counterparty is required to pledge collateral to the bank for a single financial contract or for all financial contracts in a netting set and confers upon the bank a perfected, first priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty.

\[ \text{M(EPE)} \]

\[ \text{M(EPE)} \]

\[ \text{M(EPE)} \]
counterparty under the agreement. This security interest must provide the bank with a right to close out the financial positions and liquidate the collateral upon an event of default of the counterparty under the collateral agreement. A contract would not satisfy this requirement if the bank’s exercise of rights under the agreement may be stayed or delayed under applicable law in the relevant jurisdictions. Two methods are available to capture the effect of a collateral agreement:

(i) With prior written approval from the FDIC, a bank may include the effect of a collateral agreement within its internal model used to calculate EAD. The bank may set EAD equal to the expected exposure at the end of the margin period of risk. The margin period of risk means, with respect to a netting set subject to a collateral agreement, the time period from the most recent exchange of collateral with a counterparty until the next required exchange of collateral plus the period of time required to sell and realize the proceeds of the least liquid collateral that can be delivered under the terms of the collateral agreement and, where applicable, the period of time required to re-hedge the resulting market risk, upon the default of the counterparty. The minimum margin period of risk is five business days for repo-style transactions and ten business days for other transactions when liquid financial collateral is posted under a daily margin maintenance requirement. This period should be extended to cover any additional time between margin calls; any potential closeout difficulties; any delays in selling collateral, particularly if the collateral is illiquid; and any impediments to prompt re-hedging of any market risk.

(ii) A bank that can model EPE without collateral agreements but cannot achieve the higher level of modeling sophistication to model EPE with collateral agreements can set effective EPE for a collateralized netting set equal to the lesser of:

(A) The threshold, defined as the exposure amount at which the counterparty is required to post collateral under the collateral agreement, plus an add-on that reflects the potential increase in exposure of the netting set over the margin period of risk. The add-on is computed as in exposure of the netting set over the margin period of risk. The add-on is computed as:

add-on = \left( \frac{\text{Current } \text{EAD}}{\text{Margin Period of Risk}} \right)

(B) Effective EPE without a collateral agreement.

(B) Own estimate of alpha. With prior written approval of the FDIC, a bank may calculate alpha as the ratio of economic capital from a full simulation of counterparty exposure across counterparties that incorporates a joint simulation of market and credit risk factors (numerator) to a measure of counterparty credit risk exposure based on EPE (denominator), subject to a floor of 1.2. For purposes of this calculation, economic capital is the unexpected losses for material portfolios of OTC derivative contracts, which must be related to the credit risk factor used in the simulation to reflect potential increases in volatility or correlation in an economic downturn, where appropriate; and

(C) The granularity of exposures (that is, the effect of a concentration in the proportion of each counterparty’s exposure that is driven by a particular risk factor).

(ii) The bank must assess the potential model uncertainty in its estimates of alpha.

(iii) The bank must calculate the numerator and denominator of alpha in a consistent fashion with respect to modeling methodology, parameter specifications, and portfolio composition.

(iv) The bank must review and adjust as appropriate its estimates of the numerator and denominator of alpha on at least a quarterly basis and more frequently when the composition of the portfolio varies over time.

(7) Other measures of counterparty exposure. With prior written approval of the FDIC, a bank may set EAD equal to a measure of counterparty credit risk exposure, such as peak EAD, that is more conservative than an alpha of 1.4 (or higher under the terms of paragraph (d)(2)(ii)(B) of this section) times EPE for every counterparty whose EAD at a 99.9 percent confidence level over a one-year horizon. To receive approval, the bank must meet the following minimum standards to the satisfaction of the FDIC:

(i) The bank’s own estimate of alpha must capture in the numerator the effects of:

(A) The material sources of stochastic dependency of distributions of market values of transactions or portfolios of transactions across counterparties;

(B) Volatilities and correlations of market risk factors used in the joint simulation, which must be related to the credit risk factor used in the simulation to reflect potential increases in volatility or correlation in an economic downturn, where appropriate; and

(C) The granularity of exposures (that is, the effect of a concentration in the proportion of each counterparty’s exposure that is driven by a particular risk factor).

(ii) The bank must calculate the potential model uncertainty in its estimates of alpha.

(iii) The bank must calculate the numerator and denominator of alpha in a consistent fashion with respect to modeling methodology, parameter specifications, and portfolio composition.

(iv) The bank must review and adjust as appropriate its estimates of the numerator and denominator of alpha on at least a quarterly basis and more frequently when the composition of the portfolio varies over time.
Section 33. Guarantees and Credit Derivatives: PD Substitution and LGD Adjustment Approaches

(a) Scope. (1) This section applies to wholesale exposures for which:
   (i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or
   (ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the bank and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(2) Wholesale exposures on which there is a triggering of credit risk (reflecting at least two different levels of seniority) are securitization exposures subject to the securitization framework in part V.

(3) A bank may elect to recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative covering an exposure described in paragraph (a)(1) of this section by using the PD substitution approach or the LGD adjustment approach in paragraph (c) of this section or, if the transaction qualifies, using the double default treatment in section 34 of this appendix. A bank’s PD and LGD for the hedged exposure may not be lower than the PD and LGD floors described in paragraphs (d)(2) and (d)(3) of section 31 of this appendix.

(4) If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in paragraph (a)(1) of this section, a bank may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-based capital requirement for each separate exposure as described in paragraph (a)(3) of this section.

(5) If a single eligible guarantee or eligible credit derivative covers multiple hedged wholesale exposures described in paragraph (a)(1) of this section, a bank must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-based capital requirement for each exposure as described in paragraph (a)(3) of this section.

(b) Rules of recognition. (1) A bank may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) A bank may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative’s reference exposure used for determining the derivative’s cash settlement value, deliverable obligation, or occurrence of a credit event if:
   (i) The reference exposure ranks pari passu (that is, equally) with or is junior to the hedged exposure; and
   (ii) The reference exposure and the hedged exposure are exposures to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to assure payments under the credit derivative are triggered when the obligor fails to pay under the terms of the hedged exposure.

(c) Risk parameters for hedged exposures—(1) PD substitution approach—(i) Full coverage. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, a bank may recognize the guarantee or credit derivative in determining the bank’s risk-based capital requirement for the hedged exposure by substituting the PD associated with the rating grade of the protection provider for the PD associated with the rating grade of the obligor in the risk-based capital formula applicable to the guarantee or credit derivative in Table 2 and using the appropriate LGD as described in paragraph (c)(1)(iii) of this section. If the bank determines that full substitution of the protection provider’s PD leads to an inappropriate degree of risk mitigation, the bank may substitute a higher PD than that of the protection provider.
   (ii) Partial coverage. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the bank must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.
      (A) The bank must calculate its risk-based capital requirement for the protected exposure under section 31 of this appendix, where PD is the protection provider’s PD, LGD is determined under paragraph (c)(1)(iii) of this section, and EAD is P. If the bank determines that full substitution leads to an inappropriate degree of risk mitigation, the bank may use a higher PD than that of the protection provider.
      (B) The bank must calculate its risk-based capital requirement for the unprotected exposure under section 31 of this appendix, where PD is the obligor’s PD, LGD is the hedged exposure’s LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.
      (C) The treatment in this paragraph (c)(1)(i) is applicable when the credit risk of a wholesale exposure is covered on a partial pro rata basis or when an adjustment is made to the effective notional amount of the
guarantee or credit derivative under paragraph (d), (e), or (f) of this section.

(iii) LGD of hedged exposures. The LGD of a hedged exposure under the PD substitution approach is equal to:

(A) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the bank with the option to receive immediate payout upon triggering the protection;

(B) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the bank with the option to receive immediate payout upon triggering the protection.

(ii) LGD adjustment approach—(i) Full coverage. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, the bank's risk-based capital requirement for the hedged exposure is the greater of:

(A) The risk-based capital requirement for the exposure as calculated under section 31 of this appendix, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative; or

(B) The risk-based capital requirement for a direct exposure to the protection provider as calculated under section 31 of this appendix, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD equal to the EAD of the hedged exposure.

(ii) Partial coverage. If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the bank must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The bank's risk-based capital requirement for the protected exposure would be the greater of:

(1) The risk-based capital requirement for the protected exposure as calculated under section 31 of this appendix, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative and EAD set equal to P; or

(2) The risk-based capital requirement for a direct exposure to the guarantor as calculated under section 31 of this appendix, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD set equal to P.

(B) The bank must calculate its risk-based capital requirement for the unprotected exposure under section 31 of this appendix, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(3) M of hedged exposures. The M of the hedged exposure is the same as the M of the exposure if it were unhedged.

(d) Maturity mismatch. (1) A bank that recognizes an eligible guarantee or eligible credit derivative in determining its risk-based capital requirement for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligor is scheduled to fulfill its obligation on the exposure. If a credit risk mitigant has embedded options that may reduce its term, the bank (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the bank (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the bank to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant. For example, where there is a step-up in cost in conjunction with a call feature or where the effective cost of protection increases over time even if credit quality remains the same or improves, the residual maturity of the credit risk mitigant will be the remaining time to the first call.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the bank must apply the following adjustment to the effective notional amount of the credit risk mitigant: $P_{m} = E \times \left( t - 0.25 \right) / \left( T - 0.25 \right)$, where:

(i) $P_{m}$ = effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) $E$ = effective notional amount of the credit risk mitigant;

(iii) $t$ = the lesser of $T$ or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) $T$ = the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) Credit derivatives without restructuring as a credit event. If a bank recognizes an eligible credit derivative that does not include as a...
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credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the bank must apply the following adjustment to the effective notional amount of the credit derivative: \( Pr = Pr \times 0.60 \), where:

1. \( Pr \) = effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and
2. \( Pm \) = effective notional amount of the credit risk mitigant adjusted for maturity mismatch (if applicable).
3. (f) Currency mismatch. (i) If a bank recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the bank must apply the following formula to the effective notional amount of the guarantee or credit derivative:

\[
Pc = Pr \times (1 - H_{FX})
\]

where:

1. \( Pc \) = effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);
2. \( Pr \) = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and
3. \( H_{FX} \) = haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) A bank must set \( H_{FX} \) equal to 8 percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a ten-business-day holding period and daily marking-to-market and remargining. A bank qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for:

1. The own-estimates haircuts in paragraph (f)(2)(iii) of section 32 of this appendix; or
2. The simple VaR methodology in paragraph (b)(3) of section 32 of this appendix; or
3. The internal models methodology in paragraph (d) of section 32 of this appendix.

(3) A bank must adjust \( H_{FX} \) calculated in paragraph (f)(2) of this section upward if the bank revalues the guarantee or credit derivative less frequently than once every ten business days using the square root of time formula provided in paragraph (b)(2)(iii)(A)(2) of section 32 of this appendix.

Section 34. Guarantees and Credit Derivatives: Double Default Treatment

(a) Eligibility and operational criteria for double default treatment. A bank may recognize the credit risk mitigation benefits of a guarantee or credit derivative covering an exposure described in paragraph (a)(1) of this section by applying the double default treatment in this section if all the following criteria are satisfied:

1. The hedged exposure is fully covered or covered on a pro rata basis by:
   i. An eligible guarantee issued by an eligible double default guarantor; or
   ii. An eligible credit derivative that meets the requirements of paragraph (b)(2) of section 33 of this appendix and is issued by an eligible double default guarantor.

2. The guarantee or credit derivative is:
   i. An uncollateralized guarantee or uncollateralized credit derivative (for example, a credit default swap) that provides protection with respect to a single reference obligor; or
   ii. An nth-to-default credit derivative (subject to the requirements of paragraph (m) of section 42 of this appendix).

3. The hedged exposure is a wholesale exposure (other than a sovereign exposure).

4. The obligor of the hedged exposure is not:
   i. An eligible double default guarantor or an affiliate of an eligible double default guarantor; or
   ii. An affiliate of the guarantor.

5. The bank does not recognize any credit risk mitigation benefits of the guarantee or credit derivative for the hedged exposure other than through application of the double default treatment as provided in this section.

6. The bank has implemented a process (which has received the prior, written approval of the FDIC) to detect excessive correlation between the creditworthiness of the obligor of the hedged exposure and the protection provider. If excessive correlation is present, the bank may not use the double default treatment for the hedged exposure.

(b) Full coverage. If the transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is at least equal to the EAD of the hedged exposure, the bank may determine its risk-weighted asset amount for the hedged exposure under paragraph (e) of this section.

(c) Partial coverage. If the transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the bank must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize double default treatment on the protected portion of the exposure.

1. For the protected exposure, the bank must set EAD equal to P and calculate its risk-weighted asset amount as provided in paragraph (e) of this section.
2. For the unprotected exposure, the bank must set EAD equal to the EAD of the original exposure minus P and then calculate its risk-weighted asset amount as provided in section 31 of this appendix.
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(d) Mismatches. For any hedged exposure to which a bank applies double default treatment, the bank must make applicable adjustments to the protection amount as required in paragraphs (d), (e), and (f) of section 33 of this appendix.

(e) The double default dollar risk-based capital requirement. The dollar risk-based capital requirement for a hedged exposure to which a bank has applied double default treatment is calculated according to the following formula: $K_{DD} = K_{DD}^o \times (0.15 + 160 \times PD_0)$.

Where:

(1) $K_{DD}^o = LGD^o \times \left[ N \left( \frac{N^{-1}(PD_0) + N^{-1}(0.999) \sqrt{1 - \rho_{oo}}}{1 - \rho_{oo}} \right) - PD_0 \right] \times \frac{1 + (M - 2.5) \times b}{1 - 1.5 \times b}$

Where:

(2) $PD_0 = PD$ of the protection provider.

(3) $PD_o = PD$ of the obligor of the hedged exposure.

(4) $LGD_o = (i)$ The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the bank with the option to receive immediate payout on triggering the protection; or

(ii) The LGD of the guarantee or credit derivative if the guarantee or credit derivative does not provide the bank with the option to receive immediate payout on triggering the protection.

(5) $\rho_{OO} = OS^2$ (asset value correlation of the obligor) is calculated according to the appropriate formula for (R) provided in Table 2 in section 31 of this appendix, with PD equal to $PD_o$.

(6) $b = (maturity adjustment coefficient)$ is calculated according to the formula for $b$ provided in Table 2 in section 31 of this appendix, with PD equal to the lesser of $PD_o$ and $PD_0$.

(7) $M (maturity)$ is the effective maturity of the guarantee or credit derivative, which may not be less than one year or greater than five years.

Section 35. Risk-Based Capital Requirement for Unsettled Transactions

(a) Definitions. For purposes of this section:

(1) Delivery-versus-payment (DvP) transaction means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) Payment-versus-payment (PvP) transaction means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) Normal settlement period. A transaction has a normal settlement period if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) Positive current exposure. The positive current exposure of a bank for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the bank to the counterparty.

(b) Scope. This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Transactions accepted by a qualifying central counterparty that are subject to daily marking-to-market and daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions (which are addressed in sections 31 and 32 of this appendix);

(3) One-way cash payments on OTC derivative contracts (which are addressed in sections 31 and 32 of this appendix); or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts and addressed in sections 31 and 32 of this appendix).

(c) System-wide failures. In the case of a system-wide failure of a settlement or clearing system, the FDIC may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions. A bank must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the bank’s counterparty has not made delivery or payment within five business days after the settlement date. The bank must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of
transaction for the bank by the appropriate risk weight in Table 5.

<table>
<thead>
<tr>
<th>Number of business days after contractual settlement date</th>
<th>Risk weight to be applied to positive current exposure (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 5 to 15</td>
<td>100</td>
</tr>
<tr>
<td>From 16 to 30</td>
<td>625</td>
</tr>
<tr>
<td>From 31 to 45</td>
<td>937.5</td>
</tr>
<tr>
<td>46 or more</td>
<td>1,250</td>
</tr>
</tbody>
</table>

(e) Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions. (1) A bank must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the bank has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The bank must continue to hold risk-based capital against the transaction until the bank has received its corresponding deliverables.

(2) From the business day after the bank has made its delivery until five business days after the counterparty delivery is due, the bank must calculate its risk-based capital requirement for the transaction by treating the current market value of the deliverables owed to the bank as a wholesale exposure.

(i) A bank may assign an obligor rating to a counterparty for which it is not otherwise required under this appendix to assign an obligor rating on the basis of the applicable external rating of any outstanding unsecured long-term debt security without credit enhancement issued by the counterparty.

(ii) A bank may use a 45 percent LGD for the transaction rather than estimating LGD for the transaction provided the bank uses the 45 percent LGD for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(iii) A bank may use a 100 percent risk weight for the transaction provided the bank uses this risk weight for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(3) If the bank has not received its deliverables by the fifth business day after the counterparty delivery was due, the bank must deduct the current market value of the deliverables owed to the bank 50 percent from tier 1 capital and 50 percent from tier 2 capital.

(f) Total risk-weighted assets for unsettled transactions. Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.
by the bank after the inception of the securitization;

(3) The bank obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

Section 42. Risk-Based Capital Requirement for Securitization Exposures

(a) Hierarchy of approaches. Except as provided elsewhere in this section:

(1) A bank must deduct from tier 1 capital any after-tax gain-on-sale resulting from a securitization and must deduct from total capital any after-tax gain-on-sale resulting from a securitization in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute gain-on-sale;

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and qualifies for the Ratings-Based Approach in section 43 of this appendix, a bank must apply the Ratings-Based Approach to the exposure.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the Ratings-Based Approach, the bank may either apply the Internal Assessment Approach in section 44 of this appendix to the exposure (if the bank and the exposure qualify for the Supervisory Formula Approach) or the Supervisory Formula Approach in section 45 of this appendix to the exposure (if the bank directly held the underlying exposures as if the bank held directly the underlying exposures).

(4) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the Ratings-Based Approach, the Internal Assessment Approach, or the Supervisory Formula Approach, the bank must deduct the exposure from total capital in accordance with paragraph (c) of this section.

(b) Amount of a securitization exposure.

(1) The bank's total risk-based capital requirement for a securitization exposure is the sum of:

(i) The bank's carrying value minus any unrealized gains and plus any unrealized losses on the exposure, if the exposure is a security classified as available-for-sale; or

(ii) The bank's carrying value, if the exposure is not a security classified as available-for-sale;

(2) The total ECL of the underlying exposures.

(c) Deductions. (1) If a bank must deduct a securitization exposure from total capital, the bank must take the deduction 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the bank's tier 2 capital, the bank must deduct the excess from tier 1 capital.

(2) A bank may calculate any deduction from tier 1 capital and tier 2 capital for a securitization exposure net of any deferred tax liabilities associated with the securitization exposure.

(d) Maximum risk-based capital requirement. Regardless of any other provisions of this part, unless one or more underlying exposures does not meet the definition of a wholesale, retail, securitization, or equity exposure, the total risk-based capital requirement for all securitization exposures held by a single bank associated with a single securitization (including any risk-based capital requirements that relate to an early amortization provision of the securitization but excluding any risk-based capital requirements that relate to the bank's gain-on-sale or CEIOs associated with the securitization) may not exceed the sum of:

(1) The bank's total risk-based capital requirement for the underlying exposures as if the bank directly held the underlying exposures; and

(2) The total ECL of the underlying exposures.

(e) Amount of a securitization exposure. (1) The amount of an on-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is:

(i) The bank's carrying value minus any unrealized gains and plus any unrealized losses on the exposure, if the exposure is a security classified as available-for-sale; or

(ii) The bank's carrying value, if the exposure is not a security classified as available-for-sale.

(2) The amount of an off-balance sheet securitization exposure that is not an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure equal to the amount of the exposure as determined in paragraph (e) of this section rather than apply the hierarchy of approaches described in paragraphs (a)(1) through (4) of this section.

(b) Total risk-weighted assets for securitization exposures. A bank's total risk-weighted asset amount for securitization exposures is equal to the sum of its risk-weighted assets calculated using the Ratings-Based Approach in section 43 of this appendix, the Internal Assessment Approach in section 44 of this appendix, and the Supervisory Formula Approach in section 45 of this appendix, and its risk-weighted assets amount for early amortization provisions calculated in section 47 of this appendix.
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Securitizations of non-IRB exposures. If a bank has a securitization exposure where any underlying exposure is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure, the bank must:

(i) That it has provided implicit support to the securitization; and

(ii) The regulatory capital impact to the bank of providing such implicit support.

(iii) Eligible servicer cash advance facilities. Regardless of any other provisions of this part, the risk weight for a non-credit-enhancing interest-only mortgage-backed security that is issued by a bank with a securitization exposure as calculated in section 32 of this appendix.

(j) Interest-only mortgage-backed securities. Regardless of any other provisions of this part, the risk weight for a non-credit-enhancing interest-only mortgage-backed security that is issued by a bank with a securitization exposure as calculated in section 32 of this appendix.

(k) Small-business loans and leases on personal property transferred with recourse. (1) Regardless of any other provisions of this appendix, a bank that has transferred small-business loans and leases on personal property (small-business obligations) with recourse must include in risk-weighted assets only the contractual amount of retained recourse if all the following conditions are met:

(i) The transaction is a sale under GAAP.

(ii) The bank establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the bank’s reasonably estimated liability under the recourse arrangement.

(2) If the bank is an originating bank, deduct from total capital in accordance with paragraph (c) of this section the portion of the exposure as calculated in section 32 of this appendix.

(3) If the securitization exposure does not satisfy deduction under paragraph (g)(1), apply the RBA in section 43 of this appendix to the securitization exposure if the exposure qualifies for the RBA.

(4) If the securitization exposure does not satisfy deduction under paragraph (g)(1) and does not qualify for the RBA, the bank must:

(a) The bank establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the bank’s reasonably estimated liability under the recourse arrangement.

(b) That the transaction is a sale under GAAP.

(c) That it has provided implicit support to the securitization; and

(d) The regulatory capital impact to the bank of providing such implicit support.

(e) Eligible servicer cash advance facilities. Regardless of any other provisions of this part, the bank is not required to hold risk-based capital against the undrawn portion of an eligible servicer cash advance facility.

(f) Overlapping exposures. If a bank has multiple securitization exposures that provide duplicative coverage of the underlying exposures of a securitization (such as when a bank provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the bank is not required to hold duplicative risk-based capital against the overlapping position. Instead, the bank may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(g) Securitizations of non-IRB exposures. If a bank has a securitization exposure where any underlying exposure is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure, the bank must:

(1) If the bank is an originating bank, deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization and deduct from total capital in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute gain-on-sale;

(2) If the securitization exposure does not require deduction under paragraph (g)(1), apply the RBA in section 43 of this appendix to the securitization exposure if the exposure qualifies for the RBA;

(3) If the securitization exposure does not require deduction under paragraph (g)(1) and does not qualify for the RBA, apply the IAA in section 44 of this appendix to the exposure (if the bank, the exposure, and the relevant ABCP program qualify for the IAA); and

(4) If the securitization exposure does not require deduction under paragraph (g)(1) and does not qualify for the RBA or the IAA, deduct the exposure from total capital in accordance with paragraph (c) of this section.

(h) Implicit support. If a bank provides support to a securitization in excess of the bank’s contractual obligation to provide credit support to the securitization (implicit support):

(1) If the bank is an originating bank, deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) If the bank provides support to a securitization in excess of the bank’s contractual obligation to provide credit support to the securitization (implicit support):

(1) The bank must hold regulatory capital against all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization;

(2) The bank must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(3) The bank must hold regulatory capital against all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization;

(i) That it has provided implicit support to the securitization; and

(ii) The regulatory capital impact to the bank of providing such implicit support.

(1) Re-
from risk-weighted assets if the bank is the sponsor of the ABCP program. If a bank excludes such consolidated ABCP program assets from risk-weighted assets, the bank must hold risk-based capital against any securitization exposures of the bank to the ABCP program in accordance with this part.

(2) If a bank either is not permitted, or elects not, to exclude consolidated ABCP program assets from its risk-weighted assets, the bank must hold risk-based capital against the consolidated ABCP program assets in accordance with this appendix but is not required to hold risk-based capital against any securitization exposures of the bank to the ABCP program.

(m) n-to-default credit derivatives—(i) First-to-default credit derivatives—(A) Protection purchaser. A bank that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-based capital requirement for the underlying exposures as if the bank synthetically securitized the underlying exposure with the lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) Protection provider. A bank that provides credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-based capital requirement for the underlying exposures as if the protective rating represents a short-term credit rating.

(A) N (as calculated under paragraph (e)(6) of section 45 of this appendix) is six or more (for purposes of this section only, if the notional number of underlying exposures is 25 or more or if all of the underlying exposures are retail exposures, a bank may assume that N is six or more unless the bank knows

(b) Ratings-based approach. (1) A bank must determine the risk-weighted asset amount for a securitization exposure by multiplying the amount of the exposure (as defined in paragraph (e) of section 42 of this appendix) by the appropriate risk weight provided in Table 6 and Table 7.

(ii) A bank must apply the risk weights in Table 6 when the securitization exposure's applicable external or applicable inferred rating represents a long-term credit rating, and must apply the risk weights in Table 7 when the securitization exposure's applicable external or applicable inferred rating represents a short-term credit rating.

(A) N (as calculated under paragraph (e)(6) of section 45 of this appendix) is six or more (for purposes of this section only, if the notional number of underlying exposures is 25 or more or if all of the underlying exposures are retail exposures, a bank may assume that N is six or more unless the bank knows
or has reason to know that \( N \) is less than six; and

(B) The securitization exposure is a senior securitization exposure.

(ii) A bank must apply the risk weights in column 3 of Table 6 or Table 7 to the securitization exposure if \( N \) is less than six, regardless of the seniority of the securitization exposure.

(iii) Otherwise, a bank must apply the risk weights in column 2 of Table 6 or Table 7.

### Table 6.—Long-Term Credit Rating Risk Weights Under RBA and IAA

<table>
<thead>
<tr>
<th>Applicable external or inferred rating (Illustrative rating example)</th>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk weights for senior securitization exposures backed by granular pools</td>
<td>Risk weights for non-senior securitization exposures backed by granular pools</td>
<td>Risk weights for securitization exposures backed by non-granular pools</td>
<td></td>
</tr>
</tbody>
</table>

| Highest investment grade (for example, AAA) | 7% | 12% | 20% |
| Second highest investment grade (for example, AA) | 8% | 15% | 25% |
| Third-highest investment grade—positive designation (for example, A+) | 10% | 18% | 35% |
| Third-highest investment grade (for example, A) | 12% | 20% | |
| Third-highest investment grade—negative designation (for example, A–) | 20% | | 35% |
| Lowest investment grade—positive designation (for example, BBB+) | 35% | | 50% |
| Lowest investment grade (for example, BBB) | 60% | | 75% |
| Lowest investment grade—negative designation (for example, BBB–) | | | 100% |
| One category below investment grade—positive designation (for example, BB+) | | 25% | |
| One category below investment grade (for example, BB) | | 425% | |
| One category below investment grade—negative designation (for example, BB–) | | 650% | |
| More than one category below investment grade | | | Deduction from tier 1 and tier 2 capital. |

### Table 7.—Short-Term Credit Rating Risk Weights Under RBA and IAA

<table>
<thead>
<tr>
<th>Applicable external or inferred rating (Illustrative rating example)</th>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk weights for senior securitization exposures backed by granular pools</td>
<td>Risk weights for non-senior securitization exposures backed by granular pools</td>
<td>Risk weights for securitization exposures backed by non-granular pools</td>
<td></td>
</tr>
</tbody>
</table>

| Highest investment grade (for example, A1) | 7% | 12% | 20% |
| Second highest investment grade (for example, A2) | 12% | 20% | 35% |
| Third highest investment grade (for example, A3) | 60% | 75% | 75% |
| All other ratings | | | Deduction from tier 1 and tier 2 capital. |

Section 44. Internal Assessment Approach (IAA)

(a) Eligibility requirements. A bank may apply the IAA to calculate the risk-weighted asset amount for a securitization exposure that the bank has to an ABCP program (such as a liquidity facility or credit enhancement) if the bank, the ABCP program, and the exposure qualify for use of the IAA.

(b) [Bank] qualification criteria. A bank qualifies for use of the IAA if the bank has received the prior written approval of the FDIC. To receive such approval, the bank must demonstrate to the FDIC’s satisfaction that the bank’s internal assessment process meets the following criteria:

(i) The bank’s internal credit assessments of securitization exposures must be based on publicly available rating criteria used by an NRSRO.

(ii) The bank’s internal credit assessments of securitization exposures used for risk-based capital purposes must be consistent with those used in the bank’s internal risk management process, management information reporting systems, and capital adequacy assessment process.

(iii) The bank’s internal credit assessment process must have sufficient granularity to identify gradations of risk. Each of the bank’s internal credit assessment categories must correspond to an external rating of an NRSRO.

(iv) The bank’s internal credit assessment process, particularly the stress test factors for determining credit enhancement requirements, must be at least as conservative as
the most conservative of the publicly available rating criteria of the NRSROs that have provided external ratings to the commercial paper issued by the ABCP program.

Where the commercial paper issued by an ABCP program has an external rating from two or more NRSROs and the different NRSRO's benchmark stress factors require different levels of credit enhancement to achieve the same external rating equivalent, the bank must apply the NRSRO stress factor that requires the highest level of credit enhancement.

(B) If any NRSRO that provides an external rating to the ABCP program's commercial paper changes its methodology (including stress factors), the bank must evaluate whether to revise its internal assessment process.

(v) The bank must have an effective system of controls and oversight that ensures compliance with these operational requirements and maintains the integrity and accuracy of the internal credit assessments. The bank must have an internal audit function independent from the ABCP program business line and internal credit assessment process that assesses at least annually whether the controls over the internal credit assessment process function as intended.

(vi) The bank must review and update each internal credit assessment whenever new material information is available, but no less frequently than annually.

(vii) The bank must validate its internal credit assessment process on an ongoing basis and at least annually.

(2) ABCP-program qualification criteria. An ABCP program qualifies for use of the IAA if all commercial paper issued by the ABCP program has an external rating.

(3) Exposure qualification criteria. A securitization exposure qualifies for use of the IAA if the exposure meets the following criteria:

(i) The bank initially rated the exposure at least the equivalent of investment grade.

(ii) The ABCP program has robust credit and investment guidelines (that is, underwriting standards) for the exposures underlying the securitization exposure.

(iii) The ABCP program performs a detailed credit analysis of the sellers of the exposures underlying the securitization exposure.

(iv) The ABCP program's underwriting policy for the exposures underlying the securitization exposure establishes minimum asset eligibility criteria that include the prohibition of the purchase of assets that are significantly past due or of assets that are defaulted (that is, assets that have been charged off or written down by the seller prior to being placed into the ABCP program or assets that would be charged off or written down under the program's governing contracts), as well as limitations on concentration to individual obligors or geographic areas and the tenor of the assets to be purchased.

(v) The aggregate estimate of loss on the exposures underlying the securitization exposure considers all sources of potential risk, such as credit and dilution risk.

(vi) Where relevant, the ABCP program incorporates structural features into each purchase of exposures underlying the securitization exposure to mitigate potential credit deterioration of the underlying exposures. Such features may include wind-down triggers specific to a pool of underlying exposures.

(b) Mechanics. A bank that elects to use the IAA to calculate the risk-based capital requirement for any securitization exposure must use the IAA to calculate the risk-based capital requirements for all securitization exposures that qualify for the IAA approach. Under the IAA, a bank must map its internal assessment of such a securitization exposure to an equivalent external rating from an NRSRO. Under the IAA, a bank must determine the risk-weighted asset amount for such a securitization exposure by multiplying the amount of the exposure (as defined in paragraph (e) of section 42 of this appendix) by the appropriate risk weight in Table 6 and Table 7 in paragraph (b) of section 43 of this appendix.

Section 45. Supervisory Formula Approach (SFA)

(a) Eligibility requirements. A bank may use the SFA to determine its risk-based capital requirement for a securitization exposure only if the bank can calculate on an ongoing basis each of the SFA parameters in paragraph (e) of this section.

(b) Mechanics. Under the SFA, a securitization exposure incurs a deduction from total capital (as described in paragraph (c) of section 42 of this appendix) and/or an SFA risk-based capital requirement, as determined in paragraph (c) of this section. The risk-weighted asset amount for the securitization exposure equals the SFA risk-based capital requirement for the exposure multiplied by 12.5.

(c) The SFA risk-based capital requirement.

(1) If K_{ira} is greater than or equal to L + T, the entire exposure must be deducted from total capital.

(2) If K_{ira} is less than or equal to L, the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of

(i) 0.005 * T; or

(ii) [S(L + T) - S(L)]

(3) If K_{ira} is greater than L and less than L + T, the bank must deduct from total capital an amount equal to UE*TP*(K_{ira} – L), and the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) 0.005 * T; or

(ii) [S(L + T) - S(L)]
(i) \(0.0056 \times (T - (K_{\text{IRB}} - L))\); or
(ii) \(S[L + T] - S[K_{\text{IRB}}]\).

(d) The supervisory formula:

\[
S[Y] = \begin{cases} 
Y & \text{when } Y \leq K_{\text{IRB}} \\
K_{\text{IRB}} + K[Y] - K[K_{\text{IRB}}] + d \cdot \frac{K_{\text{IRB}}}{20} \left(1 - e^{-\frac{2b(K_{\text{IRB}} - Y)}{K_{\text{IRB}}}}\right) & \text{when } Y > K_{\text{IRB}} 
\end{cases}
\]

(2) \(K[Y] = (1-h) \cdot [(1 - \beta[Y;a,b]) \cdot Y + \beta[Y;a+1,b] \cdot c]\)

(3) \(h = \left(1 - \frac{K_{\text{IRB}}}{EWALGD}\right)^N\)

(4) \(a = g \cdot c\)

(5) \(b = g \cdot (1-c)\)

(6) \(c = \frac{K_{\text{IRB}}}{1-h}\)

(7) \(g = \frac{(1-c) \cdot c}{f} - 1\)

(8) \(f = \frac{v + K_{\text{IRB}}^2}{1-h} - c^2 + \frac{(1-K_{\text{IRB}}) \cdot K_{\text{IRB}} - v}{(1-h) \cdot 1000}\)

(9) \(v = K_{\text{IRB}} \cdot \frac{(EWALGD - K_{\text{IRB}}) + 0.25 \cdot (1 - EWALGD)}{N}\)

(10) \(d = 1 - (1-h) \cdot (1 - \beta[K_{\text{IRB}};a,b])\).

(11) In these expressions, \(\beta[Y;a,b]\) refers to the cumulative beta distribution with parameters \(a\) and \(b\) evaluated at \(Y\). In the case where \(N = 1\) and \(EWALGD = 100\) percent, \(S[Y]\) in formula (1) must be calculated with \(K[Y]\) set equal to the product of \(K_{\text{IRB}}\) and \(Y\), and \(d\) set equal to \(1 - K_{\text{IRB}}\).

(e) SFA parameters—(1) Amount of the underlying exposures (UE): UE is the EAD of any underlying exposures that are wholesale and retail exposures (including the amount of
any funded spread accounts, cash collateral accounts, and other similar funded credit enhancements) plus the amount of any underlying exposures that are securitization exposures (as defined in paragraph (e) of section 42 of this appendix) plus the adjusted carrying value of any underlying exposures that are equity exposures (as defined in paragraph (b) of section 53 of this appendix).

(2) Tranche percentage (TP). TP is the ratio of the amount of the bank's securitization exposure to the amount of the tranche that contains the securitization exposure.

(3) Capital requirement on underlying exposures (K
\text{IRB}) . (i) K
\text{IRB} is the ratio of:
\begin{itemize}
  \item[(A)] The sum of the risk-based capital requirements for the underlying exposures plus the expected credit losses of the underlying exposures (as determined under this appendix as if the underlying exposures were directly held by the bank); to
  \item[(B)] UE.
\end{itemize}
(ii) The calculation of K
\text{IRB} must reflect the effects of any credit risk mitigant applied to the underlying exposures (either to an individual underlying exposure, to a group of underlying exposures, or to the entire pool of underlying exposures).
(iii) All assets related to the securitization are treated as underlying exposures, including assets in a reserve account (such as a cash collateral account).

(4) Credit enhancement level (L). (i) L is the ratio of:
\begin{itemize}
  \item[(A)] The amount of all securitization exposures subordinated to the tranche that contains the bank's securitization exposure; to
  \item[(B)] UE.
\end{itemize}
(ii) A bank must determine L before considering the effects of any tranche-specific credit enhancements.
(iii) Any gain-on-sale or CEIO associated with the securitization may not be included in L.
(iv) Any reserve account funded by accumulated cash flows from the underlying exposures that is subordinated to the tranche that contains the bank's securitization exposure are included in the numerator and denominator of L to the extent cash has accumulated in the account. Unfunded reserve accounts (that is, reserve accounts that are to be funded from future cash flows from the underlying exposures) may not be included in the calculation of L.
(v) In some cases, the purchase price of receivables will reflect a discount that provides credit enhancement (for example, first loss protection) for all or certain tranches of the securitization. When this arises, L should be calculated inclusive of this discount if the discount provides credit enhancement for the securitization exposure.

(5) Thickness of tranche (T). T is the ratio of:
\begin{itemize}
  \item[(i)] The amount of the tranche that contains the bank's securitization exposure; to
  \item[(ii)] UE.
\end{itemize}

(6) Effective number of exposures (N). (i) Unless the bank elects to use the formula provided in paragraph (f) of this section,
\begin{equation*}
N = \frac{\left(\sum_i EAD_i\right)^2}{\sum_i EAD_i^2}
\end{equation*}
where EAD, represents the EAD associated with the ith instrument in the pool of underlying exposures.
(ii) Multiple exposures to one obligor must be treated as a single underlying exposure.
(iii) In the case of a re-securitization (that is, a securitization in which some or all of the underlying exposures are themselves securitization exposures), the bank must treat each underlying exposure as a single underlying exposure and must not look through to the originally securitized underlying exposures.

(7) Exposure-weighted average loss given default (EWALGD). EWALGD is calculated as:
\begin{equation*}
EWALGD = \frac{\sum_i LGD_i \cdot EAD_i}{\sum_i EAD_i}
\end{equation*}
where LGD, represents the average LGD associated with all exposures to the ith obligor. In the case of a re-securitization, an LGD of 100 percent must be assumed for the underlying exposures that are themselves securitization exposures.

(f) Simplified method for computing N and EWALGD. (1) If all underlying exposures of a securitization are retail exposures, a bank may apply the SFA using the following simplifications:
\begin{itemize}
  \item[(i)] h = 0; and
  \item[(ii)] v = 0.
\end{itemize}
(2) Under the conditions in paragraphs (f)(3) and (f)(4) of this section, a bank may employ a simplified method for calculating N and EWALGD.

(3) If C1 is no more than 0.03, a bank may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure or EWALGD = 1 if one or more of the underlying exposures is a securitization exposure, and may set N equal to the following amount:
Section 46. Recognition of Credit Risk Mitigants for Securitization Exposures

(a) General. An originating bank that has obtained a credit risk mitigant to hedge its securitization exposure to a synthetic or traditional securitization that satisfies the operational criteria in section 41 of this appendix may recognize the credit risk mitigant, but only as provided in this section. An investing bank that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant, but only as provided in this section. A bank that has used the RBA in section 43 of this appendix or the IIA in section 44 of this appendix to calculate its risk-based capital requirement for a securitization exposure whose external or inferred rating (or equivalent internal rating under the IAA) reflects the benefits of a credit risk mitigation provided to the associated securitization or that supports some or all of the underlying exposures is a securitization exposure or EWALGD = 1 if none of the underlying exposures is a securitization exposure and may set N = 1/C_i.

Section 42 of this appendix multiplied by the ratio of adjusted exposure amount (SE*) to original exposure amount (SE), where:

(i) SE* = max(0, |SE - C x (1 - Hs - Hfx)|);
(ii) SE = the amount of the securitization exposure calculated under paragraph (e) of section 42 of this appendix;
(iii) C = the current market value of the collateral;
(iv) Hs = the haircut appropriate to the collateral type; and
(v) Hfx = the haircut appropriate for any currency mismatch between the collateral and the exposure.

(2) Mixed collateral. Where the collateral is a basket of different asset types or a basket of assets denominated in different currencies, the haircut on the basket will be

\[ H = \sum_i a_i H_i, \]

where \( a_i \) is the current market value of the asset in the basket divided by the current market value of all assets in the basket and \( H_i \) is the haircut applicable to that asset.

(3) Standard supervisory haircuts. Unless a bank qualifies for use of and uses own-estimates haircuts in paragraph (b)(4) of this section:

(i) A bank must use the collateral type haircuts (Hs) in Table 3;
(ii) A bank must use a currency mismatch haircut (Hfx) of 8 percent if the exposure and the collateral are denominated in different currencies;
(iii) A bank may multiply the supervisory haircuts obtained in paragraphs (b)(3)(i) and (ii) by the square root of 6.5 (which equals 2.54550); and
(iv) A bank may adjust the supervisory haircuts upward on the basis of a holding period longer than 65 business days.

(c) Guarantees and credit derivatives—General. A bank may recognize an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the
bank’s risk-based capital requirement for a securitization exposure.

(2) ECL for securitization exposures. When a bank recognizes an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the bank’s risk-based capital requirement for a securitization exposure, the bank must also:

(i) Calculate ECL for the protected portion of the exposure using the same risk parameters that it uses for calculating the risk-weighted asset amount of the exposure as described in paragraph (c)(3) of this section; and

(ii) Add the exposure’s ECL to the bank’s total ECL.

(3) Rules of recognition. A bank may recognize an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the bank’s risk-based capital requirement for the securitization exposure as follows:

(i) Full coverage. If the protection amount of the eligible guarantee or eligible credit derivative equals or exceeds the amount of the securitization exposure, the bank may set the risk-weighted asset amount for the securitization exposure equal to the risk-weighted asset amount for a direct exposure to the eligible securitization guarantor (as determined in the wholesale risk weight function described in section 31 of this appendix), using the bank’s PD for the guarantor, the bank’s LGD for the guarantee or credit derivative, and an EAD equal to the amount of the securitization exposure (as determined in section 33 of this appendix).

(ii) Partial coverage. If the protection amount of the eligible guarantee or eligible credit derivative is less than the amount of the securitization exposure, the bank may set the risk-weighted asset amount for the securitization exposure equal to the sum of:

(A) Covered portion. The risk-weighted asset amount for a direct exposure to the eligible securitization guarantor (as determined in the wholesale risk weight function described in section 31 of this appendix), using the bank’s PD for the guarantor, the bank’s LGD for the guarantee or credit derivative, and an EAD equal to the amount of the securitization exposure (as determined in section 31 of this appendix); and

(B) Uncovered portion. (1) 1.0 minus the ratio of the protection amount of the eligible guarantee or eligible credit derivative to the amount of the securitization exposure; multiplied by

(2) The risk-weighted asset amount for the securitization exposure without the credit risk mitigant (as determined in sections 42–45 of this appendix).

(3) Mismatches. The bank must make applicable adjustments to the protection amount as required in paragraphs (d), (e), and (f) of section 33 of this appendix for any hedged securitization exposure and any more senior securitization exposure that benefits from the hedge. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the bank must use the longest residual maturity of any of the hedged exposures as the residual maturity of all the hedged exposures.

Section 47. Risk-Based Capital Requirement for Early Amortization Provisions

(a) General. (1) An originating bank must hold risk-based capital against the sum of the originating bank’s interest and the investors’ interest in a securitization that:

(i) Includes one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contains an early amortization provision.

(2) For securitizations described in paragraph (a)(1) of this section, an originating bank must calculate the risk-based capital requirement for the originating bank’s interest under sections 42–45 of this appendix, and the risk-based capital requirement for the investors’ interest under paragraph (b) of this section.

(b) Risk-weighted asset amount for investors’ interest. The originating bank’s risk-weighted asset amount for the investors’ interest in the securitization is equal to the product of the following 5 quantities:

(1) The investors’ interest EAD;

(2) The appropriate conversion factor in paragraph (c) of this section;

(3) K_B (as defined in paragraph (e)(3) of section 45 of this appendix);

(4) 12.5; and

(5) The proportion of the underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit.

(c) Conversion factor. (1) (i) Except as provided in paragraph (c)(2) of this section, to calculate the appropriate conversion factor, a bank must use Table 8 for a securitization that contains a controlled early amortization provision and must use Table 9 for a securitization that contains a non-controlled early amortization provision. In circumstances where a securitization contains a mix of retail and nonretail exposures or a mix of committed and uncommitted exposures, a bank may take a pro rata approach to determining the conversion factor for the securitization’s early amortization provision. If a pro rata approach is not feasible, a bank must calculate the risk-weighted asset amount for investors’ interest using the same risk parameters as used for determining the risk-weighted asset amount for the securitization in paragraphs (a)(1) and (a)(2) of this section.

(ii) Reviews the appropriate conversion factor for the securitization’s early amortization provision.

(iii) Reviews the appropriate conversion factor for the securitization’s early amortization provision.
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Securitization as a securitization of committed exposures if a single underlying exposure is a committed exposure.

(ii) To find the appropriate conversion factor in the tables, a bank must divide the three-month average annualized excess spread of the securitization by the excess spread trapping point in the securitization structure. In securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average annualized excess spread, the excess spread trapping point is 4.5 percent.

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<th>Table 8.—Controlled Early Amortization Provisions</th>
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<td>Uncommitted</td>
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<tr>
<td>Retail Credit Lines</td>
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<tr>
<td>9% CF</td>
</tr>
<tr>
<td>133.33% of trapping point or more, 0% CF.</td>
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<tr>
<td>less than 133.33% to 100% of trapping point, 1% CF.</td>
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<tr>
<td>less than 100% to 75% of trapping point, 2% CF.</td>
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<tr>
<td>less than 75% to 50% of trapping point, 10% CF.</td>
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<tr>
<td>less than 50% to 25% of trapping point, 20% CF.</td>
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<td>less than 25% of trapping point, 40% CF.</td>
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<td>Non-realt Credit Lines</td>
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<td>90% CF</td>
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<td>Retail Credit Lines</td>
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<tr>
<td>less than 133.33% to 100% of trapping point, 5% CF.</td>
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<tr>
<td>less than 100% to 75% of trapping point, 15% CF.</td>
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<tr>
<td>less than 75% to 50% of trapping point, 50% CF.</td>
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<tr>
<td>less than 50% of trapping point, 100% CF.</td>
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<tr>
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(2) For a securitization for which all or substantially all of the underlying exposures are residential mortgage exposures, a bank may calculate the appropriate conversion factor using paragraph (c)(1) of this section or may use a conversion factor of 10 percent. If the bank chooses to use a conversion factor of 10 percent, it must use that conversion factor for all securitizations for which all or substantially all of the underlying exposures are residential mortgage exposures.

PART VI. RISK-WEIGHTED ASSETS FOR EQUITY EXPOSURES

Section 51. Introduction and Exposure Measurement

(a) General. To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to investment funds, a bank may apply either the Simple Risk Weight Approach (SRWA) in section 52 of this appendix or, if it qualifies to do so, the Internal Models Approach (IMA) in section 53 of this appendix. A bank must use the look-through approaches in section 54 of this appendix to calculate its risk-weighted asset amounts for equity exposures to investment funds.

(b) Adjusted carrying value. For purposes of this part, the adjusted carrying value of an equity exposure is:

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<td>Non-realt Credit Lines</td>
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<td>100% CF</td>
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</table>

(1) For the on-balance sheet component of an equity exposure, the bank’s carrying value of the exposure reduced by any unrealized gains on the exposure that are reflected in such carrying value but excluded from the bank’s tier 1 and tier 2 capital; and

(2) For the off-balance sheet component of an equity exposure, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) for a given small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section. For unfunded equity commitments that are unconditional, the effective notional principal amount is the notional amount of the commitment. For unfunded equity commitments that are conditional, the effective notional principal amount is the bank’s best estimate of the amount that would be funded under economic downturn conditions.

Section 52. Simple Risk Weight Approach (SRWA)

(a) General. Under the SRWA, a bank’s aggregate risk-weighted asset amount for its equity exposures is equal to the sum of the
risk-weighted asset amounts for each of the bank's individual equity exposures (other than equity exposures to an investment fund) as determined in this section and the risk-weighted asset amounts for each of the bank's individual equity exposures to an investment fund as determined in section 54 of this appendix.

(b) SRWA computation for individual equity exposures. A bank must determine the risk-weighted asset amount for an individual equity exposure (other than an equity exposure to an investment fund) by multiplying the adjusted carrying value of the equity exposure or the effective portion and ineffective portion of a hedge pair (as defined in paragraph (c) of this section) by the lowest applicable risk weight in this paragraph (b).

(1) 0 percent risk weight equity exposures. An equity exposure to an entity whose credit exposures are exempt from the 0.03 percent PD floor in paragraph (d)(2) of section 31 of this appendix is assigned a 0 percent risk weight.

(2) 20 percent risk weight equity exposures. An equity exposure to a Federal Home Loan Bank or Farmer Mac is assigned a 20 percent risk weight.

(3) 100 percent risk weight equity exposures. The following equity exposures are assigned a 100 percent risk weight:

(i) Community development equity exposures. An equity exposure that qualifies as a community development investment under 12 U.S.C. 24 (Eleventh), excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682), then must include publicly traded equity exposures (including those held indirectly through investment funds), and then must include non-publicly traded equity exposures (including those held indirectly through investment funds).

(ii) 300 percent risk weight equity exposures. A publicly traded equity exposure (other than an equity exposure described in paragraph (b)(6) of this section and including the ineffective portion of a hedge pair) is assigned a 300 percent risk weight.

(iii) 400 percent risk weight equity exposures. An equity exposure (other than an equity exposure described in paragraph (b)(6) of this section) that is not publicly traded is assigned a 400 percent risk weight.

(iv) 600 percent risk weight equity exposures. An equity exposure to an investment firm that:

(A) Would meet the definition of a traditional securitization were it not for the FDIC's application of paragraph (B) of that definition; and

(B) Has greater than immaterial leverage is assigned a 600 percent risk weight.

(c) Hedge transactions—(1) Hedge pair. A hedge pair is two equity exposures that form an effective hedge so long as each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure.

(2) Effective hedge. Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is formally documented in a prospective manner (that is, before the bank acquires at least one of the equity exposures); the documentation specifies the measure of effectiveness (E) the bank will use for the hedge relationship throughout the life of the transaction; and the hedge relationship has an E greater than or equal to 0.8. A bank must measure E at least quarterly and must use one of three alternative measures of E:

E = 0.8...
(i) Under the dollar-offset method of measuring effectiveness, the bank must determine the ratio of value change (RVC). The RVC is the ratio of the cumulative sum of the periodic changes in value of one equity exposure to the cumulative sum of the periodic changes in the value of the other equity exposure. If RVC is positive, the hedge is not effective and $E$ equals 0. If RVC is negative and greater than or equal to $-1$ (that is, between zero and $-1$), then $E$ equals the absolute value of RVC. If RVC is negative and less than $-1$, then $E$ equals $2$ plus RVC.

(ii) Under the variability-reduction method of measuring effectiveness:

$$E = 1 - \frac{\sum_{t=1}^{T} (X_t - X_{t-1})^2}{\sum_{t=1}^{T} (A_t - A_{t-1})^2}, \text{ where}$$

(A) $X_t = A_t - B_t$;
(B) $A_t$ = the value at time $t$ of one exposure in a hedge pair; and
(C) $B_t$ = the value at time $t$ of the other exposure in a hedge pair.

(iii) Under the regression method of measuring effectiveness, $E$ equals the coefficient of determination of a regression in which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in a hedge pair is the independent variable. However, if the estimated regression coefficient is positive, then the value of $E$ is zero.

(3) The effective portion of a hedge pair is $E$ multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

(4) The ineffective portion of a hedge pair is $(1-E)$ multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

Section 53. Internal Models Approach (IMA)

(a) General. A bank may calculate its risk-weighted asset amount for equity exposures using the IMA by modeling publicly traded and non-publicly traded equity exposures (in accordance with paragraph (c) of this section) or by modeling only publicly traded equity exposures (in accordance with paragraph (d) of this section).

(b) Qualifying criteria. To qualify to use the IMA to calculate risk-based capital requirements for equity exposures, a bank must receive prior written approval from the FDIC. To receive such approval, the bank must demonstrate to the FDIC’s satisfaction that the bank meets the following criteria:

(i) Assess the potential decline in value of its modeled equity exposures;

(ii) Are commensurate with the size, complexity, and composition of the bank’s modeled equity exposures; and

(iii) Adequately capture both general market risk and idiosyncratic risk.

(2) The bank’s model must produce an estimate of potential losses for its modeled equity exposures that is no less than the estimate of potential losses produced by a VaR methodology employing a 99.0 percent, one-tailed confidence interval of the distribution of quarterly returns for a benchmark portfolio of equity exposures comparable to the bank’s modeled equity exposures using a long-term sample period.

(3) The number of risk factors and exposures in the sample and the data period used for quantification in the bank’s model and benchmarking exercise must be sufficient to provide confidence in the accuracy and robustness of the bank’s estimates.

(4) The bank’s model and benchmarking process must incorporate data that are relevant in representing the risk profile of the bank’s modeled equity exposures, and must include data from at least one equity market cycle containing adverse market movements relevant to the risk profile of the bank’s modeled equity exposures. In addition, the bank’s benchmarking exercise must be based on daily market prices for the benchmark portfolio. If the bank’s model uses a scenario methodology, the bank must demonstrate that the model produces a conservative estimate of potential losses on the bank’s modeled equity exposures over a relevant long-term market cycle. If the bank employs risk factor models, the bank must demonstrate through empirical analysis the appropriateness of the risk factors used.

(5) The bank must be able to demonstrate, using theoretical arguments and empirical evidence, that any proxies used in the modeling process are comparable to the bank’s modeled equity exposures and that the bank
has made appropriate adjustments for differences. The bank must derive any proxies for its modeled equity exposures and benchmark portfolio using historical market data that are relevant to the bank's modeled equity exposures and benchmark portfolio (or, where not, must use appropriately adjusted data), and such proxies must be robust estimates of the risk of the bank's modeled equity exposures.

(c) Risk-weighted assets calculation for a bank modeling publicly traded and non-publicly traded equity exposures. If a bank models publicly traded and non-publicly traded equity exposures, the bank's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 (as determined under section 52 of this appendix) and each equity exposure to an investment fund (as determined under section 54 of this appendix); and

(2) The greater of:

(i) The estimate of potential losses on the bank's equity exposures (other than equity exposures referenced in paragraph (c)(i) of this section) generated by the bank's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the bank's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund; and

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs; and

(C) 300 percent multiplied by the aggregate adjusted carrying value of the bank's equity exposures that are not publicly traded, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund.

(d) Risk-weighted assets calculation for a bank using the IMA only for publicly traded equity exposures. If a bank models only publicly traded equity exposures, the bank's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 (as determined under section 52 of this appendix), each equity exposure to an investment fund (as determined under section 54 of this appendix); and

(2) The greater of:

(i) The estimate of potential losses on the bank's equity exposures (other than equity exposures referenced in paragraph (d)(1) of this section) generated by the bank's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the bank's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund; and

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs.

Section 54. Equity Exposures to Investment Funds

(a) Available approaches. (1) Unless the exposure meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 of this appendix, a bank must determine the risk-weighted asset amount of an equity exposure to an investment fund under the Full Look-Through Approach in paragraph (b) of this section, the Simple Modified Look-Through Approach in paragraph (c) of this section, the Alternative Modified Look-Through Approach in paragraph (d) of this section, or, if the investment fund qualifies for the Money Market Fund Approach, the Money Market Fund Approach in paragraph (e) of this section.

(2) The risk-weighted asset amount of an equity exposure to an investment fund that meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 of this appendix is its adjusted carrying value.

(3) If an equity exposure to an investment fund is part of a hedge pair and the bank does not use the Full Look-Through Approach, the bank may use the ineffective portion of the hedge pair as determined under paragraph (c) of section 52 of this appendix as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair is equal to its adjusted carrying value.

(b) Full Look-Through Approach. A bank that is able to calculate a risk-weighted asset amount for its proportional ownership share of each exposure held by the investment fund (as calculated under this appendix as if the proportional ownership share of each exposure were held directly by the bank) may either:
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(1) Set the risk-weighted asset amount of the bank’s exposure to the fund equal to the product of:
   (i) The aggregate risk-weighted asset amounts of the exposures held by the fund as if they were held directly by the bank; and
   (ii) The bank’s proportional ownership share of the fund; or

(2) Include the bank’s proportional ownership share of each exposure held by the fund in the bank’s IMA.

(c) Simple Modified Look-Through Approach. Under this approach, the risk-weighted asset amount for a bank’s equity exposure to an investment fund equals the adjusted carrying value of the equity exposure multiplied by the highest risk weight in Table 10 that applies to any exposure the fund is permitted to hold under its prospectus, partnership agreement, or similar contract that defines the fund’s permissible investments (excluding derivative contracts that are used for hedging rather than speculative purposes and that do not constitute a material portion of the fund’s exposures).

**TABLE 10.—MODIFIED LOOK-THROUGH APPROACHES FOR EQUITY EXPOSURES TO INVESTMENT FUNDS**

<table>
<thead>
<tr>
<th>Risk weight</th>
<th>Exposure class</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 percent</td>
<td>Sovereign exposures with a long-term applicable external rating in the highest investment-grade rating category and sovereign exposures of the United States.</td>
</tr>
<tr>
<td>20 percent</td>
<td>Non-sovereign exposures with a long-term applicable external rating in the highest or second-highest investment-grade rating category; exposures with a short-term applicable external rating in the highest investment-grade rating category; and exposures to, or guaranteed by, depository institutions, foreign banks (as defined in 12 CFR 211.2), or securities firms subject to consolidated supervision and regulation comparable to that imposed on U.S. securities broker-dealers that are repo-style transactions or bankers’ acceptances.</td>
</tr>
<tr>
<td>50 percent</td>
<td>Exposures with a long-term applicable external rating in the third-highest investment-grade rating category.</td>
</tr>
<tr>
<td>100 percent</td>
<td>Exposures with a long-term or short-term applicable external rating in the lowest investment-grade rating category.</td>
</tr>
<tr>
<td>200 percent</td>
<td>Exposures with a long-term applicable external rating one rating category below investment grade.</td>
</tr>
<tr>
<td>300 percent</td>
<td>Publicly traded equity exposures.</td>
</tr>
<tr>
<td>400 percent</td>
<td>Non-publicly traded equity exposures; exposures with a long-term applicable external rating two rating categories or more below investment grade; and exposures without an external rating (excluding publicly traded equity exposures).</td>
</tr>
<tr>
<td>1,250 percent</td>
<td>OTC derivative contracts and exposures that must be deducted from regulatory capital or receive a risk weight greater than 400 percent under this appendix.</td>
</tr>
</tbody>
</table>

(d) Alternative Modified Look-Through Approach. Under this approach, a bank may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to different risk weight categories in Table 10 based on the investment limits in the fund’s prospectus, partnership agreement, or similar contract that defines the fund’s permissible investments. The risk-weighted asset amount for the bank’s equity exposure to the investment fund equals the sum of each portion of the adjusted carrying value assigned to an exposure class multiplied by the applicable risk weight. If the sum of the investment limits for exposure classes within the fund exceeds 100 percent, the bank must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure class with the highest risk weight under Table 10, and continues to make investments in order of the exposure class with the next-highest risk weight under Table 10 until the maximum total investment level is reached. If more than one exposure class applies to an exposure, the bank must use the highest applicable risk weight. A bank may exclude derivative contracts held by the fund that are used for hedging rather than for speculative purposes and do not constitute a material portion of the fund’s exposures.

(e) Money Market Fund Approach. The risk-weighted asset amount for a bank’s equity exposure to an investment fund that is a money market fund subject to 17 CFR 270.2a-7 and that has an applicable external rating in the highest investment-grade rating category equals the adjusted carrying value of the equity exposure multiplied by 7 percent.

Section 55. Equity Derivative Contracts

Under the IMA, in addition to holding risk-based capital against an equity derivative contract under this part, a bank must hold risk-based capital against the counterparty credit risk in the equity derivative contract by also treating the equity derivative contract as a wholesale exposure and computing a supplemental risk-weighted asset amount for the contract under part IV. Under the SRWA, a bank may choose not to hold risk-based capital against the counterparty credit...
risk of equity derivative contracts, as long as it does so for all such contracts. Where the equity derivative contracts are subject to a qualified master netting agreement, a bank using the SRWA must either include all or exclude all of the contracts from any measure used to determine counterparty credit risk exposure. 

**PART VII. RISK-WEIGHTED ASSETS FOR OPERATIONAL RISK**

Section 61. Qualification Requirements for Incorporation of Operational Risk Mitigants

(a) Qualification to use operational risk mitigants. A bank may adjust its estimate of operational risk exposure to reflect qualifying operational risk mitigants if:

(1) The bank’s operational risk quantification system is able to generate an estimate of the bank’s operational risk exposure (which does not incorporate qualifying operational risk mitigants) and an estimate of the bank’s operational risk exposure adjusted to incorporate qualifying operational risk mitigants; and

(2) The bank’s methodology for incorporating the effects of insurance, if the bank uses insurance as an operational risk mitigant, captures through appropriate discounts to the amount of risk mitigation:

(i) The residual term of the policy, where less than one year;

(ii) The cancellation terms of the policy, where less than one year;

(iii) The policy’s timeliness of payment;

(iv) The uncertainty of payment by the provider of the policy; and

(v) Mismatches in coverage between the policy and the hedged operational loss event.

(b) Qualifying operational risk mitigants. Qualifying operational risk mitigants are:

(1) Insurance that:

(i) Is provided by an unaffiliated company that has a claims payment ability that is rated in one of the three highest rating categories by a NRSRO;

(ii) Has an initial term of at least one year and a residual term of more than 90 days;

(iii) Has a minimum notice period for cancellation by the provider of 90 days;

(iv) Has no exclusions or limitations based upon regulatory action or for the receiver or liquidator of a failed depository institution; and

(v) Is explicitly mapped to a potential operational loss event; and

(2) Operational risk mitigants other than insurance for which the FDIC has given prior written approval. In evaluating an operational risk mitigant other than insurance, the FDIC will consider whether the operational risk mitigant covers potential operational losses in a manner equivalent to holding regulatory capital. 

Section 62. Mechanics of Risk-Weighted Asset Calculation

(a) If a bank does not qualify to use or does not have qualifying operational risk mitigants, the bank’s dollar risk-based capital requirement for operational risk is its operational risk exposure minus eligible operational risk offsets (if any).

(b) If a bank qualifies to use operational risk mitigants and has qualifying operational risk mitigants, the bank’s dollar risk-based capital requirement for operational risk is the greater of:

(1) The bank’s operational risk exposure adjusted for qualifying operational risk mitigants minus eligible operational risk offsets (if any); or

(2) 0.8 multiplied by the difference between:

(i) The bank’s operational risk exposure; and

(ii) Eligible operational risk offsets (if any).

(c) The bank’s risk-weighted asset amount for operational risk equals the bank’s dollar risk-based asset amount for operational risk determined under paragraph (a) or (b) of this section multiplied by 12.5.

**PART VIII. DISCLOSURE**

Section 71. Disclosure Requirements

(a) Each bank must publicly disclose each quarter its total and tier 1 risk-based capital ratios and their components (that is, tier 1 capital, tier 2 capital, total qualifying capital, and total risk-weighted assets).4

[72 FR 69396, 69437, Dec. 7, 2007]

EFFECTIVE DATE NOTE: At 72 FR 69396, 69437, Dec. 7, 2007, part 325 was amended by adding and amending appendix D, effective April 1, 2008.

4Other public disclosure requirements continue to apply—for example, Federal securities law and regulatory reporting requirements.
§ 326.3 Security program.

(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.

§ 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 § 326.13 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—(1) Program requirement. 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, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR part 103. The compliance program shall be written, approved by the bank’s board of directors, and noted in the minutes.

(2) Customer identification program. Each bank is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the FDIC and the Department of the Treasury at 31 CFR 103.121, which require a customer identification program to be implemented as

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.
part of the Bank Secrecy Act compliance program required under this section.
(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)

§ 327.2 Certified statements.
(a) Required. (1) The certified statement shall be known as the quarterly certified statement invoice. Each insured depository institution shall file and certify its quarterly certified statement invoice in the manner and form set forth in this section.
(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 assessments by such institutions;
(iii) The payment of assessments by depository institutions whose insured status has terminated;
(iv) The classification of depository institutions for risk; and
(v) The processes for review of assessments.
(2) Deductions from the assessment base of an insured branch of a foreign bank are stated in subpart B part 347 of this chapter.

§ 327.3 Payment of assessments.
(a) General. (1) The Corporation shall make available to each insured depository institution, including any insured branch of a foreign bank, the assessment payment instructions issued by the Corporation in the previous year.

§ 327.4 Assessment base.
(a) General. (1) The assessment base is determined as of the last day of each quarterly assessment period.

§ 327.5 Assessment rates.
(a) General. (1) The assessment rate is determined as of the last day of each quarterly assessment period.

§ 327.6 Terminating transfers; other terminations of insurance.
(a) General. (1) The Corporation shall terminate transfers of insurance for any insured depository institution that:
(i) Tends to reduce the assessment rate for the institution;
(ii) Is a result of a merger or consolidation of the institution with another insured depository institution;
(iii) Is the result of the acquisition of an insured depository institution by another insured depository institution; and
(iv) Is the result of the acquisition of an insured depository institution by a non-depository institution.

§ 327.7 Payment of interest on assessment underpayments and overpayments.
(a) General. (1) The Corporation shall pay interest on assessment underpayments and overpayments as provided in subpart A part 310 of this chapter.

§ 327.8 Definitions.
(a) General. (1) The terms used in this part are defined as follows:
(i) Assessment base: The sum of the insured deposits held by an insured depository institution, as determined by the Corporation, as of the last day of each quarterly assessment period.
(ii) Assessment rate: The rate at which the assessment base is assessed for insurance coverage.
(iii) Assessment: The amount of insurance coverage payable to an insured depository institution for each quarterly assessment period.
(iv) Assessment risk categories and pricing methods: The system used to determine the assessment risk categories and pricing methods for insured depository institutions.
(v) Assessment rate schedules: The schedule of assessment rates used by the Corporation to determine the assessment rate for each quarterly assessment period.

Subpart B—Implementation of One-Time Assessment Credit

§ 327.30 Purpose and scope.

§ 327.31 Definitions.

§ 327.32 Determination of aggregate credit amount.

§ 327.33 Determination of eligible institution’s credit amount.

§ 327.34 Transferability of credits.

§ 327.35 Application of credits.

§ 327.36 Requests for review of credit amount.

Subpart C—Implementation of Dividend Requirements

§ 327.50 Purpose and scope.

§ 327.51 Definitions.

§ 327.52 Annual dividend determination.

§ 327.53 Allocation and payment of dividends.

§ 327.54 Requests for review of dividend amount.

§ 327.55 Sunset date.


Source: 54 FR 51374, Dec. 15, 1989, unless otherwise noted.
insured depository institution via the FDIC's e-business Web site FDICConnect a quarterly certified statement invoice each assessment period.

(2) Insured depository institutions shall access their quarterly certified statement invoices via FDICConnect, unless the FDIC provides notice to insured depository institutions of a successor system. In the event of a contingency, the FDIC may employ an alternative means of delivering the quarterly certified statement invoices. A quarterly certified statement invoice delivered by any alternative means will be treated as if it had been downloaded from FDICConnect.

(3) Institutions that do not have Internet access may request a renewable one-year exemption from the requirement that quarterly certified statement invoices be accessed through FDICConnect. Any exemption request must be submitted in writing to the Manager of the Assessments Section.

(4) Each assessment period, the FDIC will provide courtesy e-mail notification to insured depository institutions indicating that new quarterly certified statement invoices are available and may be accessed on FDICConnect. E-mail notification will be sent to all individuals with FDICConnect access to quarterly certified statement invoices.

(5) E-mail notification may be used by the FDIC to communicate with insured depository institutions regarding quarterly certified statement invoices and other assessment-related matters.

(c) Review by institution. The president of each insured depository institution, or such other officer as the institution's president or board of directors or trustees may designate, shall review the information shown on each quarterly certified statement invoice.

(d) Retention by institution. If the appropriate officer of the insured depository institution agrees that, to the best of his or her knowledge and belief, the information shown on the quarterly certified statement invoice is not true, correct, and complete and in accordance with the Federal Deposit Insurance Act and the regulations issued under it, the institution shall pay the amount specified on the quarterly certified statement invoice, and may:

(1) Amend its report of condition, or other similar report, to correct any data believed to be inaccurate on the quarterly certified statement invoice; amendments to such reports timely filed under section 7(g) of the Federal Deposit Insurance Act but not permitted to be made by an institution's primary federal regulator may be filed with the FDIC for consideration in determining deposit insurance assessments; or

(2) Amend and sign its quarterly certified statement invoice to correct a calculation believed to be inaccurate and return it to the FDIC by the applicable payment date specified in §327.3(b)(2).

(f) Certification. Data used by the Corporation to complete the quarterly certified statement invoice has been previously attested to by the institution in its reports of condition, or other similar reports, filed with the institution's primary federal regulator. When an insured institution pays the amount shown on the quarterly certified statement invoice and does not correct that invoice as provided in paragraph (e) of this section, the information on that invoice shall be deemed true, correct, complete, and certified for purposes of paragraph (a) of this section and section 7(c) of the Federal Deposit Insurance Act.

(g) Requests for revision of assessment computation. (1) The timely filing of an amended report of condition or other similar report under paragraph (e)(1) of this section, or the timely filing of an amended quarterly certified statement invoice under paragraph (e)(2), that
§ 327.3 Payment of assessments.

(a) Required—(1) In general. Except as provided in paragraph (b) of this section, each insured depository institution shall pay to the Corporation for each assessment period an 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 paragraph (b)(2) of this section, each institution shall provide notice to the Corporation via FDICConnect 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.

(3) Transition Rule for Financing Corporation (FICO) Payments. Quarterly FICO payments shall be collected by the FDIC without interruption during the assessment system transitional period in 2007. All insured depository institutions shall make scheduled quarterly FICO payments on January 2, 2007 (unless prepaid on December 30, 2006), and March 30, 2007, based upon, respectively, their September 30, 2006, and December 31, 2006 reported assessment bases, which shall be the final assessment bases calculated pursuant to 12 CFR 327.5(a) and (b) (2006). Simultaneous collection of deposit insurance assessments and FICO assessments will resume in June of 2007, based on the March 31, 2007 reported assessment base.

(b) Assessment payment—(1) Quarterly certified statement invoice. Starting with the first assessment period of 2007, no later than 15 days prior to the payment date specified in paragraph (b)(2) of this section, the Corporation will provide to each insured depository institution a quarterly certified statement invoice showing the amount of the assessment payment due from the institution for the prior quarter (net of credits or dividends, if any), and the computation of that amount. Subject to paragraph (e) of this section, the invoiced amount on the quarterly certified statement invoice shall be the product of the following: the assessment base of the institution for the prior quarter computed in accordance with §327.5 multiplied by the institution's rate for that prior quarter as assigned to the institution pursuant to §§327.4(a) and 327.9.

(2) Quarterly payment date and manner. The Corporation will cause the amount stated in the applicable quarterly certified statement invoice to be directly debited on the appropriate payment date from the deposit account designated by the insured depository institution for that purpose, as follows:

(i) In the case of the assessment payment for the quarter that begins on January 1, the payment date is the following June 30;

(ii) In the case of the assessment payment for the quarter that begins on April 1, the payment date is the following September 30;

(iii) In the case of the assessment payment for the quarter that begins on July 1, the payment date is the following December 30; and

(iv) In the case of the assessment payment for the quarter that begins on October 1, the payment date is the following March 30.

(c) Necessary action, sufficient funding by institution. Each insured depository
§ 327.4 12 CFR Ch. III (1–1–08 Edition)

§ 327.4 Assessment rates.

(a) Assessment risk assignment. For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured 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 paragraph (b)(2) of this section, ensure that funds in an amount at least equal to the amount on the quarterly certified statement invoice 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. Penalties for failure to timely pay assessments are provided for at 12 CFR 308.132(c)(3)(v).

(b) Payment adjustments in succeeding quarters. Quarterly certified statement 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 assignment, and revision of the Corporation’s assessment computations for prior quarters.

§ 327.4 Assessment rates.

(a) Assessment risk assignment. For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured

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(a) Assessment risk assignment. For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured

§ 327.4 Assessment rates.

(a) Assessment risk assignment. For the purpose of determining the annual assessment rate for insured depository institutions under § 327.9, each insured
depository institution will be provided an assessment risk assignment. Notice of an institution's current assessment risk assignment will be provided to the institution with each quarterly certified statement invoice. Adjusted assessment risk assignments for prior periods may also be provided by the Corporation. Notice of the procedures applicable to reviews will be included with the notice of assessment risk assignment provided pursuant to paragraph (a) of this section.

(b) Payment at rate assigned. Institutions shall make timely payment of assessments based on the assessment risk assignment 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 (c) of this section. Assessment risk assignments remain in effect for future assessment periods until changed. If the risk assignment 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 assessment payment after such subsequent assignment or change. Interest payable under this paragraph shall be determined in accordance with § 327.7.

c) Requests for review. An institution that believes any assessment risk assignment provided by the Corporation pursuant to paragraph (a) of this section is incorrect and seeks to change it must submit a written request for review of that risk assignment. An institution cannot request review through this process of the CAMELS ratings assigned by its primary federal regulator; each federal regulator has established procedures for that purpose. An institution may also request review of a determination by the FDIC to assess the institution as a large or a small institution under § 327.9(d)(6) or a determination by the FDIC that the institution is a new institution under § 327.9(d)(7)). Any request for review must be submitted within 90 days from the date the assessment risk assignment being challenged pursuant to paragraph (a) of this section appears on the institution's quarterly certified statement invoice. The request shall be submitted to the Corporation's Director of the Division of Insurance and Research in Washington, DC, and shall include documentation sufficient to support the change 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 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 Insurance and Research (or designee) or the Director of the Division of Supervision and Consumer Protection (or designee), as appropriate, shall promptly notify the institution in writing of his or her determination of whether a change is warranted. If the institution requesting review disagrees with that determination, it may appeal to the FDIC's Assessment Appeals Committee. Notice of the procedures applicable to appeals will be included with the written determination.

d) Disclosure restrictions. The portion of an assessment risk assignment provided to an institution by the Corporation pursuant to paragraph (a) of this section that reflects any supervisory evaluation or confidential information is deemed to be exempt information within the scope of § 309.5(g)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

e) Limited use of assessment risk assignment. Any assessment risk assignment provided to a depository institution under this part 327 is for purposes of implementing and operating the FDIC's risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material, or in any other public place or manner, the assessment risk assignment provided to it pursuant to this part.

f) Effective date for changes to risk assignment. (1) Changes to an insured institution's risk assignment resulting from a supervisory ratings change become effective as of the date of written
§ 327.5 Assessment base.

(a) Quarter-end balances and average daily balances. An insured depository institution shall determine its assessment base using quarter-end balances until changes in the quarterly report of condition allow it to report average daily deposit balances on the quarterly report of condition, after which—

(1) An institution that becomes newly insured after the first report of condition allowing for average daily balances shall have its assessment base determined using average daily balances;

(2) An insured depository institution (other than one covered in paragraph (a)(1) of this section) reporting assets of $1 billion or more on the first report of condition allowing for average daily balances, shall within one year after so reporting have its assessment base determined using average daily balances;

(3) An insured depository institution (other than one covered in paragraph (a)(1) of this section) that was insured prior to the first report of condition allowing for average daily balances, reporting less than $1 billion in assets on the first report of condition allowing for average daily balances—

(i) May continue to have its assessment base determined using quarter-end balances; or

(ii) May opt permanently to have its assessment base determined using average daily balances after notice to the Corporation, but

(iii) Shall have its assessment rate determined using average daily balances for any quarter beginning six months after the institution reported that its assets equaled or exceeded $1 billion for two consecutive quarters and thereafter; and

(4) In any event, an insured depository institution that files its report of condition on a consolidated basis by including a subsidiary bank(s) or savings association(s) shall report its assessment base on an unconsolidated basis.

(b) Computation of assessment base. Whether computed on a quarter-end balance or an average daily balance, the assessment base for any insured institution that is required to file a quarterly report of condition shall be computed by:

(1) Adding all deposit liabilities as defined in section 3(l) of the Federal Deposit Insurance Act, to include deposits that are held in any insured branches of the institution that are located in the territories and possessions of the United States, but does not include unposted credits and is not reduced by unposted debits; and

(2) Subtracting the following allowable exclusions, in the case of any institution that maintains such records as will readily permit verification of the correctness of its assessment base—

(i) Any demand deposit balance due from or cash item in the process of collection due from any depository institution (not including a private depository institution, a foreign depository institution, a foreign office of another U.S. depository institution, or a U.S. branch of a foreign depository institution) up to the total of the amount of deposit balances due to and cash items in the process of collection due to such depository institution that are included in paragraph (b)(1) of this section;

(ii) Any outstanding drafts (including advices and authorization to charge depository institution's balance in another bank) drawn in the regular course of business;
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§ 327.6 Terminating transfers; other terminations of insurance.

(a) Terminating institution's final two quarterly certified statement invoices. If a terminating institution does not file a report of condition for the quarter prior to the quarter in which the terminating transfer occurs, its assessment base for the quarterly certified statement invoice or invoices for which it failed to file a report of condition shall be deemed to be its assessment base for the last quarter for which the institution filed a report of condition. The acquiring institution in a terminating transfer is liable for paying the final invoices of the terminating institution. The terminating institution's assessment for the quarter prior to the quarter in which the terminating transfer occurs shall be calculated at the terminating institution's rate.

(b) Assessment for quarter in which the terminating transfer occurs—(1) Acquirer using Average Daily Balances. If an acquiring institution's assessment base is computed using average daily balances pursuant to § 327.5, the terminating institution's assessment for the quarter in which the terminating transfer occurs shall be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquiring institution's rate.

(2) Acquirer using Quarter-end Balances. If an acquiring institution's assessment base is computed as a quarter-end balance pursuant to § 327.5, its assessment for the quarter in which the terminating transfer occurs shall be the acquiring institution's quarter-end balance calculated at the acquiring institution's assessment rate, and the terminating institution shall not be assessed separately for that quarter.

(c) 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; quarterly certified statement invoices. The terminating depository institution shall continue to file and certify its quarterly certified statement invoice and pay assessments for the assessment period its deposits are insured. Such terminating institution shall not be required to certify its quarterly certified statement invoice and pay further assessments after it has paid in full its deposit liabilities and the assessment to the Corporation required to be paid for the assessment period in which its deposit liabilities are paid in full, and after it, under applicable law, goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments.

(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) Any pass-through reserve balances;

(iv) Liabilities arising from a depository institution investment contract that are not treated as insured deposits under section 11(a)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(5));

(v) 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. Time and savings deposits that are pledged as collateral to secure loans are not “deposits accumulated for the payment of personal loans.”

(c) Newly insured institutions. A newly insured institution shall pay an assessment for the assessment period during which it became an insured institution.
(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 it goes out of business or transfers all or substantially all of its assets and liabilities to other institutions or otherwise ceases to be obliged to pay subsequent assessments and the method whereby the termination has been effected.

(d) 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 file and certify its quarterly certified statement invoices 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 §303.248 of this chapter.

§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. The Corporation will pay interest on any overpayment by the institution of its 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(b)(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(b)(2), and ends on the immediately following regular payment date.

(b) Interest rates. (1) 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
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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 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. Interest will be compounded daily.

§ 327.8 Definitions.

For the purpose of this part 327:

(a) Deposits. The term deposit has the meaning specified in section 3(i) of the Federal Deposit Insurance Act.

(b) 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.

(c) Assessment period—In general. The term assessment period means a period beginning on January 1 of any calendar year and ending on March 31 of the same year, or a period beginning on April 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 September 30 of the same year; or a period beginning on October 1 of any calendar year and ending on December 31 of the same year.

(d) Acquiring institution. The term acquiring institution means an insured depository institution that assumes some or all of the deposits of another insured depository institution in a terminating transfer.

(e) 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.

(f) 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 assessment 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.

(g) Small Institution. An insured depository institution with assets of less than $10 billion as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a small institution. If, after December 31, 2006, an institution classified as large under paragraph (h) of this section reports assets of less than $10 billion in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as small beginning the following quarter.

(h) Large Institution. An insured depository institution with assets of $10 billion or more as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a large institution. If, after December 31, 2006, an institution classified as small under paragraph (g) of this section reports assets of $10 billion or more in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as large beginning the following quarter.

(i) Long-Term Debt Issuer Rating. A long-term debt issuer rating shall mean a current rating of an insured depository institution's long-term debt obligations by Moody's Investor Services, Standard & Poor's, or Fitch Ratings. A long-term debt issuer rating does not include a rating of a company that controls an insured depository institution, or an affiliate or subsidiary of the institution. A current rating shall mean one that has been confirmed or assigned within 12 months before the end of the quarter for which
an assessment rate is being determined. If no current rating is available, the institution will be deemed to have no long-term debt issuer rating.

(j) CAMELS composite and CAMELS component ratings. The terms CAMELS composite ratings and CAMELS component ratings shall have the same meaning as in the Uniform Financial Institutions Rating System as published by the Federal Financial Institutions Examination Council.

(k) ROCA supervisory ratings. ROCA supervisory ratings rate risk management, operational controls, compliance, and asset quality.

(l) New depository institution. A new insured depository institution is a bank or thrift that has not been chartered for at least five years as of the last day of any quarter for which it is being assessed.

(m) Established depository institution. An established institution is a bank or thrift that has been chartered for at least five years as of the last day of any quarter for which it is being assessed.

(n) Risk assignment. An institution’s risk assignment includes assignment to Risk Category I, II, III, or IV, and, within Risk Category I, assignment to an assessment rate or rates.

§ 327.9 Assessment risk categories and pricing methods.

(a) Risk Categories. Each insured depository institution shall be assigned to one of the following four Risk Categories based upon the institution’s capital evaluation and supervisory evaluation as defined in this section.

(1) Risk Category I. All institutions in Supervisory Group A that are Well Capitalized;

(2) Risk Category II. All institutions in Supervisory Group A that are Adequately Capitalized, and all institutions in Supervisory Group B that are either Well Capitalized or Adequately Capitalized;

(3) Risk Category III. All institutions in Supervisory Groups A and B that are Undercapitalized, and all institutions in Supervisory Group C that are Well Capitalized or Adequately Capitalized; and

(4) Risk Category IV. All institutions in Supervisory Group C that are Undercapitalized.

(b) Capital evaluations. An institution will receive one of the following three capital evaluations on the basis of data reported in the institution’s Consolidated Reports of Condition and Income, Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report dated as of March 31 for the assessment period beginning the preceding January; dated as of June 30 for the assessment period beginning the preceding April; dated as of September 30 for the assessment period beginning the preceding July; and dated as of December 31 for the assessment period beginning the preceding October.

(1) Well Capitalized. (i) Except as provided in paragraph (b)(1)(ii) of this section, a Well Capitalized institution is one that satisfies 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 percent or greater.

(ii) For purposes of this section, an insured branch of a foreign bank will be deemed to be Well Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter.

(2) Adequately Capitalized. (i) Except as provided in paragraph (b)(2)(ii) of this section, an Adequately Capitalized institution is one that does not satisfy the standards of Well Capitalized under this paragraph but satisfies 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.

(ii) For purposes of this section, an insured branch of a foreign bank will be deemed to be Adequately Capitalized if the insured branch:
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(A) Maintains the pledge of assets required under §327.209 of this chapter; and

(B) Maintains the eligible assets prescribed under §327.210 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 (b) of this section; and

(C) Does not meet the definition of a Well Capitalized insured branch of a foreign bank.

(3) Undercapitalized. An undercapitalized institution is one that does not qualify as either Well Capitalized or Adequately Capitalized under paragraphs (b)(1) and (b)(2) of this section.

(c) Supervisory evaluations. Each institution will be assigned to one of three Supervisory Groups 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 that 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 Deposit Insurance Fund. The three Supervisory Groups are:

(1) Supervisory Group “A.” This Supervisory Group consists of financially sound institutions with only a few minor weaknesses;

(2) Supervisory Group “B.” This Supervisory Group 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 Deposit Insurance Fund; and

(3) Supervisory Group “C.” This Supervisory Group consists of institutions that pose a substantial probability of loss to the Deposit Insurance Fund unless effective corrective action is taken.

(d) Determining Assessment Rates for Risk Category I Institutions. Subject to paragraphs (d)(4), (6), (7) and (8) of this section, an insured depository institution in Risk Category I, except for a large institution that has at least one long-term debt issuer rating, as defined in §327.8(i), shall have its assessment rate determined using the supervisory ratings and financial ratios method set forth in paragraph (d)(1) of this section. A large insured depository institution in Risk Category I that has at least one long-term debt issuer rating shall have its assessment rate determined using the supervisory and debt ratings method set forth in paragraph (d)(2) of this section (subject to paragraphs (d)(4), (6), (7) and (8) of this section). The assessment rate for a large institution whose assessment rate in the prior quarter was determined using the supervisory and debt ratings method, but which no longer has a long-term debt issuer rating, shall be determined using the supervisory ratings and financial ratios method.

(1) Supervisory ratings and financial ratios method. Under the supervisory ratings and financial ratios method for Risk Category I institutions, each of five financial ratios and a weighted average of CAMELS component ratings will be multiplied by a corresponding pricing multiplier. The sum of these products will be added to or subtracted from a uniform amount. The resulting sum, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board under §327.10, will equal an institution’s assessment rate; provided, however, that no institution’s assessment rate will be less than the minimum rate in effect for Risk Category I institutions for that quarter nor greater than the maximum rate in effect for Risk Category I institutions for that quarter. The five financial ratios are: Tier 1 Leverage Ratio; Loans past due 30–89 days/gross assets; Nonperforming assets/gross assets; Net loan charge-offs/gross assets; and Net income before taxes/risk-weighted assets. The ratios are defined in Table A.1 of Appendix A to this subpart. The ratios will be determined for an assessment period based upon information contained in an institution’s report of condition filed as of the last day of the assessment period as set out in §327.9(b). The weighted average of CAMELS component ratings is created by multiplying

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each component by the following percentages and adding the products: Capital adequacy—25%, Asset quality—20%, Management—25%, Earnings—10%, Liquidity—10%, and Sensitivity to market risk—10%. Appendix A to this subpart contains the initial values of the pricing multipliers and uniform amount, describes their derivation, and explains how they will be periodically updated.

(i) Publication of uniform amount and pricing multipliers. The FDIC will publish notice in the Federal Register whenever a change is made to the uniform amount or the pricing multipliers for the supervisory ratings and financial ratios method.

(ii) Implementation of CAMELS rating changes—(A) Changes between risk categories. If, during a quarter, a CAMELS rating change occurs that results in an institution whose Risk Category I assessment rate is determined using the supervisory ratings and financial ratios method moving from Risk Category I to Risk Category II, III or IV, the institution’s assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the CAMELS rating in effect before the change, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board under §327.10. For the portion of the quarter that the institution was not in Risk Category I, the institution’s assessment rate shall be determined under the assessment schedule for the appropriate Risk Category.

(B) Changes within Risk Category I. If, during a quarter, an institution’s CAMELS component ratings change in a way that would change the institution’s assessment rate within Risk Category I, the assessment rate for the period before the change shall be determined under the supervisory ratings and financial ratios method using the CAMELS component ratings in effect before the change. Beginning on the date of the CAMELS component ratings change, the assessment rate for the remainder of the quarter shall be determined using the CAMELS component ratings in effect after the change.

(2) Supervisory and debt ratings method. A large insured depository institution in Risk Category I that has at least one long-term debt issuer rating shall have its assessment rate determined using the supervisory and debt ratings method (subject to paragraphs (d)(4) through (8) of this section). Its CAMELS component ratings will be weighted to derive a weighted average CAMELS rating using the same weights applied in the supervisory ratings and financial ratios method as set forth under paragraph (d)(1) of this section. Long-term debt issuer ratings will be converted to numerical values between 1 and 3 as provided in Appendix B to this subpart and the converted values will be averaged. The weighted average CAMELS rating and the average of converted long-term debt issuer ratings each will be multiplied by 1.176 (which shall be the pricing multiplier), and the products will be summed. To this result will be added 1.882 (which shall be a uniform amount for all institutions subject to the supervisory and debt ratings method). The resulting sum, subject to adjustment pursuant to paragraph (d)(4) of this section, if appropriate, and adjusted for the actual assessment rates set by the Board pursuant to §327.10, will equal an institution’s assessment rate; provided, however, that no institution’s assessment rate will be less than the minimum rate in effect for Risk Category I institutions for that quarter nor greater than the maximum rate in effect for Risk Category I institutions for that quarter.
(3) Assessment rate for insured branches of foreign banks—(i) Insured branches of foreign banks in Risk Category I. Insured branches of foreign banks in Risk Category I shall be assessed using the weighted average ROCA component rating, as determined under paragraph (d)(3)(ii) of this section.

(ii) Weighted average ROCA component rating. The weighted average ROCA component rating shall equal the sum of the products that result from multiplying ROCA component ratings by the following percentages: Risk Management—35%, Operational Controls—25%, Compliance—25%, and Asset Quality—15%. The weighted average ROCA rating will be multiplied by 2.353 (which shall be the pricing multiplier). To this result will be added ¥1.882 (which shall be a uniform amount for all insured branches of foreign banks). The resulting sum, subject to adjustment pursuant to paragraph (d)(4) of this section and adjusted for assessment rates set by the FDIC pursuant to §327.10(b), will equal an institution's assessment rate; provided, however, that no institution's assessment rate will be less than the minimum rate in effect for Risk Category I institutions for that quarter nor greater than the maximum rate in effect for Risk Category I institutions for that quarter.

(4) Adjustments to the initial risk assignment for large banks or insured branches of foreign banks—(i) Basis for and size of adjustment. Within Risk Category I, large institutions and insured branches of foreign banks are subject to risk assignment adjustment. In determining whether to make an adjustment for a large institution or an insured branch of a foreign bank, the FDIC may consider other relevant information in addition to the factors used to derive the risk assignment under paragraphs (d)(1), (2), or (3) of this section. Relevant information includes financial performance and condition information, other market information, and stress considerations, as described in Appendix C to this subpart. Any such adjustment shall be limited to a change in assessment rate of up to 0.5 basis points higher or lower than the rate determined using the supervisory ratings and financial ratios method, the supervisory and debt ratings method, or the weighted average ROCA component rating method, whichever is applicable.

(ii) Adjustment subject to maximum and minimum rates. No rate will be adjusted below the minimum rate or above the maximum rate for Risk Category I institutions in effect for the quarter.

(iii) Prior notice of adjustments—(A) Prior notice of upward adjustment. Prior to making any upward adjustment to an institution's rate because of considerations of additional risk information, the FDIC will formally notify the institution and its primary federal regulator and provide an opportunity to respond. This notification will include the reasons for the adjustment and when the adjustment will take effect.

(B) Prior notice of downward adjustment. Prior to making any downward adjustment to an institution's rate because of considerations of additional risk information, the FDIC will formally notify the institution's primary federal regulator and provide an opportunity to respond.

(iv) Determination whether to adjust upward; effective period of adjustment. After considering an institution’s and the primary federal regulator’s responses to the notice, the FDIC will determine whether the adjustment to an institution’s assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to address the FDIC’s concerns described in the notice. The FDIC will evaluate the need for the adjustment each subsequent assessment period, until it determines that an adjustment is no longer warranted. The amount of adjustment will in no event be larger than that contained in the initial notice without further notice to, and consideration of, responses from the primary federal regulator and the institution.

(v) Determination whether to adjust downward; effective period of adjustment. After considering the primary federal regulator’s responses to the notice, the
FDIC will determine whether the adjustment to an institution's assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. Any downward adjustment in an institution's assessment rate will remain in effect for subsequent assessment periods until the FDIC determines that an adjustment is no longer warranted. Downward adjustments will be made without notification to the institution. However, the FDIC will provide advance notice to an institution and its primary federal regulator and give them an opportunity to respond before removing a downward adjustment.

(vi) Adjustment without notice. Notwithstanding the notice provisions set forth above, the FDIC may change an institution's assessment rate without advance notice under this paragraph, if the institution's supervisory or agency ratings or the financial ratios set forth in Appendix A to this subpart (for an institution without long-term debt issuer ratings) deteriorate.

(5) Implementation of Supervisory and Long-Term Debt Issuer Rating Changes—

(i) Changes between risk categories. If, during a quarter, a CAMELS rating change occurs that results in an institution whose Risk Category I assessment rate is determined using the supervisory and debt ratings method or an insured branch of a foreign bank moving from Risk Category I to Risk Category II, III or IV, the institution’s assessment rate for the portion of the quarter that it was in Risk Category I shall be based upon its assessment rate for the prior quarter; no new Risk Category I assessment rate will be developed for the quarter in which the institution moved to Risk Category II, III or IV. If, during a quarter, a CAMELS rating change occurs that results in a large institution with a long-term debt issuer rating or an insured branch of a foreign bank moving from Risk Category II, III or IV to Risk Category I, the institution’s assessment rate for the portion of the quarter that it was in Risk Category I shall equal the rate determined under paragraphs (d)(2) and (4) or (d)(3) and (4) of this section, as appropriate.

(ii) Changes within Risk Category I. If, during a quarter, an institution whose Risk Category I assessment rate is determined using the supervisory and debt ratings method remains in Risk Category I, but a CAMELS component or a long-term debt issuer rating changes that would affect the institution’s assessment rate, or if, during a quarter, an insured branch of a foreign bank remains in Risk Category I, but a ROCA component rating changes that would affect the institution’s assessment rate, separate assessment rates for the portion(s) of the quarter before and after the change(s) shall be determined under paragraphs (d)(2) and (4) or (d)(3) and (4) of this section, as appropriate.

(6) Request to be treated as a large institution—

(i) Procedure. Any institution in Risk Category I with assets of between $5 billion and $10 billion may request that the FDIC determine its assessment rate as a large institution. The FDIC will grant such a request if it determines that it has sufficient information to do so. The absence of long-term debt issuer ratings alone will not preclude the FDIC from granting a request. The assessment rate for an institution without a long-term debt issuer rating will be derived using the supervisory ratings and financial ratios method, but will be subject to adjustment. Any such request must be made to the FDIC’s Division of Insurance and Research. Any approved change will become effective within one year from the date of the request. If an institution whose request has been granted subsequently reports assets of less than $5 billion in its report of condition for four consecutive quarters, the FDIC will consider such institution to be a small institution subject to the supervisory ratings and financial ratios method. An institution that disagrees with the FDIC’s determination that it is a large or small institution may request review of that determination pursuant to §327.4(c).

(ii) Time limit on subsequent request for alternate method. An institution whose request to be assessed as a large institution is granted by the FDIC shall not
be eligible to request that it be assessed as a small institution for a period of three years from the first quarter in which its approved request to be assessed as a large bank became effective. Any request to be assessed as a small institution must be made to the FDIC’s Division of Insurance and Research.

(7) New and established institutions and exceptions—(i) New Risk Category I institutions—(A) Rule as of January 1, 2010. Effective for assessment periods beginning on or after January 1, 2010, a new institution shall be assessed the Risk Category I maximum rate for the relevant assessment period, except as provided in paragraphs (d)(7)(ii)–(viii) of this section.

(B) Rule prior to January 1, 2010. Prior to January 1, 2010, a new institution’s risk assignment shall be determined under paragraph (d)(1) or (2) of this section, as appropriate. Prior to January 1, 2010, a Risk Category I institution that has no CAMELS component ratings shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than $10 billion in assets or has at least $10 billion in assets and no long-term debt issuer rating, its assessment rate will be determined under the supervisory ratings and financial ratios method once it receives CAMELS component ratings. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from the reports of condition that have been filed, until the earlier of the following two events occurs: the institution files four reports of condition, or, if it has at least $10 billion in assets, it receives a long-term debt issuer rating.

(ii) Merger or consolidation involving new and established institution(s). Subject to paragraphs (d)(7)(iii)–(viii) of this section, when an established institution merges into or consolidates with a new institution, the resulting institution is a new institution unless:

(A) The assets of the established institution, as reported in its report of condition for the quarter ending immediately before the merger; and

(B) Substantially all of the management of the established institution continued as management of the resulting or surviving institution.

(iii) Consolidation involving established institutions. When established institutions consolidate into a new institution, the resulting institution is an established institution.

(iv) Grandfather exception. If a new institution merges into an established institution, and the merger agreement was entered into on or before July 11, 2006, the resulting institution shall be deemed to be an established institution for purposes of this section.

(v) Subsidiary exception. Subject to paragraph (d)(7)(vi) of this section, a new institution will be considered established if it is a wholly owned subsidiary of:

(A) A company that is a bank holding company under the Bank Holding Company Act of 1956 or a savings and loan holding company under the Home Owners’ Loan Act, and:

(1) At least one eligible depository institution (as defined in 12 CFR 303.2(r)) that is owned by the holding company has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established; and

(2) The holding company has a composite rating of at least “2” for bank holding companies or an above average or “A” rating for savings association holding companies and at least 75 percent of its insured depository institution assets are assets of eligible depository institutions, as defined in 12 CFR 303.2(r); or

(B) An eligible depository institution, as defined in 12 CFR 303.2(r), that has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established.

(vi) Effect of credit union conversion. In determining whether an insured depository institution is new or established, as those terms are defined in §327.8, the FDIC will include any period of time that the institution was a federally insured credit union.
§ 327.10

When an established institution merges with or consolidates into a new institution, if the FDIC determines the resulting institution to be an established institution under paragraph (d)(ii) of this section, its CAMELS ratings will be based upon the established institution’s ratings prior to the merger or consolidation until new ratings become available.

(viii) Rate applicable to institutions subject to subsidiary or credit union exception. On or after January 1, 2010, if an institution is considered established under paragraph (d)(7)(v) or (vi) of this section, but does not have CAMELS component ratings, it shall be assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings. If an institution has less than $10 billion in assets or has at least $10 billion in assets and no long-term debt issuer rating, its assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from all reports of condition that have been filed, until the earlier of the following two events occurs: the institution files four reports of condition, or, if it has at least $10 billion in assets, it receives a long-term debt issuer rating.

(ix) Request for review. An institution that disagrees with the FDIC’s determination that it is a new institution may request review of that determination pursuant to §327.4(c).

(8) Assessment rates for bridge banks and conservatorships. Institutions that are bridge banks under 12 U.S.C. 1821(n) and institutions for which the Corporation has been appointed or serves as conservator shall, in all cases, be assessed at the Risk Category I minimum rate.

[71 FR 69309, Nov. 30, 2006]

§ 327.10 Assessment rate schedules.

(a) Base Assessment Schedule. The base annual assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

<table>
<thead>
<tr>
<th>Risk Category</th>
<th>I*</th>
<th>II</th>
<th>III</th>
<th>IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum</td>
<td>2</td>
<td>4</td>
<td>7</td>
<td>25</td>
</tr>
<tr>
<td>Maximum</td>
<td></td>
<td></td>
<td>25</td>
<td>40</td>
</tr>
</tbody>
</table>

*Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

(1) Risk Category I Base Rate Schedule. The base annual assessment rates for all institutions in Risk Category I shall range from 2 to 4 basis points.

(2) Risk Category II, III, and IV Base Rate Schedule. The base annual assessment rates for Risk Categories II, III, and IV shall be 7, 25, and 40 basis points respectively.

(3) All institutions in any one risk category, other than Risk Category I, will be charged the same assessment rate.

(b) Adjusted Rate Schedule. Beginning on January 1, 2007, the adjusted annual assessment rate for an insured depository institution shall be the rate prescribed in the following schedule:

<table>
<thead>
<tr>
<th>Risk Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>I*</td>
</tr>
<tr>
<td>Minimum</td>
</tr>
<tr>
<td>Maximum</td>
</tr>
</tbody>
</table>

*Rates for institutions that do not pay the minimum or maximum rate vary between these rates.
(1) Risk Category I Adjusted Rate Schedule. The adjusted annual assessment rates for all institutions in Risk Category I shall range from 5 to 7 basis points.

(2) Risk Category II, III, and IV Adjusted Rate Schedule. The adjusted annual assessment rates for Risk Categories II, III, and IV shall be 10, 28, and 43 basis points respectively.

(3) All institutions in any one risk category, other than Risk Category I, will be charged the same assessment rate.

(c) Rate schedule adjustments and procedures—(1) Adjustments. The Board may increase or decrease the base assessment schedule up to a maximum increase of 3 basis points or a fraction thereof or a maximum decrease of 3 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary. 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 that, at any time, is more than 3 basis points above or below the base assessment schedule for the Deposit Insurance Fund, nor may any one such adjustment constitute an increase or decrease of more than 3 basis points.

(2) Amount of revenue. In setting assessment rates, the Board shall take into consideration the following:

(i) Estimated operating expenses of the Deposit Insurance Fund;

(ii) Case resolution expenditures and income of the Deposit Insurance Fund;

(iii) The projected effects of assessments on the capital and earnings of the institutions paying assessments to the Deposit Insurance Fund;

(iv) The risk factors and other factors taken into account pursuant to 12 U.S.C. 1817(b)(1); and

(v) Any other factors the Board may deem appropriate.

(3) Adjustment procedure. Any adjustment adopted by the Board pursuant to this paragraph will be adopted by rulemaking, except that the Corporation may set assessment rates as necessary to manage the reserve ratio, within set parameters not exceeding cumulatively 3 basis points, pursuant to paragraph (c)(1) of this section, without further rulemaking.

(4) Announcement. The Board shall announce the assessment schedule and the amount and basis for any adjustment thereto not later than 30 days before the quarterly certified statement invoice date specified in §327.3(b) of this part for the first assessment period for which the adjustment shall be effective. Once set, rates will remain in effect until changed by the Board.

[71 FR 69309, Nov. 30, 2006]

APPENDICES A–C TO SUBPART A

APPENDIX A TO SUBPART A

Method to Derive Pricing Multipliers and Uniform Amount

I. Introduction

The uniform amount and pricing multipliers are derived from:

- A model (the Statistical Model) that estimates the probability that a Risk Category I institution will be downgraded to a composite CAMELS rating of 3 or worse within one year;

- Minimum and maximum downgrade probability cutoff values, based on data from June 2006, that will determine which small institutions will be charged the minimum and maximum assessment rates in Risk Category I;

- The minimum base assessment rate for Risk Category I, equal to two basis points, and

- The maximum base assessment rate for Risk Category I, which is two basis points higher than the minimum rate.

II. The Statistical Model

The Statistical Model is defined in equation 1a below.
Equation 1a

\[
\text{Downgrade}(0,1)_{i,t} = \beta_0 + \beta_1 (\text{Tier 1 leverage ratio}_{i,t}) \\
+ \beta_2 (\text{Loans past due 30 to 89 days ratio}_{i,t}) \\
+ \beta_3 (\text{Nonperforming asset ratio}_{i,t}) \\
+ \beta_4 (\text{Net loan charge-off ratio}_{i,t}) \\
+ \beta_5 (\text{Net income before taxes ratio}_{i,t}) \\
+ \beta_6 (\text{Weighted average of the C, A, M, E and L component ratings}_{i,t})
\]

where Downgrade(0,1)_{i,t} (the dependent variable—the event being explained) is the incidence of downgrade from a composite rating of 1 or 2 to a rating of 3 or worse during an on-site examination for an institution i between 3 and 12 months after time t. Time \( t \) is the end of a year within the multi-year period over which the model was estimated (as explained below). The dependent variable takes a value of 1 if a downgrade occurs and 0 if it does not.

The explanatory variables (regressors) in the model are five financial ratios and a weighted average of the “C,” “A,” “M,” “E” and “L” component ratings. The five financial ratios included in the model are:

- Tier 1 leverage ratio
- Loans past due 30–89 days/Gross assets
- Nonperforming assets/Gross assets
- Net loan charge-offs/Gross assets
- Net income before taxes/Risk-weighted assets.

The financial ratios and the weighted average of the “C,” “A,” “M,” “E” and “L” component ratings (collectively, the regressors) are defined in Table A.1. The component rating for sensitivity to market risk (the “S” rating) is not available for years prior to 1997. As a result, and as described in Table A.1, the Statistical Model is estimated using a weighted average of five component ratings excluding the “S” component. In addition, delinquency and non-accrual data on government guaranteed loans are not available before 1993 for Call Report filers and before the third quarter of 2005 for TFR filers. As a result, and as also described in Table A.1, the Statistical Model is estimated without deducting delinquent or past-due government guaranteed loans from either the loans past due 30–89 days to gross assets ratio or the nonperforming assets to gross assets ratio.

<table>
<thead>
<tr>
<th>Regressor Description</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 1 Leverage Ratio (%)</td>
<td>Tier 1 capital for Prompt Corrective Action (PCA) divided by adjusted average assets based on the definition for prompt corrective action</td>
</tr>
<tr>
<td>Loans Past Due 30–89 Days/Gross Assets (%)</td>
<td>Total loans and lease financing receivables past due 30 through 89 days and still accruing interest divided by gross assets (gross assets equal total assets plus allowance for loan and lease financing receivable losses and allocated transfer risk)</td>
</tr>
<tr>
<td>Nonperforming Assets/Gross Assets (%)</td>
<td>Sum of total loans and lease financing receivables past due 90 or more days and still accruing interest, total nonaccrual loans and lease financing receivables, and other real estate owned divided by gross assets</td>
</tr>
<tr>
<td>Net Loan Charge-Offs/Gross Assets (%)</td>
<td>Total charged-off loans and lease financing receivables debited to the allowance for loan and lease losses less total recoveries credited to the allowance to loan and lease losses for the most recent twelve months divided by gross assets</td>
</tr>
<tr>
<td>Net Income before Taxes/Risk-Weighted Assets (%)</td>
<td>Income before income taxes and extraordinary items and other adjustments for the most recent twelve months divided by risk-weighted assets</td>
</tr>
<tr>
<td>Weighted Average of C, A, M, E and L Component Ratings</td>
<td>The weighted sum of the “C,” “A,” “M,” “E” and “L” CAMELS components, with weights of 28 percent each for the “C” and “M” components, 22 percent for the “A” component, and 11 percent each for the “E” and “L” components. (For the regression, the “S” component is omitted.)</td>
</tr>
</tbody>
</table>
Federal Deposit Insurance Corporation

The financial ratio regressors used to estimate the downgrade probabilities are obtained from quarterly reports of condition (Reports of Condition and Income and Thrift Financial Reports). The weighted average of the "C," "A," "M," "E" and "L" component ratings regressor is based on component ratings obtained from the most recent bank examination conducted within 24 months before the date of the report of condition.

The Statistical Model uses ordinary least squares (OLS) regression to estimate downgrade probabilities. The model is estimated with data from a multi-year period (as explained below) for all institutions in Risk Category I, except for institutions established within five years before the date of the report of condition.

The OLS regression estimates coefficients, $\beta_j$, for a given regressor $j$ and a constant amount, $\beta_0$, as specified in equation 1a. As shown in equation 1b below, these coefficients are multiplied by values of risk measures at time $T$, which is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed. The sum of the products is then added to the constant amount to produce an estimated probability, $d_{i,T}$, that an institution will be downgraded to 3 or worse within 3 to 12 months from time $T$.

The risk measures are financial ratios as defined in Table A.1, except that the loans past due 30 to 89 days ratio and the nonperforming asset ratio are adjusted to exclude the maximum amount recoverable from the U.S. Government, its agencies or government-sponsored agencies, under guarantee or insurance provisions. Also, the weighted sum of six CAMELS component ratings is used, with weights of 25 percent each for the "C" and "M" components, 20 percent for the "A" component, and 10 percent each for the "E," "L," and "S" components.

Equation 1b

$$d_{i,T} = \beta_0 + \beta_1 \text{(Tier 1 leverage ratio)} + \beta_2 \text{(Loans past due 30 to 89 days ratio)} + \beta_3 \text{(Nonperforming asset ratio)} + \beta_4 \text{(Net loan charge - off ratio)} + \beta_5 \text{(Net income before taxes ratio)} + \beta_6 \text{(Weighted average of CAMELS component ratings)}$$

III. Minimum and maximum downgrade probability cutoff values

The pricing multipliers are also determined by minimum and maximum downgrade probability cutoff values, which will be computed as follows:

• The minimum downgrade probability cutoff value will be the maximum downgrade probability among the forty-five percent of all small insured institutions in Risk Category I (excluding new institutions) with the lowest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2006. The minimum downgrade probability cutoff value is approximately 2 percent.

• The maximum downgrade probability cutoff value will be the minimum downgrade probability among the five percent of all small insured institutions in Risk Category I (excluding new institutions) with the highest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2006. The maximum downgrade probability cutoff value is approximately 14 percent.

IV. Derivation of uniform amount and pricing multipliers

The uniform amount and pricing multipliers used to compute the annual base assessment rate in basis points, $P_{T}$, for any such institution $i$ at a given time $T$ will be determined from the Statistical Model, the minimum and maximum downgrade probability cutoff values, and minimum and maximum base assessment rates in Risk Category I as follows:

1As used in this context, a "new institution" means an institution that has been chartered as a bank or thrift for less than five years.

2As used in this context, a "new institution" means an institution that has been chartered as a bank or thrift for less than five years.
Equation 2
\[ P_{it} = \alpha_0 + \alpha_i \cdot d_{it}, \text{ subject to } 2 \leq P_{it} \leq 4 \]

where \( \alpha_0 \) and \( \alpha_i \) are a constant term and a scale factor used to convert \( d_{it} \) (the estimated downgrade probability for institution \( i \) at a given time \( T \) from the Statistical Model) to an assessment rate, respectively.

The numbers 2 and 4 in the restriction to equation 2 are the minimum base assessment rate and maximum base assessment rate, respectively, and they are expressed in basis points.

\[ (P_{it} \text{ is expressed as an annual rate, but the actual rate applied in any quarter will be } \frac{P_{it}}{4}) \]

Solving equation 2 for minimum and maximum base assessment rates simultaneously, \( 2 = \alpha_0 + \alpha_i \cdot 0.02 \) and \( 4 = \alpha_0 + \alpha_i \cdot 0.14 \), where 0.02 is the minimum downgrade probability cutoff value and 0.14 is the maximum downgrade probability cutoff value, results in values for the constant amount, \( \alpha_0 \), and the scale factor, \( \alpha_i \):

**Equation 3**
\[ \alpha_0 = 2 - \frac{2 \cdot 0.02}{0.14 - 0.02} = 1.67 \text{ and } \]

**Equation 4**
\[ \alpha_i = \frac{2}{0.14 - 0.02} = 16.67 \]

Substituting equations 1b, 3 and 4 into equation 2 produces an annual base assessment rate for institution \( i \) at time \( T \), \( P_{it} \), in terms of the uniform amount, the pricing multipliers and the ratios and weighted average CAMELS component rating referred to in 12 CFR 327.9(d)(2)(i):

**Equation 5**
\[ P_{it} = [1.67 + 16.67 \cdot \beta_i] + 16.67 \cdot \beta_i \cdot \left( \text{Tier 1 Leverage Ratio}_{it} \right) + 16.67 \cdot \beta_i \cdot \left( \text{Loans past due 30 to 89 days ratio}_{it} \right) + 16.67 \cdot \beta_i \cdot \left( \text{Nonperforming asset ratio}_{it} \right) + 16.67 \cdot \beta_i \cdot \left( \text{Net loan charge - off ratio}_{it} \right) + 16.67 \cdot \beta_i \cdot \left( \text{Net income before taxes ratio}_{it} \right) + 16.67 \cdot \beta_i \cdot \left( \text{Weighted average CAMELS component rating}_{it} \right) \]

again subject to \( 2 \leq P_{it} \leq 4 \)

where \( 1.67+16.67\beta \) equals the uniform amount, \( 16.67\beta_i \) is a pricing multiplier for the associated risk measure \( j \), and \( T \) is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed.

V. Updating the Statistical Model, uniform amount, and pricing multipliers

The initial Statistical Model is estimated using year-end financial ratios and the weighted average of the “C,” “A,” “M,” “E” and “L” component ratings over the 1984 to 2004 period and downgrade data from the 1985 to 2006 period. The FDIC may, from time to time, but no more frequently than annually, re-estimate the Statistical Model with updated data and publish a new formula for determining assessment rates—equation 5—based on updated uniform amounts and pricing multipliers. However, the minimum and maximum downgrade probability cutoff values will not change without additional notice-and-comment rulemaking. The period covered by the analysis will be lengthened by one year each year; however, from time to time, the FDIC may drop some earlier years from its analysis.

[71 FR 69313, Nov. 30, 2006]
APPENDIX B TO SUBPART A

NUMERICAL CONVERSION OF LONG-TERM DEBT ISSUER RATINGS

<table>
<thead>
<tr>
<th>Current long-term debt issuer rating</th>
<th>Converted value</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA</td>
<td>1.00</td>
</tr>
<tr>
<td>AA</td>
<td>1.05</td>
</tr>
<tr>
<td>A</td>
<td>1.15</td>
</tr>
<tr>
<td>AA−</td>
<td>1.30</td>
</tr>
<tr>
<td>A+</td>
<td>1.50</td>
</tr>
<tr>
<td>A</td>
<td>1.80</td>
</tr>
<tr>
<td>A−</td>
<td>2.20</td>
</tr>
<tr>
<td>BBB+</td>
<td>2.70</td>
</tr>
<tr>
<td>BBB or worse</td>
<td>3.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Moody’s</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Aa1</td>
<td>1.00</td>
</tr>
<tr>
<td>Aa2</td>
<td>1.05</td>
</tr>
<tr>
<td>Aa3</td>
<td>1.15</td>
</tr>
<tr>
<td>A1</td>
<td>1.30</td>
</tr>
<tr>
<td>A2</td>
<td>1.50</td>
</tr>
<tr>
<td>A3</td>
<td>1.80</td>
</tr>
<tr>
<td>BBB or worse</td>
<td>2.20</td>
</tr>
</tbody>
</table>

APPENDIX C TO SUBPART A

ADDITIONAL RISK CONSIDERATIONS FOR LARGE RISK CATEGORY INSTITUTIONS

<table>
<thead>
<tr>
<th>Information source</th>
<th>Examples of Associated Risk Indicators or Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Performance and Condition Information</td>
<td>Capital Measures (Level and Trend)</td>
</tr>
<tr>
<td></td>
<td>Regulatory capital ratios</td>
</tr>
<tr>
<td></td>
<td>Capital composition</td>
</tr>
<tr>
<td></td>
<td>Dividend payout ratios</td>
</tr>
<tr>
<td></td>
<td>Internal capital growth rates relative to asset growth</td>
</tr>
<tr>
<td>Profitability Measures (Level and Trend)</td>
<td>Return on assets and return on risk-adjusted assets</td>
</tr>
<tr>
<td></td>
<td>Net interest margins, funding costs and volumes, earning asset yields and volumes</td>
</tr>
<tr>
<td></td>
<td>Noninterest revenue sources</td>
</tr>
<tr>
<td></td>
<td>Operating expenses</td>
</tr>
<tr>
<td></td>
<td>Loan loss provisions relative to problem loans</td>
</tr>
<tr>
<td></td>
<td>Historical volatility of various earnings sources</td>
</tr>
<tr>
<td>Asset Quality Measures (Level and Trend)</td>
<td>Loan and securities portfolio composition and volume of higher risk lending activities (e.g., sub-prime lending)</td>
</tr>
<tr>
<td></td>
<td>Loan performance measures (past due, nonaccrual, classified and criticized, and renegotiated loans) and portfolio characteristics such as internal loan rating and credit score distributions, internal estimates of default, internal estimates of loss given default, and internal estimates of exposures in the event of default</td>
</tr>
<tr>
<td></td>
<td>Loan loss reserve trends</td>
</tr>
<tr>
<td></td>
<td>Loan growth and underwriting trends</td>
</tr>
<tr>
<td></td>
<td>Off-balance sheet credit exposure measures (unfunded loan commitments, securitization activities, counterparty derivatives exposures) and hedging activities</td>
</tr>
<tr>
<td>Liquidity and Funding Measures (Level and Trend)</td>
<td>Composition of deposit and non-deposit funding sources</td>
</tr>
<tr>
<td></td>
<td>Liquid resources relative to short-term obligations, undisbursed credit lines, and contingent liabilities</td>
</tr>
<tr>
<td>Interest Rate Risk and Market Risk (Level and Trend)</td>
<td>Maturity and repricing information on assets and liabilities, interest rate risk analyses</td>
</tr>
<tr>
<td></td>
<td>Trading book composition and Value-at-Risk information</td>
</tr>
<tr>
<td>Market Information</td>
<td>Subordinated debt spreads</td>
</tr>
<tr>
<td></td>
<td>Credit default swap spreads</td>
</tr>
<tr>
<td></td>
<td>Parent’s debt issuer ratings and equity price volatility</td>
</tr>
<tr>
<td></td>
<td>Market-based measures of default probabilities</td>
</tr>
<tr>
<td></td>
<td>Rating agency watch lists</td>
</tr>
<tr>
<td></td>
<td>Market analyst reports</td>
</tr>
<tr>
<td>Stress Considerations</td>
<td>Ability to Withstand Stress Conditions</td>
</tr>
<tr>
<td></td>
<td>Internal analyses of portfolio composition and risk concentrations, and vulnerabilities to changing economic and financial conditions</td>
</tr>
</tbody>
</table>

[71 FR 69313, Nov. 30, 2006]


Information source | Examples of Associated Risk Indicators or Information
--- | ---
| Stress scenario development and analyses |
| Results of stress tests or scenario analyses that show the degree of vulnerability to adverse economic, industry, market, and liquidity events. Examples include: |
| i. an evaluation of credit portfolio performance under varying stress scenarios |
| ii. an evaluation of non-credit business performance under varying stress scenarios |
| iii. an analysis of the ability of earnings and capital to absorb losses stemming from unanticipated adverse events |
| Contingency or emergency funding strategies and analyses |
| Capital adequacy assessments |
| Nature of and breadth of an institution’s primary business lines and the degree of variability in valuations for firms with similar business lines or similar portfolios |
| Ability to identify and describe discrete business units within the banking legal entity |
| Funding structure considerations relating to the order of claims in the event of liquidation (including the extent of subordinated claims and priority claims) |
| Extent of insured institutions assets held in foreign units |
| Degree of reliance on affiliates and outsourcing for material mission-critical services, such as management information systems or loan servicing, and products |
| Availability of sufficient information, such as information on insured deposits and qualified financial contracts, to resolve an institution in an orderly and cost-efficient manner |

Subpart B—Implementation of One-Time Assessment Credit


Source: 71 FR 61383, Oct. 18, 2006, unless otherwise noted.

§ 327.30 Purpose and scope.

(a) Scope. This subpart B of part 327 implements the one-time assessment credit required by section 7(e)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(e)(3) and applies to insured depository institutions.

(b) Purpose. This subpart B of part 327 sets forth the rules for:

1. Determination of the aggregate amount of the one-time credit;
2. Identification of eligible insured depository institutions;
3. Determination of the amount of each eligible institution’s December 31, 1996 assessment base ratio and one-time credit;
4. Transferability of credit amounts among insured depository institutions;
5. Application of such credit amounts against assessments; and
6. An institution’s request for review of the FDIC’s determination of a credit amount.

§ 327.31 Definitions.

For purposes of this subpart and subpart C:

(a) The average assessment rate for any assessment period means the aggregate assessment charged all insured depository institutions for that period divided by the aggregate assessment base for that period.

(b) Board means the Board of Directors of the FDIC.

(c) De facto rule means any transaction in which an insured depository institution assumes substantially all of the deposit liabilities and acquires substantially all of the assets of any other insured depository institution at the time of the transaction.

(d) An eligible insured depository institution:

1. Means an insured depository institution that:
   1. Was in existence on December 31, 1996, and paid a deposit insurance assessment before December 31, 1996; or
   2. Is a successor to an insured depository institution referred to in paragraph (d)(1)(i) of this section; and
2. Does not include an institution if its insured status has terminated as of or after the effective date of this regulation.

(e) Merger means any transaction in which an insured depository institution merges or consolidates with any other insured depository institution.

Notwithstanding part 303, subpart D, for purposes of this subpart B and subpart C of this part, merger does not include transactions in which an insured depository institution either directly...
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or indirectly acquires the assets of, or assumes liability to pay any deposits made in, any other insured depository institution, but there is not a legal merger or consolidation of the two insured depository institutions.

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

(g) Successor means a resulting institution or an insured depository institution that acquired part of another insured depository institution's 1996 assessment base ratio under paragraph 327.33(c) of this subpart under the de facto rule.

§ 327.32 Determination of aggregate credit amount.

The aggregate amount of the one-time credit shall equal $4,707,580,238.19.

§ 327.33 Determination of eligible institution's credit amount.

(a) Subject to paragraph (c) of this section, allocation of the one-time credit shall be based on each eligible insured depository institution's 1996 assessment base ratio.

(b) Subject to paragraph (c) of this section, an eligible insured depository institution's 1996 assessment base ratio shall consist of:

(1) Its assessment base as of December 31, 1996 (adjusted as appropriate to reflect the assessment base of December 31, 1996, of all institutions for which it is the successor), as the numerator; and

(2) The combined aggregate assessment bases of all eligible insured depository institutions, including any successor institutions, as of December 31, 1996, as the denominator.

(c) If an insured depository institution is a successor to an eligible insured depository institution under the de facto rule, as defined in paragraph 327.33(c) of this subpart, the successor and the eligible insured depository institution will divide the eligible insured depository institution's 1996 assessment base ratio pro rata, based on the deposit liabilities assumed in the transaction. In any subsequent transaction involving an insured depository institution that previously engaged in a transaction to which the de facto rule applied, the insured depository institution may not be deemed to have transferred more than its remaining 1996 assessment base ratio. If the transferring institution is no longer an insured depository institution after the transfer, the last successor will acquire the transferring institution's remaining 1996 assessment base ratio.

§ 327.34 Transferability of credits.

(a) Any remaining amount of the one-time assessment credit and the associated 1996 assessment base ratio shall transfer to a successor of an eligible insured depository institution.

(b) Prior to the final determination of its 1996 assessment base and one-time assessment credit amount by the FDIC, an eligible insured depository institution may enter into an agreement to transfer any portion of such institution's one-time credit amount and 1996 assessment base ratio to another insured depository institution. The parties to the agreement shall notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The adjustment to credit amount and the associated 1996 assessment base ratio shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement.

(c) An eligible insured depository institution may enter into an agreement after the final determination of its 1996 assessment base ratio and one-time credit amount by the FDIC to transfer any portion of such institution's one-time credit amount to another insured depository institution. The parties to the agreement shall notify the FDIC's Division of Finance and submit a written agreement, signed by legal representatives of both institutions. The parties must include documentation stating that each representative has the legal authority to bind the institution. The adjustment to the credit amount shall be made in the next assessment invoice that is sent at least 10 days after the FDIC's receipt of the written agreement.
§ 327.35 Application of credits.

(a) Subject to the limitations in paragraph (b) of this section, the amount of an eligible insured depository institution’s one-time credit shall be applied to the maximum extent allowable by law against that institution’s quarterly assessment payment under subpart A of this part, until the institution’s credit is exhausted.

(b) The following limitations shall apply to the application of the credit against assessment payments.

(1) For assessments that become due for assessment periods beginning in calendar years 2008, 2009, and 2010, the credit may not be applied to more than 90 percent of the quarterly assessment.

(2) For an insured depository institution that exhibits financial, operational, or compliance weaknesses ranging from moderately severe to unsatisfactory, or is not at least adequately capitalized (as defined pursuant to section 38 of the Federal Deposit Insurance Act) at the beginning of an assessment period, the amount of the credit that may be applied against the institution’s quarterly assessment for that period shall not exceed the amount that the institution would have been assessed if it had been assessed at the average assessment rate for all insured institutions for that period. The FDIC shall determine the average assessment rate for an assessment period based upon its best estimate of the average rate for the period. The estimate shall be made using the best information available, but shall be made no earlier than 30 days and no later than 20 days prior to the payment due date for the period.

(3) If the FDIC has established a restoration plan pursuant to section 7(b)(3)(E) of the Federal Deposit Insurance Act, the FDIC may elect to restrict the application of credit amounts, in any assessment period, up to the lesser of:

(i) The amount of an insured depository institution’s assessment for that period; or

(ii) The amount equal to 3 basis points of the institution’s assessment base.

§ 327.36 Requests for review of credit amount.

(a)(1) As soon as practicable after the publication date of this rule, the FDIC shall notify each insured depository institution by FDICconnect or mail of its 1996 assessment base ratio and credit amount in a Statement of One-Time Credit (“Statement”), if any. An insured depository institution may submit a request for review of the FDIC’s determination of the institution’s 1996 assessment base ratio or credit amount as shown on the Statement within 30 days after the effective date of this rule. Such review may be requested if:

(i) The institution disagrees with a determination as to eligibility for the credit that relates to that institution’s credit amount;

(ii) The institution disagrees with the calculation of the credit as stated on the Statement; or

(iii) The institution believes that the 1996 assessment base ratio attributed to the institution on the Statement does not fully or accurately reflect its own 1996 assessment base or appropriate adjustments for successors.

(2) If an institution does not submit a timely request for review, that institution is barred from subsequently requesting review of its credit amount, subject to paragraph (e) of this section.

(b)(1) An insured depository institution may submit a request for review of the FDIC’s adjustment to the credit amount in a quarterly invoice within 30 days of the date on which the FDIC provides the invoice. Such review may be requested if:

(i) The institution disagrees with the calculation of the credit as stated on the invoice; or

(ii) The institution believes that the 1996 assessment base ratio attributed to the institution due to the adjustment to the invoice does not fully or accurately reflect appropriate adjustments for successors since the last quarterly invoice.

(2) If an institution does not submit a timely request for review, that institution is barred from subsequently requesting review of its credit amount, subject to paragraph (e) of this section.

(c) The request for review shall be submitted to the Division of Finance...
and shall provide documentation sufficient to support the change sought by the institution. At the time of filing with the FDIC, the requesting institution shall notify, to the extent practicable, any other insured depository institution that would be directly and materially affected by granting the request for review and provide such institution with copies of the request for review, the supporting documentation, and the FDIC’s procedures for requests under this subpart. In addition, the FDIC also shall make reasonable efforts, based on its official systems of records, to determine that such institutions have been identified and notified.

(d) During the FDIC’s consideration of the request for review, the amount of credit in dispute shall not be available for use by any institution.

(e) Within 30 days of being notified of the filing of the request for review, those institutions identified as potentially affected by the request for review may submit a response to such request, along with any supporting documentation, to the Division of Finance, and shall provide copies to the requesting institution. If an institution that was notified under paragraph (c) does not submit a response to the request for review, that institution may not:

(1) Subsequently dispute the information submitted by other institutions on the transaction(s) at issue in the review process; or
(2) Appeal the decision by the Director of the Division of Finance.

(f) If additional information is requested of the requesting or affected institutions by the FDIC, such information shall be provided by the institution within 21 days of the date of the FDIC’s request for additional information.

(g) Any institution submitting a timely request for review will receive a written response from the FDIC’s Director of the Division of Finance, or his or her designee, notifying the requesting and affected institutions of the determination of the Director as to whether the requested change is warranted. Notice of the procedures applicable to appeals under paragraph (h) of this section will be included with the Director’s written determination.

Whenever feasible, the FDIC will provide the institution with the aforesaid written response the later of:

(1) Within 60 days of receipt by the FDIC of the request for revision;
(2) If additional institutions have been notified by the requesting institution or the FDIC, within 60 days of the date of the last response to the notification; or
(3) If additional information has been requested by the FDIC, within 60 days of receipt of the additional information.

(h) Subject to paragraph (e) of this section, the insured depository institution that requested review under this section, or an insured depository institution materially affected by the Director’s determination, that disagrees with that determination may appeal to the FDIC’s Assessment Appeals Committee on the same grounds as set forth under paragraph (a) of this section. Any such appeal must be submitted within 30 calendar days from the date of the Director’s written determination. Notice of the procedures applicable to appeals under this section will be included with the Director’s written determination. The decision of the Assessment Appeals Committee shall be the final determination of the FDIC.

(i) Any adjustment to an institution’s credits resulting from a determination by the Director of the FDIC’s Assessment Appeals Committee shall be reflected in the institution’s next assessment invoice. The adjustment to credits shall affect future assessments only and shall not result in a retroactive adjustment of assessment amounts owed for prior periods.

Subpart C—Implementation of Dividend Requirements


SOURCE: 71 FR 61389, Oct. 18, 2006, unless otherwise noted.

§ 327.50 Purpose and scope.

(a) Scope. This subpart C of part 327 implements the dividend provisions of section 7(e)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(e)(2), and
§ 327.51 Definitions.

For purposes of this subpart:
(a) Board has the same meaning as under subpart B of this part.
(b) DIF means the Deposit Insurance Fund.
(c) An insured depository institution's 1996 assessment base ratio means an institution's 1996 assessment base ratio as determined pursuant to § 327.33 of subpart B of this part, adjusted as necessary after the effective date of subpart B of this part to reflect subsequent transactions in which the institution succeeds to another institution's assessment base ratio, or a transfer of the assessment base ratio pursuant to § 327.34.
(d) Predecessor, when used in the context of insured depository institutions, refers to the institution merged with or into a resulting institution, consistent with the definition of "successor" in § 327.31.

§ 327.52 Annual dividend determination.

(a) On or before May 15th of each calendar year, beginning in 2007, the Board shall determine whether to declare a dividend based upon the reserve ratio of the DIF as of December 31st of the preceding year, and the amount of the dividend, if any.
(b) Except as provided in paragraph (d) of this section, if the reserve ratio of the DIF equals or exceeds 1.35 percent of estimated insured deposits and does not exceed 1.5 percent, the Board shall declare the amount that is equal to one-half of the amount in excess of the amount required to maintain the reserve ratio at 1.35 percent as the aggregate dividend to be paid to insured depository institutions.
(c) If the reserve ratio of the DIF exceeds 1.5 percent of estimated insured deposits, except as provided in paragraph (d) of this section, the Board shall declare the amount in excess of the amount required to maintain the reserve ratio at 1.5 percent as the aggregate dividend to be paid to insured depository institutions and shall declare a dividend under paragraph (b) of this section.
(d) (1) The Board may suspend or limit a dividend otherwise required to be paid if the Board determines that:
   (i) A significant risk of losses to the DIF exists over the next one-year period; and
   (ii) It is likely that such losses will be sufficiently high as to justify the Board concluding that the reserve ratio should be allowed:
      (A) To grow temporarily without requiring dividends when the reserve ratio is between 1.35 and 1.5 percent; or
      (B) To exceed 1.5 percent.
   (2) In making a determination under this paragraph, the Board shall consider:
      (i) National and regional conditions and their impact on insured depository institutions;
      (ii) Potential problems affecting insured depository institutions or a specific group or type of depository institution;
      (iii) The degree to which the contingent liability of the FDIC for anticipated failures of insured institutions adequately addresses concerns over funding levels in the DIF; and
      (iv) Any other factors that the Board may deem appropriate.
   (3) Within 270 days of making a determination under this paragraph, the Board shall submit a report to the Committee on Financial Services and the Committee on Banking, Housing, and Urban Affairs, providing a detailed explanation of its determination, including a discussion of the factors considered.
   (e) The Board shall annually review any determination to suspend or limit dividend payments and must either:
      (1) Make a new finding justifying the renewal of the suspension or limitation.
under paragraph (d) of this section, and submit a report as required under paragraph (d)(3) of this section; or
(2) Reinstate the payment of dividends as required by paragraph (b) or (c) of this section.

§ 327.53 Allocation and payment of dividends.
(a) For any dividend declared before January 1, 2009, allocation of such dividend among insured depository institutions shall be based solely on an insured depository institution's 1996 assessment base ratio, as determined pursuant to paragraph 327.51(c) of this subpart, as of December 31st of the year for which dividends are declared.
(b) The FDIC shall notify each insured depository institution of the amount of such institution's dividend payment based on its share as determined pursuant to paragraph (a) of this section. Notice shall be given as soon as practicable after the Board's declaration of a dividend through a special notice of dividend.
(c) The FDIC shall pay individual dividend amounts, which are not subject to request for review under section 327.54 of this subpart, to insured depository institutions no later than 45 days after the issuance of the special notices of dividend. The FDIC shall notify institutions whether dividends will offset the next collection of assessments at the time of the invoice. An institution's dividend amount may be remitted with that institution's assessment or paid separately. If remitted with the institution's assessment, any excess dividend amount will be a net credit to the institution and will be deposited into the deposit account designated by the institution for assessment payment purposes pursuant to subpart A of this part. If remitted with the institution's assessment and the dividend amount is less than the amount of assessment due, then the institution's account will be directly debited to the FDIC to reflect the net amount owed to the FDIC as an assessment.
(d) If an insured depository institution's dividend amount is subject to review under §327.54, and that request is not finally resolved prior to the dividend payment date, the FDIC may credit the institution with the dividend amount provided on the invoice or freeze the amount in dispute. Adjustments to an individual institution's dividend amount based on the final determination of a request for review will be handled in the same manner as assessment underpayments and overpayments.

§ 327.54 Requests for review of dividend amount.
(a) An insured depository institution may submit a request for review of the FDIC's determination of the institution's dividend amount as shown on the special notice of dividend or assessment invoice, as appropriate. Such review may be requested if:
(1) The institution disagrees with the calculation of the dividend as stated on the special notice of dividend or invoice; or
(2) The institution believes that the 1996 assessment base ratio attributed to the institution has not been adjusted to include the 1996 assessment base ratio of an institution acquired by merger or transfer pursuant to §§ 327.33 and 327.34 of subpart B and the institution has not had an opportunity (whether or not that opportunity was utilized) to appeal that same determination under subpart B.
(b) Any such request for review must be submitted within 30 days of the date of the special notice of dividend or invoice for which a change is requested. The request for review shall be submitted to the Division of Finance and shall provide documentation sufficient to support the change sought by the institution. If an institution does not submit a timely request for review, that institution may not subsequently request review of its dividend amount, subject to paragraph (d) of this section. At the time of filing with the FDIC, the requesting institution shall notify, to the extent practicable, any other insured depository institution that would be directly and materially affected by granting the request for review and provide such institution with copies of the request for review, the supporting documentation, and the FDIC's procedures for requests under this subpart. The FDIC shall make reasonable efforts, based on its official systems of
§ 327.55 Sunset date.

Subpart C shall cease to be effective on December 31, 2008.

PART 328—ADVERTISEMENT OF MEMBERSHIP

§ 328.0 Scope.

Sec. 328.0 Scope. 328.1 Official sign. 328.2 Display and procurement of official sign. 328.3 Official advertising statement requirements. 328.4 Prohibition against receiving deposits at same teller station or window as non-insured institution.

Authority: 12 U.S.C. 1818(a), 1819 (Tenth), 1828(a).

Source: 72 FR 66102, Nov. 13, 2006, unless otherwise noted.

§ 328.0 Scope.

Part 328 describes the official sign of the FDIC and prescribes its use by insured depository institutions. It also prescribes the official advertising statement insured depository institutions must include in their advertisements. For purposes of part 328, the term “insured depository institution” includes insured branches of a foreign depository institution. Part 328 does not apply to non-insured offices or branches of insured depository institutions located in foreign countries.

§ 328.1 Official sign.

(a) The official sign referred to in this part shall be 7” by 3” in size, with black lettering and gold background, and of the following design:
§ 328.2 Display and procurement of official sign.

(a) Display of official sign. Each insured depository institution shall continuously display the official sign at each station or window where insured deposits are usually and normally received in the depository institution's principal place of business and in all its branches.

(1) Other locations—
(i) Within the institution. In addition to locations where display of the official sign is required under this § 328.2(a), an insured depository institution may display the official sign in other locations at the institution.
(ii) Other facilities. An insured depository institution may display the official sign on or at Remote Service Facilities. If an insured depository institution displays the official sign at a Remote Service Facility, and if there are any unserved institutions that share in the Remote Service Facility, any insured depository institution that displays the official sign must clearly show that the sign refers only to a designated insured depository institution(s). As used in this part, the term "Remote Service Facility" includes any automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received.

(2) Varied signs. Instead of displaying the official sign, an insured depository institution may display signs that vary from the official sign in size, color, or material at any location where display of the official sign is required or permitted under this § 328.2(a). However, any such varied sign that is displayed in locations where display of the official sign is required under this § 328.2(a) must not be smaller in size than the official sign and must have the same color for the text and symbols.

(3) Newly insured institutions. A depository institution shall display the official sign no later than its twenty-first day of operation as an insured depository institution, unless the institution promptly requested the official sign from the Corporation, but did not receive it before that date.

(b) Procuring official sign. An insured depository institution may procure the official sign from the Corporation for official use at no charge. Information on obtaining the official sign is posted on the FDIC's internet Web site, http://www.fdic.gov. Alternatively, insured depository institutions may, at their expense, procure from commercial suppliers signs that vary from the official sign in size, color, or material. Any insured depository institution which has promptly submitted a written request for an official sign to the Corporation shall not be deemed to have violated this § 328.2 by failing to display the official sign, unless the insured depository
§ 328.3 Official advertising statement requirements.

(a) Advertisement defined. The term “advertisement” as used in this part, shall mean a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business.

(b) Official advertising statement. The official advertising statement shall be in substance as follows: “Member of the Federal Deposit Insurance Corporation.”

(1) Optional short title and symbol. The short title “Member of FDIC” or “Member FDIC,” or a reproduction of the symbol of the Corporation (as described in § 328.1(b)), may be used by insured depository institutions at their option as the official advertising statement.

(2) Size and print. The official advertising statement shall be of such size and print to be clearly legible. If the symbol of the Corporation is used as the official advertising statement, and the symbol must be reduced to such proportions that the two lines of smaller type above and below “FDIC” are indistinct and illegible, those lines of smaller type may be blocked out or dropped.

(c) Use of official advertising statement in advertisements—(1) General requirement. Except as provided in § 328.3(d), each insured depository institution shall include the official advertising statement prescribed in § 328.3(b) in all advertisements that either promote deposit products and services or promote non-specific banking products and services offered by the institution. For purposes of this § 328.3, an advertisement promotes non-specific banking products and services if it includes the name of the insured depository institution but does not list or describe particular products or services offered by the institution. An example of such an advertisement would be, “Anytown Bank, offering a full range of banking services.”

(2) Foreign depository institutions. When a foreign depository institution has both insured and uninsured U.S. branches, the depository institution must also identify which branches are insured and which branches are not insured in all of its advertisements requiring use of the official advertising statement.

(3) Newly insured institutions. A depository institution shall include the official advertising statement in its advertisements no later than its twenty-first day of operation as an insured depository institution.

(d) Types of advertisements which do not require the official advertising statement:

(1) Statements of condition and reports of condition of an insured depository institution which are required to be published by State or Federal law;

(2) Insured depository institution 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 insured depository institution offices or attached to the building or buildings in which such offices are located;

(4) Listings in directories;

(5) Advertisements not setting forth the name of the insured depository institution;

(6) Entries in a depository institution directory, provided the name of the insured depository institution 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 depository institution services where the names of insured depository institutions and noninsured institutions are listed and form a part of such advertisements;

(8) Advertisements by radio or television, other than display advertisements, which do not exceed thirty (30) seconds in time;
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(9) Advertisements which are of the type or character that make it impractical to include the official advertising statement, including, but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains; and

(10) Advertisements which contain a statement to the effect that the depository institution is a member of the Federal Deposit Insurance Corporation, or that the depository institution is insured by the Federal Deposit Insurance Corporation, or that its deposits or depositors are insured by the Federal Deposit Insurance Corporation to at least $100,000 for each depositor.

(e) Restrictions on using the official advertising statement when advertising non-deposit products—

(i) Non-deposit product. As used in this part, the term "non-deposit product" shall include, but is not limited to, insurance products, annuities, mutual funds, and securities. For purposes of this definition, a credit product is not a non-deposit product.

(ii) Hybrid product. As used in this part, the term "hybrid product" shall mean a product or service that has both deposit product features and non-deposit product features. A sweep account is an example of a hybrid product.

(2) Non-deposit product advertisements. Except as provided in §328.3(e)(4), an insured depository institution shall not include the official advertising statement, or any other statement or symbol which implies or suggests the existence of Federal deposit insurance, in any advertisement relating solely to non-deposit products.

(3) Hybrid product advertisements. Except as provided in §328.3(e)(4), an insured depository institution shall not include the official advertising statement, or any other statement or symbol which implies or suggests the existence of federal deposit insurance, in any advertisement relating solely to hybrid products.

(4) Mixed advertisements. In advertisements containing information about both insured deposit products and non-deposit products or hybrid products, an insured depository institution shall clearly segregate the official advertising statement or any similar statement from that portion of the advertisement that relates to the non-deposit products.

(f) 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.

§ 328.4 Prohibition against receiving deposits at same teller station or window as noninsured institution.

(a) Prohibition. An insured depository institution may not receive deposits at any teller station or window where any noninsured institution receives deposits or similar liabilities.

(b) Exception. This §328.4 does not apply to deposits received at a Remote Service Facility.

PART 329—INTEREST ON DEPOSITS

Sec.
329.0 Scope.
329.1 Definitions.
329.2 Payment of interest.
329.3 Exception to prohibition on payment of interest.
329.101 Transfers not included within the six transfers allowed for nondemand deposits pursuant to §329.1(b)(3).
329.102 Deposits described in §329.1(b)(3).
329.103 Premiums.
329.104 Ten-day grace period.

AUTHORITY: 12 U.S.C. 1819, 1829(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.
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 a depositor identified in paragraph (2) of section 2(a) of Pub. L. 93-100 (12 U.S.C. 1832(a)(2))."  

(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.

§ 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.

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.

§ 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 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)).
(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.
§ 329.101 Transfers not included within the six transfers allowed for nondemand deposits pursuant to § 329.1(b)(3). This interpretive rule describes certain transfers that are not included as any of the six transfers allowed pursuant to § 329.1(b)(3).

(a) Transfers from a deposit described in § 329.1(b)(3) that are made to the bank are not deemed to be included within the six transfers permitted for a nondemand deposit by that paragraph (3) when the transfers are made for the purpose of repaying loans and associated expenses at the bank (as originator or servicer). This exemption does not apply to transfers to the bank that are made for the purpose of repaying loans that are made by the bank to the depositor’s demand account for the purpose of covering overdrafts.

(b) Transfers from a deposit described in § 329.1(b)(3) that are made to another account of the same depositor at the bank are not deemed to be included within the six transfers permitted for a nondemand deposit by that paragraph (3) when the transfers are made by mail, messenger, automated teller machine or in person.

(c) Withdrawals from a deposit described in § 329.1(b)(3) are not deemed to be included within the six transfers permitted for a nondemand deposit by that paragraph (3) when the withdrawals are made by mail, messenger, telephone (via check mailed to the depositor), automated teller machine, or in person.

§ 329.102 Deposits described in § 329.1(b)(3). This interpretive rule explains the second proviso of § 329.1(b)(3).

(a) No deposit described in § 329.1(b)(3) that is held by an organization that is not organized for profit and that is described in paragraphs 501(c)(3) through (13) and (19) and section 528 of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3) through (13) and (19), and 528) is deemed to be a demand deposit. Actual Internal Revenue Service documentation of the organization’s tax-exempt status is not required; it is merely an aid in making the determination.

(b) No deposit described in § 329.1(b)(3) that is held by a depositor identified in section 2(a)(2) of Pub. L. 93-100 (12 U.S.C. 1832(a)(2))—whether the deposit is used for business purposes or otherwise—is deemed to be a demand deposit.

(c) No deposit described in § 329.1(b)(3) that represents funds held in a fiduciary capacity (whether the fiduciary 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
§ 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

§ 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.
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(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) Standard maximum deposit insurance amount, referred to as "the SMDIA" hereafter, means $100,000 adjusted pursuant to subparagraph (F) of section 11(a)(1) of the FDI Act (12 U.S.C. 1821(a)(1)(F)).

(o) 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.

(p) 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.

(q) 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.

(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.

(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 are not separately insured; rather they shall be added together and insured in accordance with this part.

(d) Deposits maintained by foreign banks or foreign branches of insured depository institutions in the United States. 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.

(e) Deposits maintained by foreign banks or foreign branches of insured depository institutions in foreign currency. 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.

(f) Deposits maintained by foreign banks or foreign branches of insured depository institutions in foreign currency. 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.

(g) Deposits maintained by foreign banks or foreign branches of insured depository institutions in foreign currency. 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.

(h) Deposits maintained by foreign banks or foreign branches of insured depository institutions in foreign currency. 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.
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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. 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. 2121(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 and of the 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).

§330.5 Recognition of deposit ownership and fiduciary relationships.

(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) Fiduciary relationships—(1) Recognition. The FDIC will recognize a claim for insurance coverage based on a fiduciary relationship only if the relationship is expressly disclosed, by way of specific references, in the “deposit account records” (as defined in §330.1(e)) of the insured depository institution. Such relationships include, but are not limited to, relationships involving a trustee, agent, nominee, guardian, executor or custodian pursuant to which funds are deposited. The express indication that the account is held in a fiduciary capacity will not be necessary, 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—(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 the SMDIA 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 the SMDIA in the aggregate.

§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
§ 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 the SMDIA 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 the 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 twice the SMDIA, separately from any funds deposited into accounts bearing their individual names.

(b) Determination of insurance coverage. The interests of each co-owner in all qualifying joint accounts shall be added together and the total shall be insured up to the SMDIA. (Example: “A&B” have a qualifying joint account with a balance of $60,000; “A&C” have a qualifying joint account with a balance of $80,000; and “A&B&C” have a qualifying joint account with a balance of $150,000. A’s combined ownership interest in all qualifying joint accounts...
would be $120,000 ($30,000 plus $40,000 plus $50,000); therefore, A's interest would be insured in the amount of $100,000 and uninsured in the amount of $20,000. B's combined ownership interest in all qualifying joint accounts would be $80,000 ($30,000 plus $50,000); therefore, B's interest would be fully insured. C's combined ownership interest in all qualifying joint accounts would be $90,000 ($40,000 plus $50,000); therefore, C's interest would be fully 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 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.

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 the SMDIA 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 the SMDIA. 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”, “grandchildren”, “parents”, “brothers” and “sisters”. For the purpose of establishing the qualifying degree of kinship identified in paragraph (a) of this section, the term “children” includes biological, adopted and step-children of the owner. The term “grandchildren” includes biological, adopted and step-children of any of the owner’s children. The term “parents” includes biological, adoptive and step-parents of the owner. The term “brothers” includes full brothers, half brothers, brothers through adoption and step-brothers. The term “sisters” includes full sisters, half sisters, sisters through adoption and step-sisters.

(f) Living trust accounts. (1) This section also applies to revocable trust accounts held in connection with a formal revocable trust created by an owner/grantor and over which the owner/grantor retains ownership during his or her lifetime. These trusts are usually referred to as living trusts. If a named beneficiary in a living trust is a qualifying beneficiary under this section, then the account held in connection with the living trust is eligible for the per-qualifying-beneficiary coverage described in paragraph (a) of this section. This coverage will apply only if, at the time an insured depository institution fails, a qualifying beneficiary would be entitled to his or her interest in the trust assets upon the grantor’s death and that ownership interest would not depend on the death of another trust beneficiary. If there is more than one grantor, then the beneficiary’s entitlement to the trust assets must be upon the death of the last grantor. The coverage provided in this paragraph (f) shall be irrespective of
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any other conditions in the trust that might prevent a beneficiary from acquiring an interest in the deposit account upon the account owner's death.

(Example 1: A is the owner of a living trust account with a deposit balance of $300,000. The trust provides that, upon A's death, her husband shall receive $100,000 and each of their two children shall receive $100,000, but only if the children graduate from college by age twenty-four. Assuming A has no other revocable trust accounts at the same depository institution, the coverage on her living trust account would be $300,000. The trust names three qualifying beneficiaries. Coverage would be provided up to $300,000 per qualifying beneficiary regardless of any contingencies.)

(Example 2: B is the owner of a living trust account with a deposit balance of $200,000. The trust provides that, upon B's death, his wife shall receive $200,000 but, if the wife predeceases B, each of the two children shall receive $100,000. Assuming B has no other revocable trust accounts at the same depository institution and his wife is alive at the time of the institution failure, the coverage on his living trust account would be $100,000. The trust names only one beneficiary (B's spouse) who would become the owner of the trust assets upon B's death. If when the institution fails B's wife has predeceased him, then the account would be insured to $200,000 because the two children would be entitled to the trust assets upon B's death.)

(2) The rules in paragraph (c) of this section on the interest of non-qualifying beneficiaries apply to living trust accounts. (Example: C is the owner of a living trust account with a deposit balance of $200,000. The trust provides that, upon C's death, his son shall receive $100,000 and his nephew shall receive $100,000. The account would be insured for at least $100,000 because one qualifying beneficiary (C's son) would become the owner of trust interests upon C's death. Because the nephew is a non-qualifying beneficiary entitled to receive an interest in the trust upon C's death, that interest would be considered C's single-ownership funds and insured with any other single-ownership funds C might have at the same institution. Assuming C has no other single-ownership funds at the institution, the full $200,000 in the living trust account would be insured ($100,000 in C's revocable trust account ownership capacity and $100,000 in C's single-ownership account capacity).

(3) For living trusts accounts that provide for a life estate interest for designated beneficiaries and a remainder interest for other beneficiaries, unless otherwise indicated in the trust, each life estate holder and each remainder-man will be deemed to have equal interests in the trust assets for deposit insurance purposes. Coverage will then be provided under the rules in this paragraph (f) up to the SMDIA per qualifying beneficiary.

(Example 1: D creates a living trust providing for his wife to have a life estate interest in the trust assets with the remaining assets going to their two children upon the wife's death. The assets in the trust are $300,000 and a living trust deposit account is opened for that full amount. Unless otherwise indicated in the trust, each beneficiary (all of whom here are qualifying beneficiaries) would be deemed to own an equal share of the $300,000; hence, the full amount would be insured. This result would be the same even if the wife has the power to invade the principal of the trust, inasmuch as defeating contingencies are not relevant for insurance purposes.)

(Example 2: E creates a living trust providing for a life estate interest for her spouse and remainder interests for two nephews. The life estate holder is a qualifying beneficiary (E's spouse) but the remainder-men (E's nephews) are not. Assuming a deposit account balance of $300,000, the living trust account would be insured for at least $100,000 because there is one qualifying beneficiary (E's spouse). The $200,000 attributable to E's nephews would be insured as E's single-ownership funds. If E has no other single-ownership funds at the same institution, then $100,000 would be insured separately as E's single-ownership funds. Thus, the $300,000 in the living trust account would be insured for a total of $200,000 and $100,000 would be uninsured.)

(4) In order for a depositor to qualify for the living trust account coverage provided under this paragraph (f), the title of the account must reflect that the funds in the account are held pursuant to a formal revocable trust. There is no requirement, however, that the deposit accounts records of the depository institution indicate the names of the beneficiaries of the living trust and their ownership interests in the trust.

(5) Effective April 1, 2004, this paragraph (f) shall apply to all living trust accounts.
§ 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 the SMDIA 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 section, 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 (15 U.S.C. 80a-8) 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 of the United States or but for the fact the person or persons owning such a deposit account is incorporated shall be deemed to be a corporation for purposes of determining deposit insurance coverage. An exception to this paragraph (a)(2) shall exist for any trust or other business arrangement established by a state or that is a state agency or state public instrumentality as part of a qualified tuition savings program under section 529 of the Internal Revenue Code (26 U.S.C. 529). A deposit account of such a trust or business arrangement shall not be deemed to be the deposit of a corporation provided that: The funds in the account may be traced to one or more particular investors or participants; and the existence of the trust relationships is disclosed in accordance with the requirements of §330.5. If these conditions are satisfied, each participant’s funds shall be insured as a deposit account of the participant.

(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 the SMDIA 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 the SMDIA 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 the SMDIA 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(p)) 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 the SMDIA 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(o)) 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 depositary 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 the SMDIA 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(q)) 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 the SMDIA 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 the SMDIA, separately from the funds of any other such estate.


§ 330.14 Retirement and other employee benefit plan accounts.

(a) "Pass-through" insurance. Any deposits of an employee benefit plan in an insured depository institution shall be insured on a "pass-through" basis, in the amount of up to the SMDIA for the non-contingent interest of each plan participant, provided the rules in §330.5 are satisfied. Deposits eligible for coverage under paragraph (b)(2) of
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this section that also are deposits of a
employee benefit plan or deposits of an
deferred compensation plan described
in section 457 of the Internal Revenue
depository institution shall be insured
as a “pass-through” basis in the
amount of $250,000 for the non-conting-
ent interest of each plan participant,
provided the rules in § 330.5 are satis-
fied.

(b) Aggregation—(1) Multiple plans.
Funds representing the non-contingent
interests of a beneficiary in an em-
ployee 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 compen-
sation plans described in section 457
of the Internal Revenue Code of 1986,
established by the same employer or
employee organization.

(2) Certain retirement accounts. De-
posits in an insured depository institu-
tion made in connection with the fol-
lowing types of retirement plans shall
be aggregated and insured in the
amount of up to $250,000 per partici-
pant:

(i) Any individual retirement account
described in section 408(a) of the Inter-
408(a));

(ii) Any eligible deferred compensa-
tion plan described in section 457 of the
Internal Revenue Code of 1986 (26
U.S.C. 457); and

(iii) Any individual account plan de-
 fined in section 3(34) of the Employee
Retirement Income Security Act
(ERISA) (29 U.S.C. 1002) and any plan
defined in section 401(d) of the Inter-
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.

(c) Determination of interests—(1) De-
 fined 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, regard-
less of whether said amount was de-
signed, in whole or in part, from con-
tributions 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, evalu-
ated in accordance with the method of
calculation ordinarily used under such
plan, as of the date of default of the in-
sured depository institution.

(d) Treatment of contingent interests. In
the event that employees' interests in
an employee benefit plan are not capa-
bile of evaluation in accordance with
the provisions of this section, or an ac-
count established for any such plan in-
cludes amounts for future participants
in the plan, payment by the FDIC with
respect to all such interests shall not
exceed the SMDIA in the aggregate.

(e) Overfunded pension plan deposits.
Any portion of an employee benefit
plan's deposits which is not attrib-
utable to the interests of the bene-
cficiaries under the plan shall be
deemed attributable to the overfunded
portion of the plan's assets and shall be
aggregated and insured up to the
SMDIA, separately from any other de-
posits.

(f) Definitions of “depositor”, “em-
ployee benefit plan”, “employee organiza-
tion” and “non-contingent interest”. Ex-
ccept as otherwise indicated in this sec-
tion, for purposes of this section:

(1) The term depositor means the per-
son(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 Retire-
ment 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.


§ 330.15 Accounts held by government depositors.

(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 the SMDIA in the aggregate for all time and savings deposits; and

(ii) Up to the SMDIA 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 the SMDIA in the aggregate for all time and savings deposits; and

(B) Up to the SMDIA 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 the SMDIA 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 the SMDIA in the aggregate for all time and savings deposits; and

(B) Up to the SMDIA 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 the SMDIA 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 the SMDIA in the aggregate for all time and savings deposits; and

(B) Up to the SMDIA in the aggregate for all demand deposits.

(ii) In addition, each such official custodian depositing such funds in an insured depository institution outside
part 332 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 the SMDIA 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 the SMDIA in the aggregate for all time and savings deposits; and

(ii) Up to the SMDIA 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 note holders are pro rata beneficiaries, and the beneficial interest of each note holder or bondholder in the deposit shall be separately insured up to the SMDIA.

(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.

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Subpart B—Limits on Disclosures

332.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.
332.11 Limits on disclosure and reuse of information.
332.12 Limits on sharing account number information for marketing purposes.

Subpart C—Exceptions

332.13 Exception to opt out requirements for service providers and joint marketing.
332.14 Exceptions to notice and opt out requirements for processing and servicing transactions.
332.15 Other exceptions to notice and opt out requirements.

Subpart D—Relation to Other Laws; Effective Date

332.16 Protection of Fair Credit Reporting Act.
332.17 Relation to State laws.
332.18 Effective date; transition rule.

APPENDIX A TO PART 332—SAMPLE CLAUSES

AUTHORITY: 12 U.S.C. 1819 (Seventh and Tenth); 15 U.S.C. 6801 et seq.

SOURCE: 65 FR 35216, June 1, 2000, unless otherwise noted.

§ 332.1 Purpose and scope.

(a) Purpose. This part governs the treatment of nonpublic personal information about consumers by the financial institutions listed in paragraph (b) of this section. This part:

(1) Requires a financial institution to provide notice to customers about its privacy policies and practices;

(2) Describes the conditions under which a financial institution may disclose nonpublic personal information about consumers to nonaffiliated third parties; and

(3) Provides a method for consumers to prevent a financial institution from disclosing that information to most nonaffiliated third parties by “opting out” of that disclosure, subject to the exceptions in §§ 332.13, 332.14, and 332.15.

(b) Scope. (1) This part applies only to nonpublic personal information about individuals who obtain financial products or services primarily for personal, family, or household purposes from the institutions listed below. This part does not apply to information about companies or about individuals who obtain financial products or services for business, commercial, or agricultural purposes. This part applies to the United States offices of entities for which the Federal Deposit Insurance Corporation (FDIC) has primary federal supervisory authority. They are referred to in this part as “you.” These are: banks insured by the FDIC (other than members of the Federal Reserve System), insured state branches of foreign banks, and certain subsidiaries of such entities.

(2) Nothing in this part modifies, limits, or supersedes the standards governing individually identifiable health information promulgated by the Secretary of Health and Human Services under the authority of sections 262 and 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–1320d–8).

§ 332.2 Rule of construction.

The examples in this part and the sample clauses in Appendix A of this part are not exclusive. Compliance with an example or use of a sample clause, to the extent applicable, constitutes compliance with this part.

§ 332.3 Definitions.

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

(a) Affiliate means any company that controls, is controlled by, or is under common control with another company.

(b)(1) Clear and conspicuous means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(2) Examples—(i) Reasonably understandable. You make your notice reasonably understandable if you:

(A) Present the information in clear, concise sentences, paragraphs, and sections;

(B) Use short explanatory sentences or bullet lists whenever possible;

(C) Use definite, concrete, everyday words and active voice whenever possible;

(D) Avoid multiple negatives;

(E) Avoid legal and highly technical business terminology whenever possible; and
(F) Avoid explanations that are imprecise and readily subject to different interpretations.

(ii) Designed to call attention. You design your notice to call attention to the nature and significance of the information in it if you:

(A) Use a plain-language heading to call attention to the notice;
(B) Use a typeface and type size that are easy to read;
(C) Provide wide margins and ample line spacing;
(D) Use boldface or italics for key words; and
(E) In a form that combines your notice with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars, when you combine your notice with other information.

(iii) Notices on website. If you provide a notice on a webpage, you design your notice to call attention to the nature and significance of the information in it if you use text or visual cues to encourage scrolling down the page if necessary to view the entire notice and ensure that other elements on the webpage such as text, graphics, hyperlinks, or sound do not distract attention from the notice, and you either:

(A) Place the notice on a screen that consumers frequently access, such as a page on which transactions are conducted; or
(B) Place a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature, and relevance of the notice.

(c) Collect means to obtain information that you organize or can retrieve by the name of an individual or by identifying number, symbol, or other identifying particular assigned to the individual, irrespective of the source of the underlying information.

(d) Company means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e)(1) Consumer means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual’s legal representative.

(2) Examples—(i) An individual who applies to you for credit for personal, family, or household purposes is a consumer of a financial service, regardless of whether the credit is extended.

(ii) An individual who provides nonpublic personal information to you in order to obtain a determination about whether he or she may qualify for a loan to be used primarily for personal, family, or household purposes is a consumer of a financial service, regardless of whether the loan is extended.

(iii) An individual who provides nonpublic personal information to you in connection with obtaining or seeking to obtain financial, investment, or economic advisory services is a consumer regardless of whether you establish a continuing advisory relationship.

(iv) If you hold ownership or servicing rights to an individual’s loan that is used primarily for personal, family, or household purposes, the individual is your consumer, even if you hold those rights in conjunction with one or more other institutions. (The individual is also a consumer with respect to the other financial institutions involved.) An individual who has a loan in which you have ownership or servicing rights is your consumer, even if you, or another institution with those rights, hire an agent to collect on the loan.

(v) An individual who is a consumer of another financial institution is not a consumer solely because you act as agent for, or provide processing or other services to, that financial institution.

(vi) An individual is a consumer solely because he or she has designated you as trustee for a trust.

(vii) An individual is not a consumer solely because he or she is a beneficiary of a trust for which you are a trustee.

(viii) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

(f) Consumer reporting agency has the same meaning as in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).
(g) Control of a company means:
(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;
(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or
(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the FDIC determines.
(h) Customer means a consumer who has a customer relationship with you.
(i)(1) Customer relationship means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes.
(2) Examples—(i) Continuing relationship. A consumer has a continuing relationship with you if the consumer:
(A) Has a deposit or investment account with you;
(B) Obtains a loan from you;
(C) Has a loan for which you own the servicing rights;
(D) Purchases an insurance product from you;
(E) Holds an investment product through you, such as when you act as a custodian for securities or for assets in an Individual Retirement Arrangement;
(F) Enters into an agreement or understanding with you whereby you undertake to arrange or broker a home mortgage loan for the consumer;
(G) Enters into a lease of personal property with you; or
(H) Obtains financial, investment, or economic advisory services from you for a fee.
(ii) No continuing relationship. A consumer does not, however, have a continuing relationship with you if:
(A) The consumer obtains a financial product or service only in isolated transactions, such as using your ATM to withdraw cash from an account at another financial institution or purchasing a cashier’s check or money order;
(B) You sell the consumer’s loan and do not retain the rights to service that loan; or
(C) You sell the consumer airline tickets, travel insurance, or traveler’s checks in isolated transactions.
(j) Federal functional regulator means:
(1) The Board of Governors of the Federal Reserve System;
(2) The Office of the Comptroller of the Currency;
(3) The Board of Directors of the Federal Deposit Insurance Corporation;
(4) The Director of the Office of Thrift Supervision;
(5) The National Credit Union Administration Board; and
(k)(1) Financial institution means any institution the business of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).
(2) Financial institution does not include:
(i) Any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);
(ii) The Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.); or
(iii) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights), or similar transactions related to a transaction of a consumer, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.
(l)(1) Financial product or service means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).
(2) Financial service includes your evaluation or brokerage of information that you collect in connection with a
request or an application from a consumer for a financial product or service.

(m)(1) Nonaffiliated third party means any person except:
   (i) Your affiliate; or
   (ii) A person employed jointly by you and any company that is not your affiliate (but nonaffiliated third party includes the other company that jointly employs the person).

(2) Nonaffiliated third party includes any company that is an affiliate solely by virtue of your or your affiliate’s direct or indirect ownership or control of the company in conducting merchant banking or investment banking activities of the type described in section 4(k)(4)(H) or insurance company investment activities of the type described in section 4(k)(4)(I) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)(4)(H) and (I)).

(n)(1) Nonpublic personal information means:
   (i) Personally identifiable financial information; and
   (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

(2) Nonpublic personal information does not include:
   (i) Publicly available information, except as included on a list described in paragraph (n)(1)(ii) of this section; or
   (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

(3) Examples of lists—(i) Nonpublic personal information includes any list of individuals’ names and street addresses that is derived in whole or in part using personally identifiable financial information that is not publicly available.

   (ii) Nonpublic personal information does not include any list of individuals’ names and addresses that contains only publicly available information, is not derived in whole or in part using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

(o)(1) Personally identifiable financial information means any information:
   (i) A consumer provides to you to obtain a financial product or service from you;
   (ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or
   (iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) Examples—(i) Information included. Personally identifiable financial information includes:
   (A) Information a consumer provides to you on an application to obtain a loan, credit card, or other financial product or service;
   (B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;
   (C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;
   (D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;
   (E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on a loan or servicing a loan;
   (F) Any information you collect through an Internet “cookie” (an information collecting device from a web server); and
   (G) Information from a consumer report.

   (ii) Information not included. Personally identifiable financial information does not include:
   (A) A list of names and addresses of customers of an entity that is not a financial institution; and
   (B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.
Publicly available information means any information that you have a reasonable basis to believe is lawfully made available to the general public from:

(i) Federal, State, or local government records;
(ii) Disclosures to the general public that are required to be made by Federal, State, or local law.

(2) Reasonable basis. You have a reasonable basis to believe that information is lawfully made available to the general public if you have taken steps to determine:

(i) That the information is of the type that is available to the general public; and
(ii) Whether an individual can direct that the information not be made available to the general public and, if so, that your consumer has not done so.

(3) Examples—(i) Government records. Publicly available information in government records includes information in government real estate records and security interest filings.
(ii) Widely distributed media. Publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper, or a website that is available to the general public on an unrestricted basis. A website is not restricted merely because an Internet service provider or a site operator requires a fee or a password, so long as access is available to the general public.
(iii) Reasonable basis. (A) You have a reasonable basis to believe that mortgage information is lawfully made available to the general public if you have determined that the information is of the type included on the public record in the jurisdiction where the mortgage would be recorded.
(B) You have a reasonable basis to believe that an individual’s telephone number is lawfully made available to the general public if you have located the telephone number in the telephone book or the consumer has informed you that the telephone number is not unlisted.

(q) You means:

(1) A bank insured by the FDIC (other than a member of the Federal Reserve System);
(2) An insured state branch of a foreign bank; and
(3) A subsidiary of either such entity except:
(i) A broker or dealer that is registered under the Securities and Exchange Act of 1934 (15 U.S.C. 78a et seq.);
(ii) A registered investment adviser, properly registered by or on behalf of either the Securities Exchange Commission or any State, with respect to its investment advisory activities and its activities incidental to those investment advisory activities;
(iii) An investment company that is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.); or
(iv) An insurance company, with respect to its insurance activities and its activities incidental to those insurance activities, that is subject to supervision by a State insurance regulator.

Subpart A—Privacy and Opt Out Notices

§ 332.4 Initial privacy notice to consumers required.

(a) Initial notice requirement. You must provide a clear and conspicuous notice that accurately reflects your privacy policies and practices to:
(1) Customer. An individual who becomes your customer, not later than when you establish a customer relationship, except as provided in paragraph (e) of this section; and
(2) Consumer. A consumer, before you disclose any nonpublic personal information about the consumer to any nonaffiliated third party, if you make such a disclosure other than as authorized by §§332.14 and 332.15.
(b) When initial notice to a consumer is not required. You are not required to provide an initial notice to a consumer under paragraph (a) of this section if:
(1) You do not disclose any nonpublic personal information about the consumer to any nonaffiliated third party, other than as authorized by §§332.14 and 332.15; and
(2) You do not have a customer relationship with the consumer.
(c) When you establish a customer relationship—(1) General rule. You establish a customer relationship when you and the consumer enter into a continuing relationship.

(2) Special rule for loans. You establish a customer relationship with a consumer when you originate a loan to the consumer for personal, family, or household purposes. If you subsequently transfer the servicing rights to that loan to another financial institution, the customer relationship transfers with the servicing rights.

(3)(i) Examples of establishing customer relationship. You establish a customer relationship when the consumer:

(A) Opens a credit card account with you;
(B) Executes the contract to open a deposit account with you, obtains credit from you, or purchases insurance from you;
(C) Agrees to obtain financial, economic, or investment advisory services from you for a fee; or
(D) Becomes your client for the purpose of your providing credit counseling or tax preparation services.

(ii) Examples of loan rule. You establish a customer relationship with a consumer who obtains a loan for personal, family, or household purposes when you:

(A) Originate the loan to the consumer; or
(B) Purchase the servicing rights to the consumer’s loan.

(d) Existing customers. When an existing customer obtains a new financial product or service from you that is to be used primarily for personal, family, or household purposes, you satisfy the initial notice requirements of paragraph (a) of this section as follows:

(1) You may provide a revised privacy notice, under §332.8, that covers the customer’s new financial product or service; or
(2) If the initial, revised, or annual notice that you most recently provided to that customer was accurate with respect to the new financial product or service, you do not need to provide a new privacy notice under paragraph (a) of this section.

(e) Exceptions to allow subsequent delivery of notice. (1) You may provide the initial notice required by paragraph (a)(1) of this section within a reasonable time after you establish a customer relationship if:

(i) Establishing the customer relationship is not at the customer’s election;
or
(ii) Providing notice not later than when you establish a customer relationship would substantially delay the customer’s transaction and the customer agrees to receive the notice at a later time.

(2) Examples of exceptions—(i) Not at customer’s election. Establishing a customer relationship is not at the customer’s election if you acquire a customer’s deposit liability or the servicing rights to a customer’s loan from another financial institution and the customer does not have a choice about your acquisition.

(ii) Substantial delay of customer’s transaction. Providing notice not later than when you establish a customer relationship would substantially delay the customer’s transaction when:

(A) You and the individual agree over the telephone to enter into a customer relationship involving prompt delivery of the financial product or service; or
(B) You establish a customer relationship with an individual under a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.) or similar student loan programs where loan proceeds are disbursed promptly without prior communication between you and the customer.

(iii) No substantial delay of customer’s transaction. Providing notice not later than when you establish a customer relationship would not substantially delay the customer’s transaction when the relationship is initiated in person at your office or through other means by which the customer may view the notice, such as on a web site.

(f) Delivery. When you are required to deliver an initial privacy notice by this section, you must deliver it according to §332.9. If you use a short-form initial notice for non-customers according to §332.6(d), you may deliver your privacy notice according to §332.6(d)(3).
§ 332.5 Annual privacy notice to customers required.

(a)(1) General rule. You must provide a clear and conspicuous notice to customers that accurately reflects your privacy policies and practices not less than annually during the continuation of the customer relationship. Annually means at least once in any period of 12 consecutive months during which that relationship exists. You may define the 12-consecutive-month period, but you must apply it to the customer on a consistent basis.

(2) Example. You provide a notice annually if you define the 12-consecutive-month period as a calendar year and provide the annual notice to the customer once in each calendar year following the calendar year in which you provided the initial notice. For example, if a customer opens an account on any day of year 1, you must provide an annual notice to that customer by December 31 of year 2.

(b)(1) Termination of customer relationship. You are not required to provide an annual notice to a former customer.

(2) Examples. Your customer becomes a former customer when:

(i) In the case of a deposit account, the account is inactive under your policies;
(ii) In the case of a closed-end loan, the customer pays the loan in full, you charge off the loan, or you sell the loan without retaining servicing rights;
(iii) In the case of a credit card relationship or other open-end credit relationship, you no longer provide any statements or notices to the customer concerning that relationship or you sell the credit card receivables without retaining servicing rights; or
(iv) You have not communicated with the customer about the relationship for a period of 12 consecutive months, other than to provide annual privacy notices or promotional material.

(c) Special rule for loans. If you do not have a customer relationship with a consumer under the special rule for loans in §332.4(c)(2), then you need not provide an annual notice to that consumer under this section.

(d) Delivery. When you are required to deliver an annual privacy notice by this section, you must deliver it according to §332.9.

§ 332.6 Information to be included in privacy notices.

(a) General rule. The initial, annual and revised privacy notices that you provide under §§332.4, 332.5, and 332.8 must include each of the following items of information, in addition to any other information you wish to provide, that applies to you and to the consumers to whom you send your privacy notice:

(1) The categories of nonpublic personal information that you collect;
(2) The categories of nonpublic personal information that you disclose;
(3) The categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information, other than those parties to whom you disclose information under §§332.14 and 332.15;
(4) The categories of nonpublic personal information about your former customers that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information about your former customers, other than those parties to whom you disclose information under §§332.14 and 332.15;
(5) If you disclose nonpublic personal information to a nonaffiliated third party under §332.13 (and no other exception in §332.14 or 332.15 applies to that disclosure), a separate statement of the categories of information you disclose and the categories of third parties with whom you have contracted;
(6) An explanation of the consumer’s right under §332.10(a) to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the consumer may exercise that right at that time;
(7) Any disclosures that you make under section 603(d)(2)(A)(ii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(ii)) (that is, notices regarding the ability to opt out of disclosures of information among affiliates);
(8) Your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and
(9) Any disclosure that you make under paragraph (b) of this section.
§ 332.6 (b) Description of nonaffiliated third parties subject to exceptions. If you disclose nonpublic personal information to third parties as authorized under §§ 332.14 and 332.15, you are not required to list those exceptions in the initial or annual privacy notices required by §§ 332.4 and 332.5. When describing the categories with respect to those parties, you are required to state only that you make disclosures to other nonaffiliated third parties as permitted by law.

(c) Examples—(1) Categories of nonpublic personal information that you collect. You satisfy the requirement to categorize the nonpublic personal information that you collect if you list the following categories, as applicable:
   (i) Information from the consumer;
   (ii) Information about the consumer’s transactions with you or your affiliates;
   (iii) Information about the consumer’s transactions with nonaffiliated third parties; and
   (iv) Information from a consumer reporting agency.

(2) Categories of nonpublic personal information you disclose—(i) You satisfy the requirement to categorize the nonpublic personal information that you disclose if you list the categories described in paragraph (c)(1) of this section, as applicable, and a few examples to illustrate the types of information in each category.

(ii) If you reserve the right to disclose all of the nonpublic personal information about consumers that you collect, you may simply state that fact without describing the categories or examples of the nonpublic personal information you disclose.

(3) Categories of affiliates and nonaffiliated third parties to whom you disclose. You satisfy the requirement to categorize the affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information if you list the following categories, as applicable, and a few examples to illustrate the types of third parties in each category.

   (i) Financial service providers;
   (ii) Non-financial companies; and
   (iii) Others.

(4) Disclosures under exception for service providers and joint marketers. If you disclose nonpublic personal information under the exception in § 332.13 to a nonaffiliated third party to market products or services that you offer alone or jointly with another financial institution, you satisfy the disclosure requirement of paragraph (a)(5) of this section if you:

   (i) List the categories of nonpublic personal information you disclose, using the same categories and examples you used to meet the requirements of paragraph (a)(2) of this section, as applicable; and
   (ii) State whether the third party is:
      (A) A service provider that performs marketing services on your behalf or on behalf of you and another financial institution; or
      (B) A financial institution with whom you have a joint marketing agreement.

(5) Simplified notices. If you do not disclose, and do not wish to reserve the right to disclose, nonpublic personal information about customers or former customers to affiliates or nonaffiliated third parties except as authorized under §§ 332.14 and 332.15, you may simply state that fact, in addition to the information you must provide under paragraphs (a)(1), (a)(8), (a)(9), and (b) of this section.

(6) Confidentiality and security. You describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information if you do both of the following:

   (i) Describe in general terms who is authorized to have access to the information; and
   (ii) State whether you have security practices and procedures in place to ensure the confidentiality of the information in accordance with your policy.

You are not required to describe technical information about the safeguards you use.

(d) Short-form initial notice with opt out notice for non-customers—(1) You may satisfy the initial notice requirements in §§ 332.4(a)(2), 332.7(b), and 332.7(c) for a consumer who is not a customer by providing a short-form initial notice at the same time as you deliver an opt out notice as required in § 332.7.

   (2) A short-form initial notice must:
§ 332.7 Form of opt out notice to consumers; opt out methods.

(a) (1) Form of opt out notice. If you are required to provide an opt out notice under §332.10(a), you must provide a clear and conspicuous notice to each of your consumers that accurately explains the right to opt out under that section. The notice must state:

(i) That you disclose or reserve the right to disclose nonpublic personal information about your consumer to a nonaffiliated third party;

(ii) That the consumer has the right to opt out of that disclosure; and

(iii) A reasonable means by which the consumer may exercise the opt out right.

(2) Examples—(i) Adequate opt out notice. You provide adequate notice that the consumer can opt out of the disclosure of nonpublic personal information to a nonaffiliated third party if you:

(A) Identify all of the categories of nonpublic personal information that you disclose or reserve the right to disclose, and all of the categories of nonaffiliated third parties to which you disclose the information, as described in §332.6(a)(2) and (3), and state that the consumer can opt out of the disclosure of that information; and

(B) Identify the financial products or services that the consumer obtains from you, either singly or jointly, to which the opt out direction would apply.

(ii) Reasonable opt out means. You provide a reasonable means to exercise an opt out right if you:

(A) Designate check-off boxes in a prominent position on the relevant forms with the opt out notice;

(B) Include a reply form together with the opt out notice;

(C) Provide an electronic means to opt out, such as a form that can be sent via electronic mail or a process at your web site, if the consumer agrees to the electronic delivery of information; or

(D) Provide a toll-free telephone number that consumers may call to opt out.

(iii) Unreasonable opt out means. You do not provide a reasonable means of opting out if:

(A) The only means of opting out is for the consumer to write his or her own letter to exercise that opt out right; or

(B) The only means of opting out as described in any notice subsequent to the initial notice is to use a check-off box that you provide with the initial notice but did not include with the subsequent notice.

(iv) Specific opt out means. You may require each consumer to opt out through a specific means, as long as that means is reasonable for that consumer.
§ 332.8 Revised privacy notices.

(a) General rule. Except as otherwise authorized in this part, you must not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party other than as described in the initial notice that you provided to that consumer under § 332.4, unless:

(1) You have provided to the consumer a clear and conspicuous revised notice that accurately describes your policies and practices;

(2) You have provided to the consumer a new opt out notice;

(A) You must permit John and Mary to opt out for each other;

(B) If both opt out, you must permit both to notify you in a single response (such as on a form or through a telephone call); and

(C) If John opts out and Mary does not, you may only disclose nonpublic personal information about Mary, but not about John and not about John and Mary jointly.

(e) Time to comply with opt out. You must comply with a consumer’s opt out direction as soon as reasonably practical after you receive it.

(f) Continuing right to opt out. A consumer may exercise the right to opt out at any time.

(g) Duration of consumer’s opt out direction—(1) A consumer’s direction to opt out under this section is effective until the consumer revokes it in writing or, if the consumer agrees, electronically.

(2) When a customer relationship terminates, the customer’s opt out direction continues to apply to the nonpublic personal information that you collected during or related to that relationship. If the individual subsequently establishes a new customer relationship with you, the opt out direction that applied to the former relationship does not apply to the new relationship.

(h) Delivery. When you are required to deliver an opt out notice by this section, you must deliver it according to § 332.9.
(3) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and
(4) The consumer does not opt out.

(b) Examples—(1) Except as otherwise permitted by §§ 332.13, 332.14, and 332.15, you must provide a revised notice before you:
(i) Disclose a new category of nonpublic personal information to any nonaffiliated third party;
(ii) Disclose nonpublic personal information to a new category of nonaffiliated third party; or
(iii) Disclose nonpublic personal information about a former customer to a nonaffiliated third party, if that former customer has not had the opportunity to exercise an opt out right regarding that disclosure.
(2) A revised notice is not required if you disclose nonpublic personal information to a new nonaffiliated third party that you adequately described in your prior notice.

(c) Delivery. When you are required to deliver a revised privacy notice by this section, you must deliver it according to §332.9.

§332.9 Delivering privacy and opt out notices.

(a) How to provide notices. You must provide any privacy notices and opt out notices, including short-form initial notices, that this part requires so that each consumer can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically.

(b) Examples of reasonable expectation of actual notice. You may reasonably expect that a consumer will receive actual notice if you:
(i) Hand-deliver a printed copy of the notice to the consumer;
(ii) Mail a printed copy of the notice to the last known address of the consumer;
(iii) For the consumer who conducts transactions electronically, post the notice on the electronic site and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial product or service, or
(iv) For an isolated transaction with the consumer, such as an ATM transaction, post the notice on the ATM screen and require the consumer to acknowledge receipt of the notice as a necessary step to obtaining the particular financial product or service.

(2) Examples of unreasonable expectation of actual notice. You may not, however, reasonably expect that a consumer will receive actual notice of your privacy policies and practices if you:
(i) Only post a sign in your branch or office or generally publish advertisements of your privacy policies and practices; or
(ii) Send the notice via electronic mail to a consumer who does not obtain a financial product or service from you electronically.

(c) Annual notices only. You may reasonably expect that a customer will receive actual notice of your annual privacy notice if:
(1) The customer uses your web site to access financial products and services electronically and agrees to receive notices at the web site, and you post your current privacy notice continuously in a clear and conspicuous manner on the web site; or
(2) The customer has requested that you refrain from sending any information regarding the customer relationship, and your current privacy notice remains available to the customer upon request.

(d) Oral description of notice insufficient. You may not provide any notice required by this part solely by orally explaining the notice, either in person or over the telephone.

(e) Retention or accessibility of notices for customers—(1) For customers only, you must provide the initial notice required by §332.4(a)(1), the annual notice required by §332.5(a), and the revised notice required by §332.8 so that the customer can retain them or obtain them later in writing or, if the customer agrees, electronically.
(2) Examples of retention or accessibility. You provide a privacy notice to the customer so that the customer can retain it or obtain it later if you:
(i) Hand-deliver a printed copy of the notice to the customer;
(ii) Mail a printed copy of the notice to the last known address of the customer; or
(iii) Make your current privacy notice available on a web site (or a link to another web site) for the customer who obtains a financial product or service electronically and agrees to receive the notice at the web site.

(f) Joint notice with other financial institutions. You may provide a joint notice from you and one or more of your affiliates or other financial institutions, as identified in the notice, as long as the notice is accurate with respect to you and the other institutions.

(g) Joint relationships. If two or more consumers jointly obtain a financial product or service from you, you may satisfy the initial, annual, and revised notice requirements of §§ 332.4(a), 332.5(a), and 332.8(a), respectively, by providing one notice to those consumers jointly.

Subpart B—Limits on Disclosures

§ 332.10 Limits on disclosure of nonpublic personal information to nonaffiliated third parties.

(a) (1) Conditions for disclosure. Except as otherwise authorized in this part, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer to a nonaffiliated third party unless:
(i) You have provided to the consumer an initial notice as required under § 332.4;
(ii) You have provided to the consumer an opt out notice as required in § 332.7;
(iii) You have provided the consumer an opt out notice as required in § 332.7;
(iv) You have given the consumer a reasonable opportunity, before you disclose the information to the nonaffiliated third party, to opt out of the disclosure; and
(v) The consumer does not opt out.

(2) Opt out definition. Opt out means a direction by the consumer that you not disclose nonpublic personal information about that consumer to a nonaffiliated third party, other than as permitted by §§ 332.13, 332.14, and 332.15.

(3) Examples of reasonable opportunity to opt out. You provide a consumer with a reasonable opportunity to opt out if:
(i) By mail. You mail the notices required in paragraph (a)(1) of this section to the consumer and allow the consumer to opt out by mailing a form, calling a toll-free telephone number, or any other reasonable means within 30 days from the date you mailed the notices.
(ii) By electronic means. A customer opens an on-line account with you and agrees to receive the notices required in paragraph (a)(1) of this section electronically, and you allow the customer to opt out by any reasonable means within 30 days after the date that the customer acknowledges receipt of the notices in conjunction with opening the account.
(iii) Isolated transaction with consumer. For an isolated transaction, such as the purchase of a cashier’s check by a consumer, you provide the consumer with a reasonable opportunity to opt out if you provide the notices required in paragraph (a)(1) of this section at the time of the transaction and request that the consumer decide, as a necessary part of the transaction, whether to opt out before completing the transaction.

(b) Application of opt out to all consumers and all nonpublic personal information—(1) You must comply with this section, regardless of whether you and the consumer have established a customer relationship.

(2) Unless you comply with this section, you may not, directly or through any affiliate, disclose any nonpublic personal information about a consumer that you have collected, regardless of whether you collected it before or after receiving the direction to opt out from the consumer.

(c) Partial opt out. You may allow a consumer to select certain nonpublic personal information or certain nonaffiliated third parties with respect to which the consumer wishes to opt out.

§ 332.11 Limits on redisclosure and reuse of information.

(a)(1) Information you receive under an exception. If you receive nonpublic personal information from a nonaffiliated financial institution under an exception in § 332.14 or § 332.15 of this part, your disclosure and use of that information is limited as follows:
(i) You may disclose the information to the affiliates of the financial institution from which you received the information;

(ii) You may disclose the information to your affiliates, but your affiliates may, in turn, disclose and use the information only to the extent that you may disclose and use the information; and

(iii) You may disclose and use the information pursuant to an exception in §332.14 or 332.15 in the ordinary course of business to carry out the activity covered by the exception under which you received the information.

(2) Example. If you receive a customer list from a nonaffiliated financial institution in order to provide account processing services under the exception in §332.14(a), you may disclose that information under any exception in §332.14 or 332.15 in the ordinary course of business in order to provide those services. For example, you could disclose the information in response to a properly authorized subpoena or to your attorneys, accountants, and auditors. You could not disclose that information to a third party for marketing purposes or use that information for your own marketing purposes.

(b)(1) Information you receive outside of an exception. If you receive nonpublic personal information from a nonaffiliated financial institution other than under an exception in §332.14 or 332.15 of this part, you may disclose the information only:

(i) To the affiliates of the financial institution from which you received the information;

(ii) To your affiliates, but your affiliates may, in turn, disclose the information only to the extent that you can disclose the information; and

(iii) To any other person, if the disclosure would be lawful if made directly to that person by the financial institution from which you received the information.

(2) Example. If you obtain a customer list from a nonaffiliated financial institution outside of the exceptions in §332.14 and 332.15:

(i) You may use that list for your own purposes; and

(ii) You may disclose that list to another nonaffiliated third party only if the financial institution from which you purchased the list could have lawfully disclosed the list to that third party. That is, you may disclose the list in accordance with the privacy policy of the financial institution from which you received the list, as limited by the opt out direction of each consumer whose nonpublic personal information you intend to disclose, and you may disclose the list in accordance with an exception in §332.14 or 332.15, such as to your attorneys or accountants.

(c) Information you disclose under an exception. If you disclose nonpublic personal information to a nonaffiliated third party under an exception in §332.14 or §332.15 of this part, the third party may disclose and use that information only as follows:

(1) The third party may disclose the information to your affiliates;

(2) The third party may disclose the information to its affiliates, but its affiliates may, in turn, disclose and use the information only to the extent that the third party may disclose and use the information; and

(3) The third party may disclose and use the information pursuant to an exception in §332.14 or §332.15 in the ordinary course of business to carry out the activity covered by the exception under which it received the information.

(d) Information you disclose outside of an exception. If you disclose nonpublic personal information to a nonaffiliated third party other than under an exception in §332.14 or §332.15 of this part, the third party may disclose the information only:

(1) To your affiliates;

(2) To its affiliates, but its affiliates, in turn, may disclose the information only to the extent the third party can disclose the information; and

(3) To any other person, if the disclosure would be lawful if you made it directly to that person.

§332.12 Limits on sharing account number information for marketing purposes.

(a) General prohibition on disclosure of account numbers. You must not, directly or through an affiliate, disclose other than to a consumer reporting
agency, an account number or similar form of access number or access code for a consumer's credit card account, deposit account, or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.

(b) Exceptions. Paragraph (a) of this section does not apply if you disclose an account number or similar form of access number or access code:

(1) To your agent or service provider solely in order to perform marketing for your own products or services, as long as the agent or service provider is not authorized to directly initiate charges to the account; or

(2) To a participant in a private label credit card program or an affinity or similar program where the participants in the program are identified to the customer when the customer enters into the program.

(c) Examples—(1) Account number. An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.

(2) Transaction account. A transaction account is an account other than a deposit account or a credit card account. A transaction account does not include an account to which third parties cannot initiate charges.

Subpart C—Exceptions

§ 332.13 Exception to opt out requirements for service providers and joint marketing.

(a) General rule. (1) The opt out requirements in §§332.7 and 332.10 do not apply when you provide nonpublic personal information to a nonaffiliated third party to perform services for you or functions on your behalf, if you:

(i) Provide the initial notice in accordance with §332.4; and

(ii) Enter into a contractual agreement with the third party that prohibits the third party from disclosing or using the information other than to carry out the purposes for which you disclosed the information, including use under an exception in §332.14 or §332.15 in the ordinary course of business to carry out those purposes.

(2) Example. If you disclose nonpublic personal information under this section to a financial institution with which you perform joint marketing, your contractual agreement with that institution meets the requirements of paragraph (a)(1)(ii) of this section if it prohibits the institution from disclosing or using the nonpublic personal information except as necessary to carry out the joint marketing or under an exception in §332.14 or §332.15 in the ordinary course of business to carry out that joint marketing.

(b) Service may include joint marketing. The services a nonaffiliated third party performs for you under paragraph (a) of this section may include marketing of your own products or services or marketing of financial products or services offered pursuant to joint agreements between you and one or more financial institutions.

(c) Definition of joint agreement. For purposes of this section, joint agreement means a written contract pursuant to which you and one or more financial institutions jointly offer, endorse, or sponsor a financial product or service.

§ 332.14 Exceptions to notice and opt out requirements for processing and servicing transactions.

(a) Exceptions for processing transactions at consumer's request. The requirements for initial notice in §332.4(a)(2), for the opt out in §§332.7 and 332.10 and for service providers and joint marketing in §332.13 do not apply if you disclose nonpublic personal information as necessary to effect, administer, or enforce a transaction that a consumer requests or authorizes, or in connection with:

(1) Servicing or processing a financial product or service that a consumer requests or authorizes;

(2) Maintaining or servicing the consumer's account with you, or with another entity as part of a private label credit card program or other extension of credit on behalf of such entity; or

(3) A proposed or actual securitization, secondary market sale (including sales of servicing rights), or...
similar transaction related to a transaction of the consumer.

(b) Necessary to effect, administer, or enforce a transaction means that the disclosure is:

(1) Required, or is one of the lawful or appropriate methods, to enforce your rights or the rights of other persons engaged in carrying out the financial transaction or providing the product or service; or

(2) Required, or is a usual, appropriate or acceptable method:

(i) To carry out the transaction or the product or service business of which the transaction is a part, and record, service, or maintain the consumer's account in the ordinary course of providing the financial service or financial product;

(ii) To administer or service benefits or claims relating to the transaction or the product or service business of which it is a part;

(iii) To provide a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product to the consumer or the consumer's agent or broker;

(iv) To accrue or recognize incentives or bonuses associated with the transaction that are provided by you or any other party;

(v) To underwrite insurance at the consumer's request or for reinsurance purposes, or for any of the following purposes as they relate to a consumer's insurance: account administration, reporting, investigating, or preventing fraud or material misrepresentation, processing premium payments, processing insurance claims, administering insurance benefits (including utilization review activities), participating in research projects, or as otherwise required or specifically permitted by Federal or State law; or

(vi) In connection with:

(A) The authorization, settlement, billing, processing, clearing, transfers, reconciling or collection of amounts charged, debited, or otherwise paid using a debit, credit, or other payment card, check, or account number, or by other payment means;

(B) The transfer of receivables, accounts, or interests therein; or

(C) The audit of debit, credit, or other payment information.

§ 332.15 Other exceptions to notice and opt out requirements.

(a) Exceptions to opt out requirements. The requirements for initial notice in § 332.4(a)(2), for the opt out in §§ 332.7 and 332.10, and for service providers and joint marketing in §332.13 do not apply when you disclose nonpublic personal information:

(1) With the consent or at the direction of the consumer, provided that the consumer has not revoked the consent or direction;

(2) (i) To protect the confidentiality or security of your records pertaining to the consumer, service, product, or transaction;

(ii) To protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability;

(iii) For required institutional risk control or for resolving consumer disputes or inquiries;

(iv) To persons holding a legal or beneficial interest relating to the consumer; or

(v) To persons acting in a fiduciary or representative capacity on behalf of the consumer;

(3) To provide information to insurance rate advisory organizations, guaranty funds or agencies, agencies that are rating you, persons that are assessing your compliance with industry standards, and your attorneys, accountants, and auditors;

(4) To the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), to law enforcement agencies (including a federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a State insurance authority, with respect to any person domiciled in that insurance authority's State that is engaged in providing insurance, and the Federal Trade Commission), self-regulatory organizations, or for an investigation on a matter related to public safety;
(5) (i) To a consumer reporting agency in accordance with the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or  
(ii) From a consumer report reported by a consumer reporting agency;  
(6) In connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of such business or unit; or  
(7) (i) To comply with Federal, State, or local laws, rules and other applicable legal requirements;  
(ii) To comply with a properly authorized civil, criminal, or regulatory investigation, or subpoena or summons by Federal, State, or local authorities; or  
(iii) To respond to judicial process or government regulatory authorities having jurisdiction over you for examination, compliance, or other purposes as authorized by law.  

Subpart D—Relation to Other Laws; Effective Date  
§ 332.16 Protection of Fair Credit Reporting Act.  
Nothing in this part shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), and no inference shall be drawn on the basis of the provisions of this part regarding whether information is transaction or experience information under section 603 of that Act.  

§ 332.17 Relation to State laws.  
(a) In general. This part shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such State statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.  
(b) Greater protection under State law. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part, as determined by the Federal Trade Commission, after consultation with the FDIC, on the Federal Trade Commission's own motion, or upon the petition of any interested party.  

§ 332.18 Effective date; transition rule.  
(a) Effective date. This part is effective November 13, 2000. In order to provide sufficient time for you to establish policies and systems to comply with the requirements of this part, the FDIC has extended the time for compliance with this part until July 1, 2001.  
(b)(1) Notice requirement for consumers who are your customers on the compliance date. By July 1, 2001, you must have provided an initial notice, as required by § 332.4, to consumers who are your customers on July 1, 2001.  
(2) Example. You provide an initial notice to consumers who are your customers on July 1, 2001, if, by that date, you have established a system for providing an initial notice to all new customers and have mailed the initial notice to all your existing customers.  
(c) Two-year grandfathering of service agreements. Until July 1, 2002, a contract that you have entered into with a nonaffiliated third party to perform services for you or functions on your behalf satisfies the provisions of § 332.13(a)(1)(ii) of this part, even if the contract does not include a requirement that the third party maintain the confidentiality of nonpublic personal information, as long as you entered into the contract on or before July 1, 2000.  

Appendix A to Part 332—Sample Clauses  
Financial institutions, including a group of financial holding company affiliates that use
a common privacy notice, may use the following sample clauses, if the clause is accu-
rate for each institution that uses the no-
tice. (Note that disclosure of certain infor-
mation, such as assets and income, and in-
formation from a consumer reporting agen-
cy, may give rise to obligations under the Fair Credit Reporting Act, such as a require-
ment to permit a consumer to opt out of disclo-
sures to affiliates or designation as a con-
sumer reporting agency if disclosures are made to nonaffiliated third parties.)

A–1—CATEGORIES OF INFORMATION YOU COLLECT (ALL INSTITUTIONS)

You may use this clause, as applicable, to meet the requirement of §332.6(a)(1) to de-
scribe the categories of nonpublic personal information you collect.

Sample Clause A–1:
We collect nonpublic personal information about you from the following sources:
• Information we receive from you on appli-
cations or other forms;
• Information about your transactions with us, our affiliates, or others; and
• Information we receive from a consumer reporting agency.

A–2—CATEGORIES OF INFORMATION YOU DISCLOSE (INSTITUTIONS THAT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use one of these clauses, as applicable, to meet the requirement of §332.6(a)(2) to
to describe the categories of nonpublic personal information you disclose. You may use
these clauses if you disclose nonpublic personal information other than as permitted
by the exceptions in §§332.13, 332.14, and 332.15.

Sample Clause A–2, Alternative 1:
We may disclose the following kinds of nonpublic personal information about you:
• Information we receive from you on appli-
cations or other forms, such as "your name, ad-
dress, social security number, assets, and in-
come";
• Information about your transactions with us, our affiliates, or others, such as
(provide illustrative examples, such as "your account balance, payment history, parties to
transactions, and credit card usage"); and
• Information we receive from a consumer reporting agency, such as [provide illustrative
elements, such as "your creditworthiness and credit history"].

Sample Clause A–2, Alternative 2:
We may disclose all of the information
that we collect, as described [describe location
in the notice, such as "above" or "below"].

A–3—CATEGORIES OF INFORMATION YOU DISCLOSE AND PARTIES TO WHOM YOU DISCLOSE (INSTITUTIONS THAT DO NOT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use this clause, as applicable, to meet the requirements of §§332.6(a)(2), (3),
and (4) to describe the categories of non-
public personal information about customers
and former customers that you disclose and
the categories of affiliates and nonaffiliated
third parties to whom you disclose. You may
use this clause if you do not disclose non-
public personal information to any party, other than as permitted by the exceptions in §§332.14 and 332.15.

Sample Clause A–3:
We do not disclose any nonpublic personal
information about our customers or former
customers to anyone, except as permitted by
law.

A–4—CATEGORIES OF PARTIES TO WHOM YOU DISCLOSE (INSTITUTIONS THAT DISCLOSE OUTSIDE OF THE EXCEPTIONS)

You may use this clause, as applicable, to meet the requirement of §332.6(a)(3) to de-
scribe the categories of affiliates and non-
affiliated third parties to whom you disclose
nonpublic personal information. You may
use this clause if you disclose nonpublic per-
sonal information other than as permitted
by the exceptions in §§332.13, 332.14, and
332.15, as well as when permitted by the ex-
ceptions in §§332.14 and 332.15.

Sample Clause A–4:
We may disclose nonpublic personal infor-
mation about you to the following types of
third parties:
• Financial service providers, such as [provide illustrative examples, such as "mort-
gage bankers, securities broker-dealers, and in-
surance agents"]; and
• Non-financial companies, such as [provide illustrative examples, such as "retailers, direct
marketers, airlines, and publishers"]; and
• Others, such as [provide illustrative examples, such as "non-profit organizations"].

We may also disclose nonpublic personal
information about you to nonaffiliated third
parties as permitted by law.

A–5—SERVICE PROVIDER/JOINT MARKETING EXCEPTION

You may use one of these clauses, as applicable, to meet the requirements of §332.6(a)(5) related to the exception for ser-
cice providers and joint marketers in §332.13.
If you disclose nonpublic personal infor-
mation under this exception, you must describe
the categories of nonpublic personal infor-
mation you disclose and the categories of
third parties with whom you have con-
tracted.

Sample Clause A–5, Alternative 1:
We may disclose the following information to companies that perform marketing services on our behalf or to other financial institutions with whom we have joint marketing agreements:

- Information we receive from you on applications or other forms, such as 
  your name, address, social security number, assets, and income;
- Information about your transactions with us, our affiliates, or others, such as 
  your account balance, payment history, parties to transactions, and credit card usage; and
- Information we receive from a consumer report your policy or practices with respect to protecting the confidentiality and security of nonpublic personal information.

Part 333—Extension of Corporate Powers

We may disclose the following information:

- Information we receive from you on applications or other forms, such as your name, address, social security number, assets, and income;
- Information about your transactions with us, our affiliates, or others, such as your account balance, payment history, parties to transactions, and credit card usage; and
- Information we receive from a consumer report.

Part 333—Explanation of Opt Out Right (Institutions That Disclose Outside of the Exceptions)

You may use this clause, as applicable, to meet the requirement of §332.6(a)(8) to provide an explanation of the consumer’s right to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the methods by which the consumer may exercise that right. You may use this clause if you disclose nonpublic personal information other than as permitted by the exceptions in §§332.13, 332.14, and 332.15.

Sample Clause A–6:

If you prefer that we not disclose nonpublic personal information about you to nonaffiliated third parties, you may opt out of those disclosures, that is, you may direct us not to make those disclosures (other than disclosures permitted by law). If you wish to opt out of disclosures to nonaffiliated third parties, you may [describe a reasonable means of opting out, such as “call the following toll-free number: (insert number)”.]

Part 333—Confidentiality and Security (All Institutions)

You may use this clause, as applicable, to meet the requirement of §332.6(a)(8) to describe your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information.

Sample Clause A–7:

We restrict access to nonpublic personal information about you to [provide an appropriate description, such as “those employees who need to know that information to provide products or services to you”). We maintain physical, electronic, and procedural safeguards that comply with federal standards to guard your nonpublic personal information.
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 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 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 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 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 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.

(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 subpart I of part 303 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
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(5) For management or employee stock benefit plans, no conversion stock is used to fund the plans.


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 (26 U.S.C. 408), Self-Employed Retirement Plans established pursuant to the Self-Employed Individuals Retirement Act of 1962 (26 U.S.C. 401), Roth Individual Retirement Accounts and Coverdell Education Savings Accounts established pursuant to the Taxpayer Relief Act of 1997 (26 U.S.C. 408A and 530 respectively), Health Savings Accounts established pursuant to the Medicare Prescription Drug Improvement, and Modernization Act of 2003 (26 U.S.C. 223), and other similar accounts 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 exercise any investment discretion or provide 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 applicable State law.

Subpart A—General Provisions

§ 334.1 Purpose and scope.

(a) Purpose. The purpose of this part is to implement the Fair Credit Reporting Act. This part generally applies to persons that obtain and use information about consumers to determine the consumer's eligibility for products, services, or employment, share such information among affiliates, and furnish information to consumer reporting agencies.

(b) Scope. Except as otherwise provided in this part, the regulations in this part apply to insured state non-member banks, insured state licensed branches of foreign banks, and subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

§ 334.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 334.3 Definitions.

For purposes of this part, unless explicitly stated otherwise:

(a) Act means the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.).

(b) Affiliate means any company that is related by common ownership or common control with another company.

(c) [Reserved]

(d) Company means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) Consumer means an individual.

(f)-(h) [Reserved]

(i) Common ownership or common corporate control means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(ii) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(iii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iv) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the FDIC determines;

(k) Medical information means:

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

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

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

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

(l) Person means any individual, partnership, corporation, trust, estate, co-operative, association, government or governmental subdivision or agency, or other entity.

[70 FR 70685, Nov. 22, 2005, as amended at 72 FR 63760, Nov. 9, 2007]
§ 334.20 Coverage and definitions.

(a) Coverage. Subpart C of this part applies to insured state nonmember banks, insured state licensed branches of foreign banks, and subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

(b) Definitions. For purposes of this subpart:

(1) Clear and conspicuous. The term “clear and conspicuous” means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(2) Concise. (i) In general. The term “concise” means a reasonably brief expression or statement.

(ii) Combination with other required disclosures. A notice required by this subpart may be concise even if it is combined with other disclosures required or authorized by federal or state law.

(3) Eligibility information. The term “eligibility information” means any information the communication of which would be a consumer report if the exclusions from the definition of “consumer report” in section 603(d)(2)(A) of the Act did not apply. Eligibility information does not include aggregate or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(4) Pre-existing business relationship. (i) In general. The term “pre-existing business relationship” means a relationship between a person, or a person’s licensed agent, and a consumer based on—

(A) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by this subpart;

(B) The purchase, rental, or lease by the consumer of the person’s goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart; or

(C) An inquiry or application by the consumer regarding a product or service offered by that person during the three-month period immediately preceding the date on which the consumer is sent a solicitation covered by this subpart.

(ii) Examples of pre-existing business relationships. (A) If a consumer has a time deposit account, such as a certificate of deposit, at a depository institution that is currently in force, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services.

(B) If a consumer obtained a certificate of deposit from a depository institution, but did not renew the certificate at maturity, the depository institution has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(C) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer’s entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(D) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer’s entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.

(E) If a consumer obtains a mortgage, the mortgage lender has a pre-existing business relationship with the consumer. If the mortgage lender sells the consumer’s entire loan to an investor, the mortgage lender has a pre-existing business relationship with the consumer and can use eligibility information it receives from its affiliates to make solicitations to the consumer about its products or services for 18 months after the date of maturity of the certificate of deposit.
not have a pre-existing business relationship with the consumer. If the mortgage lender retains ownership of the loan, but sells ownership of the servicing rights to the consumer's loan, the mortgage lender continues to have a pre-existing business relationship with the consumer. The purchaser of the servicing rights also has a pre-existing business relationship with the consumer as of the date it purchases ownership of the servicing rights, but only if it collects payments from or otherwise deals directly with the consumer on a continuing basis.

(D) If a consumer applies to a depository institution for a product or service that it offers, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the application.

(E) If a consumer makes a telephone inquiry to a depository institution about its products or services and provides contact information to the institution, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(F) If a consumer makes an inquiry to a depository institution by e-mail about its products or services, but does not obtain a product or service from or enter into a financial contract or transaction with the institution, the depository institution has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(G) If a consumer has an existing relationship with a depository institution that is part of a group of affiliated companies, makes a telephone call to the centralized call center for the group of affiliated companies to inquire about products or services offered by the insurance affiliate, and provides contact information to the call center, the call constitutes an inquiry to the insurance affiliate that offers those products or services. The insurance affiliate has a pre-existing business relationship with the consumer and can therefore use eligibility information it receives from its affiliated depository institution to make solicitations to the consumer about its products or services for three months after the date of the inquiry.

(iii) Examples where no pre-existing business relationship is created. (A) If a consumer makes a telephone call to a centralized call center for a group of affiliated companies to inquire about the consumer's existing account at a depository institution, the call does not constitute an inquiry to any affiliate other than the depository institution that holds the consumer's account and does not establish a pre-existing business relationship between the consumer and any affiliate of the account-holding depository institution.

(B) If a consumer who has a deposit account with a depository institution makes a telephone call to an affiliate of the institution to ask about the affiliate's retail locations and hours, but does not make an inquiry about the affiliate's products or services, the call does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate. Also, the affiliate's capture of the consumer's telephone number does not constitute an inquiry and does not establish a pre-existing business relationship between the consumer and the affiliate.

(C) If a consumer makes a telephone call to a depository institution in response to an advertisement that offers a free promotional item to consumers who call a toll-free number, but the advertisement does not indicate that the depository institution's products or services will be marketed to consumers who call in response, the call does not
create a pre-existing business relationship between the consumer and the depository institution because the consumer has not made an inquiry about a product or service offered by the institution, but has merely responded to an offer for a free promotional item.

(5) Solicitation. (i) In general. The term “solicitation” means the marketing of a product or service initiated by a person to a particular consumer that is—

(A) Based on eligibility information communicated to that person by its affiliate as described in this subpart; and

(B) Intended to encourage the consumer to purchase or obtain such product or service.

(ii) Exclusion of marketing directed at the general public. A solicitation does not include marketing communications that are directed at the general public. For example, television, general circulation magazine, and billboard advertisements do not constitute solicitations, even if those communications are intended to encourage consumers to purchase products and services from the person initiating the communications.

(iii) Examples of solicitations. A solicitation would include, for example, a telemarketing call, direct mail, e-mail, or other form of marketing communication directed to a particular consumer that is based on eligibility information received from an affiliate.

(6) You means a person described in paragraph (a) of this section.

§ 334.21 Affiliate marketing opt-out and exceptions.

(a) Initial notice and opt-out requirement—(1) In general. You may not use eligibility information about a consumer that you receive from an affiliate to make a solicitation for marketing purposes to the consumer, unless—

(i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that you may use eligibility information about that consumer received from an affiliate to make solicitations for marketing purposes to the consumer;

(ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to “opt out,” or prohibit you from using eligibility information to make solicitations for marketing purposes to the consumer; and

(iii) The consumer has not opted out.

(2) Example. A consumer has a homeowner’s insurance policy with an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its home equity loan products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions apply. The depository institution is prohibited from using eligibility information received from its insurance affiliate to make solicitations to the consumer about its home equity loan products unless the consumer is given a notice and opportunity to opt out and the consumer does not opt out.

(b) Affiliates who may provide the notice. The notice required by this paragraph must be provided:

(i) By an affiliate that has or has previously had a pre-existing business relationship with the consumer; or

(ii) As part of a joint notice from two or more members of an affiliated group of companies, provided that at least one of the affiliates on the joint notice has or has previously had a pre-existing business relationship with the consumer.

(b) Making solicitations—(1) In general. For purposes of this subpart, you make a solicitation for marketing purposes if—

(i) You receive eligibility information from an affiliate;

(ii) You use that eligibility information to do one or more of the following:

(A) Identify the consumer or type of consumer to receive a solicitation;

(B) Establish criteria used to select the consumer to receive a solicitation; or

(C) Decide which of your products or services to market to the consumer or tailor your solicitation to that consumer; and
(iii) As a result of your use of the eligibility information, the consumer is provided a solicitation.

(2) Receiving eligibility information from an affiliate, including through a common database. You may receive eligibility information from an affiliate in various ways, including when the affiliate places that information into a common database that you may access.

(3) Receipt or use of eligibility information by your service provider. Except as provided in paragraph (b)(5) of this section, you receive or use an affiliate's eligibility information if a service provider acting on your behalf (whether an affiliate or a nonaffiliated third party) receives or uses that information in the manner described in paragraphs (b)(1)(i) or (b)(1)(ii) of this section. All relevant facts and circumstances will determine whether a person is acting as your service provider when it receives or uses an affiliate's eligibility information in connection with marketing your products and services.

(4) Use by an affiliate of its own eligibility information. Unless you have used eligibility information that you receive from an affiliate in the manner described in paragraph (b)(1)(ii) of this section, you do not make a solicitation subject to this subpart if your affiliate:

(i) Uses its own eligibility information that it obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) Writing requirements. (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(5) Use of eligibility information by a service provider—(i) In general. You do not make a solicitation subject to Sub-part C of this part if a service provider (including an affiliated or third-party service provider that maintains or accesses a common database that you may access) receives eligibility information from your affiliate that your affiliate obtained in connection with a pre-existing business relationship it has or had with the consumer and uses that eligibility information to market your products or services to the consumer, so long as—

(A) Your affiliate controls access to and use of its eligibility information by the service provider (including the right to establish the specific terms and conditions under which the service provider may use such information to market your products or services);

(B) Your affiliate establishes specific terms and conditions under which the service provider may access and use the affiliate's eligibility information to market your products and services (or those of affiliates generally) to the consumer, such as the identity of the affiliated companies whose products or services may be marketed to the consumer by the service provider, the types of products or services of affiliated companies that may be marketed, and the number of times the consumer may receive marketing materials, and periodically evaluates the service provider's compliance with those terms and conditions;

(C) Your affiliate requires the service provider to implement reasonable policies and procedures designed to ensure that the service provider uses the affiliate's eligibility information in accordance with the terms and conditions established by the affiliate relating to the marketing of your products or services;

(D) Your affiliate is identified on or with the marketing materials provided to the consumer; and

(E) You do not directly use your affiliate's eligibility information in the manner described in paragraph (b)(1)(ii) of this section.

(ii) Writing requirements. (A) The requirements of paragraphs (b)(5)(i)(A) and (C) of this section must be set forth in a written agreement between your affiliate and the service provider; and

(B) The specific terms and conditions established by your affiliate as provided in paragraph (b)(5)(i)(B) of this section must be set forth in writing.

(6) Examples of making solicitations. (i) A consumer has a deposit account with a depository institution, which is affiliated with an insurance company. The insurance company receives eligibility
information about the consumer from the depository institution. The insurance company uses that eligibility information to identify the consumer to receive a solicitation about insurance products, and, as a result, the insurance company provides a solicitation to the consumer about its insurance products. Pursuant to paragraph (b)(3) of this section, the insurance company has made a solicitation to the consumer.

(ii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that after using the eligibility information to identify the consumer to receive a solicitation about insurance products, the insurance company asks the depository institution to send the solicitation to the consumer and the depository institution does so. Pursuant to paragraph (b)(1) of this section, the insurance company has made a solicitation to the consumer because it used eligibility information about the consumer that it received from an affiliate to identify the consumer to receive a solicitation about its products or services, and, as a result, a solicitation was provided to the consumer about the insurance company's products.

(iii) The same facts as in the example in paragraph (b)(6)(i) of this section, except that eligibility information about consumers that have deposit accounts with the depository institution is placed into a common database that all members of the affiliated group of companies may independently access and use. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the depository institution. The depository institution reviews eligibility information about its own consumers using the selection criteria provided by the insurance company to determine which consumers should receive the insurance company's marketing materials and sends marketing materials about the insurance company's products to those consumers. Even though the insurance company has received eligibility information through the common database as provided in paragraph (b)(2) of this section, it did not use that information to identify consumers or establish selection criteria; instead, the depository institution used its own eligibility information. Therefore, pursuant to paragraph (b)(4)(i) of this section, the insurance company has not made a solicitation to the consumer.

(iv) The same facts as in the example in paragraph (b)(6)(iii) of this section, except that the depository institution provides the insurance company's criteria to the depository institution's service provider and directs the service provider to use the depository institution's eligibility information to identify depository institution consumers who meet the criteria and to send the insurance company's marketing materials to those consumers. The insurance company does not communicate directly with the service provider regarding the use of the depository institution's eligibility information to market its products to the depository institution's consumers. Pursuant to paragraph (b)(4)(ii) of this section, the insurance company has not made a solicitation to the consumer.

(v) An affiliated group of companies includes a depository institution, an insurance company, and a service provider. Each affiliate in the group places information about its consumers into a common database. The service provider has access to all information in the common database. The depository institution controls access to and use of its eligibility information by the service provider. This control is set forth in a written agreement between the depository institution and the service provider. The written agreement also requires the service provider to establish reasonable policies and procedures designed to ensure that the service provider uses the depository institution's eligibility information in accordance with specific terms and conditions established by the depository institution relating to the marketing of the products and services of all affiliates, including the insurance company. In a separate written communication, the depository institution specifies the terms and conditions under which the
service provider may use the depository institution's eligibility information to market the insurance company's products and services to the depository institution's consumers. The specific terms and conditions are: a list of affiliated companies (including the insurance company) whose products or services may be marketed to the depository institution's consumers by the service provider; the specific products or types of products that may be marketed to the depository institution's consumers by the service provider; the categories of eligibility information that may be used by the service provider in marketing products or services to the depository institution's consumers; the types or categories of the depository institution's consumers to whom the service provider may market products or services of depository institution affiliates; the number and/or types of marketing communications that the service provider may send to the depository institution's consumers; and the length of time during which the service provider may market the products or services of the depository institution's affiliates to its consumers. The depository institution periodically evaluates the service provider's compliance with these terms and conditions. The insurance company asks the service provider to market insurance products to certain consumers who have deposit accounts with the depository institution. Without using the depository institution's eligibility information, the insurance company develops selection criteria and provides those criteria, marketing materials, and related instructions to the service provider. The service provider uses the depository institution's eligibility information from the common database to identify the depository institution's consumers to whom insurance products will be marketed. When the insurance company's marketing materials are provided to the identified consumers, the name of the depository institution is displayed on the insurance marketing materials, an introductory letter that accompanies the marketing materials, an account statement that accompanies the marketing materials, or the envelope containing the marketing materials. The requirements of paragraph (b)(5) of this section have been satisfied, and the insurance company has not made a solicitation to the consumer.

(vi) The same facts as in the example in paragraph (b)(6)(v) of this section, except that the terms and conditions permit the service provider to use the depository institution's eligibility information to market the products and services of other affiliates to the depository institution's consumers whenever the service provider deems it appropriate to do so. The service provider uses the depository institution's eligibility information in accordance with the discretion afforded to it by the terms and conditions. Because the terms and conditions are not specific, the requirements of paragraph (b)(5) of this section have not been satisfied.

(c) Exceptions. The provisions of this subpart do not apply to you if you use eligibility information that you receive from an affiliate:

(1) To make a solicitation for marketing purposes to a consumer with whom you have a pre-existing business relationship;
(2) To facilitate communications to an individual for whose benefit you provide employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;
(3) To perform services on behalf of an affiliate, except that this subparagraph shall not be construed as permitting you to send solicitations on behalf of an affiliate if the affiliate would not be permitted to send the solicitation as a result of the election of the consumer to opt out under this subpart;
(4) In response to a communication about your products or services initiated by the consumer;
(5) In response to an authorization or request by the consumer to receive solicitations; or
(6) If your compliance with this subpart would prevent you from complying with any provision of State insurance laws pertaining to unfair discrimination in any State in which you are lawfully doing business.
(d) Examples of exceptions—(1) Example of the pre-existing business relationship exception. A consumer has a deposit account with a depository institution. The consumer also has a relationship with the depository institution's securities affiliate for management of the consumer's securities portfolio. The depository institution receives eligibility information about the consumer from its securities affiliate and uses that information to make a solicitation to the consumer about the depository institution's wealth management services. The depository institution may make this solicitation even if the consumer has not been given a notice and opportunity to opt out because the depository institution has a pre-existing business relationship with the consumer.

(2) Examples of service provider exception. (i) A consumer has an insurance policy issued by an insurance company. The insurance company furnishes eligibility information about the consumer to its affiliated depository institution. Based on that eligibility information, the depository institution wants to make a solicitation to the consumer about its deposit products. The depository institution does not have a pre-existing business relationship with the consumer and none of the other exceptions in paragraph (c) of this section apply. The consumer has been given an opt-out notice and has elected to opt out of receiving such solicitations. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may not send the solicitation on behalf of the depository institution because, as a result of the consumer's opt-out election, the depository institution is not permitted to make the solicitation.

(ii) The same facts as in paragraph (d)(2)(i) of this section, except the consumer has been given an opt-out notice, but has not elected to opt out. The depository institution asks a service provider to send the solicitation to the consumer on its behalf. The service provider may send the solicitation on behalf of the depository institution because, as a result of the consumer's not opting out, the depository institution is permitted to make the solicitation.

(3) Examples of consumer-initiated communications. (i) A consumer who has a deposit account with a depository institution contacts the institution to request information about how to save and invest for a child's college education without specifying the type of product in which the consumer may be interested. Information about a range of different products or services offered by the depository institution and one or more affiliates of the institution may be responsive to that communication. Such products or services may include the following: Mutual funds offered by the institution's mutual fund affiliate, section 529 plans offered by the institution, its mutual fund affiliate, or another securities affiliate; or trust services offered by a different financial institution in the affiliated group. Any affiliate offering investment products or services that would be responsive to the consumer's request for information about saving and investing for a child's college education may use eligibility information to make solicitations to the consumer in response to this communication.

(ii) A credit card issuer makes a marketing call to the consumer without using eligibility information received from an affiliate. The issuer leaves a voice-mail message that invites the consumer to call a toll-free number to apply for the issuer's credit card. If the consumer calls the toll-free number to inquire about the credit card, the call is a consumer-initiated communication about a product or service and the credit card issuer may now use eligibility information it receives from its affiliates to make solicitations to the consumer.

(iv) A consumer calls a depository institution to ask about retail locations.
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and hours, but does not request information about products or services. The institution may not use eligibility information it receives from an affiliate to make solicitations to the consumer about its products or services because the consumer-initiated communication does not relate to the depository institution’s products or services. Thus, the use of eligibility information received from an affiliate would not be responsive to the communication and the exception does not apply.

(v) A consumer calls a depository institution to ask about retail locations and hours. The customer service representative asks the consumer if there is a particular product or service about which the consumer is seeking information. The consumer responds that the consumer wants to stop in and find out about certificates of deposit. The customer service representative offers to provide that information by telephone and mail additional information and application materials to the consumer. The consumer agrees and provides or confirms contact information for receipt of the materials to be mailed. The depository institution may use eligibility information it receives from an affiliate to make solicitations to the consumer about certificates of deposit because such solicitations would respond to the consumer-initiated communication about products or services.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer’s affiliates. The consumer has not authorized or requested solicitations from the card issuer’s affiliates.

(e) Relation to affiliate-sharing notice and opt-out. Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 334.22 Scope and duration of opt-out.

(a) Scope of opt-out—(1) In general. Except as otherwise provided in this section, the consumer’s election to opt out prohibits any affiliate covered by the opt-out notice from using eligibility information received from another affiliate as described in the notice to make solicitations to the consumer.

(2) Continuing relationship—(i) In general. If the consumer establishes a continuing relationship with you or your affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or

(d) Examples of consumer authorization or request for solicitations. (i) A consumer who obtains a mortgage from a mortgage lender authorizes or requests information about homeowner’s insurance offered by the mortgage lender’s insurance affiliate. Such authorization or request, whether given to the mortgage lender or to the insurance affiliate, would permit the insurance affiliate to use eligibility information about the consumer it obtains from the mortgage lender or any other affiliate to make solicitations to the consumer about homeowner’s insurance.

(ii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer’s online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer’s affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer’s affiliates.

(iii) A consumer completes an online application to apply for a credit card from a credit card issuer. The issuer’s online application contains a pre-selected check box indicating that the consumer authorizes or requests information from the issuer’s affiliates. The consumer does not deselect the check box. The consumer has not authorized or requested solicitations from the card issuer’s affiliates.

(iv) The terms and conditions of a credit card account agreement contain preprinted boilerplate language stating that by applying to open an account the consumer authorizes or requests to receive solicitations from the credit card issuer’s affiliates. The consumer has not authorized or requested solicitations from the card issuer’s affiliates.

(e) Relation to affiliate-sharing notice and opt-out. Nothing in this subpart limits the responsibility of a person to comply with the notice and opt-out provisions of section 603(d)(2)(A)(iii) of the Act where applicable.

§ 334.22 Scope and duration of opt-out.

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(2) Continuing relationship—(i) In general. If the consumer establishes a continuing relationship with you or your affiliate, an opt-out notice may apply to eligibility information obtained in connection with—

(A) A single continuing relationship or multiple continuing relationships that the consumer establishes with you or your affiliates, including continuing relationships established subsequent to delivery of the opt-out notice, so long as the notice adequately describes the continuing relationships covered by the opt-out; or
(B) Any other transaction between the consumer and you or your affiliates as described in the notice.

   (ii) Examples of continuing relationships. A consumer has a continuing relationship with you or your affiliate if the consumer—
   
   (A) Opens a deposit or investment account with you or your affiliate;
   
   (B) Obtains a loan for which you or your affiliate owns the servicing rights;
   
   (C) Purchases an insurance product from you or your affiliate;
   
   (D) Holds an investment product through you or your affiliate, such as when you act or your affiliate acts as a custodian for securities or for assets in an individual retirement arrangement;
   
   (E) Enters into an agreement or understanding with you or your affiliate whereby you or your affiliate undertakes to arrange or broker a home mortgage loan for the consumer;
   
   (F) Enters into a lease of personal property with you or your affiliate; or
   
   (G) Obtains financial, investment, or economic advisory services from you or your affiliate for a fee.

(3) No continuing relationship—(i) In general. If there is no continuing relationship between a consumer and you or your affiliate, and you or your affiliate obtain eligibility information about a consumer in connection with a transaction with the consumer, such as an isolated transaction or a credit application that is denied, an opt-out notice provided to the consumer only applies to eligibility information obtained in connection with that transaction.

   (ii) Examples of isolated transactions. An isolated transaction occurs if—
   
   (A) The consumer uses your or your affiliate's ATM to withdraw cash from an account at another financial institution; or
   
   (B) You or your affiliate sells the consumer a cashier's check or money order, airline tickets, travel insurance, or traveler's checks in isolated transactions.

(4) Menu of alternatives. A consumer may be given the opportunity to choose from a menu of alternatives when electing to prohibit solicitations, such as by electing to prohibit solicitations from certain types of affiliates covered by the opt-out notice but not other types of affiliates covered by the notice, electing to prohibit solicitations based on certain types of eligibility information but not other types of eligibility information, or electing to prohibit solicitations by certain methods of delivery but not other methods of delivery. However, one of the alternatives must allow the consumer to prohibit all solicitations from all of the affiliates that are covered by the notice.

(5) Special rule for a notice following termination of all continuing relationships—(i) In general. A consumer must be given a new opt-out notice if, after all continuing relationships with you or your affiliate(s) are terminated, the consumer subsequently establishes another continuing relationship with you or your affiliate(s) and the consumer's eligibility information is to be used to make a solicitation. The new opt-out notice must apply, at a minimum, to eligibility information obtained in connection with the new continuing relationship. Consistent with paragraph (b) of this section, the consumer's decision not to opt out after receiving the new opt-out notice would not override a prior opt-out election by the consumer that applies to eligibility information obtained in connection with a terminated relationship, regardless of whether the new opt-out notice applies to eligibility information obtained in connection with the terminated relationship.

   (ii) Example. A consumer has a checking account with a depository institution that is part of an affiliated group. The consumer closes the checking account. One year after closing the checking account, the consumer opens a savings account with the same depository institution. The consumer must be given a new notice and opportunity to opt out before the depository institution's affiliates may make solicitations to the consumer using eligibility information obtained by the depository institution in connection with the new savings account relationship, regardless of whether the consumer opted out in connection with the checking account.
§ 334.23 Contents of opt-out notice; consolidated and equivalent notices.

(b) Duration of opt-out. The election of a consumer to opt out must be effective for a period of at least five years (the “opt-out period”) beginning when the consumer’s opt-out election is received and implemented, unless the consumer subsequently revokes the opt-out in writing or, if the consumer agrees, electronically. An opt-out period of more than five years may be established, including an opt-out period that does not expire unless revoked by the consumer.

(c) Time of opt-out. A consumer may opt out at any time.

§ 334.23 Contents of opt-out notice; consolidated and equivalent notices.

(a) Contents of opt-out notice. (1) In general. A notice must be clear, conspicuous, and concise, and must accurately disclose:

(i) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as “ABC,” then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to “all of the ABC and XYZ companies” or to “the ABC banking and credit card companies and the XYZ insurance companies”;

(ii) A list of the affiliates or types of affiliate whose use of eligibility information is covered by the notice, which may include companies that become affiliates after the notice is provided to the consumer. If each affiliate covered by the notice shares a common name, such as “ABC,” then the notice may indicate that it applies to multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates covered by the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to “all of the ABC and XYZ companies” or to “the ABC banking and credit card companies and the XYZ insurance companies”;

(iii) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(iv) That the consumer may elect to limit the use of eligibility information to make solicitations to the consumer;

(v) That the consumer’s election will apply for the specified period of time stated in the notice and, if applicable, that the consumer will be allowed to renew the election once that period expires;

(vi) If the notice is provided to consumers who may have previously opted out, such as if a notice is provided to consumers annually, that the consumer who has chosen to limit solicitations does not need to act again until the consumer receives a renewal notice; and

(vii) A reasonable and simple method for the consumer to opt out.

(2) Joint relationships. (i) If two or more consumers jointly obtain a product or service, a single opt-out notice may be provided to the joint consumers. Any of the joint consumers may exercise the right to opt out.

(ii) The opt-out notice must explain how an opt-out direction by a joint consumer will be treated. An opt-out direction by a joint consumer may be treated as applying to all of the associated joint consumers, or each joint consumer may be permitted to opt-out separately. If each joint consumer is permitted to opt out separately, one of the joint consumers must be permitted to opt out on behalf of all of the joint consumers and the joint consumers.
must be permitted to exercise their separate rights to opt out in a single response.

(iii) It is impermissible to require all joint consumers to opt out before implementing any opt-out direction.

(3) Alternative contents. If the consumer is afforded a broader right to opt out of receiving marketing than is required by this subpart, the requirements of this section may be satisfied by providing the consumer with a clear, conspicuous, and concise notice that accurately discloses the consumer's opt-out rights.

(4) Model notices. Model notices are provided in Appendix C of this part.

(b) Coordinated and consolidated notices. A notice required by this subpart may be coordinated and consolidated with any other notice or disclosure required to be issued under any other provision of law by the entity providing the notice, including but not limited to the notice described in section 603(d)(2)(A)(iii) of the Act and the Gramm-Leach-Bliley Act privacy notice.

(c) Equivalent notices. A notice or other disclosure that is equivalent to the notice required by this subpart, and that is provided to a consumer together with disclosures required by any other provision of law, satisfies the requirements of this section.

§ 334.24 Reasonable opportunity to opt out.

(a) In general. You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable opportunity to opt out, as required by §334.21(a)(1)(ii) of this part.

(b) Examples of a reasonable opportunity to opt out. The consumer is given a reasonable opportunity to opt out if:

(1) By mail. The opt-out notice is mailed to the consumer. The consumer is given 30 days from the date the notice is mailed to elect to opt out by any reasonable means.

(2) By electronic means. (i) The opt-out notice is provided electronically to the consumer, such as by posting the notice at an Internet Web site at which the consumer has obtained a product or service. The consumer acknowledges receipt of the electronic notice. The consumer is given 30 days after the date the consumer acknowledges receipt to elect to opt out by any reasonable means.

(ii) The opt-out notice is provided to the consumer by e-mail where the consumer has agreed to receive disclosures by e-mail from the person sending the notice. The consumer is given 30 days after the e-mail is sent to elect to opt out by any reasonable means.

(3) At the time of an electronic transaction. The opt-out notice is provided to the consumer at the time of an electronic transaction, such as a transaction conducted on an Internet Web site. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction. There is a simple process that the consumer may use to opt out at that time using the same mechanism through which the transaction is conducted.

(4) At the time of an in-person transaction. The opt-out notice is provided to the consumer in writing at the time of an in-person transaction. The consumer is required to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction, and is not permitted to complete the transaction without making a choice. There is a simple process that the consumer may use during the course of the in-person transaction to opt out, such as completing a form that requires consumers to write a "yes" or "no" to indicate their opt-out preference or that requires the consumer to check one of two blank check boxes—one that allows consumers to indicate that they want to opt out and one that allows consumers to indicate that they do not want to opt out.

(5) By including in a privacy notice. The opt-out notice is included in a Gramm-Leach-Bliley Act privacy notice. The consumer is allowed to exercise the opt-out within a reasonable period of time and in the same manner as the opt-out under that privacy notice.
§ 334.25 Reasonable and simple methods of opting out.

(a) In general. You must not use eligibility information about a consumer that you receive from an affiliate to make a solicitation to the consumer about your products or services, unless the consumer is provided a reasonable and simple method to opt out, as required by § 334.21(a)(1)(ii) of this part.

(b) Examples. (1) Reasonable and simple opt-out methods. Reasonable and simple methods for exercising the opt-out right include—

(i) Designating a check-off box in a prominent position on the opt-out form;

(ii) Including a reply form and a self-addressed envelope together with the opt-out notice;

(iii) Providing an electronic means to opt out, such as a form that can be electronically mailed or processed at an Internet Web site, if the consumer agrees to the electronic delivery of information;

(iv) Providing a toll-free telephone number that consumers may call to opt out; or

(v) Allowing consumers to exercise all of their opt-out rights described in a consolidated opt-out notice that includes the privacy opt-out under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 et seq., the affiliate sharing opt-out under the Act, and the affiliate marketing opt-out under the Act, by a single method, such as by calling a single toll-free telephone number.

(2) Opt-out methods that are not reasonable and simple. Reasonable and simple methods for exercising an opt-out right do not include—

(i) Requiring the consumer to write his or her own letter;

(ii) Requiring the consumer to call or write to obtain a form for opting out, rather than including the form with the opt-out notice;

(iii) Requiring the consumer who receives the opt-out notice in electronic form only, such as through posting at an Internet Web site, to opt out solely by paper mail or by visiting a different Web site without providing a link to that site.

(c) Specific opt-out means. Each consumer may be required to opt out through a specific means, as long as that means is reasonable and simple for that consumer.

§ 334.26 Delivery of opt-out notices.

(a) In general. The opt-out notice must be provided so that each consumer can reasonably be expected to receive actual notice. For opt-out notices provided electronically, the notice may be provided in compliance with either the electronic disclosure provisions in this subpart or the provisions in section 101 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq.

(b) Examples of reasonable expectation of actual notice. A consumer may reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Hand-delivers a printed copy of the notice to the consumer;

(2) Mails a printed copy of the notice to the last known mailing address of the consumer;

(3) Provides a notice by e-mail to a consumer who has agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(4) Posts the notice on the Internet Web site at which the consumer obtained a product or service electronically and requires the consumer to acknowledge receipt of the notice.

(c) Examples of no reasonable expectation of actual notice. A consumer may not reasonably be expected to receive actual notice if the affiliate providing the notice:

(1) Only posts the notice on a sign in a branch or office or generally publishes the notice in a newspaper;

(2) Sends the notice via e-mail to a consumer who has not agreed to receive electronic disclosures by e-mail from the affiliate providing the notice; or

(3) Posts the notice on an Internet Web site without requiring the consumer to acknowledge receipt of the notice.

§ 334.27 Renewal of opt-out.

(a) Renewal notice and opt-out requirement—(1) In general. After the opt-out period expires, you may not make solicitations based on eligibility information you receive from an affiliate to a
consumer who previously opted out, unless:

(i) The consumer has been given a renewal notice that complies with the requirements of this section and §§334.24 through 334.26 of this part, and a reasonable opportunity and a reasonable and simple method to renew the opt-out, and the consumer does not renew the opt-out; or

(ii) An exception in §334.21(c) of this part applies.

(2) Renewal period. Each opt-out renewal must be effective for a period of at least five years as provided in §334.22(b) of this part.

(3) Affiliates who may provide the notice. The notice required by this paragraph must be provided:

(i) By the affiliate that provided the previous opt-out notice, or its successor; or

(ii) As part of a joint renewal notice from two or more members of an affiliated group of companies, or their successors, that jointly provided the previous opt-out notice.

(b) Contents of renewal notice. The renewal notice must be clear, conspicuous, and concise, and must accurately disclose:

(1) The name of the affiliate(s) providing the notice. If the notice is provided jointly by multiple affiliates and each affiliate shares a common name, such as “ABC,” then the notice may indicate that it is being provided by multiple companies with the ABC name or multiple companies in the ABC group or family of companies, for example, by stating that the notice is provided by “all of the ABC companies,” “the ABC banking, credit card, insurance, and securities companies,” or by listing the name of each affiliate providing the notice. But if the affiliates providing the notice do not all share a common name, then the notice must either separately identify each covered affiliate by name or identify each of the common names used by those affiliates, for example, by stating that the notice applies to “all of the ABC and XYZ companies” or to “the ABC banking and credit card companies and the XYZ insurance companies.”

(3) A general description of the types of eligibility information that may be used to make solicitations to the consumer;

(4) That the consumer previously elected to limit the use of certain information to make solicitations to the consumer;

(5) That the consumer’s election has expired or is about to expire;

(6) That the consumer may elect to renew the consumer’s previous election;

(7) If applicable, that the consumer’s election to renew will apply for the specified period of time stated in the notice and that the consumer will be allowed to renew the election once that period expires; and

(8) A reasonable and simple method for the consumer to opt out.

(c) Timing of the renewal notice—(1) In general. A renewal notice may be provided to the consumer either—

(i) A reasonable period of time before the expiration of the opt-out period; or

(ii) Any time after the expiration of the opt-out period but before solicitations that would have been prohibited by the expired opt-out are made to the consumer.

(2) Combination with annual privacy notice. If you provide an annual privacy notice.
notice under the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 et seq., providing a renewal notice with the last annual privacy notice provided to the consumer before expiration of the opt-out period is a reasonable period of time before expiration of the opt-out in all cases.

(d) No effect on opt-out period. An opt-out period may not be shortened by sending a renewal notice to the consumer before expiration of the opt-out period, even if the consumer does not renew the opt-out.

§ 334.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) Scope. This section applies to:

(1) Any of the following that participates as a creditor in a transaction:

(i) A State bank insured by the FDIC (other than members of the Federal Reserve System);

(ii) An insured State branch of a foreign bank; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) General prohibition on obtaining or using medical information—(1) In general. A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit, except as provided in this section.

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

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

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

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

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

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

(c) Rule of construction for obtaining and using unsolicited medical information. (1) In general. A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) Use of unsolicited medical information. A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in §334.30(d) or (e).

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

(i) In response to a general question regarding a consumer’s debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.
(ii) In a conversation with the creditor’s loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

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

(d) Financial information exception for obtaining and using medical information.

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

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

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

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

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

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

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

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

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

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

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

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the
creditors underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) Examples of uses of medical information inconsistent with the exception.

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

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the creditor has used medical information in a manner and to an extent that is less favorable than it would use comparable non-medical information.

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

(e) Specific exceptions for obtaining and using medical information—(1) In general. A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

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

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

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is:

(A) Designed to meet the special needs of consumers with medical conditions; and
(B) Established and administered pursuant to a written plan that:

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

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

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

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

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

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

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

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

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

(3) Examples of verifying the medical purpose of the loan or the use of proceeds.

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

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

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

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

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

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

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

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

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Example of a forbearance practice or program. After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill.
at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

§ 334.31 Limits on redisclosure of information.
(a) Scope. This section applies to State banks insured by the FDIC (other than members of the Federal Reserve System) and insured State branches of foreign banks.
(b) Limits on redisclosure. If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 334.32 Sharing medical information with affiliates.
(a) Scope. This section applies to State banks insured by the FDIC (other than members of the Federal Reserve System) and insured State branches of foreign banks.
(b) In general. The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate—
(1) Medical information;
(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
(3) An aggregate list of identified consumers based on payment transactions for medical products or services.
(c) Exceptions. A person described in paragraph (b) of this section may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate—
(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);
(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);
(3) For any purpose referred to in section 1179 of HIPAA;
(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;
(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with §334.30; or
(6) As otherwise permitted by order of the FDIC.

Subparts E–H [Reserved]

Subpart I—Duties of Users of Consumer Reports Regarding Address Discrepancies and Records Disposal

§ 334.80–334.81 [Reserved]

§ 334.82 Duties of users regarding address discrepancies.
(a) Scope. This section applies to a user of consumer reports (user) that receives a notice of address discrepancy from a consumer reporting agency and that is an insured state nonmember bank, insured state licensed branch of a foreign bank, or a subsidiary of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).
(b) Definition. For purposes of this section, a notice of address discrepancy means a notice sent to a user by a consumer reporting agency pursuant to 15 U.S.C. 1681c(h)(1), that informs the user of a substantial difference between the address for the consumer that the user
provided to request the consumer report and the address(es) in the agency’s file for the consumer.

(c) Reasonable belief. (1) Requirement to form a reasonable belief. A user must develop and implement reasonable policies and procedures designed to enable the user to form a reasonable belief that a consumer report relates to the consumer about whom it has requested the report, when the user receives a notice of address discrepancy.

(2) Examples of reasonable policies and procedures. (i) Comparing the information in the consumer report provided by the consumer reporting agency with information the user:

(A) Obtains and uses to verify the consumer’s identity in accordance with the requirements of the Customer Information Program (CIP) rules implementing 31 U.S.C. 5318(l) (31 CFR 103.121);

(B) Maintains in its own records, such as applications, change of address notifications, other customer account records, or retained CIP documentation; or

(C) Obtains from third-party sources; or

(ii) Verifying the information in the consumer report provided by the consumer reporting agency with the consumer.

(d) Consumer’s address. (1) Requirement to furnish consumer’s address to a consumer reporting agency. A user must develop and implement reasonable policies and procedures for furnishing an address for the consumer that the user has reasonably confirmed is accurate to the consumer reporting agency from whom it received the notice of address discrepancy when the user:

(i) Can form a reasonable belief that the consumer report relates to the consumer about whom the user requested the report;

(ii) Establishes a continuing relationship with the consumer; and

(iii) Regularly and in the ordinary course of business furnishes information to the consumer reporting agency from which the notice of address discrepancy relating to the consumer was obtained.

(2) Examples of confirmation methods. The user may reasonably confirm an address is accurate by:

(i) Verifying the address with the consumer about whom it has requested the report;

(ii) Reviewing its own records to verify the address of the consumer;

(iii) Verifying the address through third-party sources; or

(iv) Using other reasonable means.

(3) Timing. The policies and procedures developed in accordance with paragraph (d)(1) of this section must provide that the user will furnish the consumer’s address that the user has reasonably confirmed is accurate to the consumer reporting agency as part of the information it regularly furnishes for the reporting period in which it establishes a relationship with the consumer.

[72 FR 63760, Nov. 9, 2007]

§ 334.83 Disposal of consumer information.

(a) In general. You must properly dispose of any consumer information that you maintain or otherwise possess in accordance with the Interagency Guidelines Establishing Information Security Standards, as set forth in appendix B to part 364 of this chapter, prescribed pursuant to section 216 of the Fair and Accurate Credit Transactions Act of 2003 (15 U.S.C. 1681w) and section 501(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801(b)), to the extent the Guidelines are applicable to you.

(b) Rule of construction. Nothing in this section shall be construed to:

(1) Require you to maintain or destroy any record pertaining to a consumer that is not imposed under any other law; or

(2) Alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

Subpart J—Identity Theft Red Flags

SOURCE: 72 FR 63761, Nov. 9, 2007, unless otherwise noted.

§ 334.90 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) Scope. This section applies to a financial institution or creditor that is an insured state nonmember bank, insured state licensed branch of a foreign
bank, or a subsidiary of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

(b) Definitions. For purposes of this section and Appendix J, the following definitions apply:

(1) Account means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes:

(i) An extension of credit, such as the purchase of property or services involving a deferred payment; and
(ii) A deposit account.

(2) The term board of directors includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and
(ii) In the case of any other creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) Covered account means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and
(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) Credit has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) Creditor has the same meaning as in 15 U.S.C. 1681a(r)(5), and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.

(6) Customer means a person that has a covered account with a financial institution or creditor.

(7) Financial institution has the same meaning as in 15 U.S.C. 1681a(t).

(8) Identity theft has the same meaning as in 16 CFR 603.2(a).

(9) Red Flag means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(10) Service provider means a person that provides a service directly to the financial institution or creditor.

(c) Periodic identification of covered accounts. Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;
(2) The methods it provides to access its accounts; and
(3) Its previous experiences with identity theft.

(d) Establishment of an Identity Theft Prevention Program—(1) Program requirement. Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) Elements of the Program. The Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;
(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;
(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and
(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

e Administration of the Program. Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) Guidelines. Each financial institution or creditor that is required to implement a Program must consider the guidelines in Appendix J of this part and include in its Program those guidelines that are appropriate.

§334.91 Duties of card issuers regarding changes of address.

(a) Scope. This section applies to an issuer of a debit or credit card (card issuer) that is an insured state non-member bank, insured state licensed branch of a foreign bank, or a subsidiary of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

(b) Definitions. For purposes of this section:

(1) Cardholder means a consumer who has been issued a credit or debit card.

(2) Clear and conspicuous means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(3) Address validation requirements. A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer’s debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(i) Notifies the cardholder of the request:

(A) At the cardholder’s former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to §334.90 of this part.

(d) Alternative timing of address validation. A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) Form of notice. Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

APPENDICES A–B TO PART 334
[RESERVED]

APPENDIX C TO PART 334—MODEL FORMS FOR OPT-OUT NOTICES

a. Although use of the model forms is not required, use of the model forms in this Appendix (as applicable) complies with the requirement in section 624 of the Act for clear, conspicuous, and concise notices.

b. Certain changes may be made to the language or format of the model forms without losing the protection from liability afforded by use of the model forms. These changes
may not be so extensive as to affect the substance, clarity, or meaningful sequence of the language in the model forms. Persons making such extensive revisions will lose the safe harbor that this Appendix provides. Acceptable changes include, for example:

1. Rearranging the order of the references to “your income,” “your account history,” and “your credit score.”

2. Substituting other types of information for “income,” “account history,” or “credit score” for accuracy, such as “payment history,” “credit history,” “payoff status,” or “claims history.”

3. Substituting a clearer and more accurate description of the affiliates providing or covered by the notice for phrases such as “the [ABC] group of companies,” including without limitation a statement that the entity providing the notice recently purchased the consumer’s account.

4. Substituting other types of affiliates covered by the notice for “credit card,” “insurance,” or “securities” affiliates.

5. Omitting items that are not accurate or applicable. For example, if a person does not limit the duration of the opt-out period, the notice may omit information about the renewal notice.

6. Adding a statement informing consumers how much time they have to opt out before shared eligibility information may be used to make solicitations to them.

7. Adding a statement that the consumer may exercise the right to opt out at any time.

8. Adding the following statement, if accurate: “If you previously opted out, you do not need to do so again.”

9. Providing a place on the form for the consumer to fill in identifying information, such as his or her name and address:

C-1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)

C-2 Model Form for Initial Opt-out Notice (Joint Notice)

C-3 Model Form for Renewal Notice (Single-Affiliate Notice)

C-4 Model Form for Renewal Notice (Joint Notice)

C-5 Model Form for Voluntary “No Marketing” Notice

C-1—Model Form for Initial Opt-out Notice (Single-Affiliate Notice)—[Your Choice To Limit Marketing][Marketing Opt-out]

• [Name of Affiliate] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]

• You may limit our affiliates in the [ABC group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that we collect and share with them. This information includes your [income], your [account history with us], and your [credit score].]

• Your choice to limit marketing offers from our affiliates will apply [until you tell us to change your choice][for x years from when you tell us your choice][for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from our affiliates for [another x years][at least another 5 years].

• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from our affiliates, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:

• By telephone: 1–877–###–####

• On the Web: www...com

• By mail: Check the box and complete the form below, and send the form to:

[Company name]

[Company address]

Do not allow your affiliates to use my personal information to market to me.

C-2—Model Form for Initial Opt-out Notice (Joint Notice)—[Your Choice To Limit Marketing][Marketing Opt-out]

• The [ABC group of companies] is providing this notice.

• [Optional: Federal law gives you the right to limit some but not all marketing from the [ABC] companies. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from the [ABC] companies.]

• You may limit the [ABC] companies, such as the [ABC credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other [ABC] companies. This information includes your [income], your [account history], and your [credit score].

• Your choice to limit marketing offers from the [ABC] companies will apply [until you tell us to change your choice][for x years from when you tell us your choice][for at least 5 years from when you tell us your choice]. [Include if the opt-out period expires.] Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the [ABC] companies for [another x years][at least another 5 years].
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• [Include, if applicable, in a subsequent notice, including an annual notice, for consumers who may have previously opted out.] If you have already made a choice to limit marketing offers from the [ABC] companies, you do not need to act again until you receive the renewal notice.

To limit marketing offers, contact us [include all that apply]:
• By telephone: 1-877-###-####
• On the Web: www.---.com
• By mail: Check the box and complete the form below, and send the form to:
[Company name]
[Company address]

Do not allow any company [in the ABC group of companies] to use my personal information to market to me.

C–3—Model Form for Renewal Notice (Single-Affiliate Notice)—[Renewing Your Choice To Limit Marketing][Renewing Your Marketing Opt-out]

• [Name of Affiliate] is providing this notice.
• [Optional: Federal law gives you the right to limit some but not all marketing from our affiliates. Federal law also requires us to give you this notice to tell you about your choice to limit marketing from our affiliates.]
• You previously chose to limit our affiliates in the [ABC] group of companies, such as our [credit card, insurance, and securities] affiliates, from marketing their products or services to you based on your personal information that they receive from other ABC companies. This information includes your [income], your [account history], and your [credit score].
• Your choice has expired or is about to expire.
To renew your choice to limit marketing for [x] more years, contact us [include all that apply]:
• By telephone: 1-877-###-####
• On the Web: www.---.com
• By mail: Check the box and complete the form below, and send the form to:
[Company name]
[Company address]

Renew my choice to limit marketing for [x] more years.

C–5—Model Form for Voluntary "No Marketing" Notice—Your Choice To Stop Marketing

• [Name of Affiliate] is providing this notice.
• You may choose to stop all marketing from us and our affiliates.
To stop all marketing, contact us [include all that apply]:
• By telephone: 1-877-###-####
• On the Web: www.---.com
• By mail: Check the box and complete the form below, and send the form to:
[Company name]
[Company address]

Do not market to me.

[72 FR 62971, Nov. 7, 2007]

APPENDICES D–I TO PART 334
[RESERVED]

APPENDIX J TO PART 334—INTERAGENCY GUIDELINES ON IDENTITY THEFT DETECTION, PREVENTION, AND MITIGATION

Section 334.90 of this part requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in §334.90(b)(3) of this part, to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of §334.90 of this part.
I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) Risk Factors. A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;
(2) The methods it provides to open its covered accounts;
(3) The methods it provides to access its covered accounts; and
(4) Its previous experiences with identity theft.

(b) Sources of Red Flags. Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Web site. Appropriate responses may include the following:

- Contacting the customer;
- Changing any passwords, security codes, or other security devices that permit access to a covered account;
- Reopening a covered account with a new account number;
- Not opening a new covered account;
- Closing an existing covered account;
- Not attempting to collect on a covered account or not selling a covered account to a debt collector;
- Notifying law enforcement; or
- Determining that no response is warranted under the particular circumstances.

(c) Applicable supervisory guidance.

(d) Categories of Red Flags. The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;
(2) The presentation of suspicious documents;
(3) The presentation of suspicious personal identifying information, such as a suspicious address change;
(4) The unusual use of, or other suspicious activity related to, a covered account; and
(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(i)(31 CFR 103.121); and
(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Web site. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;
(b) Contacting the customer;
(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;
(d) Reopening a covered account with a new account number;
(e) Not opening a new covered account;
(f) Closing an existing covered account;
(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;
(h) Notifying law enforcement; or
(i) Determining that no response is warranted under the particular circumstances.

V. Updating the Program

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;
(b) Changes in methods of identity theft;
(c) Changes in methods to detect, prevent, and mitigate identity theft;
(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and
(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances,
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joint ventures, and service provider arrangements.

VI. Methods for Administering the Program

(a) Oversight of Program. Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:

(1) Assigning specific responsibility for the Program’s implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with §334.90 of this part; and

(3) Approving material changes to the Program as necessary to address changing identity theft risks.

(b) Reports. (1) In general. Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with §334.90 of this part.

(2) Contents of report. The report should address material matters related to the Program and evaluate issues such as: the effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management’s response; and recommendations for material changes to the Program.

(c) Oversight of service provider arrangements. Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts, the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider’s activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c-1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert; and

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix J

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in Appendix J of this part, each financial institution or creditor may consider incorporating its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings from a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as defined in §334.92 of this part.

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

   a. A recent and significant increase in the volume of inquiries;

   b. An unusual number of recently established credit relationships;

   c. A material change in the use of credit, especially with respect to recently established credit relationships; or

   d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor.

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institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:
   a. The address does not match any address in the consumer report; or
   b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:
   a. The address on an application is the same as the address provided on a fraudulent application; or
   b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:
   a. The address on an application is fictitious, a mail drop, or a prison; or
   b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the account number or telephone number submitted by an unusually large number of other persons opening accounts or other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement card or a cell phone, or for the addition of authorized users on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud patterns. For example:
   a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (e.g., electronics equipment or jewelry); or
   b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:
   a. Nonpayment when there is no history of late or missed payments;
   b. A material increase in the use of available credit;
   c. A material change in purchasing or spending patterns;
   d. A material change in electronic fund transfer patterns in connection with a deposit account; or
   e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer’s covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer’s covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

[72 FR 63762, Nov. 9, 2007]
§ 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 applicable 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 10A(m), 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, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p)), and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) regarding nonmember banks with one or more classes of securities subject to the registration provisions of sections 12(b) and 12(g) of the Exchange Act.

(b) Part 335 generally incorporates through cross reference the regulations of the SEC as these regulations are issued, revised, or updated from time to time under sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), except as provided at §335.801 of this part. References to the Commission in the regulations of the SEC are deemed to refer to the FDIC unless the context otherwise requires.


§ 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 applicable 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 10A(m), 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, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p)), and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), except as provided at §335.801 of this part. References to the Commission in the regulations of the SEC are deemed to refer to the FDIC unless the context otherwise requires.
§ 335.121 Listing standards related to audit committees.

The provisions of the applicable SEC regulation under section 10A(m) of the Exchange Act shall be followed as codified at 17 CFR 240.10A–3.

[70 FR 44272, Aug. 2, 2005]

§ 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 240.3a–12–1 through 240.3a–12–11, 240.12a–4 through 240.12a–9, and 240.12g–1 through 240.12h–5.

[70 FR 44272, Aug. 2, 2005]

§ 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–37.

[70 FR 44272, Aug. 2, 2005]

§ 335.221 Forms for registration of securities; optional forms for small business issuers; and incorporation of Regulation FD (Fair Disclosure).

(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.

(d) The provisions of the applicable and currently effective SEC regulation FD shall be followed as codified at 17 CFR 243.100 through 243.103.


§ 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 240.12d–1 through 240.12d–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–5.

[70 FR 44272, Aug. 2, 2005]

§ 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 240.13b–1 through 240.13b–2.

§ 335.331 Acquisition statements, acquisition of securities by issuers, and other matters.

The provisions of the applicable and currently effective SEC regulations under sections 13(d) and 13(e) of the Exchange Act shall be followed as codified at 17 CFR 240.13d–1 through 240.13e–102 and 240.13k–1.

[70 FR 44272, Aug. 2, 2005]

§ 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.


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 (FDIC Form 3), §335.612 (FDIC Form 4), and §335.613
§ 335.611 Initial statement of beneficial ownership of securities (Form 3).

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 4).

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 5).

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: Accounting and Securities Disclosure Section, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

(69 FR 59783, Oct. 6, 2004)
§ 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 10A(m), 12, 13, 14, and 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78), sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265), and this part.

(b) Electronic filings. (1) The FDIC does not participate in the SEC's EDGAR (Electronic Data Gathering Analysis and Retrieval) electronic filing program (17 CFR part 232). The FDIC does not permit electronically transmitted filings or submissions of

(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 portion of the 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 will 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.

materials in electronic format to the FDIC, with the exception of beneficial ownership report filings on FDIC Forms 3, 4 and 5.

(2) All reporting persons must file beneficial ownership report Forms 3, 4 and 5, including amendments and exhibits thereto, in electronic format using the Internet based, interagency Beneficial Ownership Filings system, which is accessible through the FDICconnect Business Center, except that a reporting person that has obtained a continuing hardship exemption under these rules may file the forms with the FDIC in paper format. For information and answers to questions regarding beneficial ownership and the completion and filing of the forms, please contact the FDIC Accounting and Securities Disclosure Section in Washington DC For information and answers to technical questions or problems relating to the use of FDICconnect, contact the FDICconnect Project Team toll-free at 877–275–3342 or by mail at 3501 North Fairfax Drive, Arlington, VA 22226.

(3) Electronic filings of FDIC beneficial ownership report Forms 3, 4, and 5 must be submitted to the FDIC through the interagency Beneficial Ownership Filings system. Beneficial ownership reports and any amendments are deemed filed with the FDIC upon electronic receipt on business days from 8 a.m. through 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect (Eastern Time). Business days include each day, except Saturdays, Sundays and Federal holidays. All filings submitted electronically to the FDIC commencing after 10 p.m. Eastern Time on business days shall be deemed filed as of 8 a.m. on the following business day. All filings submitted electronically to the FDIC on non-business days shall be deemed filed as of 8 a.m. on the following business day.

(4) Adjustment of the filing date. If an electronic filer in good faith attempts to file a beneficial ownership report with the FDIC in a timely manner but the filing is delayed due to technical difficulties beyond the electronic filer’s control, the electronic filer may request an adjustment of the filing date of such submission. The FDIC may grant the request if it appears that such adjustment is appropriate and consistent with the public interest and the protection of investors.

(5) Exhibits. (i) Exhibits to an electronic filing that have not previously been filed with the FDIC shall be filed in electronic format, absent a hardship exemption.

(ii) Previously filed exhibits, whether in paper or electronic format, may be incorporated by reference into an electronic filing to the extent permitted by applicable SEC rules under the Exchange Act. An electronic filer may, at its option, restate in electronic format an exhibit incorporated by reference that originally was filed in paper format.

(iii) Any document filed in paper format in violation of mandated electronic filing requirements shall not be incorporated by reference into an electronic filing.

(6) Continuing Hardship Exemption. The FDIC will not accept in paper format any beneficial ownership report filing required to be submitted electronically under this part unless the filer satisfies the requirements for a continuing hardship exemption:

(i) A filer may apply in writing for a continuing hardship exemption if all or part of a filing or group of filings otherwise to be filed in electronic format cannot be so filed without undue burden or expense. Such written application shall be made at least ten business days prior to the required due date of the filing(s) or the proposed filing date, as appropriate, or within such shorter period as may be permitted. The written application shall be sent to the Accounting and Securities Disclosure Section, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429, and shall contain the information set forth in paragraph (b)(6)(ii) of this section.

(A) The application shall not be deemed granted until the applicant is notified by the FDIC.

(B) If the FDIC denies the application for a continuing hardship exemption, the filer shall file the required document in electronic format on the required due date or the proposed filing date.
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date or such other date as may be permitted.

(C) If the FDIC determines that the grant of the exemption is appropriate and consistent with the public interest and the protection of investors and so notifies the applicant, the filer shall follow the procedures set forth in paragraph (b)(6)(iii) of this section.

(ii) The request for the continuing hardship exemption shall include, but not be limited to, the following:

(A) The reason(s) that the necessary hardware and software are not available without unreasonable burden and expense;

(B) The burden and expense involved to employ alternative means to make the electronic submission; and/or

(C) The reasons for not submitting electronically the document or group of documents, as well as justification for the requested time period for the exemption.

(iii) If the request for a continuing hardship exemption is granted, the electronic filer shall submit the document or group of documents for which the exemption is granted in paper format on the required due date specified in the applicable form, rule or regulation, or the proposed filing date, as appropriate. The paper format document(s) shall have placed at the top of page 1, or at the top of an attached cover page, a legend in capital letters: IN ACCORDANCE WITH 12 CFR 335.801(b), THIS (SPECIFY DOCUMENT) IS BEING FILED IN PAPER PURSUANT TO A CONTINUING HARDSHIP EXEMPTION.

(iv) Where a continuing hardship exemption is granted with respect to an exhibit only, the paper format exhibit shall be filed with the FDIC under cover of SEC Form SE (17 CFR 249.444). Form SE shall be filed as a paper cover sheet to all exhibits to beneficial ownership reports submitted to the FDIC in paper form pursuant to a hardship exemption.

(v) Form SE shall be submitted along with all exhibits filed in paper form pursuant to a hardship exemption. Form SE may be filed up to six business days prior to, or on the date of filing of, the electronic form to which it relates but shall not be filed after such filing date. If a paper exhibit is submitted in this manner, requirements that the exhibit be filed with, provided with, or accompany the electronic filing shall be satisfied. Any requirements as to delivery or furnishing the information to persons other than the FDIC shall not be affected by this section.

(7) Signatures. (i) Required signatures to, or within, any electronic submission must be in typed form. When used in connection with an electronic filing, the term “signature” means an electronic entry or other form of computer data compilation of any letters or series of letters or characters comprising a name, executed, adopted or authorized as a signature.

(ii) Each signatory to an electronic filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document shall be executed before or at the time the electronic filing is made and shall be retained by the filer for a period of five years. Upon request, an electronic filer shall furnish to the FDIC a copy of any or all documents retained pursuant to this section.

(iii) Where the FDIC’s rules require a filer to furnish to a national securities exchange, a national securities association, or a bank, paper copies of a document filed with the FDIC in electronic format, signatures to such paper copies may be in typed form.

(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
§ 335.801 12 CFR Ch. III (1–1–08 Edition)

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.

§ 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, 206, 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 Deposit Insurance Fund, the former Bank Insurance Fund, the former Savings Association Insurance Fund, the Federal Savings and Loan Insurance Corporation (FSLIC) Resolution Trust, or the funds 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) through (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
§ 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 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.

Subpart C—One-Year Restriction on Post-Employment Activities of Senior Examiners

Source: 70 FR 69639, Nov. 17, 2005, unless otherwise noted.

Authority: 12 U.S.C. 1819 and 1820(k).
§ 336.10 Purpose and scope.

This subpart applies to officers or employees of the FDIC who are subject to the post-employment restrictions set forth in section 10(k) of the Federal Deposit Insurance Act, 12 U.S.C. 1820(k), and implements those restrictions as they apply to officers and employees of the FDIC.

§ 336.11 Definitions.

For purposes of this subpart:

(a) Bank holding company has the meaning given to such term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)).

(b) A consultant for an insured depository institution or other company shall include only individuals who work directly on matters for, or on behalf of, such institution or other company.

(c) Control has the meaning given to such term in section 336.3(b), and a foreign bank shall be deemed to control any insured branch of the foreign bank.

(d) Depository institution means any bank or savings association, including a branch of a foreign bank, if such branch is located in the United States.

(e) Foreign bank means any bank or company described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)).

(f) Savings and loan holding company has the meaning given to such term in section 10(a)(1)(D) of the Home Owners’ Loan Act (12 U.S.C. 1467a(a)(1)(D)).

(g) A senior examiner for an insured depository institution means an officer or employee of the FDIC—

(1) who has been authorized by the FDIC to conduct examinations or inspections of insured depository institutions on behalf of the FDIC;

(2) who has been assigned continuing, broad, and lead responsibility for the examination or inspection of the institution;

(3) who routinely interacts with officers or employees of the institution or its affiliates; and

(4) whose responsibilities with respect to the institution represent a substantial portion of the FDIC officer or employee’s overall responsibilities.

§ 336.12 One-year post-employment restriction.

(a) Prohibition. An officer or employee of the FDIC who serves as a senior examiner of an insured depository institution for at least 2 months during the last 12 months of that individual’s employment with the FDIC may not, within 1 year after the termination date of his or her employment with the FDIC, knowingly accept compensation as an employee, officer, director, or consultant from—

(1) The insured depository institution; or

(2) Any company (including a bank holding company or savings and loan holding company) that controls such institution.

(b) Waivers. The post-employment restrictions in paragraph (a) of this section will not apply to a senior examiner if the FDIC Chairperson certifies in writing and on a case-by-case basis that a waiver of the restrictions will not affect the integrity of the FDIC’s supervisory program.

(c) Effective Date. The post-employment restrictions in paragraph (a) of this section will not apply to any officer or employee of the FDIC, or any former officer or employee of the FDIC, who ceased to be an officer or employee of the FDIC before December 17, 2005.

§ 336.13 Penalties.

(a) Penalties under section 10(k) of the FDIC Act. A senior examiner of the FDIC who violates the post-employment restrictions set forth in §336.12 shall be subject to the following penalties—

(1) An order—

(i) Removing such person from office or prohibiting such person from further participation in the affairs of the relevant insured depository institution or company (including a bank holding company or savings and loan holding company) that controls such institution for a period of up to five years, and

(ii) Prohibiting any further participation by such person, in any manner, in the affairs of any insured depository institution for a period of up to five years; or

(2) A civil monetary penalty of not more than $250,000; or

(3) Both.
§ 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. 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.

(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,

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.
(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 in the same manner as though they were member banks.

(b) For the purposes of compliance with §215.4(b) of Federal Reserve Board Regulation O, no insured nonmember bank may extend credit or grant a line of credit to any of its executive officers, directors, or principal shareholders or to any related interest of any such person in an amount that, when aggregated with the amount of all other extensions of credit and lines of credit by the bank to that person and to all related interests of that person, exceeds the greater of $25,000 or five percent of the bank’s capital and unimpaired surplus, or $500,000, 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.

(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,
§ 337.4 12 CFR Ch. III (1–1–08 Edition)

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 and Consumer Protection (DSC)) 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)


§ 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, 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.

(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.

(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 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 sections 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 those 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 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 offering deposits of the next longer and shorter maturity 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
§ 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 less than $500 million;
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—
   (i) Assigned the bank a rating of 1 or 2 for management as part of the bank's composite rating under the Uniform Financial Institutions Rating System (commonly referred to as CAMELS); and
   (ii) Assigned the bank a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (copies of which are available at the addresses specified in §309.4 of this chapter);
4. The bank currently is not subject to a formal enforcement proceeding or order by the FDIC, OCC or the Federal Reserve and
5. 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 more frequently than once every 18 months.
bank as frequently as the agency deems necessary.


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.


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.


§ 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 which 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 permission 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 individual 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).

§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:
(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.
Federal Deposit Insurance Corporation

required in §110.25(a) of those rules and regulations.

Subpart B—Recordkeeping

§ 338.5 Purpose.
The purpose of this subpart B is two-fold. 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.).

§ 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.

§ 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).

§ 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).

§ 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.

PART 339—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
339.1 Authority, purpose, and scope.
339.2 Definitions.
339.3 Requirement to purchase flood insurance where available.
339.4 Exemptions.
339.5 Escrow requirement.
§ 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. 4001–4128).

(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.


(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 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. A non-member bank may obtain the standard flood hazard determination form by written request to FEMA, P.O. Box 2012, Jessup, MD 20794-2012.

(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.

[61 FR 45706, Aug. 29, 1996, as amended at 64 FR 71274, Dec. 21, 1999]

§ 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
appreciation 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, renew, 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 non-participating 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—RESTRICTIONS ON SALE OF ASSETS BY THE FEDERAL DEPOSIT INSURANCE CORPORATION

Sec. 340.1 What is the statutory authority for the regulation, what are its purpose and
§ 340.1 What is the statutory authority for the regulation, what are its purpose and scope, and can the FDIC have other policies on related topics?

(a) Authority. The statutory authority for adopting this part is section 11(p) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1821(p). Section 11(p) was added to the FDI Act by section 20 of the Resolution Trust Corporation Completion Act (Pub. L. 103-204, 107 Stat. 2369 (1993)).

(b) Purpose. The purpose of this part is to prohibit individuals or entities who profited or engaged in wrongdoing at the expense of an insured institution, or seriously mismanaged an insured institution, from buying assets of failed financial institutions from the FDIC.

(c) Scope. The restrictions of this part generally apply to assets of failed institutions owned or controlled by the FDIC in any capacity, even though the assets are not owned by the insured institution that the prospective purchaser injured. Unless we determine otherwise, this part does not apply to the sale of securities in connection with the investment of corporate and receivership funds pursuant to the Investment Policy for Liquidation Funds managed by the FDIC as it is in effect from time to time. In the case of a sale of securities backed by a pool of assets that may include assets of failed institutions by a trust or other entity, this part applies only to the sale of assets by the FDIC to an underwriter in an initial offering, and not to any other purchaser of the securities.

(d) The FDIC retains the authority to establish other policies restricting asset sales. Neither section 11(p) of the FDI Act nor this part in any way limits the authority of the FDIC to establish policies prohibiting the sale of assets to prospective purchasers who have injured any failed financial institution, or to other prospective purchasers, such as certain employees or contractors of the FDIC, or individuals who are not in compliance with the terms of any debt or duty owed to the FDIC. Any such policies may be independent of, in conjunction with, or in addition to the restrictions set forth in this part.

§ 340.2 Definitions.

(a) Associated person of an individual or entity means:

(1) With respect to an individual:

(i) The individual’s spouse or dependent child or any member of his or her immediate household;

(ii) A partnership of which the individual is or was a general or limited partner; or

(iii) A corporation of which the individual is or was an officer or director;

(2) With respect to a partnership, a managing or general partner of the partnership; or

(3) With respect to any entity, an individual or entity who, acting individually or in concert with one or more individuals or entities, owns or controls 25 percent or more of the entity.

(b) Default means any failure to comply with the terms of an obligation to such an extent that:

(1) A judgment has been rendered in favor of the FDIC or a failed institution; or

(2) In the case of a secured obligation, the property securing such obligation is foreclosed on.

(c) FDIC means the Federal Deposit Insurance Corporation.

(d) Failed institution means any bank or savings association that has been
§ 340.3 What are the restrictions on the sale of assets by the FDIC if the buyer wants to finance the purchase with a loan from the FDIC?

A person may not borrow money or accept credit from the FDIC in connection with the purchase of any assets from the FDIC or any failed institution if:

(a) There has been a default with respect to one or more obligations totaling in excess of $1,000,000 owed by that person or its associated person; and

(b) The person or its associated person made any fraudulent misrepresentations in connection with any such obligation(s).

§ 340.4 What are the restrictions on the sale of assets by the FDIC regardless of the method of financing?

(a) A person may not acquire any assets from the FDIC or from any failed institution if the person or its associated person:

(1) Has participated, as an officer or director of a failed institution or of an affiliate of a failed institution, in a material way in one or more transaction(s) that caused a substantial loss to that failed institution;

(2) Has been removed from, or prohibited from participating in the affairs of, a failed 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, the FDIC, or any of their successors;

(3) Has demonstrated a pattern or practice of defalcation regarding obligations to any failed institution; or

(4) Has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1014, 1032, 1341, 1343 or 1344 affecting any failed institution and there has been a default with respect to one or more obligations owed by that person or its associated person.

(b) For purposes of paragraph (a) of this section, a person has participated "in a material way in a transaction that caused a substantial loss to a failed institution" if, in connection with a substantial loss to a failed institution, the person has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by the FDIC or by any component of the government of the United States or of any state:

(1) To have violated any law, regulation, or order issued by a federal or state banking agency, or breached or defaulted on a written agreement with a federal or state banking agency, or breached a written agreement with a failed institution;

(2) To have engaged in an unsafe or unsound practice in conducting the affairs of a failed institution; or

(3) To have breached a fiduciary duty owed to a failed institution.
§ 340.5  For purposes of paragraph (a) of this section, a person or its associated person has demonstrated a “pattern or practice of defalcation” regarding obligations to a failed institution if the person or associated person has:

(1) Engaged in more than one transaction that created an obligation on the part of such person or its associated person with intent to cause a loss to any financial institution insured by the FDIC or with reckless disregard for whether such transactions would cause a loss to any such insured financial institution; and

(2) The transactions, in the aggregate, caused a substantial loss to one or more failed institution(s).

§ 340.5  Can the FDIC deny a loan to a buyer who is not disqualified from purchasing assets using seller-financing under this regulation?

The FDIC still has the right to make an independent determination, based upon all relevant facts of a person’s financial condition and history, of that person’s eligibility to receive any loan or extension of credit from the FDIC, even if the person is not in any way disqualified from purchasing assets from the FDIC under the restrictions set forth in this part.

§ 340.6  What is the effect of this part on transactions that were entered into before its effective date?

This part does not affect the enforceability of a contract of sale and/or agreement for seller financing in effect prior to July 1, 2000.

§ 340.7  When is a certification required, and who does not have to provide a certification?

(a) Before any person may purchase any asset from the FDIC that person must certify, under penalty of perjury, that none of the restrictions contained in this part applies to the purchase. The FDIC may establish the form of the certification and may change the form from time to time.

(b) Notwithstanding paragraph (a) of this section, a state or political subdivision of a state, a federal agency or instrumentality such as the Government National Mortgage Association, or a federally-regulated, government-sponsored enterprise such as Fannie Mae or Freddie Mac does not have to give a certification before it can purchase assets from the FDIC, unless the Director of the FDIC’s Division of Resolutions and Receiverships, or his designee, in his discretion, requires a certification of any such entity.

§ 340.8  Does this part apply in the case of a workout, resolution, or settlement of obligations?

The restrictions of §§340.3 and 340.4 do not apply if the sale or transfer of an asset resolves or settles, or is part of the resolution or settlement of, one or more obligations, regardless of the amount of such obligations.

PART 341—REGISTRATION OF SECURITIES TRANSFER AGENTS

§ 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, as amended (15 U.S.C. 78b, 78c(a)(34)(B), 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. 78j), or for securities exempt from registration under subsections (g)(2)(B) or (g)(2)(G) of section 12 (15 U.S.C. 78l(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.


(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
§ 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.

§ 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 and Consumer Protection (DSC), FDIC, Washington, DC 20429.

§ 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 (DSC) 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)).
§ 343.20 Definitions.

As used in this part:

(a) Affiliate means a company that controls, is controlled by, or is under common control with another company.

(b) 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 Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(c) Company means any corporation, partnership, business trust, association or similar organization, or any other trust (unless by its terms the trust 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). It does not include any corporation the majority of the shares of which are owned by the United States or by any State, or a qualified family partnership, as defined in section 2(o)(10) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841(o)(10)).

(d) Consumer means an individual who purchases, applies to purchase, or is solicited to purchase from you insurance products or annuities primarily for personal, family, or household purposes.

(e) Control of a company has the same meaning as in section 3(w)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(5)).

(f) Domestic violence means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

(1) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault;

(2) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;

(3) Subjecting another person to false imprisonment; or

(4) Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

(g) Electronic media includes any means for transmitting messages electronically between you and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(h) Office means the premises of a bank where retail deposits are accepted from the public.

(i) Subsidiary has the same meaning as in section 3(w)(4) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(4)).

(j) (1) You means:

(i) A bank; or

(ii) Any other person only when the person sells, solicits, advertises, or offers an insurance product or annuity to a consumer at an office of the bank or on behalf of the bank.

(2) For purposes of this definition, activities on behalf of a bank include activities where a person, whether at an office of the bank or at another location sells, solicits, advertises, or offers an insurance product or annuity and at least one of the following applies:

(i) The person represents to the consumer that the sale, solicitation, advertisement, or offer of any insurance product or annuity is by or on behalf of the bank;

(ii) The bank refers a consumer to a seller of insurance products or annuities and the bank has a contractual arrangement to receive commissions or
§ 343.30 Prohibited practices.

(a) Anticoercion and antitying rules. You may not engage in any practice that would lead a consumer to believe that an extension of credit, in violation of section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972), is conditional upon either:

(1) The purchase of an insurance product or annuity from the bank or any of its affiliates; or

(2) An agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(b) Prohibition on misrepresentations generally. You may not engage in any practice or use any advertisement at any office of, or on behalf of, the bank or a subsidiary of the bank that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(1) The fact that an insurance product or annuity sold or offered for sale by you or any subsidiary of the bank is not backed by the Federal government or the bank, or (if applicable) an affiliate of the bank; and

(2) In the case of an insurance product or annuity that involves investment risk, the fact that there is an investment risk, including the potential that principal may be lost and that the product may decline in value.

(c) Prohibition on domestic violence discrimination. You may not sell or offer for sale, as principal, agent, or broker, any life or health insurance product if the status of the applicant or insured as a victim of domestic violence or as a provider of services to victims of domestic violence is considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of such product, or with regard to the payment of insurance claims on such product, except as required or expressly permitted under State law.

§ 343.40 What you must disclose.

(a) Insurance disclosures. In connection with the initial purchase of an insurance product or annuity by a consumer from you, you must disclose to the consumer, except to the extent the disclosure would not be accurate, that:

(1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, the bank or an affiliate of the bank;

(2) The insurance product or annuity is not insured by the Federal Deposit Insurance Corporation (FDIC) or any other agency of the United States, the bank, or (if applicable) an affiliate of the bank; and

(3) In the case of an insurance product or annuity that involves investment risk, there is investment risk associated with the product, including the possible loss of value.

(b) Credit disclosure. In the case of an application for credit in connection with which an insurance product or annuity is solicited, offered, or sold, you must disclose that the bank may not condition an extension of credit on either:

(1) The consumer’s purchase of an insurance product or annuity from the bank or any of its affiliates; or

(2) The consumer’s agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(c) Timing and method of disclosures—

(1) In general. The disclosures required by paragraph (a) of this section must be provided orally and in writing before the completion of the initial sale of an insurance product or annuity.
§ 343.40 Insurance or annuity transactions

(1) General. The disclosure required by paragraph (b) of this section must be made orally and in writing at the time the consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold.

(2) Exception for transactions by mail. If a sale of an insurance product or annuity is conducted by mail, you are not required to make the oral disclosures required by paragraph (a) of this section. If you take an application for credit by mail, you are not required to make the oral disclosure required by paragraph (b).

(3) Exception for transactions by telephone. If a sale of an insurance product or annuity is conducted by telephone, you may provide the written disclosures required by paragraph (a) of this section by mail within 3 business days beginning on the first business day after the sale, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a). If you take an application for credit by telephone, you may provide the written disclosure required by paragraph (b) of this section by mail, provided you mail it to the consumer within three days beginning the first business day after the application is taken, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(4) Electronic form of disclosures. (i) Subject to the requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (12 U.S.C. 7001(c)), you may provide the written disclosures required by paragraph (a) and (b) of this section through electronic media instead of on paper, if the consumer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the consumer may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(ii) Any disclosure required by paragraphs (a) or (b) of this section that is provided by electronic media is not required to be provided orally.

(5) Disclosures must be readily understandable. The disclosures provided shall be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided.

For instance, you may use the following disclosures in visual media, such as television broadcasting, ATM screens, billboards, signs, posters and written advertisements and promotional materials, as appropriate and consistent with paragraphs (a) and (b) of this section:

• NOT A DEPOSIT
• NOT FDIC-INSURED
• NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY
• NOT GUARANTEED BY THE BANK
• MAY GO DOWN IN VALUE

(6) Disclosures must be meaningful. (i) You must provide the disclosures required by paragraphs (a) and (b) of this section in a meaningful form. Examples of the types of methods that could call attention to the nature and significance of the information provided include:

(A) A plain-language heading to call attention to the disclosures;

(B) A typeface and type size that are easy to read;

(C) Wide margins and ample line spacing;

(D) Boldface or italics for key words; and

(E) Distinctive type size, style, and graphic devices, such as shading or sidebars, when the disclosures are combined with other information.

(ii) You have not provided the disclosures in a meaningful form if you merely state to the consumer that the required disclosures are available in printed material, but do not provide the printed material when required and do not orally disclose the information to the consumer when required.

(iii) With respect to those disclosures made through electronic media for which paper or oral disclosures are not required, the disclosures are not meaningfully provided if the consumer may bypass the visual text of the disclosures before purchasing an insurance product or annuity.

(7) Consumer acknowledgment. You must obtain from the consumer, at the time a consumer receives the disclosures required under paragraphs (a) or (b) of this section, or at the time of the initial purchase by the consumer of an
§ 343.50 Where insurance activities may take place.

(a) General rule. A bank must, to the extent practicable, keep the area where the bank conducts transactions involving insurance products or annuities physically segregated from areas where retail deposits are routinely accepted from the general public, identify the areas where insurance product or annuity sales activities occur, and clearly delineate and distinguish those areas from the areas where the bank's retail deposit-taking activities occur.

(b) Referrals. Any person who accepts deposits from the public in an area where such transactions are routinely conducted in the bank may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person who sells that product only if the person making the referral receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

§ 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, record-keeping, 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 record-keeping 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.


(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 book-entry 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;

(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.

(1) 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, the 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
§ 344.5

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;

(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;
§ 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.
§ 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 transaction 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
§ 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 30-calendar 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...
§ 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

Sec.
345.11 Authority, purposes, and scope.
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Subpart B—Standards for Assessing Performance

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345.22 Lending test.
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345.26 Small bank performance standards.
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Subpart C—Records, Reporting, and Disclosure Requirements

345.41 Assessment area delineation.
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345.43 Content and availability of public file.
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APPENDIX A TO PART 345—RATINGS

APPENDIX B TO PART 345—CRA NOTICE


SOURCE: 43 FR 47151, Oct. 12, 1978, unless otherwise noted.

Subpart A—General

SOURCE: 60 FR 22201, May 4, 1995, unless otherwise noted.
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 incidental 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 for the metropolitan division, if a person or geography is located in an MSA that has been subdivided into metropolitan divisions; 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 dispensed, 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(a) of the FDIA (12 U.S.C. 1813(o)).

(g) 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—

(i) Low- or moderate-income geographies;

(ii) Designated disaster areas; or

(iii) Distressed or underserved nonmetropolitan middle-income geographies designated by the Board of Governors of the Federal Reserve System, FDIC, and Office of the Comptroller of the Currency, based on—

(A) Rates of poverty, unemployment, and population loss; or

(B) Population size, density, and dispersion. Activities revitalize and stabilize geographies designated based on population size, density, and dispersion if they help to meet essential community needs, including needs of low- and moderate-income individuals.

(h) Community development loan means a loan that:

(1) Has as its primary purpose community development; and
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(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).
   (i) 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).
   (j) 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.
   (k) Geography means a census tract delineated by the United States Bureau of the Census in the most recent decennial census.
   (l) Home mortgage loan means a “home improvement loan,” “home purchase loan,” or a “refinancing” as defined in §203.2 of this title.
   (m) 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.
   (n) 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).
   (o) 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.
   (p) 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.
   (q) Metropolitan division means a metropolitan division as defined by the Director of the Office of Management and Budget.
   (r) MSA means a metropolitan statistical area as defined by the Director of the Office of Management and Budget.
   (s) Nonmetropolitan area means any area that is not located in an MSA.
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§ 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...
§ 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;
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(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;

(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
§ 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;
§ 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:

(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 the 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—(1) Small banks that are not intermediate small banks. The FDIC evaluates the record of a small bank that is not, or that was not during the prior calendar year, an intermediate small bank, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraph (b) of this section.

(b) Lending test. A small bank’s lending performance is evaluated 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).

(c) Community development test. An intermediate small bank’s community development performance also is evaluated pursuant to the following criteria:

(1) The number and amount of community development loans;

(2) The number and amount of qualified investments;

(3) The extent to which the bank provides community development services; and

(4) The bank’s responsiveness through such activities to community development lending, investment, and services needs.

(d) Small bank performance rating. The FDIC rates the performance of a bank evaluated under this section as provided in appendix A of this part.

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(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. A bank may 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.

(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 (e) 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.

§ 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 non-compliance” 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. The FDIC’s evaluation of a bank’s CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank’s lending performance. In connection with any type of lending activity described in §345.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:

(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;

(ii) Violations of the Home Ownership and Equity Protection Act;

(iii) Violations of section 5 of the Federal Trade Commission Act;

(iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and

(v) Violations of the Truth in Lending Act provisions regarding a consumer’s right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the bank’s assigned rating, the FDIC considers the nature, extent, and strength of the evidence of the practices; the
§ 345.29 Policies and procedures that the bank (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the bank (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any 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:

(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.
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 an MSA 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 an MSA boundary, the bank shall delineate separate assessment areas for the areas inside and outside the MSA.

(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;
   (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
§ 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);
§ 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 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 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.
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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

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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) An excellent 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) Significant use of innovative or complex qualified investments; and
(C) Adequate 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 not 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) 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 “highly 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 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 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 inconveniences its assessment area(s), particularly low- or moderate-income geographies or to 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.
(ii) Occasional use of innovative or complex qualified investments, community development loans, or community development services; and

(a) 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).

(b) 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).

(c) Banks evaluated under the small bank performance standards—(1) Lending test rating—(i) Eligibility for a satisfactory lending test rating. The FDIC rates a small bank’s lending performance “satisfactory” if, in general, the bank demonstrates:

(A) 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, other lending-related activities such as loan originations for sale to the secondary markets and community development loans and qualified investments;

(B) A majority of its loans and, as appropriate, other lending-related activities, are in its assessment area;

(C) 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);

(D) A record of taking appropriate action, when 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

(E) A reasonable geographic distribution of loans given the bank’s assessment area(s).

(ii) Eligibility for an “outstanding” lending test rating. A small 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 a lending test rating of “outstanding.”

(iii) Needs to improve or substantial noncompliance ratings. A small bank may also receive a lending test rating of “needs to improve” or “substantial noncompliance” depending on the degree to which its performance has failed to meet the standard for a “satisfactory” rating.

(2) Community development test ratings for intermediate small banks—(i) Eligibility for a satisfactory community development test rating. The FDIC rates an intermediate small bank’s community development performance “satisfactory” if the bank demonstrates adequate responsiveness to the community development needs of its assessment area(s) through community development loans, qualified investments, and community development services. The adequacy of the bank’s response will depend on its capacity for such community development activities, its assessment area’s need for such community development activities, and the availability of such opportunities for community development in the bank’s assessment area(s).

(ii) Eligibility for an outstanding community development test rating. The FDIC rates an intermediate small bank’s community development performance “outstanding” if the bank demonstrates excellent responsiveness to community development needs in its assessment area(s) through community development loans, qualified investments, and community development services, as appropriate, considering the bank’s capacity and the need and availability of such opportunities for community development in the bank’s assessment area(s).

(iii) Needs to improve or substantial noncompliance ratings. An intermediate small bank may also receive a community development test 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.

(3) Overall rating—(i) Eligibility for a satisfactory overall rating. No intermediate small bank may receive an assigned overall rating of “satisfactory” unless it receives a rating of at least “satisfactory” on both the lending test and the community development test.

(ii) Eligibility for an outstanding overall rating. (A) An intermediate small bank that receives an “outstanding” rating on one test...
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and at least "satisfactory" on the other test may receive an assigned overall rating of "outstanding."

(B) A small bank that is not an intermediate small bank that meets each of the standards for a "satisfactory" rating under the lending test 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).

(iii) Needs to improve or substantial non-compliance overall ratings. A small bank may also 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 fails short of its plan goals, unless the bank elected in its plan to be rated otherwise, as provided in §345.27(f)(4).

[60 FR 22201, May 4, 1995, as amended at 70 FR 44270, Aug. 2, 2005]

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 Supervision and Consumer Protection (DSC), 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 Supervision and Consumer Protection (DSC), 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—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

Sec. 346.1 Purpose and scope of this part.
346.2 Definition of covered agreement.
346.3 CRA communications.
346.4 Fulfillment of the CRA.
346.5 Related agreements considered a single agreement.
346.6 Disclosure of covered agreements.
346.7 Annual reports.
346.8 Release of information under FOIA.
346.9 Compliance provisions.

\[\text{346.10 Transition provisions.}\]
\[\text{346.11 Other definitions and rules of construction used in this part.}\]


\textbf{SOURCE:} 66 FR 2099, Jan. 10, 2001, unless otherwise noted.

\section{346.1 Purpose and scope of this part.}

(a) \textbf{General.} This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, or affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) \textbf{Scope of this part.} The provisions of this part apply to—

(1) State nonmember insured banks;

(2) Subsidiaries of state nonmember insured banks;

(3) Nongovernmental entities or persons that enter into covered agreements with any company listed in paragraph (b)(1) and (2) of this section.

(c) Relation to Community Reinvestment Act. This part does not affect in any way the Community Reinvestment Act of 1977 (12 U.S.C. 2901 et seq.) or the FDIC's Community Reinvestment regulation found at 12 CFR part 345, or the FDIC's interpretations or administration of that Act or regulation.

(d) Examples. (1) The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

(2) Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issues that may arise in this part.

\section{346.2 Definition of covered agreement.}

(a) \textbf{General definition of covered agreement.} A covered agreement is any contract, arrangement, or understanding that meets all of the following criteria—

(1) The agreement is in writing.
(2) The parties to the agreement include—
   (i) One or more insured depository institutions or affiliates of an insured depository institution; and
   (ii) One or more nongovernmental entities or persons (referred to hereafter as NGEPs).

(3) The agreement provides for the insured depository institution or any affiliate to—
   (i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than $10,000 in any calendar year; or
   (ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than $50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 et seq.) (CRA), as defined in §346.4.

(5) The agreement is with a NGEP that has had a CRA communication as described in §346.3 prior to entering into the agreement.

(b) Examples concerning written arrangements or understandings—(1) Example 1. A NGEP meets with an insured depository institution and states that the institution needs to make more community development investments in the NGEP’s community. The NGEP and the insured depository institution do not reach an agreement concerning the community development investments the institution should make in the community, and the parties do not reach any mutual arrangement or understanding. Two weeks later, the institution unilaterally issues a press release announcing that it has established a general goal of making $100 million of community development grants in low- and moderate-income neighborhoods served by the insured depository institution over the next 5 years. The NGEP is not identified in the press release. The press release is not a written arrangement or understanding.

(2) Example 2. A NGEP meets with an insured depository institution and states that the institution needs to offer new loan programs in the NGEP’s community. The NGEP and the insured depository institution reach a mutual arrangement or understanding that the institution will provide additional loans in the NGEP’s community. The institution tells the NGEP that it will issue a press release announcing the program. Later, the insured depository institution issues a press release announcing the loan program. The press release incorporates the key terms of the understanding reached between the NGEP and the insured depository institution. The written press release reflects the mutual arrangement or understanding of the NGEP and the insured depository institution and is, therefore, a written arrangement or understanding.

(3) Example 3. An NGEP sends a letter to an insured depository institution requesting that the institution provide a $15,000 grant to the NGEP. The insured depository institution responds in writing and agrees to provide the grant in connection with its annual grant program. The exchange of letters constitutes a written arrangement or understanding.

(c) Loan agreements that are not covered agreements. A covered agreement does not include—
   (1) Any individual loan that is secured by real estate; or
   (2) Any specific contract or commitment for a loan or extension of credit to an individual, business, farm, or other entity, or group of such individuals or entities if—
      (i) The funds are loaned at rates that are not substantially below market rates; and
      (ii) The loan application or other loan documentation does not indicate that the borrower intends or is authorized to use the borrowed funds to make a loan or extension of credit to one or more third parties.

(d) Examples concerning loan agreements—(1) Example 1. An insured depository institution provides an organization with a $1 million loan that is documented in writing and is secured by real estate owned or to-be-acquired by the organization. The agreement is an individual mortgage loan and is exempt from coverage under paragraph (c)(1) of this section, regardless of the
interest rate on the loan or whether the organization intends or is authorized to re-lend the funds to a third party.

(2) Example 2. An insured depository institution commits to provide a $500,000 line of credit to a small business that is documented by a written agreement. The loan is made at rates that are within the range of rates offered by the institution to similarly situated small businesses in the market and the loan documentation does not indicate that the small business intends or is authorized to re-lend the borrowed funds. The agreement is exempt from coverage under paragraph (c)(2) of this section.

(3) Example 3. An insured depository institution offers small business loans that are guaranteed by the Small Business Administration (SBA). A small business obtains a $75,000 loan, documented in writing, from the institution under the institution's SBA loan program. The loan documentation does not indicate that the borrower intends or is authorized to re-lend the funds. Although the rate charged on the loan is well below that charged by the institution on commercial loans, the rate is within the range of rates that the institution would charge a similarly situated small business for a similar loan under the SBA loan program. Accordingly, the loan is not made at substantially below market rates and is exempt from coverage under paragraph (c)(2) of this section.

(4) Example 4. A bank holding company enters into a written agreement with a community development organization that provides that insured depository institutions owned by the bank holding company will make $250 million in small business loans in the community over the next 5 years. The written agreement is not a specific contract or commitment for a loan or an extension of credit and, thus, is not exempt from coverage under paragraph (c)(2) of this section. Each small business loan made by the insured depository institution pursuant to this general commitment would, however, be exempt from coverage if the loan is made at rates that are not substantially below market rates and the loan documentation does not indicate that the borrower intended or was authorized to re-lend the funds.

(e) Agreements that include exempt loan agreements. If an agreement includes a loan, extension of credit or loan commitment that, if documented separately, would be exempt under paragraph (c) of this section, the exempt loan, extension of credit or loan commitment may be excluded for purposes of determining whether the agreement is a covered agreement.

(f) Determining annual value of agreements that lack schedule of disbursements. For purposes of paragraph (a)(3) of this section, a multi-year agreement that does not include a schedule for the disbursement of payments, grants, loans or other consideration by the insured depository institution or affiliate, is considered to have a value in the first year of the agreement equal to all payments, grants, loans and other consideration to be provided at any time under the agreement.

§ 346.3 CRA communications.

(a) Definition of CRA communication. A CRA communication is any of the following—

(1) Any written or oral comment or testimony provided to a Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(2) Any written comment submitted to the insured depository institution that discusses the adequacy of the institution's performance under the CRA and must be included in the institution's CRA public file.

(3) Any discussion or other contact with the insured depository institution or any affiliate about—

(i) Providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate;

(ii) Providing (or refraining from providing) written comments to the insured depository institution that concern the adequacy of the institution's performance under the CRA and must
be included in the institution's CRA public file; or
  (iii) The adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(b) Discussions or contacts that are not CRA communications—(1) Timing of contacts with a Federal banking agency. An oral or written communication with a Federal banking agency is not a CRA communication if it occurred more than 3 years before the parties entered into the agreement.

  (2) Timing of contacts with insured depository institutions and affiliates. A communication with an insured depository institution or affiliate is not a CRA communication if the communication occurred—

    (i) More than 3 years before the parties entered into the agreement, in the case of any written communication;

    (ii) More than 3 years before the parties entered into the agreement, in the case of any oral communication in which the NGEP discusses providing (or refraining from providing) comments or testimony to a Federal banking agency or written comments that must be included in the institution's CRA public file in connection with a request to, or agreement by, the institution or affiliate to take (or refrain from taking) any action that is in fulfillment of the CRA; or

    (iii) More than 1 year before the parties entered into the agreement, in the case of any other oral communication not described in paragraph (b)(2)(ii) of this section.

  (3) Knowledge of communication by insured depository institution or affiliate. A communication is only a CRA communication under paragraph (a) of this section if the insured depository institution or its affiliate has knowledge of the communication under this paragraph (b)(3)(ii) or (b)(3)(iii) of this section.

  (i) Communication with insured depository institution or affiliate. An insured depository institution or affiliate has knowledge of a communication by the NGEP to the institution or its affiliate under this paragraph only if one of the following representatives of the insured depository institution or any affiliate has knowledge of the communication—

    (A) An employee who approves, directs, authorizes, or negotiates the agreement with the NGEP; or

    (B) An employee designated with responsibility for compliance with the CRA or executive officer if the employee or executive officer knows that the institution or affiliate is negotiating, intends to negotiate, or has been informed by the NGEP that it expects to request that the institution or affiliate negotiate an agreement with the NGEP.

  (ii) Other communications. An insured depository institution or affiliate is deemed to have knowledge of—

    (A) Any testimony provided to a Federal banking agency at a public meeting or hearing;

    (B) Any comment submitted to a Federal banking agency that is conveyed in writing by the agency to the insured depository institution or affiliate; and

    (C) Any written comment submitted to the insured depository institution that must be and is included in the institution's CRA public file.

  (4) Communication where NGEP has knowledge. A NGEP has a CRA communication with an insured depository institution or affiliate only if any of the following individuals has knowledge of the communication—

    (i) A director, employee, or member of the NGEP who approves, directs, authorizes, or negotiates the agreement with the insured depository institution or affiliate;

    (ii) A person who functions as an executive officer of the NGEP and who knows that the NGEP is negotiating or intends to negotiate an agreement with the insured depository institution or affiliate; or

    (iii) Where the NGEP is an individual, the NGEP.

(c) Examples of CRA communications—(1) Examples of actions that are CRA communications. The following are examples of CRA communications. These examples are not exclusive and assume that the communication occurs within the relevant time period as described
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in paragraph (b)(1) or (b)(2) of this section and the appropriate representatives have knowledge of the communication as specified in paragraphs (b)(3) and (b)(4) of this section.

(i) Example 1. A NGEP files a written comment with a Federal banking agency that states that an insured depository institution successfully addresses the credit needs of its community. The written comment is in response to a general request from the agency for comments on an application of the insured depository institution to open a new branch and a copy of the comment is provided to the institution.

(ii) Example 2. A NGEP meets with an executive officer of an insured depository institution and states that the institution must improve its CRA performance.

(iii) Example 3. A NGEP meets with an executive officer of an insured depository institution and states that the institution needs to make more mortgage loans in low- and moderate-income neighborhoods in its community.

(iv) Example 4. A bank holding company files an application with a Federal banking agency to acquire an insured depository institution. Two weeks later, the NGEP meets with an executive officer of the bank holding company to discuss the adequacy of the performance under the CRA of the target insured depository institution. The insured depository institution was an affiliate of the bank holding company at the time. The NGEP met with the target institution. (See §346.11(a).) Accordingly, the NGEP had a CRA communication with an affiliate of the bank holding company.

(2) Examples of actions that are not CRA communications. The following are examples of actions that are not by themselves CRA communications. These examples are not exclusive.

(i) Example 1. A NGEP provides to a Federal banking agency comments or testimony concerning an insured depository institution or affiliate in response to a direct request by the agency for comments or testimony from that NGEP. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902(3))) by, an insured depository institution or an application by a company to acquire an insured depository institution.

(ii) Example 2. A NGEP makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions, affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(iii) Example 3. A NGEP, such as a civil rights group, community group providing housing and other services in low- and moderate-income neighborhoods, veterans organization, community theater group, or youth organization, sends a fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work by supporting the fundraising efforts of the NGEP.

(iv) Example 4. A NGEP discusses with an insured depository institution or affiliate whether particular loans, services, investments, community development activities, or other activities are generally eligible for consideration under the CRA. The NGEP and insured depository institution or affiliate do not discuss the adequacy of the CRA performance of the insured depository institution or affiliate.

(v) Example 5. A NGEP engaged in the sale or purchase of loans in the secondary market sends a general offering circular to financial institutions offering to sell or purchase a portfolio of loans. An insured depository institution that receives the offering circular discusses with the NGEP the types of loans included in the loan pool, whether such loans are generally eligible for consideration under the CRA, and which loans are made to borrowers in the institution's local community. The
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§ 346.5 Related agreements considered a single agreement.

The following rules must be applied in determining whether an agreement is a covered agreement under §346.2.

(a) Agreements entered into by same parties. All written agreements to

(1) A NGEP that is a party to a covered agreement that involves multiple NGEPs is not required to comply with the requirements of this part if—
   (i) The NGEP has not had a CRA communication; and
   (ii) No representative of the NGEP identified in paragraph (b)(4) of this section has knowledge at the time of the agreement that another NGEP that is a party to the agreement has had a CRA communication.

(2) An insured depository institution or affiliate that is a party to a covered agreement that involves multiple insured depository institutions or affiliates is not required to comply with the disclosure and annual reporting requirements in §§346.6 and 346.7 if—
   (i) No NGEP that is a party to the agreement has had a CRA communication; and
   (ii) No representative of the insured depository institution or any affiliate identified in paragraph (b)(3) of this section has knowledge at the time of the agreement that another NGEP that is a party to the agreement has had a CRA communication concerning any other insured depository institution or affiliate that is a party to the agreement.

§ 346.4 Fulfillment of the CRA.

(a) List of factors that are in fulfillment of the CRA. Fulfillment of the CRA, for purposes of this part, means the following list of factors—

(1) Comments to a Federal banking agency or included in CRA public file. Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the performance under the CRA of an insured depository institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution; or

(2) Activities given favorable CRA consideration. Performing any of the following activities if the activity is of the type that is likely to receive favorable consideration by a Federal banking agency in evaluating the performance under the CRA of an insured depository institution that is a party to the agreement or an affiliate of a party to the agreement—

   (i) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in 12 CFR 345.22, including loan purchases, loan commitments, and letters of credit;
   (ii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in 12 CFR 345.23;
   (iii) Delivering retail banking services, as described in 12 CFR 345.24(d);
   (iv) Providing community development services, as described in 12 CFR 345.24(e);
   (v) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in 12 CFR 345.25(c);
   (vi) In the case of a small insured depository institution, any lending or other activity described in 12 CFR 345.26(a); or
   (vii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in 12 CFR 345.27(1).

(b) Agreements relating to activities of CRA affiliates. An insured depository institution or affiliate that is a party to a covered agreement that concerns any activity described in paragraph (a) of this section of a CRA affiliate must, prior to the time the agreement is entered into, notify each NGEP that is a party to the agreement that the agreement concerns a CRA affiliate.
which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the agreements—
(1) Are entered into with the same NGEP;
(2) Were entered into within the same 12-month period; and
(3) Are each in fulfillment of the CRA.

(b) Substantively related contracts. All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a NGEP is a party to each contract.

§ 346.6 Disclosure of covered agreements.

(a) Applicability date. This section applies only to covered agreements entered into after November 12, 1999.

(b) Disclosure of covered agreements to the public—
(1) Disclosure required. Each NGEP and each insured depository institution or affiliate that enters into a covered agreement must promptly make a copy of the covered agreement available to any individual or entity upon request.

(2) Nondisclosure of confidential and proprietary information permitted. In responding to a request for a covered agreement from any individual or entity under paragraph (b)(1) of this section, a NGEP, insured depository institution, or affiliate may withhold from public disclosure confidential or proprietary information that the party believes the relevant supervisory agency could withhold from disclosure under the Freedom of Information Act (5 U.S.C. 552 et seq.) (FOIA).

(3) Information that must be disclosed. Notwithstanding paragraph (b)(2) of this section, a party must disclose any of the following information that is contained in a covered agreement—

(i) The names and addresses of the parties to the agreement;
(ii) The amount of any payments, fees, loans, or other consideration to be made or provided by any party to the agreement;
(iii) Any description of how the funds or other resources provided under the agreement are to be used;
(iv) The term of the agreement (if the agreement establishes a term); and
(v) Any other information that the relevant supervisory agency determines is not properly exempt from public disclosure.

(4) Request for review of withheld information. Any individual or entity may request that the relevant supervisory agency review whether any information in a covered agreement withheld by a party must be disclosed. Any requests for agency review of withheld information must be filed, and will be processed in accordance with, the relevant supervisory agency’s rules concerning the availability of information (see the FDIC’s rules regarding Disclosure of Information (12 CFR part 309)).

(5) Duration of obligation. The obligation to disclose a covered agreement to the public terminates 12 months after the end of the term of the agreement.

(6) Reasonable copy and mailing fees. Each NGEP and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(7) Use of CRA public file by insured depository institution or affiliate. An insured depository institution and any affiliate of an insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution’s CRA public file if the institution makes the agreement available in accordance with the procedures set forth in 12 CFR 345.43.

(c) Disclosure by NGEPs of covered agreements to the relevant supervisory agency—
(1) Each NGEP that is a party to a covered agreement must provide the following within 30 days of receiving a request from the relevant supervisory agency—

(i) A complete copy of the agreement; and
(ii) In the event the NGEP proposes the withholding of any information
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contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information and an explanation justifying the exclusions. Any public version must include the information described in paragraph (b)(3) of this section.

(2) The obligation of a NGEP to provide a covered agreement to the relevant supervisory agency terminates 12 months after the end of the term of the covered agreement.

(d) Disclosure by insured depository institution or affiliate of covered agreements to the relevant supervisory agency—(1) In general. Within 60 days of the end of each calendar quarter, each insured depository institution and affiliate must provide each relevant supervisory agency with—

(i) A complete copy of each covered agreement entered into by the insured depository institution or affiliate during the calendar quarter; and

(ii) A list of all covered agreements entered into by the insured depository institution or affiliate during the calendar quarter that contains—

(A) The name and address of each insured depository institution or affiliate that is a party to the agreement;

(B) The name and address of each NGEP that is a party to the agreement;

(C) The date the agreement was entered into;

(D) The estimated total value of all payments, fees, loans and other consideration to be provided by the institution or any affiliate of the institution under the agreement; and

(E) The date the agreement terminates.

(2) Prompt filing of covered agreements contained in list required.—(i) If an insured depository institution or affiliate files a list of the covered agreements entered into by the institution or affiliate pursuant to paragraph (d)(1)(ii) of this section, the institution or affiliate must provide any relevant supervisory agency a complete copy and public version of any covered agreement referenced in the list within 7 calendar days of receiving a request from the agency for a copy of the agreement.

(ii) The obligation of an insured depository institution or affiliate to provide a covered agreement to the relevant supervisory agency under this paragraph (d)(2) terminates 36 months after the end of the term of the agreement.

(3) Joint filings. In the event that 2 or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file the documents required by this paragraph (d). Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the filings are being made.

§ 346.7 Annual reports.

(a) Applicability date. This section applies only to covered agreements entered into on or after May 12, 2000.

(b) Annual report required. Each NGEP and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) Duration of reporting requirement—(1) NGEPs. A NGEP must file an annual report for a covered agreement for any fiscal year in which the NGEP receives or uses funds or other resources under the agreement.

(2) Insured depository institutions and affiliates. An insured depository institution or affiliate must file an annual report for a covered agreement for any fiscal year in which the institution or affiliate—

(i) provides or receives any payments, fees, or loans under the covered agreement that must be reported under paragraphs (e)(1)(iii) and (iv) of this section; or

(ii) has data to report on loans, investments, and services provided by a party to the covered agreement under
§346.7

the covered agreement under paragraph (e)(1)(vi) of this section.

(d) Annual reports filed by NGEP—(1) Contents of report. The annual report filed by a NGEP under this section must include the following—

(i) The name and mailing address of the NGEP filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) A detailed, itemized list of how any funds or resources received by the NGEP under the covered agreement were used during the fiscal year, including the total amount used for—

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses and uses (specify expense or use).

(2) More detailed reporting of uses of funds or resources permitted—(i) In general. If a NGEP allocated and used funds received under a covered agreement for a specific purpose, the NGEP may fulfill the requirements of paragraph (d)(1)(iv) of this section with respect to such funds by providing—

(A) A brief description of each specific purpose for which the funds or other resources were used; and

(B) The amount of funds or resources used during the fiscal year for each specific purpose.

(ii) Specific purpose defined. A NGEP allocates and uses funds for a specific purpose if the NGEP receives and uses the funds for a purpose that is more specific and limited than the categories listed in paragraph (d)(1)(iv) of this section.

(3) Use of other reports. The annual report filed by a NGEP may consist of or incorporate a report prepared for any other purpose, such as the Internal Revenue Service Return of Organization Exempt From Income Tax on Form 990, or any other Internal Revenue Service form, state tax form, report to members or shareholders, audited or unaudited financial statements, audit report, or other report, so long as the annual report filed by the NGEP contains all of the information required by this paragraph (d).

(4) Consolidated reports permitted. A NGEP that is a party to 2 or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information reported under paragraphs (d)(1)(iv) and (d)(2) of this section may be reported on an aggregate basis for all covered agreements.

(5) Examples of annual report requirements for NGEPs—(i) Example 1. A NGEP receives an unrestricted grant of $15,000 under a covered agreement, includes the funds in its general operating budget, and uses the funds during its fiscal year. The NGEP’s annual report for the fiscal year must provide the name and mailing address of the NGEP, information sufficient to identify the covered agreement, and state that the NGEP received $15,000 during the fiscal year. The report must also indicate the total expenditures made by the NGEP during the fiscal year for compensation, administrative expenses, travel expenses, entertainment expenses, consulting and professional fees, and other expenses and uses. The NGEP’s annual report may provide this information by submitting an Internal Revenue Service Form 990 that includes the required information. If the Internal Revenue Service Form does not include information for all of the required categories listed in this part, the NGEP must report the total expenditures in the remaining categories either by providing that information directly or by providing another form or report that includes the required information.

(ii) Example 2. An organization receives $15,000 from an insured depository institution under a covered agreement and allocates and uses the $15,000 during the fiscal year to purchase computer equipment to support its functions. The organization’s annual report must include the name and address of...
the organization, information sufficient to identify the agreement, and a statement that the organization received $15,000 during the year. In addition, since the organization allocated and used the funds for a specific purpose that is more narrow and limited than the categories of expenses included in the detailed, itemized list of expenses, the organization would have the option of providing either the total amount it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section, or a statement that it used the $15,000 to purchase computer equipment and a brief description of the equipment purchased.

(iii) Example 3. A community group receives $50,000 from an insured depository institution under a covered agreement. During its fiscal year, the community group specifically allocates and uses $5,000 of the funds to pay for a particular business trip and uses the remaining $45,000 for general operating expenses. The group's annual report for the fiscal year must include the name and address of the group, information sufficient to identify the agreement, and a statement that the group received $50,000. Because the group did not allocate and use all of the funds for a specific purpose, the group's annual report must provide the total amount of funds it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section. The group's annual report also could state that it used $5,000 for a particular business trip and include a brief description of the trip.

(iv) Example 4. A community development organization is a party to two separate covered agreements with two unaffiliated insured depository institutions. Under each agreement, the organization receives $15,000 during its fiscal year and uses the funds to support its activities during that year. If the organization elects to file a consolidated annual report, the consolidated report must identify the organization and the two covered agreements, state that the organization received $15,000 during the fiscal year under each agreement, and provide the total amount that the organization used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section.

(e) Annual report filed by insured depository institution or affiliate—(1) General. The annual report filed by an insured depository institution or affiliate must include the following—

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (iv) of this section, or, in the event such terms and conditions are set forth—

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement (or a list identifying the agreement) was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement—

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not
§ 346.8 Release of information under FOIA.

The FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 et seq.) and the FDIC’s rules regarding Disclosure of Information (12 CFR part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 346.9 Compliance provisions.

(a) Willful failure to comply with disclosure and reporting obligations. (1) If the FDIC determines that a NGEP has willfully failed to comply in a material way with §§ 346.6 or 346.7, the FDIC will notify the NGEP in writing of that determination and provide the NGEP a period of 90 days (or such longer period as the FDIC finds to be reasonable under the circumstances) to comply.

(2) If the NGEP does not comply within the time period established by the FDIC, the agreement shall thereafter be unenforceable by that NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The FDIC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the NGEP’s responsibilities under the agreement.

(b) Diversion of funds. If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual’s personal financial gain, the FDIC may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) Notice and opportunity to respond. Before making a determination under

§ 346.8 Release of information under FOIA.

The FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 et seq.) and the FDIC’s rules regarding Disclosure of Information (12 CFR part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 346.9 Compliance provisions.

(a) Willful failure to comply with disclosure and reporting obligations. (1) If the FDIC determines that a NGEP has willfully failed to comply in a material way with §§ 346.6 or 346.7, the FDIC will notify the NGEP in writing of that determination and provide the NGEP a period of 90 days (or such longer period as the FDIC finds to be reasonable under the circumstances) to comply.

(2) If the NGEP does not comply within the time period established by the FDIC, the agreement shall thereafter be unenforceable by that NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The FDIC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the NGEP’s responsibilities under the agreement.

(b) Diversion of funds. If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual’s personal financial gain, the FDIC may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) Notice and opportunity to respond. Before making a determination under

§ 346.8 Release of information under FOIA.

The FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 et seq.) and the FDIC’s rules regarding Disclosure of Information (12 CFR part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 346.9 Compliance provisions.

(a) Willful failure to comply with disclosure and reporting obligations. (1) If the FDIC determines that a NGEP has willfully failed to comply in a material way with §§ 346.6 or 346.7, the FDIC will notify the NGEP in writing of that determination and provide the NGEP a period of 90 days (or such longer period as the FDIC finds to be reasonable under the circumstances) to comply.

(2) If the NGEP does not comply within the time period established by the FDIC, the agreement shall thereafter be unenforceable by that NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The FDIC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the NGEP’s responsibilities under the agreement.

(b) Diversion of funds. If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual’s personal financial gain, the FDIC may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) Notice and opportunity to respond. Before making a determination under

§ 346.8 Release of information under FOIA.

The FDIC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 et seq.) and the FDIC’s rules regarding Disclosure of Information (12 CFR part 309). A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.
paragraph (a)(1) of this section, or tak-
ing any action under paragraph (b) of
this section, the FDIC will provide
written notice and an opportunity to
present information to the FDIC con-
cerning any relevant facts or cir-
cumstances relating to the matter.
(d) Inadvertent or de minimis errors. In-
adventent or de minimis errors in an-
nual reports or other documents filed
with the FDIC under §§ 346.6 or 346.7
will not subject the reporting party to
any penalty.
(e) Enforcement of provisions in covered
agreements. No provision of this part
shall be construed as authorizing the
FDIC to enforce the provisions of any
covered agreement.
[66 FR 2099, Jan. 10, 2001, as amended at 66
FR 14071, Mar. 9, 2001]
§ 346.10 Transition provisions.
(a) Disclosure of covered agreements en-
tered into before the effective date of this
part. The following disclosure require-
ments apply to covered agreements
that were entered into after November
12, 1999, and that terminated before
April 1, 2001.
(1) Disclosure to the public. Each
NGEP and each insured depository insti-
tution or affiliate that was a party
to the agreement must make the agree-
ment available to the public under
§ 346.6 until at least April 1, 2002.
(2) Disclosure to the relevant supervi-
sory agency. (i) Each NGEP that was
a party to the agreement must make
the agreement available to the rel-
vant supervisory agency under § 346.6
until at least April 1, 2002.
(ii) Each insured depository institu-
tion or affiliate that was a party to the
agreement must, by June 30, 2001,
provide each relevant supervisory agency
either—
(A) A copy of the agreement under
§ 346.6(d)(1)(i); or
(B) The information described in
§ 346.6(d)(1)(ii) for each agreement.
(b) Filing of annual reports that relate
to fiscal years ending on or before Decem-
ber 31, 2000. In the event that a NGEP
insured depository institution or affili-
ate has any information to report
under § 346.7 for a fiscal year that ends
on or before December 31, 2000, and
that concerns a covered agreement en-
tered into between May 12, 2000, and
December 31, 2000, the annual report
for that fiscal year must be provided no
later than June 30, 2001, to—
(1) Each relevant supervisory agency; or
(2) In the case of a NGEP, to an in-
sured depository institution or affiliate
that is a party to the agreement in ac-
cordance with § 346.7(f)(2).
§ 346.11 Other definitions and rules of
construction used in this part.
(a) Affiliate. “Affiliate” means—
(1) Any company that controls, is
controlled by, or is under common con-
trol with another company; and
(2) For the purpose of determining
whether an agreement is a covered
agreement under § 346.2, an “affiliate”
includes any company that would be
under common control or merged with
another company on consummation of
any transaction pending before a Fed-
eral banking agency at the time—
(i) The parties enter into the agree-
ment; and
(ii) The NGEP that is a party to the
agreement makes a CRA commu-
nication, as described in § 346.3.
(b) Control. “Control” is defined in
section 2(a) of the Bank Holding Com-
pany Act (12 U.S.C. 1841(a)).
(c) CRA affiliate. A “CRA affiliate” of
an insured depository institution is
any company that is an affiliate of an
insured depository institution to the
extent, and only to the extent, that the
activities of the affiliate were consid-
ered by the appropriate Federal bank-
ing agency when evaluating the CRA
performance of the institution at its
most recent CRA examination prior to
the agreement. An insured depository
institution or affiliate also may des-
ignate any company as a CRA affiliate
at any time prior to the time a covered
agreement is entered into by informing
the NGEP that is a party to the agree-
ment of such designation.
(d) CRA public file. “CRA public file”
means the public file maintained by an
insured depository institution and de-
scribed in 12 CFR 345.43.
(e) Executive officer. The term “exec-
utive officer” has the same meaning as
in §215.2(e)(1) of the Board of Governors
of the Federal Reserve System’s Regu-
lation O (12 CFR 215.2(e)(1)).
(f) Federal banking agency; appropriate Federal banking agency. The terms “Federal banking agency” and “appropriate Federal banking agency” have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(g) Fiscal year. (1) The fiscal year for a NGEP that does not have a fiscal year shall be the calendar year.

(2) Any NGEP, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(h) Insured depository institution. “Insured depository institution” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(i) NGEP. “NGEP” means a nongovernmental entity or person.

(j) Nongovernmental entity or person—

(1) General. A “nongovernmental entity or person” is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) Exclusions. A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives Federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (j)(2)(i) through (iii) of this section.

(k) Party. The term “party”. The authority citation for part 405 continues to read as follows: with respect to a covered agreement means each NGEP and each insured depository institution or affiliate that entered into the agreement.

(l) Relevant supervisory agency. The “relevant supervisory agency” for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.


PART 347—INTERNATIONAL BANKING

Subpart A—Foreign Banking and Investment by Insured State Nonmember Banks

Sec. 347.101 Authority, purpose, and scope.

347.102 Definitions.

347.103 Effect of state law on actions taken under this subpart.

347.104 Insured state nonmember bank investment in foreign organizations.

347.105 Permissible financial activities outside the United States.

347.106 Going concerns.

347.107 Joint ventures.

347.108 Portfolio investments.

347.109 Limitations on indirect investments in foreign organizations.

347.110 Underwriting and dealing limits applicable to foreign organizations held by insured state nonmember banks.

347.111 Restrictions applicable to foreign organizations that act as futures commission merchants.
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§ 347.102 Definitions.

For the purposes of this part:
(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;
(3) Any other organization that 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) Domestic means United States.
(d) Eligible insured state nonmember bank means an eligible depository institution as defined in §303.2(r) of this chapter.

(e) 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.

(f) 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.

(g) FRB means the Board of Governors of the Federal Reserve System.

(h) 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.

(i) 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.

(j) 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.

(k) 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.

(l) Foreign organization means an organization that is organized under the laws of a foreign country.

(m) Insured state nonmember bank or bank means a state bank, as defined by §3(a)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(2)), whose deposits are insured by the FDIC and that is not a member of the Federal Reserve System.

(n) Indirectly means investments held or activities conducted by a subsidiary of an organization.

(o) Investment grade means a security that is rated in one of the four highest categories by:
(1) Two or more NRSROs; or
(2) One NRSRO if the security is rated by only one NRSRO.

(p) 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.

(q) Organization or entity means a corporation, partnership, association, bank, or other similar entity.

(r) NRSRO means a nationally recognized statistical rating organization as designated by the Securities and Exchange Commission.

(s) 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.

(t) Subsidiary means any organization more than 50 percent of the voting equity interests of which are directly or indirectly held by another organization.

(u) Tier 1 capital means Tier 1 capital as defined in §325.2 of this chapter.

(v) Well capitalized means well capitalized as defined in §325.103 of this chapter.
§ 347.103 Effect of state law on actions taken under this subpart.

A bank may acquire and retain equity interests in a foreign organization or establish a foreign branch, subject to the requirements of this subpart, if it is authorized to do so by the law of the state in which the bank is chartered.

§ 347.104 Insured state nonmember bank investments in foreign organizations.

(a) Investment in foreign banks or foreign banking organizations. A bank may directly or indirectly acquire and retain equity interests in a foreign bank or foreign banking organization.

(b) Investment in other foreign organizations. A bank may only:

(1) acquire and retain equity interests in foreign organizations, other than foreign banks or foreign banking organizations in amounts of 50 percent or less of the foreign organization's voting equity interests, if the equity interest is held through a domestic or foreign subsidiary; and

(2) The bank meets its minimum capital requirements.

§ 347.105 Permissible financial activities outside the United States.

(a) Limitation on authorized activities. A bank may not directly or indirectly acquire or hold equity interests in a foreign organization that will result in the bank and its affiliates:

(1) Holding more than 50 percent, in the aggregate, of the voting equity interest in such foreign organization; or

(2) Controlling such foreign organization, unless the activities of a foreign organization are limited to those authorized under paragraph (b) of this section.

(b) Authorized activities. The following financial activities are authorized outside the United States:

(1) Commercial and other banking activities.

(2) Financing, including commercial financing, consumer financing, mortgage banking, and factoring, subject to compliance with any attendant restrictions contained in 12 CFR 225.28(b).

(3) Leasing real or personal property, acting as agent, broker or advisor in leasing real or personal property, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(4) Acting as a fiduciary, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(5) Underwriting credit life, credit accident and credit health insurance.

(6) Performing services for other direct or indirect operations of a domestic 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.

(7) 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.

(8) Providing investment, financial, or economic services, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).

(9) General insurance agency and brokerage.

(10) Data processing.

(11) 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.

(12) Performing management consulting services, provided that such services when rendered with respect to the domestic market must be restricted to the initial entry.

(13) Underwriting, distributing, and dealing in debt securities outside the United States.

(14) With the prior approval of the FDIC under section 347.119(d), underwriting, distributing, and dealing in equity securities outside the United States.

(15) Operating a travel agency in connection with financial services offered outside the United States by the bank or others.

(16) Providing futures commission merchant services, subject to compliance with any attendant restrictions in 12 CFR 225.28(b).
§ 347.106 Going concerns.

Going concerns. If a bank acquires an equity interest in a foreign organization that is a going concern, no more than 5 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under § 347.105(b).

§ 347.107 Joint ventures.

(a) Joint ventures. If a bank, directly or indirectly, acquires or holds an equity interest in a foreign organization that is a joint venture, and the bank or its affiliates do not control the foreign organization, no more than 10 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under § 347.105(b).

(b) Joint venture defined. For purposes of this section, the term “joint venture” means any organization in which 20 percent or more but not in excess of 50 percent of the voting equity interests, in the aggregate, are directly or indirectly held by a bank or its affiliates.

§ 347.108 Portfolio investments.

(a) Portfolio investments. If a bank, directly or indirectly, acquires or holds an equity interest in a foreign organization as a portfolio investment and the foreign organization is not controlled, directly or indirectly, by the bank or its affiliates:

(1) No more than 10 percent of either the consolidated assets or revenues of the foreign organization may be attributable to activities that are not permissible under § 347.105(b); and

(2) Any loans or extensions of credit made by the 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 bank or its affiliates and nonaffiliated organizations.

(b) Portfolio investment defined. For purposes of this section, the term “portfolio investment” means an investment in an organization in which less than 20 percent of the voting equity interests, in the aggregate, are directly or indirectly held by a bank or its affiliates.

§ 347.109 Limitations on indirect investments in nonfinancial foreign organizations.

(a) A bank may, through a subsidiary authorized by §§ 347.105 or 347.106, or an Edge corporation if also authorized by the FRB, acquire and hold equity interests in foreign organizations that are not foreign banks or foreign banking organizations and that engage generally in activities beyond those listed in § 347.105(b), subject to the following:

(1) The amount of the investment does not exceed 15 percent of the bank’s Tier 1 capital;

(2) The aggregate holding of voting equity interests of one foreign organization by the bank and its affiliates must be less than:

(i) 20 percent of the foreign organization’s voting equity interests; and
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§ 347.111 Underwriting and dealing limits applicable to foreign organizations held by insured state nonmember banks.

A bank that holds an equity interest in one or more foreign organizations which underwrite, deal, or distribute equity securities outside the United States as authorized by § 347.105(b)(14) is subject to the following limitations:

(a) Underwriting commitment limits.

(1) 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 bank under the authority of 12 CFR 211.10(b), may not exceed the lesser of $60 million or 25 percent of the bank’s Tier 1 capital, except as otherwise provided in this paragraph.

(2) Underwriting commitments in excess of this limit must be either:

(i) Covered by binding commitments from subunderwriters or purchasers; or

(ii) Deducted from the capital of the bank, with at least 50 percent of the deduction being taken from Tier 1 capital, with the bank remaining 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 bank under the authority of 12 CFR 211.10:

(1) May not exceed the lesser of $30 million or 5 percent of the 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 §§347.105 through 347.109 or 12 CFR 211.10 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 §347.117(b)(3) if the 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 bank (this includes shares held in connection with an underwriting or for distribution or dealing by an affiliate permitted to do so by §§362.8 or 362.18 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 bank, must conform to the limits of §§347.105 through 347.109.

(d) Combined limits. The aggregate of the following may not exceed 25 percent of the bank’s Tier 1 capital:

(1) All equity interests of foreign organizations held for investment or
trading under §347.109 or by an affiliate of the bank under the corresponding paragraph of 12 CFR 211.10.

(2) All underwriting commitments under paragraph (a) of this section, taken together with all underwriting commitments by any affiliate of the bank under the authority of 12 CFR 211.10, 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 211.10; or

(ii) Already deducted from the bank’s capital under paragraph (a)(2) of this section, or the appropriate affiliate’s capital under the comparable provisions of 12 CFR 211.10; 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 bank under the authority of 12 CFR 211.10, 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 211.10.

§347.112 Restrictions applicable to foreign organizations that act as futures commission merchants.

(a) If a bank acquires or retains an equity interest in a foreign organization that acts as a futures commission merchant pursuant to §347.105(b)(16), 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:

(1) Foreign organization’s liability does not exceed two percent of the bank’s Tier 1 capital, or

(2) Bank has obtained the prior approval of the FDIC under §347.120(d).

(b) [Reserved]

§347.113 Restrictions applicable to activities by a foreign organization in the United States.

(a) A bank, acting under the authority provided in this subpart, may not directly or indirectly hold:

(1) Equity interests of any foreign organization that engages in the general business of buying or selling goods, wares, merchandise, or commodities in the United States; or

(2) More than 5 percent of the equity interests of any foreign organization that engages in activities in the United States unless any activities in which the foreign organization engages in the United States are incidental to its international or foreign business.

(b) For purposes of this section:

(1) A foreign organization is not engaged in any business or activities in the United States unless it maintains an office in the United States other than a representative office.

(2) The following activities are incidental to international or foreign business:

(i) Activities that are permissible for an Edge corporation in the United States under 12 CFR 211.6; or

(ii) Other activities approved by the FDIC.

§347.114 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. A bank that 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.

§347.115 Permissible activities for a foreign branch of an insured state nonmember bank.

In addition to its general banking powers and if permitted by the law of the state in which the bank is chartered, a foreign branch of a bank may
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conduct the following activities to the extent that they are consistent with banking practices in a foreign country where the bank maintains a branch:

(a) Guarantees. Guarantees debts, or otherwise agree to make payments on the occurrence of readily ascertainable events including, without limitation, nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents, if:
   (1) The guarantee or agreement specifies a maximum monetary liability; and
   (2) 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.

(b) Government obligations. Engage in the following types of transactions with respect to the obligations of foreign countries, so long as aggregate investments, securities held in connection with distribution and dealing, and underwriting commitments do not exceed ten percent of the bank’s Tier 1 capital:
   (1) Underwrite, distribute and deal, invest in, or trade obligations of:
      (i) The national government of the country in which the branch is located or its political subdivisions; and
      (ii) An agency or instrumentality of such national government if supported by the taxing authority, guarantee, or full faith and credit of the national government.
   (2) Underwrite, distribute and deal, invest in or trade obligations rated as investment grade:
      (i) The national government of any foreign country or its political subdivisions, to the extent permissible under the law of the issuing foreign country; and
      (ii) 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.

(c) Local investments. (1) Acquire and hold local investments in:
   (i) Equity securities of the central bank, clearinghouses, governmental entities, and government sponsored 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.
   (2) Aggregate local 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 a single foreign country must 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):2
   (d) Insurance. Act as an insurance agent or broker.
   (e) Employee benefits program. Pay to an employee of a branch, as part of an employee benefits program, a greater rate of interest than that paid to other depositors of the branch.
   (f) Repurchase agreements. Engage in repurchase agreements involving securities and commodities that are the functional equivalents of extensions of credit.
   (g) Other activities. Engage in other activities, with the prior approval of the FDIC.
   (h) Approval of other activities. Activities that are not specifically authorized by this section, but that are authorized by 12 CFR 211.4 or FRB interpretations of activities authorized by that section, may be authorized by specific consent of the FDIC on an individual basis and upon such terms and conditions as the FDIC may consider appropriate. Activities that will be engaged in as principal (defined by reference to section 362.1(b) of this chapter), and that are not authorized by 12 CFR 211.4 or FRB interpretations of activities authorized by that section, may be authorized by specific consent of the FDIC on an individual basis and upon such terms and conditions as the FDIC may consider appropriate.

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1If 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.

2If a branch has recently been acquired by the bank and the branch was not previously required to file a Call Report, branch deposits as of the acquisition date must be used.
CFR 211.4 or FRB interpretations of activities authorized under that section, must satisfy the requirements of part 362 of this chapter and be approved by the FDIC under this part as well as part 362 of this chapter.

§ 347.116 Recordkeeping and supervision of foreign activities of insured state nonmember banks.

(a) Records, controls and reports. A 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 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, accounting procedures in compliance with applicable accounting standards, 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 bank for examination and other supervisory purposes.

(2) The FDIC may from time to time require a bank to make and submit such reports and information as may be necessary to implement and enforce the provisions of this subpart, and the bank shall submit an annual report of condition for each foreign branch pursuant to instructions provided by the FDIC.

§ 347.117 General consent.

(a) General consent to establish or relocate a foreign branch. General consent of the FDIC is granted, subject to the written notification requirement contained in section 303.182(a) and consistent with the requirements of this subpart, for an:

(1) Eligible bank to establish a foreign branch conducting activities authorized by section 347.115 of this section in any foreign country in which:
§ 347.119 Specific consent.

General consent and expedited processing under this subpart do not apply in the following circumstances:

(a) Limitation on access to supervisory information in foreign country.

(i) Applicable law or practice in the foreign country where the foreign organization or foreign branch would be located would limit the FDIC’s access to information for supervisory purposes; and

(ii) A bank would hold 20 percent or more of the voting equity interests of a bank's Tier 1 capital, and such investments in all foreign organizations in the aggregate do not exceed:

(A) 5 percent of the bank's Tier 1 capital during a 12-month period; and

(B) Up to an additional 5 percent of the bank's Tier 1 capital if the investments are acquired for trading purposes.

§ 347.118 Expedited processing.

(a) Expedited processing of branch applications. An eligible bank may establish a foreign branch conducting activities authorized by § 347.115 in an additional foreign country, after complying with the expedited processing requirements contained in § 303.182(b) and (c)(1), if any of the following are located in two or more foreign countries:

(1) Foreign branches or foreign bank subsidiaries of the eligible bank;

(2) Foreign branches or foreign bank subsidiaries of banks and Edge or Agreement corporations affiliated with the eligible bank; and

(3) Foreign bank subsidiaries of the eligible bank’s holding company.

(b) Expedited processing of applications for investment in foreign organizations. 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 bank files a substantially complete application with the FDIC in compliance with the expedited processing requirements contained in § 303.183(b) and (c)(1), or within such earlier time as authorized by the FDIC.

§ 347.119 Specific consent.

General consent and expedited processing under this subpart do not apply in the following circumstances:

(a) Limitation on access to supervisory information in foreign country.

(i) Applicable law or practice in the foreign country where the foreign organization or foreign branch would be located would limit the FDIC's access to information for supervisory purposes; and

(ii) A bank would hold 20 percent or more of the voting equity interests of a
§ 347.120 Computation of investment amounts.

In computing the amount that may be invested in any foreign organization under §§ 347.117 through 347.119, any investments held by an affiliate of a bank must be included.

§ 347.201 Authority, purpose, and scope.

(a) This subpart is issued pursuant to sections 5(c) and 10(b)(4) of the Federal Deposit Insurance Act (FDI Act)(12 U.S.C. 1815(c) and 1820(b)(4)) and sections 6, 7, and 15 of the International Banking Act of 1978 (IBA)(12 U.S.C. 3104, 3105, and 3109).

(b) This subpart implements the insured branch asset pledge and examination commitment requirement for foreign banks in the FDI Act. It also implements the deposit insurance, permissible activity, and cross-border cooperation provisions of the IBA regarding the FDIC. Sections 347.203-347.211 apply to state and federal branches whose deposits are insured. Sections 347.204 and 347.207 are applicable to depository institution subsidiaries of a foreign bank. Section 347.212 applies to insured state branches and §§ 347.213-347.216 apply to state branches whose deposits are not insured by the FDIC.

§ 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(i) of the Federal Deposit Insurance Act (12 U.S.C. 1813(i)).

(d) Depository means any insured state bank, national bank, or insured branch.
(e) Domestic retail deposit activity means the acceptance by a federal or state branch of any initial deposit of less than $100,000.


(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 §§ 347.204, 347.205, 347.209, and 347.210.

(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 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) FRB means the Board of Governors of the Federal Reserve System.

(k) 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.

(l) Immediate family member of a natural person means the spouse, father, mother, brother, sister, son or daughter of that natural person.

(m) Initial deposit means the first deposit transaction between a depositor and the branch where there is no existing deposit relationship. 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.

(n) Insured bank means any bank, including a foreign bank with an insured branch, the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act.

(o) 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.

(p) 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.

(q) A majority owned subsidiary means a company the voting stock of which is more than 50 percent owned or controlled by another company.

(r) 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.

(s) OCC means the Office of the Comptroller of the Currency.

(t) Person means an individual, bank, corporation, partnership, trust, association, foundation, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(u) Significant risk to the deposit insurance fund shall be understood to be
§ 347.203 Deposit insurance required for all branches of foreign banks engaged in domestic retail deposit activity in the same State.

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 that engages in domestic retail deposit activity will be an insured branch.

§ 347.204 Commitment to be examined and provide information.

(a) In connection with an application for deposit insurance for a U.S. branch or depository institution subsidiary of a foreign bank that has been determined to be subject to comprehensive consolidated supervision by the appropriate Federal banking agency, as defined in section 3(q) of the FDI Act (12 U.S.C. 1813(q)), the foreign bank shall provide binding written commitments (including a consent to U.S. jurisdiction and designation of agent for service, acceptable to the FDIC) to the following terms:

(1) The FDIC will be provided with any information about the foreign bank and its affiliates located outside of the United States that the FDIC requests to determine:
   (i) The relationship between the U.S. branch or depository institution subsidiary and its affiliates; and
   (ii) The effect of such relationship on such U.S. branch or depository institution subsidiary;

(2) The FDIC will be allowed to examine the affairs of any office, agency, branch or affiliate of the foreign bank located in the United States and will be provided any information requested to determine:
   (i) The relationship between the U.S. branch or depository institution subsidiary and such offices, agencies, branches or affiliates; and
   (ii) The effect of such relationship on such U.S. branch or depository institution subsidiary.

(3) The FDIC will not process a deposit insurance application for any U.S. branch or depository institution subsidiary of a foreign bank if the foreign bank fails to provide the written commitments, consent to U.S. jurisdiction, and designation of agent for service required by this section.

(b) The FDIC will consider the existence and extent of any prohibition or restrictions, if any, on its ability to utilize the commitments, consent to U.S. jurisdiction, and designation of agent for service required by this section, in determining whether to grant or deny a deposit insurance application for the U.S. branch or depository institution subsidiary of the foreign bank.

In addition, the FDIC may consider any additional assurances or commitments provided by the foreign bank, including that it will cooperate and assist the FDIC, without limitation, by seeking to obtain waivers and exemptions from applicable confidentiality or secrecy restrictions or requirements to enable the foreign bank or its affiliates to make information about the foreign bank and its affiliates located outside of the United States available to the FDIC for review.

(c) The foreign bank's commitments, consent to U.S. jurisdiction, and designation of agent for service shall be signed by an officer of the foreign bank who has been so authorized by the foreign bank's board of directors and in all instances will be executed in a manner acceptable to the FDIC and shall be included with the branch or depository institution application for insurance. Any documents that are not in English shall be accompanied by an English translation.
§ 347.205 Record maintenance.

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. Each insured branch must keep a set of accounts and records in the words and figures of the English language that accurately reflects the business transactions of the insured branch on a daily basis. A foreign bank that 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.

§ 347.206 Domestic retail deposit activity requiring deposit insurance by U.S. branch of a foreign bank.

(a) Domestic retail deposit activity. To initiate or conduct domestic retail deposit activity requiring deposit insurance protection in any state after December 19, 1991, a foreign bank must establish one or more insured U.S. bank subsidiaries for that purpose.

(b) Exception. Paragraph (a) of this section does not apply to 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 FDIC 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 an insured branch of a foreign bank only if such branch was an insured branch on December 19, 1991.

(d) Change in ownership of grandfathered insured branch. The grandfathered status of an insured branch may not be transferred, except in certain merger and acquisition transactions that the FDIC determines are not designed, or motivated by the desire, to avoid compliance with section 601(1) of the International Banking Act (12 U.S.C. 3104(d)(1)).

§ 347.207 Disclosure of supervisory information to foreign supervisors.

(a) Disclosure by the FDIC. The FDIC may disclose information obtained in the course of exercising its supervisory or examination authority to a foreign bank regulatory or supervisory authority, if the FDIC determines that disclosure is appropriate for bank supervisory or regulatory purposes and will not prejudice the interests of the United States.

(b) Confidentiality. Before making any disclosure of information pursuant to paragraph (a) of this section, the FDIC will obtain, to the extent necessary, the agreement of the foreign bank regulatory or supervisory authority to maintain the confidentiality of such information to the extent possible under applicable law. The disclosure or transfer of information to a foreign bank regulatory or supervisory authority under this section will not waive any privilege applicable to the information that is disclosed or transferred.

§ 347.208 Assessment base deductions by insured branch.

Deposits in an insured branch to the credit of the foreign bank or any of its offices, branches, agencies, or wholly owned subsidiaries may be deducted from the assessment base of the insured branch.

§ 347.209 Pledge of assets.

(a) Purpose. A foreign bank that has an insured branch must 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 must become the property of the FDIC and be used to the extent necessary to protect the Deposit Insurance Fund.

(b) Amount of assets to be pledged. (1) For a newly insured branch, a foreign bank must pledge assets equal to at least 5 percent of the liabilities of the branch, based on the branch’s projection of its liabilities at the end of each of the first three years of operations. For all other insured branches, a foreign bank must pledge assets...
equal to the appropriate percentage applicable to the insured branch, as determined by reference to the risk-based assessment schedule contained in this paragraph, of the insured branch’s average liabilities for the last 30 days of the most recent calendar quarter.4

<table>
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<tr>
<th>Asset maintenance level</th>
<th>Supervisory risk subgroup</th>
<th>A (%)</th>
<th>B (%)</th>
<th>C (%)</th>
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<td>Equal to or greater than 108%</td>
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<td>2</td>
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<td>Equal to or greater than 106%</td>
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<td>Less than 106%</td>
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<td>6</td>
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The appropriate asset pledge percentage will be determined based on the supervisory risk subgroup and asset maintenance level applicable to the insured branch.

(3) Supervisory risk factors. For purposes of this section, within each asset maintenance group, each institution will be assigned to one of three subgroups based on consideration by the FDIC of supervisory evaluations provided by the primary federal regulator for the insured branch. 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 FDIC will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be relevant to the financial condition and the risk posed to the Deposit Insurance Fund. 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 deposit insurance fund; and

(iii) Subgroup “C”. This subgroup consists of institutions that pose a substantial probability of loss to the deposit insurance fund.

(4) 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 condition of the foreign bank or the insured branch is such that the assets pledged under 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 primary regulator for the insured branch. 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 related 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.

(5) Each insured branch must separately comply with the requirements of this section. A foreign bank which has more than one insured branch in a state may, however, treat all of its insured branches in the same state as one entity and will designate one insured

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4This average must 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. For days on which the branch is closed, however, balances from the previous business day are to be used in determining its average liabilities. 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 must 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.
branch to be responsible for compliance with this section.

(c) Depository. A foreign bank must 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 designee at such time as any such asset is placed with the depository, as follows:

(1)(i) Negotiable certificates of deposit that are payable in the United States and that are issued by any state bank, national bank, state or federal savings association, or branch of a foreign bank which has executed a valid waiver of offset agreement or similar debt instruments that are payable in the United States and that are issued by any agency of a foreign bank which has executed a valid waiver of offset agreement; provided, that the maturity of any certificate or issuance is not greater than one year; and provided further, that the issuing branch or agency of a foreign bank is not an affiliate of the pledging bank or from the same country as the pledging bank’s domicile;

(ii) Non-negotiable certificates of deposit, subject to the terms specified in paragraph (d)(1)(i) of this section other than the requirement of negotiability, that were pledged as collateral to the FDIC on March 18, 2005, until maturity according to the original terms of the existing deposit agreement.

(2) Treasury bills, 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, state or federal savings association, 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);


(7) Notes issued by bank and thrift holding companies, banks, or savings associations 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
issuancer 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)(4) of this section, it shall deliver (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 will 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 will 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 designee. 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 FDIC 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 at least equal to 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.
Federal Deposit Insurance Corporation

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(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)(4) 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 reporting 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, 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 reporting 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, 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 reporting need only specify that no substitution of assets has occurred; and

(ii) Additional reports. The foreign bank shall, from time to time, as may be required, 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, which states that the aggregate value of all such assets is at least equal to 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 with 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 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
§ 347.210 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 and Consumer Protection 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 FDIC 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, or its 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...
§ 347.211 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 FRB;
2. The FDIC, if an insured branch;
3. The OCC, if the branch or agency of the foreign bank is licensed by the OCC; 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 insured branch:

(i) Has total assets of less than $500 million;

(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)(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 insured branch has maintained on a daily basis, over the past three quarters, eligible assets in an amount not less than 108 percent of the preceding quarter's average third party liabilities (determined consistent with applicable federal and state law) 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 FRB, 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 an insured branch that meets the standards of paragraph (b)(1) of this section should not be eligible for an 18-month examination cycle pursuant to this paragraph (b), the FDIC may consider additional factors, including whether:

(i) Any of the individual components of the ROCA supervisory rating of an insured branch is rated "3" or worse;

(ii) The results of any off-site monitoring indicate a deterioration in the condition of the insured branch;
§ 347.212 FDIC approval to conduct activities that are 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, must file a written application for permission to conduct such activity with the FDIC.

(b) Exceptions. If the FDIC has already determined, pursuant to part 362 of this chapter, “Activities and Investment of Insured State Banks,” that an activity does not present a significant risk to the Deposit Insurance Fund, no application is required under paragraph (a) of this section for a foreign bank operating an insured branch to engage or continue to engage in the same activity.

(c) Agency activities. A foreign bank operating an insured state branch is not required to submit an application pursuant to paragraph (a) of this section to engage in or continue engaging in an activity conducted as agent if the activity is:

(1) permissible agency activity for a state-chartered bank located in the state which the state-licensed insured branch of the foreign bank is located;
(2) permissible agency activity for a state-licensed branch of a foreign bank located in that state; and
(3) permissible pursuant to any other applicable federal law or regulation.

(d) Conditions of approval. (1) Approval of such an application required by paragraph (a) of this section may be conditioned on the agreement by the foreign bank and its insured state branch to conduct the activity subject to specific limitations, which may include pledging of assets in excess of the asset pledge and asset maintenance requirements contained in §§ 347.209 and 347.210.

(2) 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 state branch shall not commence the activity until it has been approved in writing by the FDIC pursuant to this part and the FRB, 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 FRB, 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) All plans of divestitures or cessation required by this paragraph must be completed within one year from the date of the disapproval, or within such shorter period as the FDIC may direct.

(f) Procedures. Procedures for applications under this section are set out in section 303.187.

§ 347.213 Establishment or operation of noninsured foreign branch.

(a) A foreign bank may establish or operate a state branch, as provided by state law, without federal deposit insurance whenever:

[70 FR 17560, Apr. 6, 2005; 70 FR 20704, April 21, 2005, as amended at 71 FR 20527, Apr. 21, 2006]
§ 347.215 Exemptions from deposit insurance requirement.

(a) Deposit activities not requiring insurance. A state branch will not be considered to be engaged in domestic retail deposit activity that requires the foreign bank parent to establish an insured U.S. bank subsidiary if the state branch accepts initial deposits only in an amount of less than $100,000 that 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 non-deposit 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 or agreement corporation may accept deposits under 12 CFR 211.6(a)(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:
   (i) The branch’s average deposits under this paragraph (a)(7) do not exceed one percent of the branch’s average total deposits, as calculated under paragraph (a)(7)(ii) if this section (de minimis exception); and
   (ii) For purposes of calculating this exception:
      (A) The branch’s average deposits under this paragraph and the average total deposits must 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;
      (B) For days on which the branch is closed, balances from the last previous business day are to be used;
      (C) The branch may exclude deposits in the branch of other offices, branches, agencies or wholly owned subsidiaries of the bank to determine its average deposits;
      (D) 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; and
      (E) A foreign bank that 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 exempted under paragraph (a) of this section, the foreign bank may apply to the FDIC for
consent to operate the branch as a non-insured 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 §303.186.

(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, 1996:

(1) If the deposit qualifies pursuant to paragraph (a) or (b) of this section; or

(2) If the deposit does not qualify pursuant to paragraph (a) or (b) of this section, in the case of a time deposit, no later than the first maturity date of the time deposit after April 1, 1996.

§347.216 Depositor notification.

Any state branch that is exempt from the insurance requirement pursuant to §347.215 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.

Subpart C—International Lending

§347.301 Purpose, authority, and scope.


§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 obligors 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
   (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
      (B) 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 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. 033, 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 Small market share exemption.
348.6 General exemption.
§ 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) Area median income means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(c) Community means a city, town, or village, and contiguous or adjacent cities, towns, or villages.

(d) Contiguous or adjacent cities, towns, or villages means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(e) Depository holding company means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(f) Depository institution means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a home stead 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.

(g) Depository institution affiliate means a depository institution.

(h) Depository organization means a depository institution or a depository holding company.

(i) Low- and moderate-income 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 110 percent of the area median income.
§ 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 Relevant metropolitan statistical area (RMSA).

(c) Major assets. A management official of a depository organization with total assets exceeding $2.5 billion (or any affiliate of such an organization)
may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. The FDIC will adjust these thresholds, as necessary, based on the year-to-year change in the average of the Consumer Price Index for the Urban Wage Earners and Clerical Workers, not seasonally adjusted, with rounding to the nearest $100 million. The FDIC will announce the revised thresholds by publishing a final rule without notice and comment in the Federal Register.

§ 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:
(ii) 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
(iii) 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 anti-competitive 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 Small market share exemption.

(a) Exemption. A management interlock that is prohibited by § 348.3 is permissible, if:

(1) The interlock is not prohibited by § 348.3(c); and

(2) The depository organizations (and their depository institution affiliates) hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or community in which both depository organizations (or their depository institution affiliates) have offices. The amount of deposits shall be determined by reference to the most recent annual Summary of Deposits published by the FDIC for the RMSA or community.

(b) Confirmation and records. Each depository organization must maintain records sufficient to support its determination of eligibility for the exemption under paragraph (a) of this section, and must reconfirm that determination on an annual basis.

§ 348.6 General exemption.

(a) Exemption. The FDIC may by agency order exempt an interlock from the prohibitions in § 348.3 if the FDIC finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns.

(b) Presumptions. In reviewing an application for an exemption under this section, the FDIC will apply a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition if the depository organization seeking to add a management official:

(1) Primarily serves low-and moderate-income areas;

(2) Is controlled or managed by persons who are members of a minority group, or women;

(3) Is a depository institution that has been chartered for less than two years; or

(4) Is deemed to be in "troubled condition" as defined in § 303.101(c).

(c) Duration. Unless a shorter expiration period is provided in the FDIC approval, an exemption permitted by paragraph (a) of this section may continue so long as it does not result in a monopoly or substantial lessening of competition, or is unsafe or unsound. If the FDIC grants an interlock exemption in reliance upon a presumption under paragraph (b) of this section, the interlock may continue for three years, unless otherwise provided by the FDIC in writing.

(d) Procedures. Procedures for applying for an exemption under this section are set forth in 12 CFR 303.249.

[64 FR 51680, Sept. 24, 1999, as amended at 71 FR 20527, Apr. 21, 2006]

§ 348.7 Change in circumstances.

(a) Termination. A management official shall terminate his or her service or apply for an exemption if a change in circumstances causes the service to become prohibited. A change in circumstances may include an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an increase in the aggregate deposits of the depository organization, or an acquisition, merger, consolidation, or reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) Transition period. A management official described in paragraph (a) of this section may continue to serve the 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.

[64 FR 51680, Sept. 24, 1999, as amended at 68 FR 20527, Apr. 21, 2006]

§ 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 [RESERVED]

PART 350—DISCLOSURE OF FINANCIAL AND OTHER INFORMATION BY FDIC-INSURED STATE NON-MEMBER BANKS

Sec. 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.

AUTHORITY: 12 U.S.C. 1817(a)(1), 1819 “Seventh” and “Tenth”.

SOURCE: 52 FR 49379, Dec. 31, 1987, unless otherwise noted.

§ 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).


§ 350.5 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."

§ 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.

§ 350.7 Notice and availability.

(a) Shareholders.

If the bank provides written notice of the annual meeting of shareholders, the bank shall include, 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

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.

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.


PART 352—NONDISCRIMINATION ON THE BASIS OF DISABILITY

§ 352.1 Purpose.

(a) One purpose of this part is to implement the spirit of section 504 of the Rehabilitation Act of 1973 (the Rehabilitation Act) as amended by section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 and the Workforce Investment Act of 1998. Section 504 prohibits discrimination on the basis of disability in programs and activities conducted by a federal executive agency. Although the FDIC does not believe that Congress contemplated coverage of non-appropriated, independent regulatory agencies such as
the FDIC, the FDIC has chosen to pro-
mulgate this final regulation to ensure
that, to the extent practicable, persons
with disabilities are provided with
equal access to FDIC programs and ac-
tivities.
(b) This part is also intended to im-
plement section 508 of the Rehabilita-
tion Act as amended. Section 508 re-
quires each federal agency or depart-
ment to ensure that the electronic and
information technology they procure
allows individuals with disabilities ac-
cess to that technology comparable to
the access of those who are not dis-
abled, unless the agency would incur
an undue burden.

§ 352.2 Application.
(a) This part applies to all programs,
activities, and electronic and informa-
tion technology developed, procured,
maintained, used or conducted by the
FDIC. The following programs and ac-
tivities involve the direct provision of
benefits and services to, or participa-
tion 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 com-
plaints at the FDIC Office of Legisla-
tive Affairs and Office of Public Af-
fairs;
(3) Using the FDIC library in Wash-
ington, DC;
(4) Using the FDIC Web site on the
Internet;
(5) Visiting an insured bank at which
they conducted business (or an alter-
native liquidation site selected by the
FDIC) and which has become insolvent,
or been purchased by another bank
under FDIC supervision, for the pur-
pose of:
(i) Collecting FDIC checks for the in-
sured amount of their deposits previ-
ously held in such bank; and/or
(ii) Discussing with FDIC representa-
tives matters related to the repayment
of debts which they previously owed to
such bank, prior to its failure or pur-
case by another bank under FDIC su-
pervision;
(6) Seeking employment with the
FDIC;
(b) This regulation governs the con-
duct of FDIC personnel in their inter-
action 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 employ-
ment 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 im-
paired sensory, manual, or speaking
skills to have an equal opportunity to
participate in, and enjoy the benefits
of, the FDIC programs or activities,
and Electronic and Information Tech-
ology set forth in §352.2.
(b) “Electronic and Information
Technology” (“EIT”) has the same
meaning as “information technology”
except EIT also includes any equip-
ment or interconnected system or sub-
system of equipment that is used in the
creation, conversion, or duplication of
data or information. The term EIT in-
cludes, but is not limited to, tele-
communication products (such as tele-
phones), information kiosks and trans-
action machines, worldwide web sites,
multimedia, and office equipment
(such as copiers and fax machines).
(c) “Facility” means all or any por-
tion of buildings, structures, equip-
ment, roads, walks, parking lots and
other real or personal property. As
used in this definition, “personal prop-
erty” means only furniture, carpeting
and similar features not considered to
be real property.
(d) “Individual with a disability”
means any person who has a physical
or mental impairment that substan-
tially limits one or more major life ac-
tivities, has a record of such an impair-
ment, or is regarded as having such an
impairment.
(e) “Qualified individual with a dis-
ability” means—
(1) With respect to any FDIC program
or activity in which a person is re-
quired to perform services or to
achieve a level of accomplishment, an
individual with a disability 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, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; 

(3) With respect to employment, an individual with a disability as defined in 29 CFR 1630.2(g), which is made applicable to this part by §352.6. 


§ 352.4 Nondiscrimination in any program or activity conducted by the FDIC. 

In accordance with section 504 of the Rehabilitation Act, no qualified individual with a disability shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program or activity conducted by the FDIC. 

§ 352.5 Accessibility to electronic and information technology. 

(a) In accordance with section 508 of the Rehabilitation Act, the FDIC shall ensure, absent an undue burden, that the electronic and information technology the agency develops, procures, maintains or allows: 

(1) Individuals with disabilities who are FDIC employees or applicants to have access to and use of information and data that is comparable to the access to and use of information and data by FDIC employees or applicants who are not individuals with disabilities; and 

(2) Individuals with disabilities who are members of the public seeking information or services from the FDIC to have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities. 

(b) When development or procurement of electronic and information technology that meets the standards published by the Architectural and Transportation Barriers Compliance Board, 36 CFR 1194, would pose an undue burden, the FDIC shall provide individuals with disabilities covered by paragraph (a) of this section with the information and data by an alternative means of access that allows the individuals to use the information and data. 

§ 352.6 Employment. 

No qualified individual with a disability shall, on the basis of that disability, be subjected to discrimination in employment in any program or activity conducted by the FDIC. The definitions, requirements, and procedures (including those pertaining to employment discrimination complaints) of sections 501 of the Rehabilitation Act of 1973, as established in 29 CFR parts 1614 and 1630, shall apply to employment in the FDIC. 

§ 352.7 Accessibility of programs and activities: Existing facilities. 

The FDIC shall operate each of the programs or activities set forth in §352.2 of this part so that when viewed in its entirety, the program or activity is readily accessible to and usable by individuals with disabilities. 

§ 352.8 Program accessibility: New construction and alterations. 

Each building or part of a building, whether newly constructed, or substantially altered, in which FDIC programs or activities will be conducted, shall be designed, constructed or altered so as to be readily accessible to, and usable by, individuals with disabilities.
§ 352.9 Communications.

(a) The FDIC shall take appropriate steps to ensure effective communication with participants in FDIC programs, activities and EIT.

(1) The FDIC shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the FDIC programs or activities.

(i) In determining what type of auxiliary aid is necessary, the FDIC shall give primary consideration to any reasonable requests of the individual with a disability.

(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, facilities and EIT. Interested persons may obtain such information by calling, writing or visiting the FDIC Office of Diversity and Economic Opportunity (ODEO), located at 801 17th Street, NW., Washington, DC 20434. The ODEO telephone number is (202) 416-4000 and (202) 416-2487 (TDD).

(c) The FDIC shall provide information at a primary entrance to each of its facilities where programs or activities 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.

§ 352.10 Compliance procedures.

(a) Applicability. Paragraph (b) of this section applies to employment complaints. The remaining sections concern complaints alleging disability discrimination in FDIC programs or activities and denial of technology access.


(c) Informal process. A complainant shall first exhaust informal administrative procedures before filing a formal complaint alleging disability discrimination in FDIC programs or activities, or a denial of technology access. The FDIC’s Office of Diversity and Economic Opportunity shall be responsible for coordinating implementation of this section. An aggrieved individual initiates the process by filing an informal complaint with ODEO within 180 calendar days from the date of the alleged disability discrimination or denial of access to electronic information technology. An informal complaint with respect to any FDIC program or activity must include a written statement containing the individual’s name and address which describes the FDIC’s action in sufficient detail to inform the FDIC of the nature and date of the alleged violation of these regulations. An informal complaint for denial of technology access must clearly identify the individual and the manner in which the EIT was inaccessible. All informal complaints shall be signed by the complainant or one authorized to do so on his or her behalf. Informal complaints filed on behalf of third parties shall describe or identify (by name if possible) the alleged victim of discrimination or denial of technology access. During the informal resolution process, ODEO has 30 days to attempt a resolution of the matter. If the aggrieved individual elects to participate in mediation, the period for attempting informal resolution will be extended for an additional 60 calendar days. If the matter is not resolved informally, the individual will be provided written notice of the right to file a formal complaint. All complaints should be sent to the FDIC’s Office of Diversity and Economic Opportunity, 801 17th Street, NW., Washington, DC 20434.
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(d) 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.

(e) Formal complaints. The individual must file a written formal complaint within 15 calendar days after receiving the notice of a right to file a formal complaint. Formal complaints must be filed with the FDIC Chairman or the ODEO Director. Within 120 days of the receipt of such a complaint for which it has jurisdiction, the FDIC shall notify the complainant of the results of the investigation in a letter containing—

(1) A finding regarding the alleged violations;
(2) A description of a remedy for each violation found; and
(3) A notice of the right to appeal.

(f) Appeals of the findings or remedies must be filed by the complainant within 30 days of receipt from the FDIC of the letter required by § 352.10(e). The FDIC may extend this time for good cause.

(g) Timely appeals shall be accepted and processed by the FDIC Chairman or ODEO Director.

(h) The FDIC Chairman or ODEO Director shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the FDIC Chairman or ODEO Director 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.

(i) The time limits set forth in (e) and (h) above may be extended for an individual case when the FDIC Chairman or ODEO Director determines that there is good cause, based on the particular circumstances of that case.

(j) The FDIC may delegate its authority for conducting complaint investigations to other federal agencies or independent contractors, 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 programs or activities conducted by the FDIC, and make such information available to them in such manner as the Chairman or designee finds necessary to apprise such persons of the protections against discrimination under section 504 or technology access provided under section 508 and this regulation.

PART 353—SUSPICIOUS ACTIVITY REPORTS

Sec.
353.1 Purpose and scope.
353.2 Definitions.
353.3 Reports and records.


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:
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(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, 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
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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 and Consumer Protection (DSC)) 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 and Consumer Protection (DSC)).

(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 insured savings associations 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".


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.

S O U R C E : 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 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, non-qualified 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 (§303.101(c) 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 Ratings 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 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
§ 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
§ 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(l)(2)(v) and golden parachute payments permitted by §359.4 shall be submitted in writing to the appropriate regional director (DSC). 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
§ 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.


§ 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 connection with a securitization or participation.

PART 360—RESOLUTION AND RECEIVERSHIP RULES

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.
360.6 Treatment by the Federal Deposit Insurance Corporation as conservator or receiver of financial assets transferred in connection with a securitization or participation.


§ 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).
§ 360.2  
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.
§ 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 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 benefit 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 liquidated or other resolution occurring after August 10, 1993.

§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.B.2., note 12 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...
§ 360.6 Treatment by the Federal Deposit Insurance Corporation as conservator or receiver of financial assets transferred in connection with a securitization or participation.

(a) Definitions—(1) Beneficial interest means debt or equity (or mixed) interests or obligations of any type issued by a special purpose entity that entitle their holders to receive payments that depend primarily on the cash flow from financial assets owned by the special purpose entity.

(2) Financial asset means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

(3) Participation means the transfer or assignment of an undivided interest in all or part of a loan or a lease from a seller, known as the “lead”, to a buyer, known as the “participant”, without recourse to the lead, pursuant to an agreement between the lead and the participant. Without recourse means that the participation is not subject to any agreement that requires the lead to repurchase the participant’s interest or to otherwise compensate the participant due to a default on the underlying obligation.

(4) Securitization means the issuance by a special purpose entity of beneficial interests:

(i) The most senior class of which at time of issuance is rated in one of the four highest categories assigned to long-term debt or in an equivalent short-term category (within either of which there may be sub-categories or gradations indicating relative standing) by one or more nationally recognized statistical rating organizations, or

(ii) Which are sold in transactions by an issuer not involving any public offering for purposes of section 4 of the Securities Act of 1933 (15 U.S.C. 77d), as amended, or in transactions exempt from registration under such Act pursuant to Regulation S thereunder (or any successor regulation).

(5) Special purpose entity means a trust, corporation, or other entity demonstrably distinct from the insured depository institution that is primarily engaged in acquiring and holding (or transferring to another special purpose entity) financial assets, and in activities related or incidental thereto, in connection with the issuance by such special purpose entity (or by another special purpose entity that acquires financial assets directly or indirectly from such special purpose entity) of beneficial interests.

(b) The FDIC shall not, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1821(e), recharacterize as property of the institution or the receivership any financial assets transferred by an insured depository institution in connection with a securitization or participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting
§ 360.7 Post-insolvency interest.

(a) Purpose and scope. This section establishes rules governing the calculation and distribution of post-insolvency interest to creditors with proven claims in all FDIC-administered receiverships established after June 13, 2002.

(b) Definitions—(1) Equityholder. The owner of an equity interest in a failed depository institution, whether such ownership is represented by stock, membership in a mutual association, or otherwise.

(2) Post-insolvency interest. Interest calculated from the date the receivership is established on proven creditor claims in receiverships with surplus funds.

(3) Post-insolvency interest rate. For any calendar quarter, the coupon equivalent yield of the average discount rate set on the three-month Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar quarter, and adjusted each quarter thereafter.

(4) Principal amount. The proven claim amount and any interest accrued thereon as of the date the receivership is established.

(5) Proven claim. A claim that is allowed by a receiver or upon which a final non-appealable judgment has been entered in favor of a claimant against a receivership by a court with jurisdiction to adjudicate the claim.

(c) Post-insolvency interest distributions. (1) Post-insolvency interest shall only be distributed following satisfaction by the receiver of the principal amount of all creditor claims.


(3) Post-insolvency interest distributions shall be made at such time as the receiver determines that such distributions are appropriate and only to the extent of funds available in the receivership estate. Post-insolvency interest shall be calculated on the outstanding balance of a proven claim, as reduced...
from time to time by any interim dividend distributions, from the date the receivership is established until the principal amount of a proven claim has been fully distributed but not thereafter. Post-insolvency interest shall be calculated on a contingent claim from the date such claim becomes proven.

(4) Post-insolvency interest shall be determined using a simple interest method of calculation.

[67 FR 34386, May 14, 2002]

PART 361—MINORITY AND WOMEN OUTREACH PROGRAM CONTRACTING

Sec.

361.1 Why do minority- and women-owned businesses need this outreach regulation?

361.2 Why does the FDIC have this outreach program?

361.3 Who may participate in this outreach program?

361.4 What contracts are eligible for this outreach program?

361.5 What are the FDIC’s oversight and monitoring responsibilities in administering this program?

361.6 What outreach efforts are included in this program?

AUTHORITY: 12 U.S.C. 1833e.

SOURCE: 65 FR 31253, May 17, 2000, unless otherwise noted.

§ 361.1 Why do minority- and women-owned businesses need this outreach regulation?

The purpose of the FDIC Minority and Women Outreach Program (MWOP) is to ensure that minority- and women-owned businesses (MWOBs) are given the opportunity to participate fully in all contracts entered into by the FDIC.

§ 361.2 Why does the FDIC have this outreach program?

It is the policy of the FDIC that minorities and women, and businesses owned by them have the maximum practicable opportunity to participate in contracts awarded by the FDIC.

§ 361.3 Who may participate in this outreach program?

For purposes of this part:
(a) Minority has the same meaning as defined by the Small Business Administration at 13 CFR 124.103(b).
(b) Legal Services means all services provided by attorneys or law firms (including services of support staff).

§ 361.4 What contracts are eligible for this outreach program?

The FDIC outreach program applies to all contracts entered into by the FDIC. The outreach program is incorporated into FDIC policies and guidelines governing contracting and the retention of legal services.

§ 361.5 What are the FDIC’s oversight and monitoring responsibilities in administering this program?

(a) The FDIC Office of Diversity and Economic Opportunity (ODEO) has overall responsibility for nationwide outreach oversight, which includes, but is not limited to, the monitoring, review and interpretation of relevant regulations. In addition, the ODEO is responsible for providing the FDIC with technical assistance and guidance to facilitate the identification, registration, and solicitation of MWOBs.

(b) Each FDIC office that performs contracting or outreach activities will submit information to the ODEO 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.

§ 361.6 What outreach efforts are included in this program?

(a) Each office engaged in contracting with the private sector will designate one or more MWOP coordinators. The coordinators will perform outreach activities for MWOP and act as liaison between the FDIC and the public on MWOP issues. On a quarterly basis, or as requested by the ODEO, the coordinators will report to the ODEO on their implementation of the outreach 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.

(c) The identification of MWOBs for the provision of legal and non-legal services will primarily be accomplished by:
(1) Obtaining various lists and directories of MWOBs 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 the 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.

PART 362—ACTIVITIES OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

Subpart A—Activities of Insured State Banks

Sec.
362.1 Purpose and scope.
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Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

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Subpart C—Activities of Insured State Savings Associations

362.9 Purpose and scope.
362.10 Definitions.
362.11 Activities of insured State savings associations.
362.12 Service corporations of insured State savings associations.
362.13 Approvals previously granted.

Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

362.14 Purpose and scope.
§ 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 the Deposit 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 that is owned or controlled directly or indirectly by one or more insured depository institutions.

(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 non-member 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 purpose 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. Common or preferred stock listed on a national securities exchange (listed stock); or

2. Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) (registered shares); and

(B) Which during 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 Deposit Insurance Fund. Approval may be subject to whatever conditions or restrictions the

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(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 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, 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 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)

1Financial institution letters (FILs) are available in the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C. 20429.
of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the Deposit Insurance Fund 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 Fund. 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.

(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 Fund. 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
§ 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 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 Fund 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) The bank meets the capital requirements of paragraph (e) of this section; and

(B) The subsidiary is an “eligible subsidiary” as described in paragraph (c)(2) of this section; or

(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 Fund:

(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 (DSC) in writing within 10 business days after such changes.
Federal Deposit Insurance Corporation

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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)(iii)(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 Fund, 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 (DSC) 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)(i), (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 insured state nonmember bank lawfully controlled or acquired the subsidiary and had an approved notice or order from the FDIC prior to November 12, 1999 and 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 (DSC) 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 Fund. 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 requirements 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 Fund 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). 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 (DSC) 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 executive 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.

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;

(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;

(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 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(d)(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)–(5) [Reserved]
(6) Adjustable rate or money market preferred stock. An insured State bank owning adjustable rate or money market preferred stock (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.

banking agency or the state non-member bank 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 the state non-member bank and the securities underwriting affiliate company comply with the following requirements:

(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 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;

(3) The bank adopts policies and procedures, including appropriate limits on exposure, to govern its participation in financing transactions underwritten by an underwriting affiliate;

(4) 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;

(5) The bank complies with the investment and transaction limitations in sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c–1) with respect to the affiliate.

[66 FR 1028, Jan. 5, 2001]

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 Fund 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 has the same meaning as provided in subpart B of this part.

(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 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 Fund 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 Deposit Insurance Fund. Applications should be filed in accordance with §303.141 of this chapter and the FDIC will process 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 Deposit Insurance Fund.

(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 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 Fund. 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 Fund. Such instruments shall be included in the 15 percent of tier one capital limit imposed in paragraph (b)(2)(i)(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
§ 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.

(2) Service corporations conducting unrestricted activities. The FDIC has determined that the following activities do not represent a significant risk to the Deposit Insurance Fund:

(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)(i)(B) so long as instruments held under this paragraph and paragraph (b)(2)(iv) of this section, and §362.11(b)(2)(ii)(B), paragraph (b)(2)(i)(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 Fund 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. The activities covered by this paragraph may include, but are not limited to, acquiring and retaining equity securities of a company engaged in the public sale distribution or underwriting of securities.

(2) Service corporations conducting unrestricted activities. The FDIC has determined that the following activities do not represent a significant risk to the Deposit Insurance Fund:

(i) [Reserved]

(ii) A service corporation of an insured state savings association may acquire and retain equity securities of a company engaged in any activity permissible for a Federal savings association, 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)(i)(B) so long as instruments held under this paragraph and paragraph (b)(2)(iv) of this section, and §362.11(b)(2)(ii)(B), paragraph (b)(2)(i)(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 Fund 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. The activities covered by this paragraph may include, but are not limited to, acquiring and retaining equity securities of a company engaged in the public sale distribution or underwriting of securities.

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(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 a 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)–(4) [Reserved]

(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 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.
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.

§ 362.17 Definitions.

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

(a) Activity, company, control, insured depository institution, insured state bank, insured state nonmember bank and subsidiary have the same meaning as provided in subpart A of this part.

(b) Affiliate has the same meaning provided in subpart B of this part.

(c) Financial subsidiary means any company that is controlled by one or more insured depository institutions other than:

(1) A subsidiary that only engages in activities that the state nonmember bank is permitted to engage in directly and that are conducted on the same terms and conditions that govern the conduct of the activities by the state nonmember bank; or

(2) A subsidiary that the state nonmember bank is specifically authorized to control by the express terms of a federal statute (other than section 46(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831w)), and not by implication or interpretation, such as the Bank Service Company Act (12 U.S.C. 1861 et seq.).

(d) Tangible equity and Tier 2 capital have the same meaning as set forth in part 325 of this chapter.

(e) Well-managed means:

(1) Unless otherwise determined in writing by the appropriate federal...
§ 362.18 Financial subsidiaries of insured state nonmember banks.

(a) "As principal" activities. An insured state nonmember bank may not obtain control of or hold an interest in a financial subsidiary that engages in activities as principal or commence any such new activity pursuant to section 46(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831w) unless the insured state nonmember bank files a notice containing the information required in §303.121(b) of this chapter and certifies that:

1. The insured state nonmember bank is well-managed;
2. The insured state nonmember bank and all of its insured depository institution affiliates are well-capitalized as defined in the appropriate capital regulation and guidance of each institution's primary federal regulator; and
3. The insured state nonmember bank will deduct the aggregate amount of its outstanding equity investment, including retained earnings, in all financial subsidiaries that engage in activities as principal pursuant to section 46(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831w), from the bank's total assets and tangible equity and deduct such investment from its total risk-based capital (this deduction shall be made equally from Tier 1 and Tier 2 capital).

(b) Community Reinvestment Act (CRA). An insured state nonmember bank may not commence any new activity subject to section 46(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831w) or directly or indirectly acquire control of a company engaged in any such activity pursuant to §362.18(a)(1), if the bank or any of its insured depository institution affiliates received a CRA rating of less than "satisfactory record of meeting community credit needs" in its most recent CRA examination.

(c) Other requirements. An insured state nonmember bank controlling or holding an interest in a financial subsidiary under section 46(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831w) must meet and continue to meet the requirements set forth in paragraph (a) of this section as long as the insured state nonmember bank holds the financial subsidiary and:

1. Disclose and continue to disclose the capital separation required in paragraph (a)(3) in any published financial statements;
2. Comply and continue to comply with sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c–1) as if the subsidiary were a financial subsidiary of a national bank; and
3. Comply and continue to comply with the financial and operational standards provided by section 5136A(d) of the Revised Statutes of the United States (12 U.S.C. 24A(d)), unless otherwise determined by the FDIC.

(d) Securities underwriting. If the financial subsidiary of the insured state nonmember bank will engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes, or other securities activity of a type permissible for a national bank only through a financial subsidiary, then the state nonmember bank and the financial subsidiary also must comply and continue to comply with the following additional requirements:

1. The securities business of the financial subsidiary must be 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 financial subsidiary from sharing the same facility if the area where the
(1) The financial subsidiary conducts securities business with the public is physically distinct from the routine deposit taking area of the bank;

(2) The financial subsidiary must conduct its securities business pursuant to independent policies and procedures designed to inform customers and prospective customers of the financial subsidiary that the financial subsidiary is a separate organization from the insured state nonmember bank and that the insured state nonmember bank is not responsible for and does not guarantee the obligations of the financial subsidiary;

(3) The bank must adopt policies and procedures, including appropriate limits on exposure, to govern its participation in financing transactions underwritten by its financial subsidiary; and

(4) The bank must not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by its financial subsidiary unless the bank notifies the customer that the entity underwriting, making a market, distributing or dealing in the securities is a financial subsidiary of the bank.

e) Applications for exceptions to certain requirements. Any insured state nonmember bank that is unable to comply with the well-managed requirement of §362.18(a)(1) and (c)(1), any state nonmember bank that has appropriate reasons for not meeting the financial and operational standards applicable to a financial subsidiary of a national bank conducting the same activities as provided in §362.18(c)(3) or any state nonmember bank and its financial subsidiary subject to the securities underwriting activities requirements in §362.18(d) that is unable to meet such requirements may submit an application in compliance with §303.121 of this chapter to seek a waiver or modification of such requirements under the procedure in §303.122(b) of this chapter. The FDIC may impose additional prudential safeguards as are necessary as a condition of its consent.

f) Failure to meet requirements—(1) Notification by F D I C. The FDIC will notify the insured state nonmember bank in writing and identify the areas of noncompliance, if:

(i) The FDIC finds that an insured state nonmember bank or any of its insured depository institution affiliates is not in compliance with the CRA requirement of §362.18(b) at the time any new activity is commenced or control of the financial subsidiary is acquired;

(ii) The FDIC finds that the facts to which an insured state nonmember bank certified under §362.18(a) are not accurate in whole or in part; or

(iii) The FDIC finds that the insured state nonmember bank or any of its insured depository institution affiliates or the financial subsidiary fails to meet or continue to comply with the requirements of §362.18(c) and (d), if applicable, and the FDIC has not granted an exception under the procedures set forth in §362.18(e) and in §303.122(b) of this chapter.

(2) Notification by state nonmember bank. An insured state nonmember bank that controls or holds an interest in a financial subsidiary must promptly notify the FDIC if the bank becomes aware that any depository institution affiliate of the bank has ceased to be well-capitalized.

(3) Subsequent action by FDIC. The FDIC may take any appropriate action or impose any limitations, including requiring that the insured state nonmember bank to divest control of any such financial subsidiary, on the conduct or activities of the insured state nonmember bank or any financial subsidiary of the insured state bank that fails to:

(i) Meet the requirements listed in §362.18(a) and (b) at the time that any new section 46 activity is commenced or control of a financial subsidiary is acquired by an insured state nonmember bank; or

(ii) Meet and continue to meet the requirements listed in §362.18(c) and (d), as applicable.

(g) Coordination with section 24 of the Federal Deposit Insurance Act—(1) Continuing authority under section 24. Notwithstanding §362.18(a) through (f), an insured state bank may retain its interest in any subsidiary:

(i) That was conducting a financial activity with authorization in accordance with section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a)
and the applicable implementing regulation found in subpart A of this part 362 before the date on which any such activity became for the first time permissible for a financial subsidiary of a national bank; and

(ii) Which insured state nonmember bank and its subsidiary continue to meet the conditions and restrictions of the section 24 order or regulation approving the activity as well as other applicable law.

(2) Continuing authority under section 24(f) of the Federal Deposit Insurance Act. Notwithstanding §362.18(a) through (f), an insured state bank with authority under section 24(f) of the Federal Deposit Insurance Act (12 U.S.C. 1831a(f)) to hold equity securities may continue to establish new subsidiaries to engage in that investment activity.

(3) Relief from conditions. Any state nonmember bank that meets the requirements of paragraph (g)(1) of this section or that is subject to section 46(b) of the Federal Deposit Insurance Act (12 U.S.C. 1831w(b)) may submit an application in compliance with §303.121 of this chapter and seek the consent of the FDIC under the procedure in §303.122(b) of this chapter for modification of any conditions or restrictions the FDIC previously imposed in connection with a section 24 order or regulation approving the activity.

(4) New financial subsidiaries. Notwithstanding subpart A of this part 362, an insured state bank may not, on or after November 12, 1999, acquire control of, or acquire an interest in, a financial subsidiary that engages in activities as principal or commences any new activity under section 46(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831w) other than as provided in this section.

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
§ 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 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.
§ 363.5 Audit committees.

(a) Composition and duties. Each insured depository institution shall establish an audit committee of its board of directors, the composition of which com-plies with paragraphs (a)(1), (2), and (3) of this section, and the duties of which shall include reviewing with management and the independent public accountant the basis for the reports issued under this part.

(1) Each insured depository institution with total assets of $1 billion or more as of the beginning of its fiscal year 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.

(2) Each insured depository institution with total assets of $500 million or more but less than $1 billion as of the beginning of its fiscal year shall establish an audit committee of its board of directors, the members of which shall be outside directors, the majority of whom shall be independent of management of the institution. The appropriate Federal banking agency may, by order or regulation, permit the audit committee of such an insured depository institution to be made up of less than a majority of outside directors who are independent of management, if the agency determines that the institution has encountered hardships in retaining and recruiting a sufficient number of competent outside directors to serve on the audit committee of the institution.

(3) An outside director is a director who is not, and within the preceding fiscal year has not been, an officer or employee of the institution or any affiliate of the institution.

(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.


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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. Mult-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.


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.

10. Standards for Internal Controls. Each institution should determine its own standards for establishing, maintaining, and assessing the effectiveness of its internal controls.

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

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1It 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.

2In 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 and Consumer Protection (DSC) Risk Management 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.
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.

**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 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, Accounting and Securities 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 § 363.3(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 or Area Office (Supervision and Consumer Protection), i.e., the FDIC regional or area office in the FDIC region or area that is responsible for monitoring the institution or, in the case of a subsidiary institution of a holding company, 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.


(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 requirement 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, the board of an institution with $1 billion or more in total assets at the beginning of its fiscal year should determine whether all existing and potential audit committee members are “independent of management of the institution” and the board of an institution with total assets of $500 million or more but less than $1 billion as of the beginning of its fiscal year should determine whether the majority of all existing and potential audit committee members are “independent of management of the institution.” 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) Has previously been an officer of the institution or any affiliate of the institution;

(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.
Federal Deposit Insurance Corporation

29. Lack of independence. An outside director should not be considered independent of management if such director owns or controls, or has owned or controlled within the preceding fiscal 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)(B)(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 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 the board or annual meeting of stockholders, or one year from the effective date of this part.

36. Modifications of guidelines. The FDIC’s Board of Directors has delegated to the Director of the FDIC’s Division of Supervision and Consumer Protection (DSC) authority to make and publish in the Federal Register...
minor technical amendments to the Guidelines in 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 mem-
| bank | ber banks | State non-
| member banks | Savings as-
| sociations |
|---|---|---|---|
| **Insider Loans—Parts and/or Sections of Title 12 of the United States Code** | | | |
| 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) | | (2) | |
| **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. | ✓ | ✓ | (1) | (1) |
| Subpart B—Reports of Indebtedness of Executive Officers and Principal Shareholders of Insured Nonmember Banks. | ✓ | ✓ | (1) | (1) |
| 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. | ✓ | ✓ | | |
| 1831a ........................ Declaration of Dividends. | | | ✓ | |
| 1831a ........................ 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. | | | ✓ | |
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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.

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 (FDI ACT) requires each Federal banking agency (collectively, the agencies) to establish certain safety and soundness standards by regulation or by guideline for all insured depository institutions. Under section 39, the agencies must establish three types of standards: (1) Operational and managerial standards; (2) compensation standards; and (3) such standards relating to asset quality, earnings, and stock valuation as they determine to be appropriate.

ii. Section 39(a) requires the agencies to establish operational and managerial standards relating to: (1) Internal controls, information systems and internal audit systems, in accordance with section 36 of the FDI Act (12 U.S.C. 1831m); (2) loan documentation; (3) credit underwriting; (4) interest rate exposure; (5) asset growth; and (6) compensation, fees, and benefits, in accordance with subsection (c) of section 39. Section 39(b) requires the agencies to establish standards relating to asset quality, earnings, and stock valuation that the agencies determine to be appropriate.

iii. Section 39(c) requires the agencies to establish standards prohibiting as an unsafe and unsound practice any compensatory arrangement that would provide any executive officer, employee, director, or principal shareholder of the institution with excessive compensation, fees or benefits and any compensatory arrangement that could lead to material financial loss to an institution. Section 39(c) also requires that the agencies establish standards that specify when compensation is excessive.

iv. If an agency determines that an institution fails to meet any standard established by guideline under subsection (a) or (b) of section 39, the agency may require the institution to submit to the agency an acceptable plan to achieve compliance with the standard. In the event that an institution fails to submit an acceptable plan within the time 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.

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 Fund.

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 1813p-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.

Federal Deposit Insurance Corporation

3. Compensation means all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

4. Director shall have the meaning described in 12 CFR 215.2(c).3

5. Executive officer shall have the meaning described in 12 CFR 215.2(d).4

6. Principal shareholder shall have the meaning described in 12 CFR 215.2(l).5

II. OPERATIONAL AND MANAGERIAL STANDARDS

A. Internal controls and information systems. An institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities and that provide for:

1. An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies;
2. Effective risk assessment;
3. Timely and accurate financial, operational and regulatory reports;
4. Adequate procedures to safeguard and manage assets; and
5. Compliance with applicable laws and regulations.

B. Internal audit system. An institution should have an internal audit system that is appropriate to the size of the institution and the nature and scope of its activities and that provides for:

1. Adequate monitoring of the system of internal controls through an internal audit function. For an institution whose size, complexity or scope of operations does not warrant a full scale internal audit function, a system of independent reviews of key internal controls may be used;
2. Independence and objectivity;
3.Qualified persons;
4. Adequate testing and review of information systems;
5. Adequate documentation of tests and findings and any corrective actions;

C. Compliance with applicable laws and regulations.

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.

APPENDIX B TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING INFORMATION SECURITY STANDARDS

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I. INTRODUCTION

The Interagency Guidelines Establishing Information Security Standards (Guidelines) set forth standards pursuant to section 39 of the Federal Deposit Insurance Act, 12 U.S.C. 1831p–1, and sections 501 and 505(b), 15 U.S.C. 6801 and 6805(b), of the Gramm-Leach-Bliley Act. These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information. These
Guidelines also address standards with respect to the proper disposal of consumer information pursuant to sections 621 and 628 of the Fair Credit Reporting Act (15 U.S.C. 1681a and 1681w).

A. Scope. The Guidelines apply to customer information maintained by or on behalf of, and to the disposal of consumer information by or on behalf of, entities over which the Federal Deposit Insurance Corporation (FDIC) has authority. Such entities, referred to as “the bank” are banks insured by the FDIC (other than members of the Federal Reserve System), insured state branches of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

B. Preservation of Existing Authority. Neither section 39 nor these Guidelines in any way limit the authority of the FDIC to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. The FDIC may take action under section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to the FDIC.

C. Definitions. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p-1).

2. For purposes of the Guidelines, the following definitions apply:
   a. Board of directors, in the case of a branch or agency of a foreign bank, means the managing official in charge of the branch or agency.
   b. Consumer information means any record about an individual, whether in paper, electronic, or other form, that is maintained in or otherwise possessed by or on behalf of the bank for a business purpose. Consumer information also means a compilation of such records. The term does not include any record that does not personally identify an individual.
   i. Examples:
      (1) Consumer information includes:
         (A) A consumer report that a bank obtains;
         (B) Information from a consumer report that the bank obtains from its affiliate after the consumer has been given a notice and has elected not to opt out of that sharing;
         (C) Information from a consumer report that the bank obtains about an individual who applies for but does not receive a loan, including any loan sought by an individual for a business purpose;
         (D) Information from a consumer report that the bank obtains about an individual who guarantees a loan (including a loan to a business entity); or
         (E) Information from a consumer report that the bank obtains about an employee or prospective employee.
      (2) Consumer information does not include:
         (A) Aggregate information, such as the mean score, derived from a group of consumer reports; or
         (B) Blind data, such as payment history on accounts that are not personally identifiable, that may be used for developing credit scoring models or for other purposes.
   c. Consumer report has the same meaning as set forth in the Fair Credit Reporting Act, 15 U.S.C. 1681a(d).
   d. Customer means any customer of the bank as defined in § 332.3(h) of this chapter.
   e. Customer information means any record containing nonpublic personal information, as defined in § 322.4(n) of this chapter, about a customer, whether in paper, electronic, or other form, that is maintained by or on behalf of the bank.
   f. Customer information systems means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.
   g. Service provider means any person or entity that maintains, processes, or otherwise is permitted access to customer information or consumer information through its provision of services directly to the bank.

II. STANDARDS FOR INFORMATION SECURITY

A. Information Security Program. Each bank shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank and the nature and scope of its activities. While all parts of the bank are not required to implement a uniform set of policies, all elements of the information security program must be coordinated.

B. Objectives. A bank’s information security program shall be designed to:
   1. Ensure the security and confidentiality of customer information;
   2. Protect against any anticipated threats or hazards to the security or integrity of such information;
   3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer; and
   4. Ensure the proper disposal of customer information and consumer information.

III. DEVELOPMENT AND IMPLEMENTATION OF INFORMATION SECURITY PROGRAM

A. Involve the Board of Directors. The board of directors or an appropriate committee of the board of each bank shall:
   1. Approve the bank’s written information security program; and
2. Oversee the development, implementation, and maintenance of the bank’s information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. Assess Risk.

Each bank shall:
1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.
2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.
3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. Manage and Control Risk. Each bank shall:
1. Design its information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of the bank’s activities. Each bank must consider whether the following security measures are appropriate for the bank and, if so, adopt those measures the bank concludes are appropriate:
   a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.
   b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;
   c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;
   d. Procedures designed to ensure that customer information system modifications are consistent with the bank’s information security program;
   e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;
   f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;
   g. Response programs that specify actions to be taken when the bank suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and
   h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.
2. Train staff to implement the bank’s information security program.
3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by the bank’s risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.
4. Develop, implement, and maintain, as part of its information security program, appropriate measures to properly dispose of customer information and consumer information in accordance with each of the requirements of this paragraph III.

D. Oversee Service Provider Arrangements. Each bank shall:
1. Exercise appropriate due diligence in selecting its service providers.
2. Require its service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and
3. Where indicated by the bank’s risk assessment, monitor its service providers to confirm that they have satisfied their obligations as required by paragraph D.2. As part of this monitoring, a bank should review audits, summaries of test results, or other equivalent evaluations of its service providers.

E. Adjust the Program. Each bank shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of its customer information, internal or external threats to information, and the bank’s own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. Report to the Board. Each bank shall report to its board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and the bank’s compliance with these Guidelines. The report, which will vary depending upon the complexity of each bank’s program, should discuss material matters related to its program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations, and management’s responses; and recommendations for changes in the information security program.

G. Implement the Standards. 1. Effective date. Each bank must implement an information
Federal Deposit Insurance Corporation

security program pursuant to these Guidelines by July 1, 2001.

2. Two-year grandfathering of agreements with service providers. Until July 1, 2003, a contract that a bank has entered into with a service provider to perform services for it or on its behalf, satisfies the provisions of paragraph III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information as long as the bank entered into the contract on or before March 5, 2001.

3. Effective date for measures relating to the disposal of consumer information. Each bank must satisfy these Guidelines with respect to the proper disposal of consumer information by July 1, 2005.

4. Exception for existing agreements with service providers relating to the disposal of consumer information. Notwithstanding the requirement in paragraph III.G.3, a bank’s contracts with its service providers that have access to consumer information and that may dispose of consumer information, entered into before July 1, 2005, must comply with the provisions of the Guidelines relating to the proper disposal of consumer information by July 1, 2006.

SUPPLEMENT A TO APPENDIX B TO PART 364—INTERAGENCY GUIDANCE ON RESPONSE PROGRAMS FOR UNAUTHORIZED ACCESS TO CUSTOMER INFORMATION AND CUSTOMER NOTICE

I. BACKGROUND

This Guidance interprets section 501(b) of the Gramm-Leach-Bliley Act ("GLBA") and the Interagency Guidelines Establishing Information Security Standards (the "Security Guidelines") and describes response programs, including customer notification procedures, that a financial institution should develop and implement to address unauthorized access to or use of customer information that could result in substantial harm or inconvenience to a customer. The scope of, and definitions of terms used in, this Guidance are identical to those of the Security Guidelines.

This Guidance is being jointly issued by the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS).

1. The Security Guidelines direct every financial institution to have an information security program designed to:
   a. Ensure the security and confidentiality of customer information;
   b. Protect against any anticipated threats or hazards to the security or integrity of such information; and
   c. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

2. Following the assessment of these risks, the Security Guidelines require a financial institution to design a program to address the identified risks. The particular security measures an institution should adopt will depend upon the risks presented by the complexity and scope of its business. At a minimum, the financial institution is required to consider the specific security measures enumerated in the Security Guidelines, and means any record containing nonpublic personal information about a customer, whether in paper, electronic, or other form, maintained by or on behalf of the institution.

A. Interagency Security Guidelines

Section 501(b) of the GLBA required the Agencies to establish appropriate standards for financial institutions subject to their jurisdiction that include administrative, technical, and physical safeguards, to protect the security and confidentiality of customer information. Accordingly, the Agencies issued Security Guidelines requiring every financial institution to have an information security program designed to:

1. Ensure the security and confidentiality of customer information;
2. Protect against any anticipated threats or hazards to the security or integrity of such information; and
3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

B. Risk Assessment and Controls

1. The Security Guidelines direct every financial institution to assess the following risks, among others, when developing its information security program:
   a. Reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems;
   b. The likelihood and potential damage of threats, taking into consideration the sensitivity of customer information; and
   c. The sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.3

2. Following the assessment of these risks, the Security Guidelines require a financial institution to design a program to address the identified risks. The particular security measures an institution should adopt will depend upon the risks presented by the complexity and scope of its business. At a minimum, the financial institution is required to consider the specific security measures enumerated in the Security Guidelines, and adopt those that are appropriate for the institution, including:
   a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to

3. See Security Guidelines, III.B.
4. See Security Guidelines, III.C.
obtain this information through fraudulent means;

b. Background checks for employees with responsibilities for access to customer information; and

c. Response programs that specify actions to be taken when the financial institution suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies.  

C. Service Providers

The Security Guidelines direct every financial institution to require its service providers by contract to implement appropriate measures designed to protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.  

II. RESPONSE PROGRAM

Millions of Americans, throughout the country, have been victims of identity theft.  

Identity thieves misuse personal information they obtain from a number of sources, including financial institutions, to perpetrate identity theft. Therefore, financial institutions should take preventative measures to safeguard customer information against attempts to gain unauthorized access to the information. For example, financial institutions should place access controls on customer information systems and conduct background checks for employees who are authorized to access customer information.  

However, every financial institution should also develop and implement a risk-based response program to address incidents of unauthorized access to customer information in customer information systems that occur nonetheless. A response program should be a key part of an institution’s information security program. The program should be appropriate to the size and complexity of the institution and the nature and scope of its activities.

In addition, each institution should be able to address incidents of unauthorized access to customer information in customer information systems maintained by its domestic and foreign service providers. Therefore, consistent with the obligations in the Guidelines that relate to these arrangements, and with existing guidance on this topic issued by the Agencies, an institution’s contract with its service provider should require the service provider to take appropriate actions to address incidents of unauthorized access to the financial institution’s customer information, including notification to the institution as soon as possible of any such incident, to enable the institution to expeditiously implement its response program.

A. Components of a Response Program

1. At a minimum, an institution’s response program should contain procedures for the following:

a. Assessing the nature and scope of an incident, and identifying what customer information systems and types of customer information have been accessed or misused;  

Under the Guidelines, an institution’s customer information systems consist of all of the methods used to access, collect, store, use, transmit, protect, or dispose of customer information, including the systems maintained by its service providers. See Security Guidelines, I.C.2.d (I.C.2.c for OTS).

b. Background checks for employees with responsibilities for access to customer information, including the systems maintained by OTS.

c. Response programs that specify actions to be taken when the financial institution suspects or detects that unauthorized individuals have gained access to customer information systems that occur nonetheless. A response program should be a key part of an institution’s information security program. The program should be appropriate to the size and complexity of the institution and the nature and scope of its activities.

In addition, each institution should be able to respond to incidents of unauthorized access to customer information in customer information systems maintained by its domestic and foreign service providers. Therefore, consistent with the obligations in the Guidelines that relate to these arrangements, and with existing guidance on this topic issued by the Agencies, an institution’s contract with its service provider should require the service provider to take appropriate actions to address incidents of unauthorized access to the financial institution’s customer information, including notification to the institution as soon as possible of any such incident, to enable the institution to expeditiously implement its response program.

b. Background checks for employees with responsibilities for access to customer information, including the systems maintained by OTS.

c. Response programs that specify actions to be taken when the financial institution suspects or detects that unauthorized individuals have gained access to customer information systems that occur nonetheless. A response program should be a key part of an institution’s information security program. The program should be appropriate to the size and complexity of the institution and the nature and scope of its activities.

In addition, each institution should be able to respond to incidents of unauthorized access to customer information in customer information systems maintained by its domestic and foreign service providers. Therefore, consistent with the obligations in the Guidelines that relate to these arrangements, and with existing guidance on this topic issued by the Agencies, an institution’s contract with its service provider should require the service provider to take appropriate actions to address incidents of unauthorized access to the financial institution’s customer information, including notification to the institution as soon as possible of any such incident, to enable the institution to expeditiously implement its response program.

5 See Security Guidelines, III.C.
6 See Security Guidelines, II.B. and III.D. Further, the Agencies note that, in addition to contractual obligations to a financial institution, a service provider may be required to implement its own comprehensive information security program in accordance with the Safeguards Rule promulgated by the Federal Trade Commission (“FTC”), 16 CFR part 316.
8 Institutions should also conduct background checks of employees to ensure that the institution does not violate 12 U.S.C. 1829, which prohibits an institution from hiring an individual convicted of certain criminal offenses or who is subject to a prohibition order under 12 U.S.C. 1818(e)(6).  

9 Under the Guidelines, an institution’s customer information systems consist of all of the methods used to access, collect, store, use, transmit, protect, or dispose of customer information, including the systems maintained by its service providers. See Security Guidelines, I.C.2.d (I.C.2.c for OTS).


b. Notifying its primary Federal regulator as soon as possible when the institution becomes aware of an incident involving unauthorized access to or use of sensitive customer information, as defined below;  
c. Consistent with the Agencies' Suspicious Activity Report ("SAR") regulations, notifying appropriate law enforcement authorities in addition to filing a timely SAR in situations involving Federal criminal violations requiring immediate attention, such as when a reportable violation is ongoing;  
d. Taking appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information, for example, by monitoring, freezing, or closing affected accounts, while preserving records and other evidence; and  
e. Notifying customers when warranted.  

2 Where an incident of unauthorized access to customer information involves customer information systems maintained by an institution's service providers, it is the responsibility of the financial institution to notify the institution's customers and regulator. However, an institution may authorize or contract with its service provider to notify customers when warranted.

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12 An institution's obligation to file a SAR is set out in the Agencies' SAR regulations and Agency guidance. See 12 CFR 21.11 (national banks, Federal branches and agencies); 12 CFR 208.62 (State member banks); 12 CFR 211.5(k) (Edge and agreement corporations); 12 CFR 211.24(f) (uninsured State branches and agencies of foreign banks); 12 CFR 225.4(f) (bank holding companies and their nonbank subsidiaries); 12 CFR part 353 (State non-member banks); and 12 CFR 563.180 (savings associations). National banks must file SARs in connection with computer intrusions and other computer crimes. See OCC Bulletin 2000-14, "Infrastructure Threats—Intrusion Risks" (May 15, 2000); Advisory Letter 97-4, "Reporting Computer Related Crimes" (November 19, 1997) (general guidance still applicable though instructions for new SAR form published in 65 FR 1229, 1230 (January 7, 2000). See also Federal Reserve SR 01-11, Identity Theft and Pretext Calling, Apr. 26, 2001; SR 97-28, Guidance Concerning Reporting of Computer Related Crimes by Financial Institutions, Nov. 6, 1997; F D I C Fil. 46-2000, Suspicious Activity Reports, July 14, 2000; F I L 47-97, Preparation of Suspicious Activity Reports, May 6, 1997; OTS CEO Memorandum 120, Identity Theft and Pretext Calling, May 4, 2001; CEO Memorandum 126, New Suspicious Activity Report Form, July 5, 2000; http://www.ots.treas.gov/ BSA (for the latest SAR form and filing instructions required by OTS as of July 1, 2003).

or a personal identification number or password that would allow access to the customer’s account. Sensitive customer information also includes any combination of components of customer information that would allow someone to log onto or access the customer’s account, such as user name and password or account number.

2. Affected Customers

If a financial institution, based upon its investigation, can determine from its logs or other data precisely which customers’ information has been improperly accessed, it may limit notification to those customers with regard to whom the institution determines that misuse of their information has occurred or is reasonably possible. However, there may be situations where the institution determines that a group of files has been accessed improperly, but is unable to identify which specific customers’ information has been accessed. If the circumstances of the unauthorized access lead the institution to determine that misuse of the information is reasonably possible, it should notify all customers in the group.

B. Content of Customer Notice

1. Customer notice should be given in a clear and conspicuous manner. The notice should describe the incident in general terms and the type of customer information that was the subject of unauthorized access or use. It also should generally describe what the institution has done to protect the customers’ information from further unauthorized access. In addition, it should include a telephone number that customers can call for further information and assistance. The notice also should remind customers of the need to remain vigilant over the next twelve to twenty-four months, and to promptly report incidents of suspected identity theft to the institution. The notice should include the following additional items, when appropriate:
   a. A recommendation that the customer review account statements and immediately report any suspicious activity to the institution;
   b. A description of fraud alerts and an explanation of how the customer may place a fraud alert in the customer’s consumer reports to put the customer’s creditors on notice that the customer may be a victim of fraud;
   c. A recommendation that the customer periodically obtain credit reports from each nationwide credit reporting agency and have information relating to fraudulent transactions deleted;
   d. An explanation of how the customer may obtain a credit report free of charge; and
   e. Information about the availability of the FTC’s online guidance regarding steps a consumer can take to protect against identity theft. The notice should encourage the customer to report any incidents of identity theft to the FTC, and should provide the FTC’s Web site address and toll-free telephone number that customers may use to obtain the identity theft guidance and report suspected incidents of identity theft. The institution should also include any combination of components of customer information that would allow someone to log onto or access the customer’s account, such as user name and password or account number.

2. The Agencies encourage financial institutions to notify the nationwide consumer reporting agencies prior to sending notices to a large number of customers that include contact information for the reporting agencies.

C. Delivery of Customer Notice

Customer notice should be delivered in any manner designed to ensure that a customer can reasonably be expected to receive it. For example, the institution may choose to contact all customers affected by telephone or by mail, or by electronic mail for those customers for whom it has a valid e-mail address and who have agreed to receive communications electronically.


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


SOURCE: 57 FR 62966, 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,
§ 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. 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.

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).
Pt. 365, App. A

The institution should consider both internal and external factors in the formulation of its loan policies and strategic plan. Factors that should be considered include:

• The size and financial condition of the institution.
• The expertise and size of the lending staff.
• The need to avoid undue concentrations of risk.
• Compliance with all real estate related laws and regulations, including the Community Reinvestment Act, anti-discrimination laws, and for savings associations, the Qualified Thrift Lender test.
• Market conditions.

The institution should monitor conditions in the real estate markets in its lending area so that it can react quickly to changes in market conditions that are relevant to its lending decisions. Market supply and demand factors that should be considered include:

• Demographic indicators, including population and employment trends.
• Zoning requirements.
• Current and projected vacancy, construction, and absorption rates.
• Current and projected lease terms, rental rates, and sales prices, including concessions.
• Current and projected operating expenses for different types of projects.
• Economic indicators, including trends and diversification of the lending area.
• Valuation trends, including discount and direct capitalization rates.

Underwriting Standards

Prudently underwritten real estate loans should reflect all relevant credit factors, including:

• The capacity of the borrower, or income from the underlying property, to adequately service the debt.
• The value of the mortgaged property.
• The overall creditworthiness of the borrower.
• The level of equity invested in the property.
• Any secondary sources of repayment.
• Any additional collateral or credit enhancements (such as guarantees, mortgage insurance or takeout commitments).

The lending policies should reflect the level of risk that is acceptable to the board of directors and provide clear and measurable underwriting standards that enable the institution’s lending staff to evaluate these credit factors. The underwriting standards should address:

• The maximum loan amount by type of property.
• Maximum loan maturities by type of property.
• Amortization schedules.

Underwriting standards should address:

• 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.
Federal Deposit Insurance Corporation

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:

<table>
<thead>
<tr>
<th>Loan category</th>
<th>Loan-to-value limit (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Raw land</td>
<td>65</td>
</tr>
<tr>
<td>Land development</td>
<td>75</td>
</tr>
<tr>
<td>Construction:</td>
<td></td>
</tr>
<tr>
<td>Commercial, multifamily,1 and other non-residential</td>
<td>80</td>
</tr>
<tr>
<td>1- to 4-family residential</td>
<td>85</td>
</tr>
<tr>
<td>Improved property</td>
<td>85</td>
</tr>
<tr>
<td>Owner-occupied 1- to 4-family and home equity</td>
<td>(f)</td>
</tr>
</tbody>
</table>

1 Multifamily construction includes condominiums and cooperatives.

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.

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:

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.
• Loans guaranteed or insured by the U.S. government or its agencies, provided that
  the amount of the guaranty or insurance is at least equal to the portion of the loan that
  exceeds the supervisory loan-to-value limit.
• Loans backed by the full faith and credit of a state government, provided that the amount
  of the assurance is at least equal to the portion of the loan that exceeds the supervisory
  loan-to-value limit.
• Loans guaranteed or insured by a state, municipal or local government, or an agency
  thereof, provided that the amount of the guaranty or insurance is at least equal to
  the portion of the loan that exceeds the supervisory loan-to-value limit, and provided
  that the lender has determined that the guarantor or insurer has the financial capacity
  and willingness to perform under the terms of the guaranty or insurance agreement.
• Loans that are to be sold promptly after origination, without recourse, to a financially
  responsible third party.
• Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs), or loans that are renewed, refinanced, or restructured in connection with a workout situation, either with or without the advancement of new funds, where consistent with safe and sound banking practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.
• Loans that facilitate the sale of real estate acquired by the lender in the ordinary course of collecting a debt previously contracted in good faith.
• Loans for which a lien on or interest in real property is taken as additional collateral through an abundance of caution by the lender (e.g., the institution takes a blanket lien on all or substantially all of the assets of the borrower, and the value of the real property is low relative to the aggregate value of all other collateral).
• Loans, such as working capital loans, where the lender does not rely principally on real estate as security and the extension of credit is not used to acquire, develop, or construct permanent improvements on real property.
• Loans for the purpose of financing permanent improvements on real property, but not secured by the property, if such security interest is not required by prudent underwriting practice.

**Exclusions 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:
PART 366—MINIMUM STANDARDS OF INTEGRITY AND FITNESS FOR AN FDIC CONTRACTOR

Sec. 366.0 Definitions.

366.1 What is the purpose of this part?

366.2 What is the scope of this part?

366.3 Who cannot perform contractual services for the FDIC?

366.4 When is there a pattern or practice of defalcation?

366.5 What causes a substantial loss to a federal deposit insurance fund?

366.6 How is my ownership or control determined?

366.7 Will the FDIC waive the prohibitions under § 366.3?

366.8 Who can grant a waiver of a prohibition or conflict of interest?

366.9 What other requirements could prevent me from performing contractual services for the FDIC?

366.10 When would I have a conflict of interest?

366.11 Will the FDIC waive a conflict of interest?
§ 366.0 Definitions.

As used in this part:

(a) The word person refers to an individual, corporation, partnership, or other entity with a legally independent existence.

(b) The terms we, our, and us refer to the Federal Deposit Insurance Corporation (FDIC), except when acting as conservator or operator of a bridge bank.

(c) The terms I, me, my, mine, you, and yourself refer to a person who submits an offer to perform or performs, directly or indirectly, contractual services or functions on our behalf.

(d) The phrase insured depository institution refers to any bank or savings association whose deposits are insured by the FDIC.

§ 366.1 What is the purpose of this part?

This part establishes the minimum standards of integrity and fitness that contractors, subcontractors, and employees of contractors and subcontractors must meet if they perform any service or function on our behalf. This part includes regulations governing conflicts of interest, ethical responsibility, and use of confidential information in accordance with section 12(f)(3) of the FDIC Act, 12 U.S.C. 1822(f)(3), and the prohibitions and the requirements for submission of information in accordance with section 12(f)(4) of the FDIC Act, 12 U.S.C. 1822(f)(4).

§ 366.2 What is the scope of this part?

(a) This part applies to a person who submits an offer to perform or performs, directly or indirectly, a contractual service or function on our behalf.

(b) This part does not apply to:

(1) An FDIC employee for the purposes of title 18, United States Code; or

(2) The FDIC when we operate an insured depository institution such as a bridge bank or conservatorship.

§ 366.3 Who cannot perform contractual services for the FDIC?

We will not enter into a contract with you to perform a service or function on our behalf, if you or any person that owns or controls you, or any entity you own or control:

(a) Has a felony conviction;

(b) Was removed from or is prohibited from participating in the affairs of an insured depository institution as a result of a federal banking agency final enforcement action;

(c) Has a pattern or practice of defalcation; or

(d) Is responsible for a substantial loss to the Deposit Insurance Fund (or any predecessor deposit insurance fund).

§ 366.4 When is there a pattern or practice of defalcation?

(a) You have a pattern or practice of defalcation under § 366.3(c) when you, any person that owns or controls you, or any entity you own or control has a legal responsibility for the payment on at least two obligations that are:

(1) To one or more insured depository institutions;

(2) More than 90 days delinquent in the payment of principal, interest, or a combination thereof; and

(3) More than $50,000 each.

(b) The following are examples of when you have or do not have a pattern or practice of defalcation. These examples are not inclusive.

(1) You have five loans at insured depository institutions. Three of them are 90 days past due. Two of the three loans have outstanding balances of more than $50,000 each. You have a pattern or practice of defalcation.
Federal Deposit Insurance Corporation § 366.9

(2) You have five loans at insured depository institutions. Two of them are 90 days past due. One of the two is with ABC Bank for $170,000. The other one is with XYZ Bank for $60,000. You have a pattern or practice of defalcation.

(3) You have five loans at insured depository institutions. Three of them are 90 days past due. One of the three has an outstanding balance of more than $50,000. The other two have outstanding balances of less than $50,000. You do not have a pattern or practice of defalcation.

(4) You have five loans at insured depository institutions. Three of them have outstanding balances of more than $50,000. Two of those three were 90 days past due but are now current. You do not have a pattern or practice of defalcation.

§ 366.5 What causes a substantial loss to a federal deposit insurance fund?

You cause a substantial loss to the Deposit Insurance Fund (or any predecessor deposit insurance fund) under § 366.3(d) when you, or any person that owns or controls you, or any entity you own or control has:

(a) An obligation to us that is delinquent for 90 days or more and on which there is an outstanding balance of principal, interest, or a combination thereof of more than $50,000;

(b) An unpaid final judgment in our favor that is in excess of $50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding;

(c) A deficiency balance following foreclosure of collateral on an obligation owed to us that is in excess of $50,000, regardless of whether it becomes discharged in whole or in part in a bankruptcy proceeding; or

(d) A loss to us that is in excess of $50,000 that we report on IRS Form 1099-C, Information Reporting for Discharge of Indebtedness.

[67 FR 69991, Nov. 20, 2002, as amended at 71 FR 20527, Apr. 21, 2006]

§ 366.6 How is my ownership or control determined?

(a) Your ownership or control is determined on a case-by-case basis. Your ownership or control depends on the specific facts of your situation and the particular industry and legal entity involved. You must provide documentation to us to use in determining your ownership or control.

(b) The interest of a spouse or other family member in the same organization is imputed to you in determining your ownership or control.

(c) The following are examples of when your ownership or control may or may not exist. These examples are not inclusive.

(1) You have control if you are the president or chief executive officer of an organization.

(2) You have ownership or control if you are a partner in a small law firm. You might not have ownership or control if you are a partner in a large national law firm.

(3) You have control if you are a general partner of a limited partnership. You have ownership or control if you have a limited partnership interest of 25 percent or more.

(4) You have ownership or control if you have the:

(i) Power to vote, directly or indirectly, 25% or more interest of any class of voting stock of a company;

(ii) Ability to direct in any manner the election of a majority of a company’s directors or trustees; or

(iii) Ability to exercise a controlling influence over the company's management and policies.

§ 366.7 Will the FDIC waive the prohibitions under § 366.3?

We may waive the prohibitions for entities other than individuals for good cause shown at our discretion when our need to contract for your services outweighs all relevant factors. The statute does not allow us to waive the prohibitions for individuals.

§ 366.8 Who can grant a waiver of a prohibition or conflict of interest?

The FDIC’s Board of Directors delegates to the Chairman, or his designee, authority to issue waivers and implement procedures for part 366.

§ 366.9 What other requirements could prevent me from performing contractual services for the FDIC?

You must avoid a conflict of interest, be ethically responsible, and maintain
§ 366.10 When would I have a conflict of interest?

(a) You have a conflict of interest when you, any person that owns or controls you, or any entity you own or control:

(1) Has a personal, business, or financial interest or relationship that relates to the services you perform under the contract;

(2) Is a party to litigation against us, or represents a party that is;

(3) Submits an offer to acquire an asset from us for which services were performed during the past three years, unless the contract allows for the acquisition; or

(4) Engages in an activity that would cause us to question the integrity of the service you provided, are providing or offer to provide us, or impairs your independence.

(b) The following are examples of a conflict of interest. These examples are not inclusive.

(1) You submit an offer to perform property management services for us and you own or manage a competing property.

(2) You audit a business under a contract with us and you or a partner in your firm has an ownership interest in that business.

(3) You perform loan services on a pool of loans we are selling, and you submit a bid to purchase one or more of the loans in the pool.

(4) You audit your own work or provide nonaudit services that are significant or material to the subject matter of the audit.

§ 366.11 Will the FDIC waive a conflict of interest?

(a) We may waive a conflict of interest for good cause shown at our discretion when our need to contract for your services outweighs all relevant factors.

(b) The following are examples of when we may grant you a waiver for a conflict of interest. These examples are not inclusive.

(1) We may grant a waiver to an outside counsel who has a representational conflict. We will weigh all relevant facts and circumstances in making our determination.

(2) We may grant a waiver to allow a contractor to acquire an asset from us who is providing or has provided services on that asset. We will consider whether granting the waiver will adversely affect the fairness of the sale, the type of services provided, and other facts and circumstances relevant to the sale in making our determination.

§ 366.12 What are the FDIC’s minimum standards of ethical responsibility?

(a) You and any person who performs services for us must not provide preferential treatment to any person in your dealings with the public on our behalf.

(b) You must ensure that any person you employ to perform services for us is informed about their responsibilities under this part.

(c) You must disclose to us waste, fraud, abuse or corruption. Contact the Inspector General at 1–800–964–FDIC or Ighotline@fdic.gov.

(d) You and any person who performs contract services to us must not:

(1) Accept or solicit for yourself or others any favor, gift, or other item of monetary value from any person who you reasonably believe is seeking an official action from you on our behalf, or has an interest that the performance or nonperformance of your duties to us may substantially affect;

(2) Use or allow the use of our property, except as specified in the contract;

(3) Make an unauthorized promise or commitment on our behalf; or

(4) Provide impermissible gifts or entertainment to an FDIC employee or other person providing services to us.

(e) The following are examples of when you are engaging in unethical behavior. These examples are not inclusive.

(1) Using government resources, including our Internet connection, to conduct any business that is unrelated to the performance of your contract with us.
(2) Submitting false invoices or claims, or making misleading or false statements.

(3) Committing us to forgive or restructure a debt or portion of a debt, unless we provide you with written authority to do so.

§ 366.13 What is my obligation regarding confidential information?

(a) Neither you nor any person who performs services on your behalf may use or disclose information obtained from us or a third party in connection with an FDIC contract, unless:

(1) The contract allows or we authorize the use or disclosure;

(2) The information is generally available to the general public; or

(3) We make the information available to the general public.

(b) The following are examples of when your use of confidential information is inappropriate. These examples are not inclusive.

(1) Disclosing information about an asset, such as internal asset valuations, appraisals or environmental reports, except as part of authorized due diligence materials, to a prospective asset purchaser.

(2) Disclosing a borrower’s or guarantor’s personal or financial information, such as a financial statement to an unauthorized party.

§ 366.14 What information must I provide the FDIC?

You must:

(a) Certify in writing that you can perform services for us under § 366.3 and have no conflict of interest under § 366.10(a).

(b) Submit a list and description of any instance during the preceding five years in which you, any person that owns or controls you, or any entity you own or control, defaulted on a material obligation to an insured depository institution. A default on a material obligation occurs when a loan or advance with an outstanding balance of more than $50,000 is or was delinquent for 90 days or more.

(c) Notify us within 10 business days after you become aware that you, or any person you employ to perform services for us, are not in compliance with this part. Your notice must include a detailed description of the facts of the situation and how you intend to resolve the matter.

(d) Agree in writing that you will employ only persons who meet the requirements of this part to perform services on our behalf.

(e) Comply with any request from us for information.

(f) Retain any information you prepare or rely upon regarding the provisions of this part for a period of three years following termination or expiration and final payment of the related contract for services whichever occurs last.

§ 366.15 What advice or determinations will the FDIC provide me on the applicability of this part?

(a) We are available to you for consultation on those determinations you are responsible for making under this part, including those with respect to any person you employ or engage to perform services for us.

(b) We will determine if this part prohibits you from performing services for us prior to contract award, after contract award, and during the performance of a contract.

(c) We may determine what corrective action you must take.

(d) We may grant you a waiver for good cause shown where provided for under this part.

§ 366.16 When may I seek a reconsideration or review of an FDIC determination?

(a) You may seek reconsideration or review of our initial determination by sending a written request to the individual who issued you the initial decision.

(b) You must provide new information or explain a change in circumstances for our reconsideration of an initial decision. The individual who issued you the initial decision may either make a new determination or refer your request to a higher authority for review.

(c) You must provide an explanation of how you perceive that we misapplied this part that sets forth the legal or factual errors for our review of an initial decision.
§ 366.17 What are the possible consequences for violating this part?

Depending on the circumstances, violations of this part may result in rescission or termination of a contract, as well as administrative, civil, or criminal sanctions.

PART 367—SUSPENSION AND EXCLUSION OF CONTRACTOR AND TERMINATION OF CONTRACTS

Sec.
367.1 Authority, purpose, scope and application.
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367.20 Review and reconsideration of Ethics Counselor decisions.

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.

(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 former Bank Insurance Fund (BIF), the former Savings Association Insurance Fund (SAIF) or the Deposit Insurance Fund, 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 former BIF, the former SAIF, the Deposit Insurance Fund, 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 Deposit Insurance Fund (or any predecessor deposit insurance fund);

(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 anti-trust statutes, including those prescribing 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
§ 367.7 (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.


§ 367.8 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 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.

(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 extension 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
§ 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.
Federal Deposit Insurance Corporation

§ 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 such other information used or considered to be reasonable by such bank in making recommendations to the customer.

§ 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 any 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 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
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 judgment 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 judgment 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 investment decisions, including specific experience with the type of instruments under consideration;

(3) The customer’s ability to understand how market developments would affect the security; and

(4) 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 "*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 (1969).

\(^2\)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

§ 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:
(1) Any branch of a State nonmember bank, and any insured branch of a foreign bank licensed by a State, that:
(i) Is established or acquired outside the bank’s home State pursuant to the interstate branching authority granted
§ 369.3 Loan-to-deposit ratio screen.

(a) Application of screen. Beginning no earlier than one year after a covered interstate branch is acquired or established, 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...
§ 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.
# CHAPTER IV—EXPORT-IMPORT BANK OF THE UNITED STATES

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PART 400—EMPLOYEE FINANCIAL DISCLOSURE AND ETHICAL CONDUCT STANDARDS REGULATIONS


§ 400.101 Cross-reference to employee financial disclosure and ethical conduct standards regulations.

Employees of the Export-Import Bank of the United States (Bank) should refer to:

(a) The executive branch-wide financial disclosure regulations at 5 CFR part 2634;
(b) The executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635; and
(c) The Bank regulations at 5 CFR part 6201 which supplement the executive branch-wide standards.

[60 FR 17628, Apr. 7, 1995]

PART 403—CLASSIFICATION, DECLASSIFICATION, AND SAFE-GUARDING OF NATIONAL SECURITY INFORMATION

Sec. 403.1 General policies and definitions.
403.2 Responsibilities.
403.3 Classification principles and authority.
403.4 Derivative classification.
403.5 Declassification and downgrading.
403.6 Systematic review for declassification.
403.7 Mandatory review for declassification.
403.8 Appeals.
403.9 Fees.
403.10 Safeguarding.
403.11 Enforcement and investigation procedures.

AUTHORITY: E.O. 12356, National Security Information, April 2, 1982 (3 CFR, 1982 Comp. p. 166) (hereafter referred to as the Order), Information Security Oversight Directive No. 1, June 25, 1982 (32 CFR part 2001) (hereafter referred to as the Directive), and National Security Decision Directive 84, “Safeguarding National Security Information,” signed by the President on March 11, 1983 (hereafter referred to as NSDD 84). Violation of the provisions of part 403 may result in the imposition of administrative penalties, and civil and criminal penalties under applicable law. Executive Order 12356 prescribes a uniform system for classifying, declassifying, and safeguarding national security information. It recognizes that it is essential that the public be informed concerning the activities of the Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under the Order unless its disclosure reasonably could be expected to cause damage to the national security.

(b) For the purposes of the Order, the Directive and these guidelines, the following terms shall have the meanings specified below:
1. Information means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.
2. National security information means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.
3. Foreign government information means information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that

§ 403.1 General policies and definitions.

(a) This regulation of the Export-Import Bank (the Bank) implements executive orders which govern the classification, declassification, and safeguarding of national security information and material of the United States. This regulation is based on Executive Order 12356, National Security Information, April 2, 1982 (3 CFR, 1982 Comp. p. 166) (hereafter referred to as the Order), Information Security Oversight Directive No. 1, June 25, 1982 (32 CFR part 2001) (hereafter referred to as the Directive), and National Security Decision Directive 84, “Safeguarding National Security Information,” signed by the President on March 11, 1983 (hereafter referred to as NSDD 84). Violation of the provisions of part 403 may result in the imposition of administrative penalties, and civil and criminal penalties under applicable law. Executive Order 12356 prescribes a uniform system for classifying, declassifying, and safeguarding national security information. It recognizes that it is essential that the public be informed concerning the activities of the Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under the Order unless its disclosure reasonably could be expected to cause damage to the national security.

(b) For the purposes of the Order, the Directive and these guidelines, the following terms shall have the meanings specified below:
1. Information means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.
2. National security information means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.
3. Foreign government information means information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that
§ 403.2 Responsibilities.

In the carrying out of security procedures, responsibility falls on all personnel generally and on certain personnel in a more particular manner.

(a) Individual. Each employee of the Bank having access to classified material has an individual responsibility to protect such information. Classified information should be secured in approved equipment or facilities whenever it is not under the direct control of the employee.

(b) Office and Division Heads. These officials have the additional responsibility of a continuing review for ascertaining that security procedures are properly observed by the personnel comprising their respective offices.

(c) Security Officer. The Security Officer has the responsibility for developing, inspecting, and advising on procedures and controls for safeguarding classified material originating in, received by, in transit through, or in custody of the Bank; the training and orientation of employees; the carrying out of inspections; and the destruction of obsolete and non-record material.

(2) The Security Officer shall be responsible for disseminating written material and conducting oral briefings to inform Bank personnel of the Order, Directive, and regulations. An explanation of the practical application of these procedures and the underlying policy objectives thereof shall be emphasized.

(d) Security Committee. (1) This Committee consists of the General Counsel, as Chairperson, the Security Officer, and other Bank employees, as designated by the President and Chairman (hereinafter referred to as the Chairman) and is responsible for the implementation and enforcement of the Order and the Directive. This Committee will act on all matters with respect to the Bank's administration of these regulations.

(2) All suggestions and complaints regarding the Bank's Information Security Program, including those regarding over-classification, failure to declassify, or delay in declassifying, not otherwise provided for herein, shall be referred to the Security Committee for review.

(3) The Security Committee shall have responsibility for recommending to the Chairman appropriate administrative action to correct abuse or violation of these regulations or of any provision of the Order or Directive thereunder, including but not limited to notification by warning letter, formal suspension without pay, and removal. Upon receipt of such a recommendation, the Chairman shall make a decision and advise the Security Committee of this action.

§ 403.3 Classification principles and authority.

(a) Classification Principles. Except as provided in the Atomic Energy Act of 1954, as amended, the Order provides the only basis for classifying national security information. Information held by the Bank will be made available to the public to the extent possible consistent with the need to protect the national defense or foreign relations, as required by the interests of the United

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States and its citizens. Accordingly, security classification shall be applied only to protect the national security.

(2) Before a classification determination is made, each item of information that may require protection shall be identified exactly. This requires identification of that specific information, disclosure of which could affect the national security. When there is reasonable doubt about the need to classify, the information should be safeguarded as if it were confidential until a final determination is made by an authorized classifier as to its classification. The final determination must be made within thirty (30) days.

(b) Classification Designations. Information which requires protection against unauthorized disclosure in the interest of national security (classified information) shall be classified at one of the following three levels:

(1) TOP SECRET shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) SECRET shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) CONFIDENTIAL shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

Except as provided by statute, no other terms, such as SENSITIVE, OFFICIAL BUSINESS ONLY, AGENCY, BUSINESS, ADMINISTRATIVELY, etc., shall be used within the Bank in conjunction with any of the three classification levels defined above.

(c) Original Classification Authority and Criteria. (1) The Bank's authority to assign original classification to any document is limited as follows and is nondelegable:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Classifier</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONFIDENTIAL</td>
<td>President and Chairman. First Vice President and Vice Chairman. General Counsel. Senior Vice Presidents. Security Officer.</td>
</tr>
</tbody>
</table>

(2) A determination to classify information shall be made by an original classification authority when the information concerns one or more of categories (i) through (x) of this paragraph, and when the unauthorized disclosure of the information, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security. Information shall be considered for classification if it concerns:

(i) Military plans, weapons, or operations;

(ii) The vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

(iii) Foreign government information;

(iv) Intelligence activities (including special activities), or intelligence sources or methods;

(v) Foreign relations or foreign activities of the United States;

(vi) Scientific, technological, or economic matters relating to the national security;

(vii) United States Government programs for safeguarding nuclear materials or facilities;

(viii) Cryptology;

(ix) A confidential source; or

(x) Other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President of the United States, by the Chairman or by other officials who have been delegated original classification authority by the President. Recommendations concerning the need to designate additional categories of information that may be considered for classification shall be forwarded through the Security Officer to the Chairman for determination. Such a determination shall be reported to the Director of the Information Security Oversight Office.

(3) Information that is determined to concern one or more of the above categories shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to
the national security. Accordingly, certain information which would otherwise be unclassified may require classification when associated with other unclassified or classified information. Classification on this basis shall be supported by a written explanation that, at a minimum, shall be maintained with the file or reference on the recent copy of the information.

(4) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or disclosure of intelligence sources or methods is presumed to cause damage to the national security.

(5) Information classified in accordance with the above classification categories shall not be declassified automatically as a result of any unofficial publication or inadvertent or unauthorized disclosure in the United States or abroad of identical or similar information.

(d) Duration of Original Classification.

(1) Information shall be classified as long as required by national security considerations. When it can be determined, a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified. If the date or event for declassification cannot be determined at the time of classification, the standard notation "Originating Agency's Determination Required", or its abbreviation "OADR", should be entered on the "Declassify on" line.

(2) Automatic declassification determinations under predecessor orders shall remain valid unless the classification is extended by an authorized declassification authority. These extensions may be by individual documents or categories of information, provided, however, that any extension of classification on other than an individual document basis shall be reported to the Director of the Information Security Oversight Office. The declassification authority shall be responsible for notifying holders of the information of such extensions.

(3) Information classified under predecessor orders and marked for declassification review shall remain classified until reviewed for declassification under the provisions of the Order.

(e) Marking and Identification. (1) Classified information must be marked, or otherwise identified, to inform and warn the holder of the information of its sensitivity. The classifier is responsible for ensuring that proper classification markings are applied. At the time of classification, the following information shall be shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved, unless this information itself would reveal a confidential source or relationship not otherwise evident in the document or information:

(i) One of the three classification levels defined in §403.3(b); "(TS)" for Top Secret, "(S)" for Secret, "(C)" for Confidential, and "(U)" for Unclassified; with each page marked at top and bottom according to the highest level of classified information on each page.

(ii) The identity of the original classification authority if other than the person whose name appears as the approving or signing official;

(iii) The agency and office of origin; and

(iv) The date or event for declassification, or the notation "Originating Agency's Determination Required."

(2) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are not classified. The Chairman may, for good cause, grant and revoke waivers of this requirement for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

(3) Marking designations implementing the provisions of the Order, including abbreviations, shall conform to the standards prescribed in implementing directives issued by the Information Security Oversight Office. All authorized classifiers shall be issued a uniform stamp that has a "Classified by" line and a "Declassify on" line.

(4) Documents that contain foreign government information shall include either the marking, "FOREIGN GOVERNMENT INFORMATION", or a marking that otherwise indicates that the information is foreign government
Export-Import Bank of the U.S. § 403.4

information. If that fact must be concealed, the document will be marked as if it were of U.S. origin. Foreign government information shall either retain its original classification or be assigned a United States classification that shall ensure a degree of protection at least equivalent to that required by the entity that furnished the information.

(5) Documents that contain information relating to intelligence sources or methods shall include the following marking unless prescribed by the Director of the Central Intelligence:

WARNING NOTICE—INTELLIGENCE SOURCES OR METHODS INVOLVED.

(6) Information assigned a level of classification under predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Omitted markings may be inserted on a document by the General Counsel or the Security Officer.

(f) Limitations on Classification.

(1) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

(2) Basic scientific research information not clearly related to the national security may not be classified.

(3) The Chairman or other authorized original classifiers may reclassify information previously declassified and disclosed if it is determined in writing that—

(i) The information requires protection in the interest of national security, and

(ii) The information may reasonably be recovered.

In making such determination, the Chairman or any other authorized original classifier shall consider the following factors: The lapse of time following disclosure; the nature and extent of disclosure; the ability to bring the fact of reclassification to the attention of persons to whom the information was disclosed; the ability to prevent further disclosure; and the ability to retrieve the information voluntarily from persons not authorized access to its reclassified state. These reclassification actions shall be reported promptly to the Director of the Information Security Oversight Office.

(4) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of the Order and these regulations, if such classification meets the requirements of the Order and is accomplished personally and on a document-by-document basis by the Chairman, the Vice Chairman, or the Security Officer.

§ 403.4 Derivative classification.

(a) Use of derivative classification.

Unlike original classification which is an initial determination, derivative classification is an incorporation, paraphrasing, restatement, or generation in new form of information that is already classified. Derivative classification is the responsibility of those who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide. Original classification authority is not required for derivative classification.

(2) Persons who apply such derivative classification markings shall:

(i) Respect original classification decisions;

(ii) Verify the information’s current level of classification so far as practicable before applying the markings; and

(iii) Carry forward to any newly created documents the assigned dates or events for declassification or review. The latest date for declassification should be entered in the case of multiple source documents.

(b) New Material.

(1) New material that derives its classification from information classified on or after the effective date of the Order, April 2, 1982, shall be marked with the declassification date or event, or the date for review, as assigned to the source information.
§ 403.5 Declassification and downgrading.

(a) Authority and policy for declassification and downgrading. Information that continues to meet the classification requirements prescribed in §403.3(c) despite the passage of time will continue to be safeguarded. However, information which is properly classified at the time it is developed may not necessarily require protection indefinitely. National security information over which the Bank exercises final classification jurisdiction shall be declassified or downgraded as soon as national security considerations permit. Information shall be declassified or downgraded by:

(1) The official who authorized the original classification, if that official is still serving in the same position, by a successor, or by a supervisory official of either; or

(2) Officials specifically delegated this authority in writing by the Chairman or by the Security Officer. A list of those who may be so delegated shall be maintained by the Security Officer.

(b) Declassification Procedure. Information marked with a specific declassification date or event shall be declassified on that date or upon occurrence of that event. The overall classification markings shall be lined through a statement placed on the cover or first page to indicate the declassification authority, by name and title, and the date of declassification. If practicable, the classification markings on each page shall be cancelled; otherwise, the statement on the cover or first page shall indicate that the declassification applies to the entire document.

(c) Notification to Holders. When classified information has been properly marked with specific dates or events for declassification it is not necessary to issue notices of declassification to any holders. However, when declassification action is taken earlier than originally scheduled, or the duration of classification is extended, the authority making such changes shall promptly notify all holders to whom the information was originally transmitted. This notification shall include the marking action to be taken, the authority for the change (name and title), and the effective date of the change. Upon receipt of notification, recipients shall make the proper changes and shall notify holders to whom they have transmitted the classified information.

(d) Downgrading. Information designated a particular level of classification may be assigned a lower classification level by the original classifier or by an official authorized to declassify the same information. Prompt notice of such downgrading shall be provided to known holders of the information. Classified information marked for automatic downgrading under previous Executive Orders shall be reviewed to determine that it no longer continues to meet classification requirements despite the passage of time.

(3) If the Director of the Information Security Oversight Office determines that information is unlawfully classified, the Director may require the Export-Import Bank to declassify it. Any such decision by the Director may be appealed to the National Security Council. The information shall remain classified until the appeal is decided.
§ 403.7 Mandatory review for declassification.

(a) Classified information under the jurisdiction of the Bank shall be reviewed for declassification upon receipt of a request by a United States citizen or permanent resident alien, a Federal agency, or a State or local government. A request for mandatory review of classified information shall be submitted in writing and describe the information with sufficient particularity to locate it with a reasonable amount of effort. Requests may be addressed to the:

General Counsel, Export-Import Bank of the U.S., 811 Vermont Avenue, NW., Washington, DC 20571

(b) The Bank's response to mandatory review requests will be governed by the amount of search and review time required to process the request. The Bank will acknowledge receipt of all requests, and will inform the requester if additional time is needed to process the request. Except in unusual circumstances, the Bank will make a final determination within one year from the date of receipt of the request.

(c) When information cannot be declassified in its entirety, the Bank will make a reasonable effort to release, consistent with other applicable laws, those declassified portions that constitute a coherent segment.

(d) The Bank shall determine whether information under the classification jurisdiction of the Bank or any reasonably segregable portion of it no longer requires protection. If so, the General Counsel shall promptly make such information available to the requester, and shall inform the requester of any fees due before releasing the document. If the information may not be released, in whole or in part, the General Counsel shall give the requester a brief statement of the reasons, and a notice, mailed with return receipt requested, of the right to appeal the determination within 60 days of the denial letter's receipt.

(e) The agency that initially received or classified records containing foreign government information shall be responsible for making a declassification determination on review requests for classified records which contain such foreign government information. Such requests shall be referred to the appropriate agency for action.

(f) When the Bank receives a mandatory declassification review request for records in its possession that were originated by another agency, it shall forward the request to that agency. The Bank may request notification of the declassification determination.

(g) Information originated by a President, the White House staff, by committees, commissions, or boards appointed by the President, or other specifically providing advice and counsel to a President or acting on behalf of a President is exempted from the provisions of mandatory review for declassification, except as consistent with applicable laws that pertain to presidential papers or records.

(h) The Bank shall process requests for declassification that are submitted under the provisions of the Freedom of Information Act, as amended, or the...
§ 403.8 Appeals.

(a) The Vice Chairman is designated to receive appeals on requests for declassification which have been denied by the Bank. Such appeals shall be addressed to:

First Vice President & Vice Chairman, Export-Import Bank of the United States, 811 Vermont Avenue NW., Washington, DC 20571

The appeal must be received within 60 days after receipt by appellant of the denial letter. Appeals shall be decided within 30 days of their receipt by the Vice Chairman.

(1) If the decision is to declassify the materials in their entirety, the Vice Chairman shall promptly make such information available to the requester, and inform the requester of any fees due before releasing the documents.

(2) If the decision is to deny declassification of a portion of the material, the Vice Chairman shall promptly make the part which was declassified available to the requester, and shall advise the requester, in writing, of the reasons for the partial denial of declassification.

(3) If the decision is to deny declassification of all the material, the Vice Chairman shall promptly advise the requester, in writing, of the reasons for such denial.

§ 403.9 Fees.

The following specific fees shall be applicable with respect to services rendered to members of the public under these regulations, by the Bank, except that the search fee will normally be waived when the search involves less than one-half hour of clerical time.

(a) Search for records, per hour or fraction thereof:

(i) Professional .................................. $11.00

(ii) Clerical ........................................ 6.00

(b) Computer service charges per second for actual use of computer central processing unit............................ .25

(c) Copies made by photostat or otherwise (per page): maximum of 5 copies will be provided.............................. .10

(d) Certification of each record as a true copy ........................................ 1.00

(e) Certification of each record as a true copy under official seal .......... 1.50

(f) Duplication of architectural photographs and drawings................... 2.00

Fees must be paid in full prior to issuance of requested copies. Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or postal money order. Remittances shall be made payable to the order of the Export-Import Bank of the United States, and mailed to:

General Counsel, Export-Import Bank of the United States, 811 Vermont Avenue NW., Washington, DC 20571

§ 403.10 Safeguarding.

(a) General Access Requirements. Except as provided in § 403.10(c), access to classified information shall be granted in accordance with the following:

(1) Determination of Trustworthiness. No person shall be given access to classified information or material unless a favorable determination has been made as to his trustworthiness. The determination of eligibility, referred to as a security clearance, shall be based on such investigations as the Bank may require in accordance with the standards and criteria of applicable law and Executive orders.

(2) Determination of Need to Know. In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of official duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information or material.

(b) Classified Information NonDisclosure Agreement. All persons with authorized access to classified information shall be required to sign a nondisclosure agreement, Standard Form 189, as a
condition of access. This form shall be retained in the security file of the individual for 50 years.

(c) Access by Historical Researchers and Former Presidential Appointees. The Bank shall obtain written agreements from requesters to safeguard the information to which they are given access as permitted by the Order and written consent to the Bank's review of their notes and manuscripts for the purpose of determining that no classified information is contained therein. A determination of trustworthiness is a precondition to a requester's access. If the access requested by historical researchers and former Presidential Appointees requires the rendering of services for which fair and equitable fees may be charged pursuant to Title 5 of the Independent Offices Appropriations Act, 65 Stat. 290, 31 U.S.C. 483a (1976), the requester shall be so notified and the fees may be imposed.

(d) Media Contacts. All contacts by members of the media which concern classified information shall be directed to the attention of the Security Officer, Room 1031, Export-Import Bank of the United States, 811 Vermont Avenue NW., Washington, DC 20571.

(e) Dissemination. Except as otherwise provided by directives issued by the President through the National Security Council, classified information originating in another agency and in the possession of the Bank may not be disseminated outside the Bank without the consent of the originating agency.

(f) Accountability Procedures. Dissemination of various levels of classified information or material shall be within the control and responsibility of designated control officers. Particularly stringent controls shall be placed on information and material classified as TOP SECRET.

(1) TOP SECRET. Designated as TOP SECRET control officers are the Chairman, Vice Chairman and the Security Officer who alone have authority to receive TOP SECRET information for the Bank. Other personnel authorized in writing by the Chairman or Security Officer also may receive TOP SECRET information for the Bank. It shall be the responsibility of these individuals with respect to all TOP SECRET information:

(i) To receive the material for the Bank;
(ii) To maintain registers which will reflect the routing of the material and the return thereof in a reasonable length of time for security storage;
(iii) To dispatch and make record of material disseminated to authorized persons outside the Bank;
(iv) To make a physical inventory of all material at least annually; and
(v) To maintain current access records.

(2) SECRET. Designated as SECRET control officers are the Security Officer and the Analysis, Records & Communications Manager, who have the responsibility with respect to all information classified in this category:

(i) To receive the material for the Bank;
(ii) To maintain registers which will reflect the routing of the material and the return thereof in a reasonable length of time for security storage;
(iii) To dispatch and make record of material disseminated to authorized persons outside the Bank;
(iv) To maintain current access records.

(3) CONFIDENTIAL. Designated as CONFIDENTIAL control officers are the Security Officer and the Analysis, Records & Communications Manager who have responsibility with respect to all information classified in this category:

(i) To review material for the Bank;
(ii) To route the material to proper Bank offices;
(iii) To dispatch and make record of material disseminated to authorized persons outside the Bank;
(iv) To disseminate to authorized persons outside the Bank classified incoming cables are to
be logged in and routed to the appropriate offices in double envelopes. When these cables are being used in various offices, classified coversheets must be used to protect the documents. This practice eliminates the possibility of inadvertently mixing classified with non-classified material, and promotes security awareness. Coversheets are obtainable from the Office of the Security Director.

(i) Transmittal. (1) To be transmitted outside the Bank, all classified documents must be sent through the Security Office and have attached EIB Form 71–2, approved by one of the following: the President and Chairman, First Vice President and Vice Chairman, a Senior Vice President, General Counsel, Vice President or Security Officer.

(2) Preparation and Receipting. Classified information shall be enclosed in opaque inner and outer covers before transmitting. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and addresses of both sender and addressee. Transmittal documents shall indicate on their face the highest level of any information transmitted, and must clearly state whether or not the transmittal document itself is classified after removal of enclosures and attachments. The outer cover shall be sealed and addressed with no identification of the classification of its contents. A receipt shall be attached to or enclosed in the inner cover, except that CONFIDENTIAL information shall require a receipt only if the sender deems it necessary. The receipt shall identify the sender, addressee, and the document but shall contain no classified information. It shall be immediately signed by the recipient and returned to the sender. Any of these wrapping and receipting requirements may be waived by agency heads under conditions that will provide adequate protection and prevent access by unauthorized persons.

(3) Transmittal of CONFIDENTIAL information. CONFIDENTIAL information shall be transmitted within and between the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories or possessions by one of the means established for higher classifications, or by United States Postal Service, certified first class, or express mail service, when prescribed by an agency head. Outside these areas, CONFIDENTIAL information shall be transmitted only as is authorized for higher classification levels.

(4) Transmittal of TOP SECRET and SECRET information shall be in accordance with the Directive. Reference may be made to 32 CFR 2001.44 for preliminary guidance.

(j) Destruction. Classified information no longer needed in working files or for record or reference purposes shall be processed for appropriate disposition in accordance with Chapters 21 and 33 of title 44 U.S.C., when govern disposition of Federal Records. All classified information approved for destruction must be torn and placed in containers designated as burnbags which are available through the Office Services Section of the Bank. Destruction of such information will be carried out by the Security Officer or a designee by use of a disintegrator or by burning. The method of destruction selected must preclude recognition or reconstruction of the classified information or material. Records of destruction will be maintained by the Security Office for TOP SECRET information and material with serialized markings or material for which there is a special need to record its destruction.

(k) Reproduction controls. (1) Reproduction of classified documents is prohibited, except by personnel authorized in writing by the Chairman or Security Officer.

(2) TOP SECRET documents may not be reproduced without the consent of the originating agency unless otherwise marked by the originating office.

(3) Reproduction of SECRET and CONFIDENTIAL documents may be restricted by the originating agency.

(4) Reproduced copies of classified documents are subject to the same accountability and controls as the original documents.

(5) Records shall be maintained by the Security Officer to show the number and distribution or reproduced copies of all TOP SECRET documents, of all documents covered by special access programs distributed outside the
§ 403.11 Enforcement and investigation procedures.

(a) Loss or Possible Compromise. Any person who has knowledge of the loss or possible compromise of classified information shall immediately report the circumstances to the Security Officer of the Bank. In turn, the originating agency shall be notified about the loss or compromise in order that a damage assessment may be conducted and appropriate measures taken to negate or minimize any adverse effect, and prevent further such loss or compromise. An immediate inquiry shall be initiated by the Bank for the purposes: (1) Of determining cause and responsibility and (2) taking corrective measures and appropriate administrative, disciplinary, or legal action.

(b) Reporting and Investigating Unauthorized Disclosures. (1) Employees who have reason to believe that an unauthorized disclosure of classified information has occurred shall report the disclosure to their supervisor, who shall inform the Security Officer.

(2) The Bank shall promptly notify the Information Security Oversight Office at the General Services Administration, Washington, DC 20405, of all unauthorized disclosures of classified information.

(3) If the Bank believes that it is the source of an unauthorized disclosure of classified information that it originated, it shall evaluate the disclosure under paragraph (b)(7) of this section. If the disclosure is serious, the Bank shall report the disclosure and the results of the evaluation to the Department of Justice together with notification that it is conducting an internal investigation.

(4) If the Bank believes that it is the source of an unauthorized disclosure of classified information that it handled but did not originate, it shall report the disclosure to the Department of Justice and to the originating agency(ies) or department(s) for evaluation under paragraph (b)(7) of this section. If the Bank cannot determine the identity of the originating agency(ies) or department(s), it shall report the disclosure to the Department of Justice together with any information or reasonable inferences as to the identity of the originating agency(ies) or department(s).

(5) If the Bank receives a request for an evaluation of information it originated, it shall, if the evaluation shows the disclosure was serious, inform the agency(ies) or department(s) from which the disclosure occurred of this conclusion and request that the agency(ies) or department(s) conduct an internal investigation.

(6) If the Bank determines that an unauthorized disclosure of classified information has occurred but that it neither originated, handled nor disclosed the information, it shall report the disclosure to the likely originating agency(ies) or department(s).

(7) In determining whether a disclosure is sufficiently serious to warrant reporting to the Department of Justice, the Bank, if it is the originating agency, shall ascertain the nature of the disclosed information, determine the extent to which it disseminated the information and evaluate the disclosure to determine whether it seriously damages its mission and responsibilities. In evaluating the damage caused by the disclosure, the Bank shall consider such matters as whether the disclosure jeopardizes an ongoing project, operation or source of information and to what extent the policy goals underlying the project or operation must be altered.

(8) In any instance where the Bank is determined to be the source of an unauthorized disclosure and an evaluation by the Bank or the originating agency(ies) or department(s) determines the disclosure to be of a serious nature, an internal investigation will be initiated and an investigation report, containing such information as may be required by the Department of Justice, will be submitted to the Department of Justice within 15 days after notification from the originating agency or Department of Justice, but in any case no later than 30 days. If the investigation report is not completed within 15 days, the Bank shall submit as much of the required information as is available at that time and furnish
additional information as it is developed.
(9) Whenever the Bank determines during the course of an investigation that it is necessary to compel or induce the cooperation of an employee, the Bank shall first consult with the Department of Justice. The Department of Justice will coordinate with the Bank to determine the procedures the Bank may use to compel an employee’s participation without foreclosing possible criminal proceedings.
(10) The Bank shall maintain records of all disclosures that have been reported or investigated.
(11) All employees shall cooperate fully with officials of the Bank or other agencies who are conducting investigations of unauthorized disclosures of classified information.
(12) Employees determined by the Bank to have knowingly participated in an unauthorized disclosure of classified information or who have refused to cooperate with an investigation of such a disclosure shall be denied further access to classified information and shall be subject to other appropriate administrative sanctions. Prior to taking action against an employee in connection with the unauthorized disclosure or classified information, the Bank shall consult with the Department of Justice, National Security Division.

[50 FR 27215, July 2, 1985, as amended at 72 FR 66043, Nov. 27, 2007]

PART 404—INFORMATION DISCLOSURE

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SOURCE: 64 FR 14374, Mar. 25, 1999, unless otherwise noted.

§ 404.1 General provisions.

(a) Purpose. This subpart establishes policy, procedures, requirements, and responsibilities for administration of the Freedom of Information Act (FOIA), 5 U.S.C. 552, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) Policy. It is Ex-Im Bank's policy to honor all requests for the disclosure of its records, provided that disclosure would not adversely affect a legitimate public or private interest and would not impose an unreasonable burden on Ex-Im Bank. However, this subpart also recognizes that the soundness of many Ex-Im Bank programs depends upon the receipt of reliable commercial, technical, financial, and business information relating to applicants for Ex-Im Bank assistance and that receipt of such information depends on Ex-Im Bank's ability to hold such information in confidence. Consequently, except as provided by applicable law and this regulation, information provided to Ex-Im Bank in confidence will not be disclosed without the submitter's consent.

(c) Scope. All record requests made to Ex-Im Bank shall be processed under this subpart, except that information customarily furnished to the public in the regular course of the performance of official duties may continue to be furnished to the public without complying with this subpart. Requests made by individuals under the Privacy Act of 1974 which are processed under subpart B of this part also shall be processed under this subpart A.

(d) Ex-Im Bank Internet site. Ex-Im Bank maintains an Internet site at http://www.exim.gov. The site contains information on Ex-Im Bank functions, activities, programs, and transactions. Web site visitors have access to Board of Directors and Loan Committee meeting minutes, country information, and Ex-Im Bank press releases, among other information. Ex-Im Bank encourages all prospective FOIA requesters to visit the site prior to submission of a FOIA request.

(e) Delegation. Any action or determination in this subpart which is the responsibility of a specific Ex-Im Bank employee, may be delegated to a duly designated alternate.

(f) Ex-Im Bank address. The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

§ 404.2 Definitions.

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

All other requesters—Requesters other than commercial use requesters, educational and non-commercial scientific requesters, or representatives of the news media.

Appeal—A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

Business information—Potentially confidential commercial or financial information that is provided to Ex-Im Bank.

Business submitter—Any person who provides business information to Ex-Im Bank.

Commercial use request—A request for a use or purpose that furthers the commercial, trade or profit interest of the requester.

Direct costs—Expenditures incurred in the search, review, and duplication of records in response to a FOIA request.

Educational institution—A preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, or an institution of professional or vocational education.

Final determination—The written decision by the Assistant General Counsel for Administration on an appeal.

Initial determination—The initial written determination by Ex-Im Bank regarding disclosure of requested records.

Non-commercial scientific institution—An institution that is operated for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry and that is not operated solely for purposes of furthering a business, trade or profit interest.
§ 404.3 Public reference facilities.

Ex-Im Bank maintains a public reading room which contains the Ex-Im Bank records that the FOIA requires to be made available for public inspection and copying. The records available under this section include copies of records released pursuant to the FOIA that Ex-Im Bank determines have, or are likely to, become the subject of subsequent requests for substantially the same records. Requesters shall be responsible for the cost of duplicating such material in accordance with the provisions of § 404.9(e). Persons desiring to use the reading room should contact the Ex-Im Bank Freedom of Information and Privacy Office, either in writing at the address at § 404.1(f) or by telephone at (202) 565-3946 or (800) 565-3946, to arrange a time to inspect the available records.

§ 404.4 Request requirements.

(a) Form. Requests must be made in writing and must be signed by, or on behalf of, the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in § 404.1(f) and should contain both the return address and telephone number of the requester.

(b) Description of records requested. Each request must describe the records sought in sufficient detail so as to enable a professional employee of Ex-Im Bank familiar with the subject matter of the request to locate the record with a reasonable amount of effort. A request shall not be deemed to have been received until such time as the request adequately identifies the records sought. To the extent practicable, a description should include relevant dates, format, subject matter, and the name of any person to whom the record is known to relate. A general request for records with no accompanying date restriction, either express or implied, shall be deemed to be a request for records created within the preceding twelve months.
(c) Fee statement. The request must contain a statement expressing willingness to pay fees for the requested records or a request for a fee waiver (see §404.10) before the request shall be deemed to have been received. A fee statement may specify the maximum amount a requester is willing to pay for processing the request.

(1) Whenever a requester submits a FOIA request that does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this paragraph. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees under §404.9 shall be deemed an agreement to pay up to $50.00. If Ex-Im Bank estimates that the fees for a request will exceed $50.00, then Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(d) Written notice of amendment. The requester should provide any amendment to the original request in writing to Ex-Im Bank.

(e) Requester assistance. Ex-Im Bank shall make reasonable efforts to assist a requester in complying with the requirements of this section.

§ 404.5 Time for processing.

(a) General. Ex-Im Bank shall respond to requests within twenty working days of the date of receipt of the request unless unusual circumstances exist. Ex-Im Bank shall provide written notice to the requester whenever such unusual circumstances necessitate an extension. If the extension is expected to exceed ten working days, then Ex-Im Bank shall offer the requester the opportunity to:

(1) Alter the request so that it may be processed within the time limit; or

(2) Propose an alternative, feasible time frame for processing the request.

(b) Date of receipt. A request shall be deemed to have been received on the date that the request is received in the Freedom of Information and Privacy Office, provided that the requester has met all the requirements of §404.4. Ex-Im Bank shall notify the requester of the date on which a request was officially received.

(c) Order of processing. Ex-Im Bank ordinarily shall process requests according to their order of receipt.

(d) Expedited processing. A request for expedited processing must be included in the original request for records and may be granted at the discretion of Ex-Im Bank based upon the requester’s demonstration of:

(1) An imminent threat to the life or physical safety of an individual; or

(2) In the case of a requester who is a representative of the news media, an urgency to inform the public concerning actual or alleged Federal Government activity. Ex-Im Bank shall provide notice of its determination on expedited processing to the requester. A requester may file an administrative appeal, as set forth at §404.11, based on a denial of a request for expedited processing. Ex-Im Bank shall grant expeditious consideration to any such appeal.

§ 404.6 Release of records under the Freedom of Information Act.

(a) Creation of records. A reasonable request for material not in existence may be honored at Ex-Im Bank’s discretion when tabulation or compilation will not significantly burden Ex-Im Bank, its programs or its activities.

(b) Discretionary release. Consistent with federal government policy, material technically qualifying for exemption from disclosure under 5 U.S.C. 552(b)(5) may be made available when disclosure would not adversely affect legitimate public or private interests, violate law or impose an unreasonable burden on Ex-Im Bank. This policy does not, however, create any right enforceable in a court of law.

(c) Segregable records. Whenever it is determined that a portion of a record is exempt from disclosure, any reasonably segregable portion of the record shall be provided to the requester after redaction of the exempt material. If segregation would render the document meaningless, Ex-Im Bank shall withhold the entire record.
§ 404.7

(d) Date for determining responsive records. Only those records within Ex-Im Bank’s possession and control as of the date of receipt of a request shall be deemed to be responsive to a request.

§ 404.7 Confidential business information.

(a) Scope. This section applies to all business information, as defined in §404.2. Such information shall only be disclosed pursuant to a FOIA request in accordance with this section.

(b) Submitter designation. All business submitters should designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of any submission that they consider to be exempt from disclosure under 5 U.S.C. 552(b)(4).

(c) Pre-disclosure notice to the business submitter. Whenever Ex-Im Bank receives a FOIA request seeking disclosure of business information, Ex-Im Bank shall provide prompt written notice to the submitter of such information. This notice shall include a description or a copy of the records containing the business information. Such notice shall not be required, however, if:

(1) Ex-Im Bank determines that the records shall not be disclosed;  
(2) The records have been published or otherwise made available to the public; or  
(3) disclosure of the records is required by law.

(d) Opportunity to object to disclosure. The business submitter shall have ten working days from and including the date of the notification letter to provide Ex-Im Bank with a detailed statement of any objection to disclosure of the records. A submitter located outside the United States shall have twenty working days to object to disclosure. Ex-Im Bank may extend the time for objection upon timely request from the submitter and for good cause shown. A statement of objection must specify all grounds under the FOIA for withholding the information.

(e) Notice to the requester. The Freedom of Information and Privacy Office shall notify the requester in writing whenever a business submitter is afforded the opportunity to object to disclosure of records pursuant to paragraph (c) of this section.

(f) Disclosure of confidential business information. Ex-Im Bank shall consider any objections raised by the business submitter prior to making its disclosure decision.

(g) Notice of intent to disclose. Whenever Ex-Im Bank determines to disclose business information over the objection of a business submitter, Ex-Im Bank shall notify the business submitter, in writing, of such determination, the reasons for the decision, and the expected disclosure date. This notification—which shall be provided at least ten days prior to the planned disclosure date and which shall include a copy or description of the records at issue—is intended to afford the submitter the opportunity to seek judicial review.

(h) Notice to requester of disclosure date. If Ex-Im Bank determines to disclose records over a business submitter’s objection, then Ex-Im Bank shall notify the requester of the expected disclosure date.

(i) Appeal. Whenever Ex-Im Bank determines to disclose, pursuant to an administrative appeal, business information that initially was withheld from disclosure under 5 U.S.C. 552(b)(4), Ex-Im Bank shall notify the business submitter, in writing and shall be provided ten working days prior to the proposed disclosure date. It shall include a copy or description of the records at issue and a statement of Ex-Im Bank’s reasons for disclosure.

(j) Notice of FOIA lawsuit. Ex-Im Bank shall promptly notify the submitter whenever a requester brings suit against Ex-Im Bank seeking to compel the release of business information covered by this section. Ex-Im Bank shall promptly notify the requester when a submitter brings suit against Ex-Im seeking to restrict the release of business information that is covered by this section.

(k) Exception. Notwithstanding the foregoing provisions of this part, Ex-Im Bank may, upon request or on its own initiative, publicly disclose the parties to transactions for which Ex-Im Bank approves support, the amount of such
support, the identity of any participants involved, a general description of the related U.S. exports, and the country to which such exports are destined.

§ 404.8 Initial determination.

(a) Authority to grant or deny requests. The Freedom of Information andPrivacy Office shall be responsible for search, review, and the initial determination.

(b) Referrals to other government agencies. A requested record in Ex-Im Bank’s possession that was created or classified by another Federal agency shall be referred to such agency for direct response to the requester. The Freedom of Information and Privacy Office shall notify the requester of any such referral, the number of documents so referred, and the name and address of each agency to which the request has been referred.

(c) Notification of Ex-Im Bank action. The Freedom of Information and Privacy Office shall notify the requester in writing of its decision to grant or deny the request.

(1) If the decision is made to grant a request, then Ex-Im Bank shall promptly disclose the requested records and shall inform the requester of any fee payable under §404.9.

(2) A denial is a determination to withhold any requested record in whole or in part, a determination that a requested record does not exist or cannot be located or a determination that what has been requested is not a record subject to the FOIA. Whenever Ex-Im Bank withholds information, such notice shall include:

(i) The name, title, and signature of the person responsible for the determination;

(ii) The statutory basis for non-disclosure; and

(iii) A statement that any denial may be appealed under §404.11 and a brief description of the requirements of that section.

(d) Material withheld. Ex-Im Bank shall make reasonable efforts to inform the requester of the volume of material withheld pursuant to a full or partial denial and the extent of any redaction. Ex-Im Bank shall not, however, indicate the extent of any denial when doing so could harm an interest protected by an applicable exemption.

§ 404.9 Schedule of fees.

(a) General. Ex-Im Bank shall charge fees to recover the full allowable direct costs it incurs in processing requests. Ex-Im Bank shall attempt to conduct searches in the most efficient manner to minimize costs for both Ex-Im Bank and the requester.

(b) Categories of requesters. Fees shall be assessed according to the status of the requester. The specific schedule of fees for each requester category (each as defined in §404.2) is prescribed as follows:

(1) Commercial use requesters. Ex-Im Bank shall charge the full costs for search, review, and duplication.

(2) Educational and non-commercial scientific institution requesters. Ex-Im Bank shall charge only for the cost of duplication in excess of 100 pages. No fee will be charged for search or review.

(3) Representatives of the news media. Ex-Im Bank shall charge only for the cost of duplication in excess of 100 pages. No fee will be charged for search or review.

(4) All other requesters. Ex-Im Bank shall charge for the cost of search, review, and duplication, except that 100 pages of duplication and two hours of professional search time shall be furnished without charge.

(c) Search and review fees. Ex-Im Bank shall charge the following fees for search and review:

(1) Clerical. Hourly rate—$16.00.

(2) Professional. Hourly rate—$32.00.

(3) Computer Searches. Hourly rate—based upon the salary of the employee performing the work and the cost of operating any equipment.

(d) Administrative appeals. Ex-Im Bank shall not charge for administrative review of an exemption applied in an initial determination. Ex-Im Bank shall charge, however, for search and review pursuant to an administrative appeal if the appeal is based on a claim other than the application of an exemption in the initial determination.

(e) Duplication. Ex-Im Bank shall charge $.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or
§ 404.10 Fee waivers or reductions.

(a) General. Upon request, Ex-Im Bank shall consider a discretionary fee waiver or reduction of the fees chargeable under §404.9.

(b) Form of request for fee waiver. Ex-Im Bank shall deny a request for a waiver or reduction of fees that does not clearly address each of the following:

(1) The proposed use of the records and whether the requester will derive income or other benefit from such use;
(2) An explanation of the reasons why the public will benefit from such use; and
(3) If specialized use of the records is contemplated, a statement of the requester’s qualifications that are relevant to the specialized use.

(d) Burden of proof. In all cases, the requester has the burden of presenting sufficient evidence or information to justify the fee waiver or reduction. The requester may use the procedures set forth in §404.11 to appeal a denial of a fee waiver request.

(e) Employee requests. Fees of less than $50.00 shall be waived in connection with any request by an employee, former employee, or applicant for employment, related to a grievance or complaint of discrimination against Ex-Im Bank.

§ 404.11 Administrative appeal.

(a) General. Whenever a request for records, a fee waiver or expedited processing has been denied, the requester may appeal the denial within thirty days of the date of Ex-Im Bank’s issuance of notice of such action. Any denial under this subpart must be appealed according to this section before a requester is eligible to seek judicial review.

(b) Form. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address at §404.1(f). Both the envelope and the appeal letter...
should be clearly marked in capital letters: "FREEDOM OF INFORMATION ACT APPEAL." Failure to properly mark or address the appeal may slow its processing. The letter should include:

1. A copy of the denied request or a description of the records requested;
2. The name and title of the Ex-Im Bank employee who denied the request;
3. The date on which the request was denied;
4. The Ex-Im Bank identification number assigned to the request; and
5. The return address and telephone number of the appellant.

(c) Processing schedule. Appeals shall not be deemed to have been received until the Assistant General Counsel for Administration receives the appeal. Ex-Im Bank shall notify the requester of the date on which an appeal was officially received. The disposition of an appeal shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days if unusual circumstances exist, provided that the Assistant General Counsel for Administration notifies the requester in writing.

(d) Ex-Im Bank decision. A final determination which affirms an adverse initial determination shall set forth the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial determination is reversed on appeal, the request shall be remanded to the Freedom of Information and Privacy Office to be processed promptly in accordance with the decision on appeal, subject to §404.7(f).

Subpart B—Access to Records Under the Privacy Act of 1974

§ 404.13 Definitions.

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

Appeal—A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

Final determination—the written decision by the Assistant General Counsel for Administration on an appeal.

Individual—a citizen of the United States or an alien lawfully admitted for permanent residence.

Initial determination—the initial written determination in response to a Privacy Act request.

Record—Any item, collection or grouping of information about an individual that is maintained within a system of records and that contains the individual’s name or an identifying number, symbol or other identifying particular assigned to the individual.

Redaction—the process of removing non-disclosable material from a record so that the remainder may be released.

Request for access—a request to view a record.

Request for accounting—a request for a list of all disclosures of a record.

Request for correction—a request to modify a record.
§ 404.14 Requirements of request for access.

(a) Form. Requests for access must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in § 404.12(e) and should contain both the return address and telephone number of the requester.

(b) Description of records sought. A request for access must describe the records sought in sufficient detail so as to enable Ex-Im Bank personnel to locate the system of records containing the records with a reasonable amount of effort. To the extent practicable, such description should include the nature of the record sought, the date of the record or the period in which the record was compiled, and the name or identifying number of the system of records in which the requester believes the record is kept. A requester may include his or her social security number in the request in order to facilitate the identification and location of the requested records.

(c) Fee statement. The request must contain a statement expressing willingness to pay fees for processing the request or a request for a fee waiver (see § 404.16(d)).

(1) Whenever a requester submits a request for access that does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this section. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees shall be deemed an agreement to pay up to $25.00. If Ex-Im Bank estimates that the fees for a request will exceed $25.00, then Ex-Im Bank shall notify the requester. Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(3) Whenever the estimated fee chargeable under this section exceeds $25.00, Ex-Im Bank reserves the right to require a requester to make an advance payment prior to processing the request.

(4) Ex-Im Bank shall not process a request by a requester who has failed to pay a fee for a previous request unless and until such requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request.

(d) Verification of identity. An individual who submits a request for access must verify his or her identity. The request must include the requesters full name, current address, and date and place of birth. In addition, such requester must provide a notarized statement attesting to his or her identity.

(e) Verification of guardianship. When a parent or guardian of a minor or the guardian of a person judicially determined to be incompetent submits a request for access to records that relate to the minor or incompetent, such parent or guardian must establish:

(1) His or her own identity and the identity of the subject of the record in accordance with paragraph (d) of this section; and

(2) Parentage or guardianship of the subject of the record, either by providing a copy of the subject’s birth certificate showing parentage or by providing a court order establishing guardianship.

(f) Written notice of amendment. The requester must provide any amendment to the original request in writing to Ex-Im Bank.

(g) Requester assistance. Ex-Im Bank shall make reasonable efforts to assist
a requester in complying with the requirements of this section.

(h) Date of receipt. Requests for access shall be deemed to have been received on the date that the request is received by the Freedom of Information and Privacy Office, provided that all the requirements of this section have been met. Ex-Im Bank shall notify the requester of the date on which it officially received a request.

§ 404.15 Initial determination.

(a) Time for processing. The Freedom of Information and Privacy Office shall respond to valid requests for access within twenty working days of the date of receipt of the request letter. The time for response may be extended an additional ten working days for good cause, provided that the Freedom of Information and Privacy Office notifies the requester in writing.

(b) Notice regarding request for access. The Freedom of Information and Privacy Office shall notify the requester in writing of its decision to grant or deny a request for access.

(1) If the request is granted, then the notice shall either include the requested records, in releasable form, or shall describe the manner in which access to the record will be granted. The notice also shall inform the requester of any processing fee.

(2) A denial is a determination to withhold any requested record in whole or in part or a determination that the requested record does not exist or cannot be located. If the request is denied, then the denial notice shall state:

(i) The name, signature, and title or position of the person responsible for the denial;

(ii) The reasons for the denial; and

(iii) The procedure for appeal of the denial under § 404.17 and a brief description of the requirements of that section.

(c) Form of record disclosure. Ex-Im Bank shall grant access to the requested records either by providing the requester with a copy of the record or, at the requester's option, by making the record available for inspection at a reasonable time and place. If Ex-Im Bank makes the record available for inspection, such inspection shall not unreasonably disrupt Ex-Im Bank operations. In addition, the requester must provide a form of official photographic identification—such as a passport, driver's license or identification badge—and any other form of identification bearing his or her name and address prior to inspection of the requested records. Records may be inspected by the requester in the presence of another individual, provided that the requester signs a form stating that Ex-Im Bank is authorized to disclose the record in the presence of both individuals.

§ 404.16 Schedule of fees.

(a) Search and review. Ex-Im Bank shall not charge for search and review.

(b) Duplication. Ex-Im Bank shall charge $.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or printouts, or for other methods of reproduction or duplication.

(c) Minimum fee. Ex-Im Bank shall waive final fees of $5.00 or less.

(d) Fee waivers. Ex-Im Bank may waive fees whenever it is determined to be in the public interest. Fees of less than $50.00 shall be waived in connection with any request by an employee, former employee or applicant for employment, related to a grievance or complaint of discrimination against Ex-Im Bank.

(e) Special services charges. Complying with requests for special services such as those listed in this paragraph is entirely at the discretion of Ex-Im Bank. Ex-Im Bank shall recover the full costs of providing such services to the extent that it elects to provide them.

(1) Certifications. Ex-Im Bank shall charge $25.00 to certify the authenticity of any Ex-Im Bank record or any copy of such record.

(2) Special shipping. Ex-Im Bank may ship by special means (e.g., express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all costs of such special services. Ex-Im Bank shall not charge for ordinary packaging and mailing.

§ 404.17 Appeal of denials of access.

(a) Appeals to the Assistant General Counsel for Administration. Whenever
Ex-Im Bank denies a request for access or for waiver or reduction of fees, the requester may appeal the denial to the Assistant General Counsel for Administration within 30 working days of the date of Ex-Im Bank’s issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address in §404.12(e). Both the envelope and the appeal letter should be clearly marked in capital letters: “PRIVACY ACT APPEAL.” Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter should include:

1. A copy of the denied request or a description of the records requested;
2. The name and title of the Ex-Im Bank employee who denied the request;
3. The date on which the request was denied; and
4. The Ex-Im Bank identification number assigned to the request.

(b) Final determination. The disposition of an access appeal shall be made in writing within twenty working days after the date of receipt of the appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing. A decision affirming the denial of a request for access shall include a brief statement of the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

§404.18 Requests for correction of records.

(a) Form. Requests for correction must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in §404.12(e) and should contain both the return address and telephone number of the requester. The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. The requester also must verify his or her identity in accordance with the procedures set forth at §404.14(d) and (e). Both the envelope and the request for correction itself should be clearly marked in capital letters: “PRIVACY ACT CORRECTION REQUEST.”

(b) Initial determination. The Freedom of Information and Privacy Office shall respond to valid correction requests within ten working days of receipt of the request letter. If Ex-Im Bank grants the request for correction, then the Freedom of Information and Privacy Office shall advise the requester of his or her right to obtain a copy, in releasable form, of the corrected record. A denial notice shall state the reasons for the denial and shall advise the requester of the right to appeal. Ex-Im Bank shall not charge for processing requests for correction.

(c) Appeal of denial of request for correction. Whenever Ex-Im Bank denies a request for correction, the requester may appeal the denial to the Assistant General Counsel for Administration within thirty working days of Ex-Im Bank’s issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address set forth in §404.12(e). Both the envelope and the appeal letter should be clearly marked in capital letters: “PRIVACY ACT CORRECTION APPEAL.” Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter must include:

1. A copy of the denied request or a description of the correction sought;
2. The name and title of the Ex-Im Bank employee who denied the request;
3. The date on which the request was denied;
4. The Ex-Im Bank identification number assigned to the request; and
5. Any information said to justify the correction.
(d) Final determination on correction appeal. (1) The disposition of an appeal shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing.

(2) A decision affirming the denial of a request for access shall advise the appellant of the:

(i) Reasons for affirming the denial;

(ii) Right to seek judicial review; and

(iii) Right to file a statement of disagreement, as provided in paragraph (e) of this section.

(3) If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

(e) Statement of disagreement. Upon denial of a correction appeal, the appellant shall have the right to file a statement of disagreement with Ex-Im Bank, setting forth his or her reasons for disagreeing with the Agency's action. The statement should be addressed to the Freedom of Information and Privacy Office at the address in §404.12(e) and must be received within thirty working days of Ex-Im Bank's issuance of the denial notice. A statement of disagreement must not exceed one typed page per fact disputed. Statements exceeding this limit shall be returned to the requester for editing. Upon receipt of a statement of disagreement under this section, the Freedom of Information and Privacy Office shall have the statement included in the system of records in which the disputed record is maintained and shall have the disputed record marked so as to indicate that a Statement of Disagreement has been filed. Ex-Im Bank may also append to the disputed record a written statement regarding Ex-Im Bank's reasons for denying the request to correct the record.

(f) Notices of correction or disagreement. In any disclosure of a record for which Ex-Im Bank has received a statement of disagreement, Ex-Im Bank shall clearly note any portion of the record which is disputed and shall provide a copy of the statement of disagreement. Ex-Im Bank also may provide its own statement regarding the disputed record. In addition, whenever Ex-Im Bank corrects a record or receives a statement of disagreement, Ex-Im Bank shall, as is reasonable under the circumstances, advise any person or agency to which it previously disclosed such record of the correction or statement, provided that an accounting of such disclosure exists.

§404.19 Request for accounting of record disclosures.

(a) Required information. With respect to each system of records under Ex-Im Bank control, Ex-Im Bank shall maintain an accurate accounting of the date, nature, and purpose of each external disclosure of a record and the name and address of all persons, organizations, and agencies to which disclosure has been made. Ex-Im Bank shall retain this accounting for at least five years or the life of the record, whichever is longer.

(b) Form. An individual may obtain an accounting of all disclosures of a record, provided that such individual establishes his or her identity as the subject of such record in accordance with the procedures set forth at §404.14(d) and (e). A request for an accounting must be made in writing and must be signed by the requester. The request should be addressed to the Freedom of Information and Privacy Office at the address in §404.12(e) and should contain both the return address and telephone number of the requester. Both the envelope and the request itself should be clearly marked in capital letters: “PRIVACY ACT ACCOUNTING REQUEST.” Failure to properly mark or address the request may slow its processing. The request shall not be deemed to have been received by Ex-Im Bank until the Freedom of Information and Privacy Office receives the request. The letter must clearly identify the particular record for which the accounting is requested.

(c) Initial determination. The Freedom of Information and Privacy Office shall notify the requester whether the request will be granted or denied within ten working days of receipt of a valid request for an accounting. Ex-Im Bank
shall not charge for processing such a request.

(d) Exceptions. Ex-Im Bank shall not be required to provide an accounting to an individual when the accounting relates to a disclosure made:
   (1) To an employee within the agency;
   (2) Under the FOIA; or
   (3) To a law enforcement agency for an authorized law enforcement activity in response to a written request from such agency which specified the law enforcement activity for which the disclosure was sought.

§ 404.20 Notice of court-ordered and emergency disclosures.

(a) Court-ordered disclosures. When a record pertaining to an individual is required to be disclosed by a court order, the Assistant General Counsel for Administration shall make reasonable efforts to provide notice to the subject individual. Notice shall be given within a reasonable time after Ex-Im Bank’s receipt of the order, except that in a case in which the order is not a matter of public record, notice shall be given only after the order becomes public. Such notice shall be mailed to the individual’s last known address and shall contain a copy of the order and a description of the information disclosed.

(b) Emergency disclosures. If a record has been disclosed by Ex-Im Bank under compelling circumstances affecting the health or safety of any person, then, within ten working days, the Assistant General Counsel for Administration shall notify the subject individual of the disclosure at his or her last known address. The notice of such disclosure shall be in writing and shall state the:
   (1) Nature of the information disclosed;
   (2) Person, organization or agency to which it was disclosed;
   (3) Date of disclosure; and
   (4) Compelling circumstances justifying the disclosure.

§ 404.21 Submission of social security and passport numbers.

(a) Policy. Ex-Im Bank recognizes the importance of assessing, to the extent reasonably possible, the risks associated with transactions supported by Ex-Im Bank. It is often difficult to assess risks related to individuals and non-publicly traded entities. Therefore, when an individual or a non-publicly traded entity applies for participation in an Ex-Im Bank program or is proposed as a guarantor for an Ex-Im Bank transaction, Ex-Im Bank may require social security and/or U.S. passport numbers from such individual or from the principals of such entity. Ex-Im Bank shall not require submission of this information, and unwillingness or inability to provide such information shall not affect Ex-Im Bank’s decision on an application for Ex-Im Bank assistance.

(b) Use. Ex-Im Bank shall use social security and passport numbers to assess the creditworthiness of Ex-Im Bank program participants and as a mechanism for enforcing agreements with Ex-Im Bank. Such information shall not be disclosed, except as warranted by law and regulation.

(c) Notice. Whenever Ex-Im Bank requests a social security or passport number, Ex-Im Bank shall place an appropriate Privacy Act notification on the form used to collect the information.

§ 404.22 Government contracts.

(a) Approval by Assistant General Counsel for Administration. Ex-Im Bank shall not contract for the operation of a system of records or for an activity that requires access to a system of records without the express, written approval of the Assistant General Counsel for Administration.

(b) Contract clauses. Any contract authorized under paragraph (a) of this section shall contain the standard contract clauses required by the Federal Acquisition Regulation (48 CFR 24.104) to ensure compliance with the requirements imposed by the Privacy Act. The division within Ex-Im Bank that is responsible for technical supervision of the contract shall be responsible for ensuring that the contractor complies with the Privacy Act contract requirements.

(c) Contractor status. Any contractor that operates an Ex-Im Bank system of records or engages in an activity that requires access to an Ex-Im Bank system of records shall be considered an
§ 404.23 Other rights and services.

Nothing in this subpart shall be construed to entitle any person to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

Subpart C—Demands for Testimony of Current and Former Ex-Im Bank Personnel and for Production of Ex-Im Bank Records

SOURCE: 71 FR 14361, Mar. 22, 2006, unless otherwise noted.

§ 404.24 General provisions.

(a) Purpose. This subpart establishes policy, assigns responsibilities and prescribes procedures with respect to:

(1) The production or disclosure of official information or records of Ex-Im Bank in all legal proceedings to which Ex-Im Bank is not a party;

(2) Demands for testimony of Ex-Im Bank personnel related to information acquired as a result of performance of their official duties, or by virtue of their official status, in all legal proceedings where Ex-Im Bank is not a party; and

(3) The offer of expert or opinion testimony by Ex-Im Bank personnel regarding matters related to the performance of their official duties.

(b) Policy. Ex-Im Bank seeks to further the following goals in enacting this subpart:

(1) Conservation of agency resources for official business;

(2) Minimization of agency involvement in controversial issues unrelated to its mission;

(3) Maintenance of the agency’s impartiality amongst private litigants;

(4) Protection of confidential and/or sensitive information; and

(5) Maintenance of the integrity of the agency’s deliberative processes.

§ 404.25 Applicability.

This subpart applies exclusively to demands for testimony and/or production of records issued to Ex-Im Bank personnel, in connection with legal proceedings to which Ex-Im Bank is not a party, regarding information acquired in the course of the performance of official duties or due to their official status. Nothing in this subpart shall be construed to waive the sovereign immunity of the United States. This subpart shall not apply to the following:

(a) Demands for testimony and/or production of records pursuant to a legal proceeding to which Ex-Im Bank is a party;

(b) Demands for testimony and/or production of records in those instances in which Ex-Im Bank personnel are asked to disclose information wholly unrelated to their official duties; and

(c) Congressional demands and requests for testimony or records.

§ 404.26 Definitions.

For purposes of this subpart, the following definitions shall apply—

Demand—includes an order, subpoena, or other compulsory process issued by a party in litigation or a court of competent jurisdiction, requiring the production or release of Ex-Im Bank information or records, or requiring the testimony of Ex-Im Bank personnel.

Ex-Im Bank personnel—includes any current or former officer or employee of Ex-Im Bank, including all individuals who have been appointed by, or subject to, the official supervision, jurisdiction, or control of any Ex-Im Bank employees. This definition encompasses all individuals hired through contractual agreements with Ex-Im Bank, such as: consultants, contractors, sub-contractors, and their employees.

Legal proceeding—a case or controversy pending before any federal, state, or local court, including a grand jury proceeding; a proceeding before a federal, state, or local administrative judge, board, or other similar body with adjudicative powers; or a legislative proceeding before a state or local legislative body.
§ 404.27 Demand requirements.

A party’s demand for testimony and/or production of records by Ex-Im Bank personnel regarding information acquired in the course of their performance of official duties or due to their official status shall be set forth in, or accompanied by, a signed affidavit or other written statement. Such affidavit or written statement must be submitted at least 30 days prior to the date such testimony and/or production of records is requested to be taken and/or produced. A copy of the affidavit or written statement shall be served on the other parties to the legal proceeding. The affidavit or written statement must:

(a) Be addressed to the Export-Import Bank of the United States, Office of the General Counsel, 811 Vermont Ave., NW., Washington, DC 20571;

(b) State the nature of the legal proceeding, including any docket number, title of the case, and the name of the administrative or adjudicative body before which the proceedings are to be heard;

(c) State the nature of the testimony or records sought;

(d) State the relevance of the information sought to the legal proceedings;

(e) State why such information can only be obtained through testimony or production of records by Ex-Im Bank personnel; and

(f) Comply with all procedures governing valid service of process.

§ 404.28 Notification of General Counsel required.

Ex-Im Bank personnel receiving a demand for testimony and/or production of records regarding information acquired in the course of their performance of official duties, or due to their official status, shall immediately notify the General Counsel of Ex-Im Bank (“General Counsel”) upon receipt of such demand. The General Counsel maintains the exclusive authority to waive the requirements of any or all sections of this subpart and reserves the right to delegate his or her authority under this subpart to other appropriate Ex-Im Bank personnel.

§ 404.29 Restrictions on testimony and production of records.

Ex-Im Bank personnel may not provide testimony and/or produce records regarding information acquired in the course of their performance of official duties, or due to their official status, in connection with any legal proceeding to which this subpart applies, without authorization by the General Counsel. Such authorization must be in writing, unless the General Counsel determines that circumstances warrant an oral authorization, and such oral authorization is subsequently documented.

§ 404.30 Factors General Counsel may consider in determining whether to authorize testimony and/or the production of records.

In determining whether to authorize Ex-Im Bank personnel to provide testimony and/or produce records regarding information acquired in the course of their performance of official duties, or due to their official status, the General Counsel may consider factors including, but not limited to, the following:

(a) Efficiency—the conservation of the time and resources of Ex-Im Bank personnel for the conduct of official business;

(b) Undue burden—whether the demand creates an undue burden upon Ex-Im Bank or is otherwise inappropriate under any applicable administrative or court rules;

(c) Appearance of bias—whether the testimony and/or production of records could result in the public perception that Ex-Im Bank is favoring one party over another, or advocating the position of a party to the proceeding;
(d) Furtherance of agency policy—whether the testimony and/or production of records is consistent with the policy and mission of the Ex-Im Bank;

(e) Prevention of fraud or injustice—whether the disclosure of the information requested is necessary to prevent the perpetration of fraud or injustice;

(f) Relevance to litigation—whether the testimony and/or production of records sought is relevant to the subject litigation;

(g) Necessity—whether the testimony and/or production of records, including a release of such in camera, is appropriate or necessary as determined by either the procedural rules governing the legal proceeding, or according to the relevant laws concerning privilege;

(h) Availability from another source—whether the information sought through testimony or production of records is available from another source;

(i) Violations of laws or regulations—whether the testimony and/or production of records would violate a statute, regulation, executive order, or other official directive;

(j) Classified information—whether the testimony and/or production of records would improperly reveal information classified pursuant to applicable statute or Executive Order; and

(k) Compromise of rights and interests—whether the testimony and/or production of records would compromise any of the following: law enforcement interests, constitutional rights, national security interests, foreign policy interests, or the confidentiality of commercial and/or financial information.

§ 404.31 Procedure for declining to testify and/or produce records.

Ex-Im Bank personnel receiving a demand to provide testimony and/or produce records regarding information acquired in the course of their performance of official duties, or due to their official status, and who have not received written authorization from the General Counsel to provide such information, shall:

(a) Respectfully decline to answer or appear for examination on the grounds that such testimony is forbidden by this subpart;

(b) Request the opportunity to consult with the General Counsel;

(c) Explain that only upon consultation may they be granted approval to provide such testimony;

(d) Explain that providing such testimony or records absent approval may subject the individual to criminal liability under 18 U.S.C. 641, as well as other applicable laws, and other disciplinary action; and

(e) Request a stay of the request or demand pending a determination by the General Counsel.

§ 404.32 Procedure in the event a decision concerning a demand is not made prior to the time a response to the demand is required.

If response to a demand is required before a determination has been rendered by the General Counsel, the U.S. Attorney or such other attorney as may be designated for the purpose will appear with the Ex-Im Bank personnel upon whom the demand has been made, and will furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration of the General Counsel. The court or other authority shall be requested respectfully to stay the demand pending determination by the General Counsel.

§ 404.33 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with §404.32 pending a determination by the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the Ex-Im Bank personnel upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel. Touhy v. Ragen, 340 U.S. 462).
§ 404.34 Procedure for demands for testimony or production of documents regarding confidential information.

In addition to compliance with the requirements of this subpart, demands to provide testimony and/or produce records that concern information protected by the Privacy Act, 5 U.S.C. 552a, or any other authority mandating confidentiality of certain classes of records or information, must also satisfy the requirements for disclosure imposed by such authority before records may be produced or testimony given.

§ 404.35 Procedures for requests for Ex-Im Bank employees to provide expert or opinion testimony.

No Ex-Im Bank personnel may, unless specifically authorized by the General Counsel, testify in any legal proceeding as an expert or opinion witness as to any matter related to his or her duties or the functions of the Ex-Im Bank, including the meaning of Ex-Im Bank documents. Any demand for expert or opinion testimony shall comply with the policies and procedures outlined in this subpart.

§ 404.36 No private right of action.

Nothing in this subpart shall be construed as creating any right, substantive or procedural, enforceable at law or equity by a party against Ex-Im Bank or the United States.

Subparts D–E [Reserved]

PART 405 [RESERVED]

PART 407—REGULATIONS GOVERNING PUBLIC OBSERVATION OF EX-IMBANK MEETINGS

Sec.
407.1 Purpose, scope and definitions.
407.2 Closing meetings.
407.3 Procedures applicable to regularly scheduled meetings.
407.4 Procedures applicable to other meetings.
407.5 Certification by General Counsel.
407.6 Transcripts, recordings and minutes of closed meetings.
407.7 Relationship to Freedom of Information Act.
(2) Relate solely to the internal personnel rules and practices of Eximbank or any other agency;

(3) Disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5 U.S.C.), provided that such statute: (i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would:

(i) In the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to: (A) Lead to significant financial speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution; or

(ii) In the case of Eximbank or any other agency, be likely to significantly frustrate implementation of a proposed agency action;

except that paragraph (a)(9)(ii) of this section shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) Specifically concern Eximbank’s issuance of a subpoena, or Eximbank’s participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration.

(b) Inasmuch as opening any regularly scheduled meeting, or any portion thereof, to public observation will be likely to result in the disclosure of the kind of information set forth in paragraph (a) (4), (8), (9)(i) or (a)(10) of this section, or any combination thereof, of paragraph (a) of this section, the Board of Directors expects to close all regularly scheduled meetings to the public.

(c) Any other meeting of Eximbank, or any portion thereof, will be open to public observation except where the Board of Directors determines that such meeting, or any portion thereof, is likely to disclose information of the kind set forth in any paragraph of §407.2(a). In the event that the Board of Directors closes such meeting, or any portion thereof, by virtue of paragraph (a)(4), (8), (9)(i)(A) or (a)(10) of this section, or any combination thereof, the procedure set forth in §407.3 below will apply, and in the event that the Board of Directors closes such meeting, or any portion thereof, by virtue of any of the remaining paragraphs of §407.2(a), or any combination thereof, the procedures set forth in §407.4 will apply.

[42 FR 12417, Mar. 4, 1977, as amended at 72 FR 66043, Nov. 27, 2007]
§ 407.3 Procedures applicable to regularly scheduled meetings.

(a) Announcements. Regularly scheduled meetings of the Board of Directors will be held at 9:30 a.m. every Thursday in the Board Room (Room 1141) of the Bank’s headquarters. In the event that a regularly scheduled meeting is rescheduled, public announcement of the time, date and place of such meeting will be made at the earliest practicable time in the form of a notice posted in the Office of the Secretary. An agenda setting forth the subject matter of each regularly scheduled meeting will be made available in the Office of the Secretary (Room 935), telephone number (202) (566-8871) at the earliest practicable time, provided, that individual items may be added to or deleted from any agenda at any time. Inquiries from the public regarding any regularly scheduled meeting shall be directed to the Office of the Secretary.

(b) Voting. At the beginning of each regularly scheduled meeting, the Board of Directors will vote by recorded vote on whether to close such meeting. No proxy vote will be permitted. A record of such vote indicating the vote of each Director will be posted in the Office of the Secretary immediately following the conclusion of such meeting.

§ 407.4 Procedures applicable to other meetings.

(a) Amendments. (1) For every meeting which is to be open to public observation or which is to be closed pursuant to any paragraph of §407.2(a) other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof, public announcement will be made at least one week before the meeting of the time, place, and agenda setting forth the subject matter of such meeting, and whether the meeting, or any portion thereof, is to be open or closed to the public.

(2) Inquiries from the public regarding any such meeting shall be directed to the Office of the Secretary.

(3) The one-week period for the announcement required by paragraph (a)(1) of this section may be reduced if the Board of Directors determines by a recorded vote that Eximbank business requires such meeting to be called at an earlier date. Public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, will be made at the earliest practicable time.

(4) The time or place of a meeting may be changed following the announcement required by paragraph (a)(1) of this section only if public announcement is made of such change at the earliest practicable time.

(5) The subject matter of a meeting or the determination of the Board of Directors to open or close a meeting, or any portion thereof, to the public, may be changed following the announcement required by paragraph (a) of this section only if:

(i) A majority of the entire voting membership of the Board of Directors determines by a recorded vote that Eximbank business so requires and that no earlier announcement of the change was possible; and

(ii) The Board of Directors announces such change and the vote of each Director upon such change at the earliest practicable time.

(6) Individual items may be added to or deleted from any agenda at any time.

(7) The announcements required pursuant to this section shall be made in the form of a notice posted in the Office of the Secretary. In addition, immediately following each announcement required by this section, notice of: (i) The time, place and subject matter of a meeting which is to be open to public observation or which is to be closed pursuant to any section of §407.2(a) other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof, (ii) the decision to open or close such meeting, or any portion thereof, or (iii) any change in any announcement previously made shall be submitted for publication in the Federal Register.

(8) The information required by this subsection shall be disclosed except to the extent that it is exempt from disclosure under any section of §407.2(a).

(b) Voting. (1) Action to close a meeting, or any portion thereof, pursuant to any section of §407.2(a), other than...
paragraphs (a) (4), (8), (9)(i), or (10), or any combination thereof, shall be taken only when a majority of the entire voting membership of the Board of Directors votes to take such action.

(2) A separate vote of the Board of Directors shall be taken with respect to each meeting, or any portion thereof, which is proposed to be closed to the public pursuant to any section of § 407.2(a) other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof, or with respect to any information which is proposed to be withheld under any section of § 407.2(a), other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof.

(3) A single vote of the Board of Directors may be taken with respect to a series of meetings, or any portion thereof, which are proposed to be closed to the public pursuant to any paragraph of § 407.2(a), other than paragraphs (a) (4), (8), (9)(i) or (10), or combination thereof, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than 30 days after the initial meeting in such series.

(4) Whenever any person whose interests may be directly affected by any portion of a meeting which is to be open to public observation submits a request in writing to the Office of the Secretary that the Board of Directors close such portion to the public under paragraph (a) (5), (6) or (7) of § 407.2, the Board of Directors, shall vote by recorded vote on whether to close such portion.

(5) No proxy vote will be permitted for any vote required under this section.

(6) A record of each vote indicating the vote of each Director pursuant to paragraphs (b) (1), (2), (3) or (4) of this section will be posted in the Office of the Secretary within one day after it has been taken. Provided, That if a meeting or portion thereof is to be closed, such record shall be accompanied by: (i) A full written explanation of the reasons for closing such meeting or portion thereof and (ii) a list of all persons expected to attend such meeting or portion thereof and their affiliation.

§ 407.5 Certification by General Counsel.

For every meeting closed pursuant to any paragraph of § 407.2(a), the General Counsel of Eximbank will be asked to certify prior to such meeting that in his or her opinion such meeting may properly be closed to the public, and to state which of the exemptions set forth in § 407.2(a) he or she has relied upon. A copy of such certification will be posted in the Office of the Secretary. The original certification together with a statement from the presiding officer of such meeting setting forth the time, date and place of such meeting and the persons present will be retained by Eximbank as part of the transcript, recording or minutes of such meeting described below.

§ 407.6 Transcripts, recordings and minutes of closed meetings.

Eximbank will maintain a complete transcript or electronic recording of the proceedings of every meeting or portion thereof closed to the public. Provided, however. That if any meeting or portion thereof is closed pursuant to paragraphs (8), (9)(i) or (10) of § 407.2(a), Eximbank may maintain a set of detailed minutes for such meetings in lieu of a transcript or electronic recording. The entire transcript, electronic recording or set of minutes of a meeting will be made promptly available to the public for inspection and copying in the Office of the Secretary. Copies of such transcript or minutes, as well as copies of the transcription of such recording disclosing the identity of each speaker, will be furnished to any person at the actual cost of duplication or transcription. However, Eximbank will not make available for inspection or copying the transcript, electronic recording or minutes of the discussions of any item on the agenda of such meeting which contains information of the kind described in § 407.2(a). Requests to inspect or to have copies made of any transcript, electronic recording or set of minutes
§ 407.7

of any meeting or item(s) on the agenda, thereof should be made in writing to the General Counsel and if possible, identify the time, date and place of such meeting and briefly describe the item(s) being sought. Eximbank will maintain a complete verbatim copy of the transcript, a complete electronic recording or a complete copy of the minutes of each meeting, or portion thereof, closed to the public for two years after such meeting or one year from the date of final action of the Board of Directors on all items on the agenda of such meeting, whichever occurs later.

[42 FR 12417, Mar. 4, 1977, as amended at 72 FR 66043, Nov. 27, 2007]

§ 407.7 Relationship to Freedom of Information Act.

Nothing in this part expands or limits the present rights of any person under part 404, except that the exemptions contained in § 407.2 shall govern in the case of any request made pursuant to part 404 to copy or inspect the transcripts, recordings or minutes described in § 407.6.

PART 408—PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Subpart A—General

§ 408.1 Background.

(a) The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) establishes national policies and goals for the protection of the environment. Section 102(2) of NEPA contains certain procedural requirements directed toward the attainment of such goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decision-making and to prepare detailed environmental statements on recommendations or reports on proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment.

(b) Executive Order 11991 of May 24, 1977, directed the Council on Environmental Quality (CEQ) to issue regulations to implement the procedural provisions of NEPA (NEPA Regulations). Accordingly, CEQ issued final NEPA Regulations which are binding on all Federal agencies as of July 30, 1979 (40 CFR parts 1500 through 1508) on November 29, 1979. These Regulations provide that each Federal agency shall as necessary adopt implementing procedures to supplement the NEPA Regulations. Section 1507.3(b) of the NEPA Regulations identifies those sections of the NEPA Regulations which must be addressed in agency procedures.

§ 408.2 Purpose.

The purpose of this part is to establish procedures which supplement the NEPA Regulations and provide for the implementation of those provisions identified in § 1507.3(b) of the NEPA Regulations.

§ 408.3 Applicability.

Historically, virtually all financing provided by Eximbank has been in aid of U.S. exports which involve no effects on the quality of the environment within the United States, its territories or possessions. Eximbank has separate procedures for conducting environmental reviews where such reviews are required by E.O. 12114 (January 4, 1979) because of potential effects on the environment of global commons areas or on the environment of foreign
nations. The procedures set forth in this part apply to the relatively rare cases where Eximbank financing of U.S. exports may affect environmental quality in the United States, its territories or possessions.

Subpart B—Eximbank Implementing Procedures

§ 408.4 Early involvement in foreign activities for which Eximbank financing may be requested.

(a) Section 1501.2(d) of the NEPA Regulations requires agencies to provide for early involvement in actions which, while planned by private applicants or other non-Federal entities, require some form of Federal approval. Pursuant to the Export-Import Bank Act of 1945, as amended, Eximbank is asked to provide financing for transactions involving exports of U.S. goods and services for projects in foreign countries which are planned by non-U.S. entities (Transactions).

(b) To implement the requirements of § 1501.2(d) with respect to these Transactions, Eximbank:

(1) Will provide on a project-by-project basis to applicant seeking financing from Eximbank guidance as to the scope and level of environmental information to be used in evaluating a proposed Transaction where: (i) The proposed Eximbank financing would be a major action and (ii) a Transaction may significantly affect the quality of the human environment in the United States, its territories or possessions.

(2) Upon receipt of an application for Eximbank financing or notification that an application will be filed, will consult as required with other appropriate parties to initiate and coordinate the necessary environmental analyses.

These responsibilities will be performed by the General Counsel and the Engineers of Eximbank.

(c) To facilitate Eximbank review of Transactions for which positive determinations have been made under paragraphs (b)(1)(i) and (ii) of this section, applicants should:

(1) Consult with the Engineer as early as possible in the planning process for guidance on the scope and level of environmental information required to be submitted in support of their application;

(2) Conduct any studies which are deemed necessary and appropriate by Eximbank to determine the impact of the proposed action on the quality of the human environment;

(3) Consult with appropriate U.S. (Federal, regional, State and local) agencies and other potentially interested parties during preliminary planning stages to ensure that all environmental factors are identified;

(4) Submit applications for all U.S. (Federal, regional, State and local) approvals as early as possible in the planning process;

(5) Notify Eximbank as early as possible of all other applicable legal requirements for project completion so that all applicable Federal environmental reviews may be coordinated; and

(6) Notify Eximbank of all known parties potentially affected by or interested in the proposed action.

§ 408.5 Ensuring environmental documents are actually considered in Agency decision-making.

Section 1505.1 of the NEPA Regulations contains requirements to ensure adequate consideration of environmental documents in agency decision-making. To implement these requirements, Eximbank officials will:

(a) Consider all relevant environmental documents in evaluating applications for Eximbank financing;

(b) Ensure that all relevant environmental documents, comments and responses accompany the application through Eximbank’s review processes;

(c) Consider only those alternatives encompassed by the range of alternatives discussed in the relevant environmental documents when evaluating an application which is the subject of an EIS.
§ 408.6 Typical classes of action.
(a) Section 1507.3(c)(2) of the NEPA Regulations in conjunction with § 1508.4 thereof requires agencies to establish three typical classes of action for similar treatment under NEPA. These typical classes of action are set forth below:

<table>
<thead>
<tr>
<th>Actions normally requiring EIS's</th>
<th>Actions normally requiring assessments but not necessarily EIS's</th>
<th>Actions normally not requiring assessments or EIS's</th>
</tr>
</thead>
<tbody>
<tr>
<td>None ..................................</td>
<td>Applications for Eximbank financing under the direct lending program in support of transactions for which determinations under § 408.4(b)(1) (i) and (ii) above may be affirmative.</td>
<td>Applications for Eximbank financing in the form of insurance or guarantees.</td>
</tr>
</tbody>
</table>

(b) Eximbank will independently determine whether an EIS or an environmental assessment is required where:
(1) A proposal for agency action is not covered by one of the typical classes of action above; or
(2) For actions which are covered, the presence of extraordinary circumstances indicates that some other level of environmental review may be appropriate.

§ 408.7 Environmental information.
Interested persons may contact the General Counsel regarding Eximbank’s compliance with NEPA.

PART 410—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY EXPORT-IMPORT BANK OF THE UNITED STATES

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SOURCE: 51 F.R. 4575, 4579, Feb. 5, 1986, unless otherwise noted.

§ 410.101 Purpose.
This part effectuates 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 Executive agencies or the United States Postal Service.
§410.102 Application.
This part applies to all programs or activities conducted by the agency.

§410.103 Definitions.
For purposes of this part, the term—
Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.
Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.
Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. 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.
Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.
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:
(i) Physical or mental impairment includes—
(ii) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.
(2) Major life activities includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
(4) Is regarded as having an impairment means—
(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency 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;
(3) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.
Qualified handicapped person means—
(1) With respect to any agency 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 who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or
(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) Qualified handicapped person is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §410.140.


§§ 410.104–410.109 [Reserved]

§ 410.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 410.111 Notice.

The agency 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 programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 410.112–410.129 [Reserved]

§ 410.130 General prohibitions against discrimination.

(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 any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.
(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissible separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 410.131–410.139 [Reserved]

§ 410.140 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 agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 410.141–410.148 [Reserved]

§ 410.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in §410.150, no qualified handicapped person shall, because the agency’s facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 410.150 Program accessibility: Existing facilities.

(a) General. The agency shall operate each program or activity 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 agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §410.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or
§ 410.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151 through 4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 410.152–410.159 [Reserved]

§ 410.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for...
personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD’s) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §410.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§410.170 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 programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) General Counsel, Export-Import Bank of the United States shall be responsible for coordinating implementation of this section. Complaints may be sent to General Counsel, Export-Import Bank of the United States, 811 Vermont Avenue, NW., Room 947, Washington, DC 20571.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

1. Findings of fact and conclusions of law;
2. A description of a remedy for each violation found;
3. A notice of the right to appeal.

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§§ 410.171–410.999

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 410.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency 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 his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency 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 to another agency.


§§ 410.171–410.999 [Reserved]

PART 411—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

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411.100 Conditions on use of funds.
411.105 Definitions.
411.110 Certification and disclosure.

Subpart B—Activities by Own Employees

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411.205 Professional and technical services.
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APPENDIX A TO PART 411—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 411—DISCLOSURE FORM TO REPORT LOBBYING


SOURCE: 55 FR 6737, 6747, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, Dec. 20, 1989.

Subpart A—General

§ 411.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action),
which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 411.105 Definitions.

For purposes of this part:

(a) Agency, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) Covered Federal action means any of the following Federal actions:

(1) The awarding of any Federal contract;
(2) The making of any Federal grant;
(3) The making of any Federal loan;
(4) The entering into of any cooperative agreement; and,
(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) Federal contract means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) Federal cooperative agreement means a cooperative agreement entered into by an agency.

(e) Federal grant means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) Federal loan means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) Indian tribe and tribal organization have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) Influencing or attempting to influence means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) Loan guarantee and loan insurance means an agency’s guarantee or insurance of a loan made by a person.

(j) Local government means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) Officer or employee of an agency includes the following individuals who are employed by an agency:
§ 411.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

1. An award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

2. An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

1. A Federal contract, grant, or cooperative agreement exceeding $100,000; or

2. A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.
under paragraph (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

d) Any person who requests or receives from a person referred to in paragraph (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraph (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 411.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 411.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person’s products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person’s products or services for an agency’s use.

(d) For purposes of paragraph (a) of this section, the following agencies and
legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 411.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §411.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, professional and technical services shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by an attorney that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 411.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 411.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §411.100 (a), does not apply in the case of any reasonable
payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §411.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, professional and technical services shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§411.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to
continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraph (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 411.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 411.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 411.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 411.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no
later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 411.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President’s Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency’s covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 411—
CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

1. If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.
APPENDIX B TO PART 411—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES
Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See revenue for public burden disclosure.)

1. Type of Federal Action:
   a. contract
   b. grant
   c. cooperative agreement
   d. loan
   e. loan guarantee
   f. loan insurance

2. Status of Federal Action:
   a. bid/offer/application
   b. initial award
   c. post-award

3. Report Type:
   a. initial filing
   b. material change
   For Material Change Only:
     year ______ quarter _____
     date of last report ______

4. Name and Address of Reporting Entity:
   a. Prime
   b. Subawardee
   Tier ______ if known:
   Congressional District, if known:

5. If Reporting Entity in No. 4 is Subawardee. Enter Name and Address of Prime:
   Name and Address:
   Congressional District, if known:

6. Federal Department/Agency:

7. Federal Program Name/Description:
   CFDA Number, if applicable: ________

8. Federal Action Number, if known:

9. Award Amount, if known:

10. a. Name and Address of Lobbying Entity
    of individual, last name, first name, MIl:

    b. Individuals Performing Services (including address if
       different from No. 10)
       last name, first name, Mlb:

11. Amount of Payment (check all that apply):
    $ ________
    actual ________ planned ________

12. Form of Payment (check all that apply):
    a. cash ________
    b. irrevocable; specify: nature ________ value ________

13. Type of Payment (check all that apply):
    a. retainer ________
    b. one-time fee ________
    c. commission ________
    d. contingent fee ________
    e. deferred ________
    f. other; specify ________

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s),
or Member(s) contacted, for Payment Indicated in Item 11:

15. Continuation Sheet(s) SF-LLL-A attached:
    □ Yes □ No

16. Information required through this form is authorized by title 31 U.S.C.
    section 1352 This disclosure of lobbying activities is a partial representation
    of fact upon which reliance was placed by the filer above when this
    transaction was made or entered into. This disclosure is required pursuant to
    31 U.S.C. 1352 This information will be reported to the Congress semi-
    annually and will be available for public inspection. Any person who fails to
    file the required disclosure shall be subject to a civil penalty of not less than
    $1,000 and not more than $40,000 for each such failure

Authorized for Local Reproduction
Standard Form - EII

Signature: ____________________________
Print Name: _______________________
Title: ____________________________
Telephone No.: _______________ Date: ____________
INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subawardee recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 3 (e.g., Request for Proposal (RFP) number; Invitation for bid (IFB) number; Grant Announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that was contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for the collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0148-0046), Washington, D.C. 20503.
PART 412—ACCEPTANCE OF PAYMENT FROM A NON-FEDERAL SOURCE FOR TRAVEL EXPENSES

Sec. 412.1 Authority.
412.3 General.
412.5 Policy.
412.7 Conditions for acceptance.
412.9 Conflict of interest analysis.
412.11 Payment guidelines.
412.13 Limitations and penalties.


SOURCE: 59 FR 31136, June 17, 1994, unless otherwise noted.

§ 412.1 Authority.

§ 412.3 General.
(a) Applicability. This part applies to acceptance by the Export-Import Bank of the United States (Eximbank) of payment from a non-Federal source for travel, subsistence, and related expenses with respect to the attendance of an employee in a travel status at any meeting or similar event relating to the official duties of the employee, other than those described in 41 CFR 304-1.2. This part does not authorize acceptance of such payments by an employee in his/her personal capacity.
(b) Solicitation prohibited. An employee shall not solicit payment for travel, subsistence and related expenses from a non-Federal source. However, after receipt of an invitation from a non-Federal source to attend a meeting or similar event, Eximbank or the employee may inform the non-Federal source of this authority.
(c) Definitions. As used in this part, the following definitions apply:
(1) Conflicting non-Federal source. Conflicting non-Federal source means any person or entity other than the Government of the United States which has interests that may be substantially affected by the performance or nonperformance of the employee's duties.
(2) Employee. Employee means any director, officer or other employee of Eximbank.
(3) Meeting or similar event. Meeting or similar event means a meeting, formal gathering, site visit, negotiation session or similar event that takes place away from the employee's official station and which is directly related to the mission of Eximbank. This term does not include any meeting or similar function described in 41 CFR 304-1.2 or sponsored by Eximbank. A meeting or similar event need not be widely attended for purposes of this definition.
(4) Non-Federal source. Non-Federal source means any person or entity other than the Government of the United States. The term includes any individual, private or commercial entity, nonprofit organization or association, state, local, or foreign government, or international or multinational organization.
(5) Payment. Payment means funds paid or reimbursed to Eximbank by a non-Federal source for travel, subsistence, and related expenses by check or similar instrument, or payment in kind.
(6) Payment in kind. Payment in kind means goods, services or other benefits provided by a non-Federal source for travel, subsistence, and related expenses in lieu of funds paid to Eximbank by check or similar instrument for the same purpose.
(7) Travel, subsistence and related expenses. Travel, subsistence and related expenses means the same types of expenses payable under 41 CFR chapter 301.

§ 412.5 Policy.
As provided in this part, Eximbank may accept payment from a non-Federal source (or authorize an employee to receive such payment on its behalf) with respect to attendance of the employee at a meeting or similar event which the employee has been authorized to attend in an official capacity on behalf of Eximbank. The employee's immediate supervisor and Eximbank's designated agency ethics official or his/her designee (DAEO) must approve any offer and acceptance of payment under this part in accordance with the procedures described below. If the employee is a member of Eximbank's Board of Directors, only the DAEO's approval is required. Any employee authorized to
§ 412.7 Conditions for acceptance.

(a) Eximbank may accept payment for employee travel from a non-Federal source when a written authorization to accept payment is issued in advance of the travel following a determination by the employee’s supervisor (except in the case of Board members) and the DAEO that the payment is:

(1) For travel relating to an employee’s official duties under an official travel authorization issued to the employee;

(2) For attendance at a meeting or similar event as defined in §412.3(c)(3):

(i) In which the employee’s participation is necessary in order to further the mission of Eximbank;

(ii) Which cannot be held at the offices of Eximbank for justifiable business reasons in light of the location and number of participants and the purpose of the meeting or similar event; and

(iii) Which is taking place at a location and for a period of time that is appropriate for the purpose of the meeting or similar event;

(3) From a non-Federal source that is not a conflicting non-Federal source or from a conflicting non-Federal source that has been approved under §412.9; and

(4) In an amount which does not exceed the maximum per diem or actual subsistence expense rates and transportation class of service limitations prescribed in 41 CFR chapter 301.

(b) An employee requesting approval of payment of travel expenses by a non-Federal source under this part shall submit to the employee’s supervisor (except in the case of Board members) and the DAEO a written description of the following: the nature of the meeting or similar event and the reason that it cannot be held at Eximbank, the date(s) and location of the meeting or similar event, the identities of all participants in the meeting or similar event, the name of the non-Federal source offering to make the payment, the amount and method of the proposed payment, and the nature of the expenses.

(c) Payments may be accepted from multiple sources under paragraph (a) of this section.

§ 412.9 Conflict of interest analysis.

Eximbank may accept payment from a conflicting non-Federal source if the conditions of §412.7 are met and the employee’s supervisor (except in the case of Board members) and the DAEO determine that Eximbank’s interest in the employee’s attendance at or participation in the meeting or similar event outweighs concern that acceptance of the payment by Eximbank may cause a reasonable person to question the integrity of Eximbank’s programs and operations. In determining whether to accept payment, Eximbank shall consider all relevant factors, including the purpose of the meeting or similar event, the importance of the travel for Eximbank, the nature and sensitivity of any pending matter affecting the interests of the conflicting non-Federal source, the significance of the employee’s role in any such matter, the identity of other expected participants, and the location and duration of the meeting or similar event.

§ 412.11 Payment guidelines.

(a) Payments from a non-Federal source, other than payments in kind, shall be by check or similar instrument made payable to Eximbank. Payments from a non-Federal source, including payments in kind, are subject to the maximum per diem or actual subsistence expense rates and transportation class of service limitations prescribed in 41 CFR chapter 301.

(b) If Eximbank determines in advance of the travel that a payment covers some but not all of the per diem costs to be incurred by the employee, Eximbank shall authorize a reduced per diem rate, in accordance with 41 CFR part 301–7.12.

§ 412.13 Limitations and penalties.

(a) This part is in addition to and not in place of any other authority under which Eximbank may accept payment from a non-Federal source or authorize an employee to accept such payment on behalf of Eximbank. This part shall
not be applied in connection with the acceptance by Eximbank of payment for travel, subsistence, and related expenses incurred by an employee to attend a meeting or similar function described in and authorized by 41 CFR part 304-1.

(b) An employee who accepts any payment in violation of this part is subject to the following:

(1) The employee may be required, in addition to any penalty provided by law and applicable regulations, to repay for deposit to the general fund of the Treasury, an amount equal to the amount of the payment so accepted; and

(2) When repayment is required under paragraph (b)(1) of this section, the employee shall not be entitled to any payment or reimbursement from Eximbank for such expenses.
FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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### Alphabetical List of Agencies Appearing in the CFR

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| 337 Authority citation revised | 17803 |
| 337.12 (b) | Revised; interim | 17803 |

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| 344.9 (a)(3) | Revised | 60547 |
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| 348.2 (j)(1)(vi) | Amended; interim | 1276 |

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| 348.3 (b) | Amended; interim | 1276 |

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| 364 Authority citation revised | 63764 |
| 364.101 (b) | Amended | 63764 |

Chapter IV

| 403.11 (b)(12) | Amended | 66043 |
| 407.1 (b) | Revised; (c) Amended | 66043 |
| 407.2 (a) Introductory text | Amended | 66043 |
| 407.3 (a) and (b) | Amended | 66043 |
| 407.4 | Amended | 66043 |
| 407.6 | Amended | 66043 |
| 413 | Removed | 30244 |
| 414 | Added | 66043 |