CODE OF FEDERAL REGULATIONS

Title 12
Banks and Banking

Parts 347 to 599

Revised as of January 1, 2021

Containing a codification of documents
of general applicability and future effect

As of January 1, 2021

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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
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OLIVER A. POTTS,
Director,
Office of the Federal Register
January 1, 2021

THIS TITLE

Title 12—BANKS AND BANKING is composed of ten volumes. The parts in these volumes are arranged in the following order: Parts 1–199, 200–219, 220–229, 230–299, 300–346, 347–599, 600–899, 900–1025, 1026–1099, and 1100–end. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 2021.

For this volume, Gabrielle E. Burns was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

Title 12—Banks and Banking

(This book contains parts 347 to 599)

CHAPTER III—FEDERAL DEPOSIT INSURANCE CORPORATION (CONTINUED)

SUBCHAPTER B—REGULATIONS AND STATEMENTS OF GENERAL POLICY (CONTINUED)

SUBCHAPTER B—REGULATIONS AND STATEMENTS OF GENERAL POLICY (CONTINUED)

PART 347—INTERNATIONAL BANKING

Subpart A—Foreign Banking and Investment by Insured State Nonmember Banks

Subpart B—Foreign Banks

Subpart C—International Lending

AUTHORITY: 12 U.S.C. 1813, 1815, 1817, 1819, 1820, 1828, 3103, 3104, 3105, 3108, 3109; Pub L. No. 111–203, section 939A, 124 Stat. 1376, 1887 (July 21, 2010) (codified 15 U.S.C. 78o–7 note).

SOURCE: 70 FR 17560, Apr. 6, 2005, unless otherwise noted.

§ 347.101 Authority, purpose, and scope.

(a) This subpart is issued pursuant to section 18(d) and (*l*) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d), 1828(*l*)).

(b) The rules in subpart A address the FDIC's requirements for insured state nonmember bank investments in foreign organizations, permissible foreign financial activities, loans or extensions of credit to or for the account of foreign organizations, and the FDIC's recordkeeping, supervision, and approval requirements. The rules also address the permissible activities for foreign branches of insured state nonmember

banks, as well as the FDIC's requirements for establishing, operating, relocating and closing of branches in foreign countries.

§ 347.102 Definitions.

For the purposes of this subpart:

(a) An affiliate of an insured state nonmember bank means:

(1) Any entity of which the insured state nonmember bank is a direct or indirect subsidiary or which otherwise controls the insured state nonmember bank;

(2) Any organization which is a direct or indirect subsidiary of such entity or which is otherwise controlled by such entity; or

(3) Any other organization 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 issued by an entity that has adequate capacity to meet financial commitments for the projected life of the exposure. Such an entity has adequate

capacity to meet financial commitments if the risk of its default is low and the full and timely repayment of principal and interest is expected.

(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 §324.2 of this chapter.

(v) Well capitalized means well capitalized as defined in §324.403 of this chapter.

[70 FR 17560, Apr. 6, 2005, as amended at 78 FR 55595, Sept. 10, 2013; 83 FR 9143, Mar. 5, 2018; 83 FR 17741, Apr. 24, 2018]

§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).

(17) Engaging in activities that the FRB has determined in Regulation Y (12 CFR 225.28(b)) are closely related to banking under section 4(c)(8) of the Bank Holding Company Act.

(18) Engaging in other activities, with the prior approval of the FDIC.

(c) *Limitation on activities authorized under Regulation Y.* If a bank relies solely on the cross-reference to Regulation Y contained in paragraph (b)(17) of this section as authority to engage in an activity, compliance with any attendant restrictions on the activity that are contained in 12 CFR 225.28(b) is required.

(d) *Approval of other activities.* Activities that are not specifically authorized by this section, but that are authorized by 12 CFR 211.10 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 211.10 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.

§ 347.106 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

(ii) 40 percent of the foreign organization's voting and nonvoting equity interests;

(b) The bank or its affiliates must not otherwise control the foreign organization; and

(c) 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.

§ 347.110 Affiliate holdings.

References in §§ 347.107, 347.108, and 347.109 to equity interests of foreign organizations held by an affiliate of a bank include equity interests 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 (12 U.S.C. 1843(c)(8)).

§ 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 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.* Guarantee 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[1] rated as investment grade of:

(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

[1] If the obligation is an equity interest, it must be held through a subsidiary of the foreign branch and the insured state nonmember bank must meet its minimum capital requirements.

(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 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:

[2] If 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.

(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:

(i) The bank already operates one or more foreign branches or foreign bank subsidiaries;

(ii) The bank's holding company operates a foreign bank subsidiary; or

(iii) An affiliated bank or Edge or Agreement corporation operates one or more foreign branches or foreign bank subsidiaries.

(2) Insured state nonmember bank to relocate an existing foreign branch within a foreign country.

(b) *General consent to invest in a foreign organization.* General consent of the FDIC is granted, subject to the written notification requirement contained in section 303.183(a) (unless no notification is required because the investment is acquired for trading purposes) and consistent with the requirements of this subpart, for an eligible bank to make investments in foreign organizations, directly or indirectly, if:

(1) The bank operates at least one foreign bank subsidiary or foreign branch, an affiliated bank or Edge or Agreement corporation operates at least one foreign bank subsidiary or foreign branch, or the bank's holding company operates at least one foreign bank subsidiary in the country where the foreign organization will be located;

(2) In any instance where the bank and its affiliates will hold 20 percent or more of the foreign organization's voting equity interests or control the foreign organization, at least one state nonmember bank has a foreign bank subsidiary or foreign branch (other than a shell branch) in the country where the foreign organization will be located;[3] and

(3) The investment is within one of the following limits:

(i) The investment is acquired at net asset value from an affiliate;

(ii) The investment is a reinvestment of cash dividends received from the same foreign organization during the preceding 12 months; or

(iii) The total investment, directly or indirectly, in a single foreign organization in any transaction or series of transactions during a twelve-month period does not exceed 2 percent of the 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.

[3] A list of these countries can be obtained from the FDIC's Internet Web Site at *http://www.fdic.gov.*

§ 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.* (1) 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

(i) A bank would hold 20 percent or more of the voting equity interests of a foreign organization or control such organization as a result of a foreign investment; or

(ii) A bank would be establishing a foreign branch.

(b) *Modification or suspension of general consent or expedited processing.* The FDIC at any time notifies the bank that the FDIC is modifying or suspending its general consent or expedited processing procedure.

(c) *Specific consent.* Direct or indirect investments in or activities of foreign organizations by banks, the establishment of foreign branches or issues regarding the types or amounts of activity that can be engaged in by foreign branches, which are not authorized under § 347.117 or 347.118 require prior review and specific consent of the FDIC.

[70 FR 17560, Apr. 6, 2005, as amended at 85 FR 72555, Nov. 13, 2020]

§ 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.

§ 347.121 Requirements for insured state nonmember bank to close a foreign branch.

A bank must comply with the written notification requirement contained in § 303.182(d) when it closes a foreign branch.

§ 347.122 Limitations applicable to the authority provided in this subpart.

The FDIC may impose such conditions on authority granted in this subpart as it considers appropriate. If a bank is unable or fails to comply with the requirements of this subpart or any conditions imposed by the FDIC regarding transactions under this subpart, the FDIC may require termination of any activities or divestiture of investments permitted under this subpart after giving the bank notice and a reasonable opportunity to be heard on the matter.

Subpart B—Foreign Banks

§ 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) Agency means any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States.

(c) 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.

(d) Deposit has the same meaning as that term in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)).

(e) Depository means any insured state bank, national bank, or insured branch.

(f) *Domestic retail deposit activity* means the acceptance by a Federal or State branch of any initial deposit of less than an amount equal to the standard maximum deposit insurance amount (''SMDIA'').

(g) Federal branch means a branch of a foreign bank established and operating under the provisions of section 4 of the International Banking Act of 1978 (12 U.S.C. 3102).

(h) 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.

(i) Foreign business means any entity including, but not limited to, a corporation, partnership, sole proprietorship, association, foundation or trust, which is organized under the laws of a foreign country or any United States entity which is owned or controlled by an entity which is organized under the laws of a foreign country or a foreign national.

(j) Foreign country means any country other than the United States and includes any colony, dependency or possession of any such country.

(k) FRB means the Board of Governors of the Federal Reserve System.

(l) Highly liquid means, with respect to a security, that the security has low credit and market risk; is traded in an active secondary two-way market that has committed market makers and independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined within

one day and settled at that price within a reasonable time period conforming with trade custom; is a type of asset that investors historically have purchased in periods of financial market distress during which market liquidity has been impaired.

(m) 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.

(n) Immediate family member of a natural person means the spouse, father, mother, brother, sister, son or daughter of that natural person.

(o) 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.

(p) 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.

(q) 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.

(r) Investment grade means a security issued by an entity that has adequate capacity to meet financial commitments for the projected life of the exposure. Such an entity has adequate capacity to meet financial commitments if the risk of its default is low and the full and timely repayment of principal and interest is expected.

(s) 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.

(t) A majority owned subsidiary means a company the voting stock of which is more than 50 percent owned or controlled by another company.

(u) 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.

(v) OCC means the Office of the Comptroller of the Currency.

(w) Person means an individual, bank, corporation, partnership, trust, association, foundation, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(x) Significant risk to the deposit insurance fund shall be understood to be present whenever there is a high probability that the Deposit Insurance Fund administered by the FDIC may suffer a loss.

(y) *Standard maximum deposit insurance amount*, referred to as the ''SMDIA'' hereafter, means $250,000 adjusted pursuant to subparagraph (F) of section 11(a)(1) of the FDI Act (12 U.S.C. 1821(a)(1)(F)).

(z) State means any state of the United States or the District of Columbia.

(aa) State branch means a branch of a foreign bank established and operating under the laws of any state.

(bb) Wholly owned subsidiary means a company the voting stock of which is 100 percent owned or controlled by another company except for a nominal number of directors' shares.

[70 FR 17560, Apr. 6, 2005; 70 FR 20704, Apr. 21, 2005, as amended at 71 FR 20527, Apr. 21, 2006; 74 FR 47718, Sept. 17, 2009; 75 FR 49365, Aug. 13, 2010; 83 FR 9143, Mar. 5, 2018]

§ 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 accounts with balances of less than an amount equal to the SMDIA 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 6(d)(1) of the International Banking Act (12 U.S.C. 3104(d)(1)).

[70 FR 17560, Apr. 6, 2005, as amended at 74 FR 47718, Sept. 17, 2009]

§ 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]

[4] This 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

(2) *Risk-based assessment schedule.* The risk-based asset pledge required by paragraph (b)(1) will be determined by utilizing the following risk-based assessment schedule:

Asset maintenance level	Supervisory risk subgroup		
	A (%)	B (%)	C (%)
Equal to or greater than 108%	2	3	4
Equal to or greater than 106%	4	5	6
Less than 106%	6	7	8

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 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.

such assets at the time of the original pledge and thereafter as of the last day of the most recent calendar quarter.

(d) *Assets that may be pledged.* (1) This paragraph sets forth the kinds of assets that may be pledged to satisfy the requirements of this section. 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. The FDIC reserves the right to require the substitution of pledged assets with other assets deemed acceptable to the FDIC.

(2) A foreign bank may pledge the kinds of assets set forth in this paragraph (d)(2), provided that: Such assets are denominated in United States dollars; such assets are investment grade, as that term is defined in §347.202(r); and such assets are highly liquid, as that term is defined in §347.202(l). Furthermore, for the purposes of calculating the amount of assets required to be pledged under paragraph (b) of this section, the assets that are eligible for pledging under this paragraph (d)(2) must be discounted at the rates set forth in Table 1 to §347.209.

(i) Cash;

(ii) 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 thereof;

(iii) Obligations of United States government-sponsored enterprises;

(iv) 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;

(v) Obligations of the African Development Bank, Asian Development Bank, Inter-American Development Bank, and the International Bank for Reconstruction and Development;

(vi) Commercial paper;

(vii) Notes issued by bank and savings and loan holding companies, banks, or savings associations organized under the laws of the United States or any state thereof or notes issued by branches or agencies of foreign banks, provided that the notes are payable in the United States, 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;

(viii) 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;

(ix) 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;

(x) 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.

(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 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 depository has released to the successor depository the pledged assets and documents and instruments to effectuate transfer of title in accordance with the written instructions of the foreign bank as approved by the FDIC. The appointment by the foreign bank of a successor depository shall not be effective until:

(i) The FDIC has approved in writing the successor depository; and

(ii) A pledge agreement in form and substance satisfactory to the FDIC has been executed.

(13) *Waiver of terms.* The FDIC may by written order waive compliance by the foreign bank or the depository with any term or condition of the pledge agreement.

TABLE 1 TO § 347.209—SUPERVISORY HAIRCUTS FOR ASSETS PLEDGED UNDER § 347.209(d)

Remaining maturity	Haircut % assigned based on maturity and risk weight			
	Risk weight (%) by issuer as specified in part 324.32			
	0%	20%	50%	100%
≤to 1 Year	0	1.0	2.0	4.0
>1 Year but ≤5 Years	0	4.0	6.0	8.0
>5 years	0	8.0	12.0	16.0

[70 FR 17560, Apr. 6, 2005; 70 FR 20704, Apr. 21, 2005, as amended at 71 FR 20527, Apr. 21, 2006; 83 FR 9143, Mar. 5, 2018]

§ 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 determines that sufficient documentation exists. Such a determination may be made either at the next federal examination, or upon request of the insured branch, by the appropriate regional director;

(5) Any asset not in the insured branch's actual possession unless the insured branch holds title to such asset and the insured branch maintains records sufficient to enable independent verification of the insured branch's ownership of the asset, as determined at the most recent state or federal examination;

(6) Any intangible asset;

(7) Any other asset not considered bankable by the FDIC.

(c) A foreign bank which has more than one insured branch in a state may treat all of its insured branches in the same state as one entity for purposes of compliance with paragraph (a) of this section and shall designate one insured branch to be responsible for maintaining the records of the insured branches' compliance with this section.

(d) The average book value of the insured branch's liabilities for a quarter shall be, at the insured branch's option, either an average of the balances as of the close of business for each day of the quarter or an average of the balances as of the close of business on each Wednesday during the quarter. Quarters end on March 31, June 30, September 30, and December 31 of any given year. For days on which the insured branch is closed, balances from the previous business day are to be used. Calculations of the average book value of the insured branch's liabilities for a quarter shall be retained by the insured branch until the next federal examination.

§ 347.211 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 $3 billion;

(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;

(iii) The size, relative importance, and role of a particular insured branch when reviewed in the context of the foreign bank's entire U.S. operations otherwise necessitate an annual examination; and

(iv) The condition of the parent foreign bank gives rise to such a need.

(c) *Authority to conduct more frequent examinations.* Nothing in paragraphs (a) and (b) of this section limits the authority of the FDIC to examine any insured branch as frequently as it deems necessary.

(d) From December 2, 2020, through December 31, 2021, for purposes of determining eligibility for the extended examination cycle described in paragraph (b) of this section, the total assets of an insured branch shall be determined based on the lesser of:

(1) The assets of the insured branch as of December 31, 2019; and

(2) The assets of the insured branch as of the end of the most recent calendar quarter.

[70 FR 17560, Apr. 6, 2005; 70 FR 20704, Apr. 21, 2005, as amended at 72 FR 17803, Apr. 10, 2007; 81 FR 10070, Feb. 29, 2016; 83 FR 43965, Aug. 29, 2018; 85 FR 77364, Dec. 2, 2020]

§ 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.

[70 FR 17560, Apr. 6, 2005; 70 FR 20704, Apr. 21, 2005, as amended at 71 FR 20527, Apr. 21, 2006]

§ 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:

(1) The branch only accepts initial deposits in an amount equal to the SMDIA or greater; or

(2) The branch meets the criteria set forth in § 347.214 or § 347.215.

(b) [Reserved]

[70 FR 17560, Apr. 6, 2005, as amended at 74 FR 47718, Sept. 17, 2009]

§ 347.214 Branch established under section 5 of the International Banking Act.

A foreign bank may operate any state branch as a noninsured branch whenever the foreign bank has entered into an agreement with the FRB to accept at that branch only those deposits as would be permissible for a corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611 *et seq.*) and implementing rules and regulations administered by the FRB (12 CFR 211).

§ 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 an amount equal to the SMDIA 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 nondeposit banking services within the past twelve months or has entered into a written agreement to provide such services within the next twelve months;

(4) Foreign businesses, large United States businesses, and persons from whom an Edge 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).

(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 an amount equal to the SMDIA 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 noninsured branch. The Board of Directors may exempt the branch from the insurance requirement if the branch is not engaged in domestic retail deposit activities requiring insurance protection. The Board of Directors will consider the size and nature of depositors and deposit accounts, the importance of maintaining and improving the availability of credit to all sectors of the United States economy, including the international trade finance sector of the United States economy, whether the exemption would give the foreign bank an unfair competitive advantage over United States banking organizations, and any other relevant factors in making this determination.

(2) Procedures for applications under this section are set out in § 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, 1998:

(1) If the deposit qualifies pursuant to paragraph (a) or (b) of this section; or

(2) If the deposit does not qualify pursuant to paragraph (a) or (b) of this section, in the case of a time deposit, no later than the first maturity date of the time deposit after April 1, 1996.

[70 FR 17560, Apr. 6, 2005, as amended at 74 FR 47718, Sept. 17, 2009]

§ 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

SOURCE: 70 FR 17560, Apr. 6, 2005; 70 FR 20704, Apr. 21, 2005, unless otherwise noted.

§ 347.301 Purpose, authority, and scope.

Under the International Lending Supervision Act of 1983 (Title IX, Pub. L. 98–181, 97 Stat. 1153) (12 U.S.C. 3901 *et seq.*) (ILSA), the Federal Deposit Insurance Corporation prescribes the regulations in this subpart relating to international lending activities of banks.

§ 347.302 Definitions.

For the purposes of this subpart:

(a) *Administrative cost* means those costs which are specifically identified with negotiating, processing and consummating the loan. These costs include, but are not necessarily limited to: legal fees; costs of preparing and processing loan documents; and an allocable portion of salaries and related benefits of employees engaged in the international lending function. No portion of supervisory and administrative expenses or other indirect expenses such as occupancy and other similar overhead costs shall be included.

(b) *Banking institution* means an insured state nonmember bank.

(c) *Federal banking agencies* means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

(d) *International assets* means those assets required to be included in banking institutions' ''Country Exposure Report'' form (FFIEC No. 009).

(e) *International loan* means a loan as defined in the instructions to the ''Report of Condition and Income'' for the respective banking institution (FFIEC Nos. 031, 032, 033 and 034) and made to a foreign government, or to an individual, a corporation, or other entity not a citizen of, resident in, or organized or incorporated in the United States.

(f) *Restructured international loan* means a loan that meets the following criteria:

(1) The borrower is unable to service the existing loan according to its terms and is a resident of a foreign country in which there is a generalized inability of public and private sector obligors to meet their external debt obligations on a timely basis because of a lack of, or restraints on the availability of, needed foreign exchange in the country; and

(2) Either:

(i) The terms of the existing loan are amended to reduce stated interest or extend the schedule of payments; or

(ii) A new loan is made to, or for the benefit of, the borrower, enabling the borrower to service or refinance the existing debt.

(g) *Transfer risk* means the possibility that an asset cannot be serviced in the currency of payment because of a lack of, or restraints on the availability of, needed foreign exchange in the country of the obligor.

§ 347.303 Allocated transfer risk reserve.

(a) *Establishment of Allocated Transfer Risk Reserve.* A banking institution shall establish an allocated transfer risk reserve (ATRR) for specified international assets when required by the FDIC in accordance with this section.

(b) *Procedures and standards*—(1) *Joint agency determination.* At least annually, the federal banking agencies shall determine jointly, based on the standards set forth in paragraph (b)(2) of this section, the following:

(i) Which international assets subject to transfer risk warrant establishment of an ATRR;

(ii) The amount of the ATRR for the specified assets; and

(iii) Whether an ATRR established for specified assets may be reduced.

(2) *Standards for requiring ATRR*—(i) *Evaluation of assets.* The federal banking agencies shall apply the following criteria in determining whether an ATRR is required for particular international assets:

(A) Whether the quality of a banking institution's assets has been impaired by a protracted inability of public or private 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

(*3*) A foreign country has failed to comply with any International Monetary Fund or other suitable adjustment program; or

(B) Whether no definite prospects exist for the orderly restoration of debt service.

(ii) *Determination of amount of ATRR.* (A) In determining the amount of the ATRR, the federal banking agencies shall consider:

(*1*) The length of time the quality of the asset has been impaired;

(*2*) Recent actions taken to restore debt service capability;

(*3*) Prospects for restored asset quality; and

(*4*) Such other factors as the federal banking agencies may consider relevant to the quality of the asset.

(B) The initial year's provision for the ATRR shall be ten percent of the principal amount of each specified international asset, or such greater or lesser percentage determined by the federal banking agencies. Additional provision, if any, for the ATRR in subsequent years shall be fifteen percent

of the principal amount of each specified international asset, or such greater or lesser percentage determined by the federal banking agencies.

(3) *FDIC notification.* Based on the joint agency determinations under paragraph (b)(1) of this section, the FDIC shall notify each banking institution holding assets subject to an ATRR:

(i) Of the amount of the ATRR to be established by the institution for specified international assets; and

(ii) That an ATRR established for specified assets may be reduced.

(c) *Accounting treatment of ATRR*—(1) *Charge to current income.* A banking institution shall establish an ATRR by a charge to current income and the amounts so charged shall not be included in the banking institution's capital or surplus.

(2) *Separate accounting.* A banking institution shall account for an ATRR separately from the Allowance for Loan and Lease Losses or allowance for credit losses, as applicable, and shall deduct the ATRR from ''gross loans and leases'' to arrive at ''net loans and lease.'' The ATRR must be established for each asset subject to the ATRR in the percentage amount specified.

(3) *Consolidation.* A banking institution shall establish an ATRR, as required, on a consolidated basis. For banks, consolidation should be in accordance with the procedures and tests of significance set forth in the instructions for preparation of Consolidated Reports of Condition and Income (FFIEC Nos. 031, 032, 033 and 034).

(4) *Alternative accounting treatment.* A banking institution need not establish an ATRR if it writes down in the period in which the ATRR is required, or has written down in prior periods, the value of the specified international assets in the requisite amount for each such asset. For purposes of this paragraph (c)(4), international assets may be written down by a charge to the Allowance for Loan and Lease Losses or allowance for credit losses, as applicable, 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 or allowance for credit losses, as applicable, pursuant to U.S. generally accepted accounting principles may be written down by a charge to the Allowance for Loan and Lease Losses or allowance for credit losses, as applicable. However, the Allowance for Loan and Lease Losses or allowance for credit losses, as applicable, 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.

[70 FR 17560, Apr. 6, 2005; 70 FR 20704, Apr. 21, 2005, as amended at 84 FR 4249, Feb. 14, 2019]

§ 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.

AUTHORITY: 12 U.S.C. 3207, 12 U.S.C. 1823(k).

SOURCE: 80 FR 79252, Dec. 21, 2015, unless otherwise noted.

§ 348.1 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 FDIC-supervised institutions and their affiliates.

§ 348.2 Other definitions and rules of construction.

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 FDIC-supervised institution 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 homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(g) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(h) *Depository organization* means a depository institution or a depository holding company.

(i) *FDIC-supervised institution* means either an insured state nonmember bank or a State savings association.

(j) *Low- and moderate-income areas* means census tracts (or, if an area is not in a census tract, block numbering areas delineated by the United States Bureau of the Census) where the median family income is less than 100 percent of the area median income.

(k) *Management official.* (1) The term *management official* means:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in 12 CFR 303.101(b).

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (j)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a State-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(l) *Office* means a principal or branch office of a depository institution located in the United States. Office does not include a representative office of a foreign commercial bank, an electronic terminal, or a loan production office.

(m) *Person* means a natural person, corporation, or other business entity.

(n) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(o) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The FDIC will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The FDIC will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(p) *State savings association* has the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

(q) *Total assets.* (1) The term *total assets* includes assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners'

Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that are exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(3)(i) *Temporary relief for 2020 and 2021.* Notwithstanding paragraph (q)(1) of this section, from December 2, 2020, through December 31, 2021, except as provided in paragraph (q)(3)(ii) of this section, the term *total assets*, with respect to a depository organization, means the lesser of assets of the depository organization reported on a consolidated basis as of December 31, 2019, and assets reported on a consolidated basis as of December 31, 2020.

(ii) *Reservation of authority.* The temporary relief provided under this paragraph (q)(3)(i) of this section does not apply to an FDIC-supervised institution if the FDIC determines that permitting the FDIC-supervised institution to determine its assets in accordance with that paragraph would not be commensurate with the risk posed by the institution. When making this determination, the FDIC will consider all relevant factors, including the extent of asset growth of the FDIC-supervised institution since December 31, 2019; the causes of such growth, including whether growth occurred as a result of mergers or acquisitions; whether such growth is likely to be temporary or permanent; whether the FDIC-supervised institution has become involved in any additional activities since December 31, 2019; and the type of assets held by the FDIC-supervised institution.

(r) *United States* means the United States of America, any State or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

[80 FR 79252, Dec. 21, 2015, as amended at 85 FR 77364, Dec. 2, 2020]

§ 348.3 Prohibitions.

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $50 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $10 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 $10 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.

[80 FR 79252, Dec. 21, 2015, as amended at 84 FR 54472, Oct. 10, 2019]

§ 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;

(i)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F))) with respect to the service of a director of such company who is also a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The FDIC may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the FDIC.

(3) The FDIC may require that any interlock permitted under this paragraph (i) 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.

(j) Any FDIC-supervised institution which is a State savings association that has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of the Home Owners' Loan Act, except that this paragraph (j) shall apply only with regard to service as a single management official of such State savings association or any subsidiary of such State savings association by a single management official of a savings and loan holding company which purchased the stock issued in connection with such qualified stock issuance, and shall apply only when the FDIC has determined that such service is consistent with the purposes of the Interlocks Act and the Home Owners' Loan Act.

[80 FR 79252, Dec. 21, 2015, as amended at 84 FR 2706, Feb. 8, 2019]

§ 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.

§ 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 FDIC-supervised institution involved in the interlock for 15 months following the date of the change in circumstances. The FDIC may shorten this period under appropriate circumstances.

§ 348.8 Enforcement.

Except as provided in this section, the FDIC administers and enforces the Interlocks Act with respect to FDIC-supervised institutions 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 FDIC-supervised institution 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—DERIVATIVES

Subpart A—Margin and Capital Requirements for Covered Swap Entities

Sec.

SOURCE: 76 FR 40789, July 12, 2011, unless otherwise noted.

Subpart A—Margin and Capital Requirements for Covered Swap Entities

AUTHORITY: 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), and 12 U.S.C. 1818 and 12 U.S.C. 1819(a)(Tenth), 12 U.S.C.1813(q), 1818, 1819, and 3108.

SOURCE: 80 FR 74912, Nov. 30, 2015, unless otherwise noted.

§ 349.1 Authority, purpose, scope, exemptions and compliance dates.

(a) *Authority*. This subpart is issued by the Federal Deposit Insurance Corporation (FDIC) under section 4s(e) of the Commodity Exchange Act (7 U.S.C. 6s(e)), section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(e)), and section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

(b) *Purpose*. Section 4s of the Commodity Exchange Act (7 U.S.C. 6s) and section 15F of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10) require the FDIC to establish capital and margin requirements for any FDIC-insured state-chartered bank that is not a member of the Federal Reserve System or FDIC-insured state-chartered savings association that is registered as a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant with respect to all non-cleared swaps and non-cleared security-based swaps. This subpart implements section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act of 1934 by defining terms used in the statutes and related terms, establishing capital and margin requirements, and explaining the statutes' requirements.

(c) *Scope*. This subpart establishes minimum capital and margin requirements for each covered swap entity subject to this subpart with respect to all non-cleared swaps and non-cleared security-based swaps. This subpart applies to any non-cleared swap or non-cleared security-based swap entered into by a covered swap entity on or after the relevant compliance date set forth in paragraph (e) of this section. Nothing in this subpart is intended to prevent a covered swap entity from collecting margin in amounts greater than are required under this subpart.

(d) *Exemptions*—(1) *Swaps*. The requirements of this part (except for § 45.12) shall not apply to a non-cleared swap if the counterparty:

(i) Qualifies for an exception from clearing under section 2(h)(7)(A) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(A)) and implementing regulations;

(ii) Qualifies for an exemption from clearing under a rule, regulation, or order that the Commodity Futures Trading Commission issued pursuant to its authority under section 4(c)(1) of the Commodity Exchange Act of 1936 (7 U.S.C. 6(c)(1)) concerning cooperative entities that would otherwise be subject to the requirements of section 2(h)(1)(A) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(1)(A)); or

(iii) Satisfies the criteria in section 2(h)(7)(D) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(D)) and implementing regulations.

(2) *Security-based swaps*. The requirements of this part (except for § 349.12) shall not apply to a non-cleared security-based swap if the counterparty:

(i) Qualifies for an exception from clearing under section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(1)) and implementing regulations; or

(ii) Satisfies the criteria in section 3C(g)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations.

(e) *Compliance dates.* Covered swap entities shall comply with the minimum margin requirements of this subpart on or before the following dates for non-cleared swaps and non-cleared security-based swaps entered into on or after the following dates:

(1) September 1, 2016 with respect to the requirements in § 349.3 for initial margin and § 349.4 for variation margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2016 that exceeds $3 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(1)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(2) March 1, 2017 with respect to the requirements in § 349.4 for variation margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

(3) September 1, 2017 with respect to the requirements in § 349.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2017 that exceeds $2.25 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(3)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(4) September 1, 2018 with respect to the requirements in § 349.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2018 that exceeds $1.5 trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(4)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(5) September 1, 2019 with respect to the requirements in § 349.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2019 that exceeds $0.75

trillion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(5)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(6) September 1, 2021 with respect to requirements in § 349.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April and May 2021 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2022 with respect to requirements in § 349.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

(f) Once a covered swap entity must comply with the margin requirements for non-cleared swaps and non-cleared security-based swaps with respect to a particular counterparty based on the compliance dates in paragraph (e) of this section, the covered swap entity shall remain subject to the requirements of this subpart with respect to that counterparty.

(g)(1) If a covered swap entity's counterparty changes its status such that a non-cleared swap or non-cleared security-based swap with that counterparty becomes subject to stricter margin requirements under this subpart (such as if the counterparty's status changes from a financial end user without material swaps exposure to a financial end user with material swaps exposure), then the covered swap entity shall comply with the stricter margin requirements for any non-cleared swap or non-cleared security-based swap entered into with that counterparty after the counterparty changes its status.

(2) If a covered swap entity's counterparty changes its status such that a non-cleared swap or non-cleared security-based swap with that counterparty becomes subject to less strict margin requirements under this subpart (such as if the counterparty's status changes from a financial end user with material swaps exposure to a financial end user without material swaps exposure), then the covered swap entity may comply with the less strict margin requirements for any non-cleared swap or non-cleared security-based swap entered into with that counterparty after the counterparty changes its status as well as for any outstanding non-cleared swap or non-cleared security-based swap entered into after the applicable compliance date in paragraph (e) of this section and before the counterparty changed its status.

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this subpart for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this subpart if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon

termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part 252 subpart I, or 12 CFR part 382, as applicable;

(2) The non-cleared swap or non-cleared security based swap was amended under the following conditions:

(i) The swap was originally entered into, booked at, or otherwise held at, an entity located in the United Kingdom before the relevant compliance date established in paragraph (e) of this section and one party to the swap booked it at, or otherwise held it at, an entity (including a branch or other authorized form of establishment) located in the United Kingdom;

(ii) The entity in the United Kingdom subsequently arranged to amend the swap, solely for the purpose of transferring it to an affiliate, or a branch or other authorized form of establishment, located in any European Union member state or the United States, in connection with the entity's planning for or response to the event described in paragraph (h)(2)(iii) of this section, and the transferee is:

(A) A covered swap entity, or

(B) A covered swap entity's counterparty to the swap, and the counterparty represents to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of paragraphs (h)(2)(i) and (ii) of this section; subject to the following conditions:

(iii) The law of the European Union ceases to apply [to] the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, without conclusion of a Withdrawal Agreement between the United Kingdom and the European Union pursuant to Article 50(2);

(iv) The amendments do not modify any of the following: The payment amount calculation methods, the maturity date, or the notional amount of the swap or non-cleared swap;

(v) The amendments cause the transfer to take effect on or after the date of the event described in paragraph (h)(2)(iii) of this section transpires; and

(vi) The amendments cause the transfer to take effect by the later of:

(A) The date that is one year after the date of the event described in paragraph (h)(2)(iii) of this section; or

(B) Such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (E.U.) No. 2016/2251, as amended.

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not have a longer maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between

market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and their counterparties. Portfolio compression under this paragraph is not subject to the limitations in paragraph (h)(4) of this section, but any non-cleared swap[s] or non-cleared security-based swaps resulting from the portfolio compression may not extend the maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

[80 FR 74912, Nov. 30, 2015, as amended at 83 FR 50812, Oct. 10, 2018; 84 FR 9949, Mar. 19, 2019; 85 FR 39469, 39775, July 1, 2020]

§ 349.2 Definitions.

Affiliate. A company is an affiliate of another company if:

(1) Either company consolidates the other on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) Both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards;

(3) For a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied; or

(4) The FDIC has determined that a company is an affiliate of another company, based on FDIC's conclusion that either company provides significant support to, or is materially subject to the risks or losses of, the other company.

Bank holding company has the meaning specified in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

Broker has the meaning specified in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

Business day means any day other than a Saturday, Sunday, or legal holiday.

Clearing agency has the meaning specified in section 3(a)(23) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(23)).

Company means a corporation, partnership, limited liability company, business trust, special purpose entity, association, or similar organization.

Counterparty means, with respect to any non-cleared swap or non-cleared security-based swap to which a person is a party, each other party to such non-cleared swap or non-cleared security-based swap.

Covered swap entity means any FDIC-insured state-chartered bank that is not a member of the Federal Reserve System or FDIC-insured state-chartered savings association that is a swap entity, or any other entity that the FDIC determines.

Cross-currency swap means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

Currency of settlement means a currency in which a party has agreed to discharge payment obligations related to a non-cleared swap, a non-cleared security-based swap, a group of non-cleared swaps, or a group of non-cleared security-based swaps subject to a master agreement at the regularly occurring dates on which such payments are due in the ordinary course.

Day of execution means the calendar day at the time the parties enter into a non-cleared swap or non-cleared security-based swap, provided:

(1) If each party is in a different calendar day at the time the parties enter into the non-cleared swap or non-cleared security-based swap, the day of execution is deemed the latter of the two dates; and

(2) If a non-cleared swap or non-cleared security-based swap is:

(i) Entered into after 4:00 p.m. in the location of a party; or

(ii) Entered into on a day that is not a business day in the location of a party, then the non-cleared swap or non-cleared security-based swap is deemed to have been entered into on the immediately succeeding day that is a business day for both parties, and both parties shall determine the day of execution with reference to that business day.

Dealer has the meaning specified in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)).

Depository institution has the meaning specified in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

Derivatives clearing organization has the meaning specified in section 1a(15) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(15)).

Eligible collateral means collateral described in § 349.6.

Eligible master netting agreement means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the covered swap entity 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 receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit 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 of the

counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, Subpart I of part 252 or part 382 of Title 12, as applicable;

(3) 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 otherwise would make 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); and

(4) A covered swap entity that relies on the agreement for purposes of calculating the margin required by this part must:

(i) Conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that:

(A) The agreement meets the requirements of paragraph (2) of this definition; and

(B) In the event of a legal challenge (including one resulting from default or from receivership, conservatorship, insolvency, liquidation, or similar proceeding), the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; and

(ii) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition.

Financial end user means:

(1) Any counterparty that is not a swap entity and that is:

(i) A bank holding company or an affiliate thereof; a savings and loan holding company; a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(ii) A depository institution; a foreign bank; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) & (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary federal regulator;

(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended, 12 U.S.C. 2001 *et seq.*, that is regulated by the Farm Credit Administration;

(vi) A securities holding company; a broker or dealer; an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(vii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a)); an entity that would be an investment company under section 3 of the Investment

Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(viii) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in section 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(ix) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(x) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator;

(xi) An entity, person or arrangement that is, or holds itself out as being, an entity, person, or arrangement that raises money from investors, accepts money from clients, or uses its own money primarily for the purpose of investing or trading or facilitating the investing or trading in loans, securities, swaps, funds or other assets for resale or other disposition or otherwise trading in loans, securities, swaps, funds or other assets; or

(xii) An entity that would be a financial end user described in paragraph (1) of this definition or a swap entity, if it were organized under the laws of the United States or any State thereof.

(2) The term ''financial end user'' does not include any counterparty that is:

(i) A sovereign entity;

(ii) A multilateral development bank;

(iii) The Bank for International Settlements;

(iv) An entity that is exempt from the definition of financial entity pursuant to section 2(h)(7)(C)(iii) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(C)(iii)) and implementing regulations; or

(v) An affiliate that qualifies for the exemption from clearing pursuant to section 2(h)(7)(D) of the Commodity Exchange Act of 1936 (7 U.S.C. 2(h)(7)(D)) or section 3C(g)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations.

Foreign bank means an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States.

Foreign exchange forward has the meaning specified in section 1a(24) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(24)).

Foreign exchange swap has the meaning specified in section 1a(25) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(25)).

Initial margin means the collateral as calculated in accordance with §349.8 that is posted or collected in connection with a non-cleared swap or non-cleared security-based swap.

Initial margin collection amount means:

(1) In the case of a covered swap entity that does not use an initial margin model, the amount of initial margin with respect to a non-cleared swap or non-cleared security-based swap that is required under appendix A of this subpart; and

(2) In the case of a covered swap entity that uses an initial margin model pursuant to §349.8, the amount of initial margin with respect to a non-cleared swap or non-cleared security-based swap that is required under the initial margin model.

Initial margin model means an internal risk management model that:

(1) Has been developed and designed to identify an appropriate, risk-based amount of initial margin that the covered swap entity must collect with respect to one or more non-cleared swaps or non-cleared security-based swaps to which the covered swap entity is a party; and

(2) Has been approved by the FDIC pursuant to § 349.8.

Initial margin threshold amount means an aggregate credit exposure of $50 million resulting from all non-cleared swaps and non-cleared security-based swaps between a covered swap entity and its affiliates, and a counterparty and its affiliates. For purposes of this calculation, an entity shall not count a swap or security-based swap that is exempt pursuant to § 349.1(d).

Major currency means:

(1) United States Dollar (USD);

(2) Canadian Dollar (CAD);

(3) Euro (EUR);

(4) United Kingdom Pound (GBP);

(5) Japanese Yen (JPY);

(6) Swiss Franc (CHF);

(7) New Zealand Dollar (NZD);

(8) Australian Dollar (AUD);

(9) Swedish Kronor (SEK);

(10) Danish Kroner (DKK);

(11) Norwegian Krone (NOK); or

(12) Any other currency as determined by the FDIC.

Margin means initial margin and variation margin.

Market intermediary means a securities holding company; a broker or dealer; a futures commission merchant as defined in 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28)); a swap dealer as defined in section 1a(49) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(49)); or a security-based swap dealer as defined in section 3(a)(71) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(71)).

Material swaps exposure for an entity means that an entity and its affiliates have an average daily aggregate notional amount of non-cleared swaps, non-cleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July, and August of the previous calendar year that exceeds $8 billion, where such amount is calculated only for business days. An entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time. For purposes of this calculation, an entity shall not count a swap or security-based swap that is exempt pursuant to § 349.1(d).

Multilateral development bank means the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, 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 entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member or which the FDIC determines poses comparable credit risk.

Non-cleared swap means a swap that is not cleared by a derivatives clearing organization registered with the Commodity Futures Trading Commission pursuant to section 5b(a) of the Commodity Exchange Act of 1936 (7 U.S.C. 7a–1(a)) or by a clearing organization that the Commodity Futures Trading Commission has exempted from registration by rule or order pursuant to section 5b(h) of the Commodity Exchange Act of 1936 (7 U.S.C. 7a–1(h)).

Non-cleared security-based swap means a security-based swap that is not, directly or indirectly, submitted to and cleared by a clearing agency registered with the U.S. Securities and Exchange Commission pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) or by a clearing agency that the U.S. Securities and Exchange Commission has exempted from registration by rule or order pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1).

Prudential regulator has the meaning specified in section 1a(39) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(39)).

Savings and loan holding company has the meaning specified in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)).

Securities holding company has the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a).

Security-based swap has the meaning specified in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)).

Sovereign entity means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

State means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

Subsidiary. A company is a subsidiary of another company if:

(1) The company is consolidated by the other company on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) For a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) of this definition would have occurred if such principles or standards had applied; or

(3) The FDIC has determined that the company is a subsidiary of another company, based on FDIC's conclusion that either company provides significant support to, or is materially subject to the risks of loss of, the other company.

Swap has the meaning specified in section 1a(47) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(47)).

Swap entity means a person that is registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or a person that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

U.S. Government-sponsored enterprise means an entity established or chartered by the U.S. government to serve public purposes specified by federal statute but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government.

Variation margin means collateral provided by one party to its counterparty to meet the performance of its obligations under one or more non-cleared swaps or non-cleared security-based swaps between the parties as a result of a change in value of such obligations since the last time such collateral was provided.

Variation margin amount means the cumulative mark-to-market change in value to a covered swap entity of a non-cleared swap or non-cleared security-based swap, as measured from the date it is entered into (or, in the case of a non-cleared swap or non-cleared security-based swap that has a positive or negative value to a covered swap entity on the date it is entered into, such positive or negative value plus any cumulative mark-to-market change in value to the covered swap entity of a non-cleared swap or non-cleared security-based swap after such date), less the value of all variation margin previously collected, plus the value of all variation margin previously posted with respect to such non-cleared swap or non-cleared security-based swap.

[80 FR 74912, Nov. 30, 2015, as amended at 83 FR 50812, Oct. 10, 2018]

§ 349.3 Initial margin.

(a) *Collection of margin*. A covered swap entity shall collect initial margin with respect to any non-cleared swap or non-cleared security-based swap from a counterparty that is a financial end user with material swaps exposure or that is a swap entity in an amount that is no less than the greater of:

(1) Zero; or

(2) The initial margin collection amount for such non-cleared swap or non-cleared security-based swap *less* the initial margin threshold amount (not including any portion of the initial margin threshold amount already applied by the covered swap entity or its affiliates to other non-cleared swaps or non-cleared security-based swaps with the counterparty or its affiliates), as applicable.

(b) *Posting of margin*. A covered swap entity shall post initial margin with respect to any non-cleared swap or

non-cleared security-based swap to a counterparty that is a financial end user with material swaps exposure. Such initial margin shall be in an amount at least as large as the covered swap entity would be required to collect under paragraph (a) of this section if it were in the place of the counterparty.

(c) *Timing.* A covered swap entity shall comply with the initial margin requirements described in paragraphs (a) and (b) of this section on each business day, for a period beginning on or before the business day following the day of execution and ending on the date the non-cleared swap or non-cleared security-based swap terminates or expires.

(d) *Other counterparties.* A covered swap entity is not required to collect or post initial margin with respect to any non-cleared swap or non-cleared security-based swap described in §349.1(d). For any other non-cleared swap or non-cleared security-based swap between a covered swap entity and a counterparty that is neither a financial end user with a material swaps exposure nor a swap entity, the covered swap entity shall collect initial margin at such times and in such forms and such amounts (if any), that the covered swap entity determines appropriately addresses the credit risk posed by the counterparty and the risks of such non-cleared swap or non-cleared security-based swap.

§349.4 Variation margin.

(a) *General.* After the date on which a covered swap entity enters into a non-cleared swap or non-cleared security-based swap with a swap entity or financial end user, the covered swap entity shall collect variation margin equal to the variation margin amount from the counterparty to such non-cleared swap or non-cleared security-based swap when the amount is positive and post variation margin equal to the variation margin amount to the counterparty to such non-cleared swap or non-cleared security-based swap when the amount is negative.

(b) *Timing.* A covered swap entity shall comply with the variation margin requirements described in paragraph (a) of this section on each business day, for a period beginning on or before the business day following the day of execution and ending on the date the non-cleared swap or non-cleared security based swap terminates or expires.

(c) *Other counterparties.* A covered swap entity is not required to collect or post variation margin with respect to any non-cleared swap or non-cleared security-based swap described in §349.1(d). For any other non-cleared swap or non-cleared security-based swap between a covered swap entity and a counterparty that is neither a financial end user nor a swap entity, the covered swap entity shall collect variation margin at such times and in such forms and such amounts (if any), that the covered swap entity determines appropriately addresses the credit risk posed by the counterparty and the risks of such non-cleared swap or non-cleared security-based swap.

§349.5 Netting arrangements, minimum transfer amount, and satisfaction of collecting and posting requirements.

(a) *Netting arrangements.* (1) For purposes of calculating and complying with the initial margin requirements of §349.3 using an initial margin model as described in §349.8, or with the variation margin requirements of §349.4, a covered swap entity may net non-cleared swaps or non-cleared security-based swaps in accordance with this subsection.

(2) To the extent that one or more non-cleared swaps or non-cleared security-based swaps are executed pursuant to an eligible master netting agreement between a covered swap entity and its counterparty that is a swap entity or financial end user, a covered swap entity may calculate and comply with the applicable requirements of this subpart on an aggregate net basis with respect to all non-cleared swaps and non-cleared security-based swaps governed by such agreement, subject to paragraph (a)(3) of this section.

(3)(i) Except as permitted in paragraph (a)(3)(ii) of this section, if an eligible master netting agreement covers non-cleared swaps and non-cleared security-based swaps entered into on or after the applicable compliance date set forth in §349.1(e) or (g), all the non-

cleared swaps and non-cleared security-based swaps covered by that agreement are subject to the requirements of this subpart and included in the aggregate netting portfolio for the purposes of calculating and complying with the margin requirements of this subpart.

(ii) An eligible master netting agreement may identify one or more separate netting portfolios that independently meet the requirements in paragraph (1) of the definition of ''Eligible master netting agreement'' in §349.2 and to which collection and posting of margin applies on an aggregate net basis separate from and exclusive of any other non-cleared swaps or non-cleared security-based swaps covered by the eligible master netting agreement. Any such netting portfolio that contains any non-cleared swap or non-cleared security-based swap entered into on or after the applicable compliance date set forth in §349.1(e) or (g) is subject to the requirements of this subpart. Any such netting portfolio that contains only non-cleared swaps or non-cleared security-based swaps entered into before the applicable compliance date is not subject to the requirements of this subpart.

(4) If a covered swap entity cannot conclude after sufficient legal review with a well-founded basis that the netting agreement described in this section meets the definition of eligible master netting agreement set forth in §349.2, the covered swap entity must treat the non-cleared swaps and non-cleared security based swaps covered by the agreement on a gross basis for the purposes of calculating and complying with the requirements of this subpart to collect margin, but the covered swap entity may net those non-cleared swaps and non-cleared security-based swaps in accordance with paragraphs (a)(1) through (3) of this section for the purposes of calculating and complying with the requirements of this subpart to post margin.

(b) *Minimum transfer amount.* Notwithstanding §349.3 or §349.4, a covered swap entity is not required to collect or post margin pursuant to this subpart with respect to a particular counterparty unless and until the combined amount of initial margin and variation margin that is required pursuant to this subpart to be collected or posted and that has not yet been collected or posted with respect to the counterparty is greater than $500,000.

(c) *Satisfaction of collecting and posting requirements.* A covered swap entity shall not be deemed to have violated its obligation to collect or post margin from or to a counterparty under §349.3, §349.4, or §349.6(e) if:

(1) The counterparty has refused or otherwise failed to provide or accept the required margin to or from the covered swap entity; and

(2) The covered swap entity has:

(i) Made the necessary efforts to collect or post the required margin, including the timely initiation and continued pursuit of formal dispute resolution mechanisms, or has otherwise demonstrated upon request to the satisfaction of the FDIC that it has made appropriate efforts to collect or post the required margin; or

(ii) Commenced termination of the non-cleared swap or non-cleared security-based swap with the counterparty promptly following the applicable cure period and notification requirements.

§349.6 Eligible collateral.

(a) *Non-cleared swaps and non-cleared security-based swaps with a swap entity.* For a non-cleared swap or non-cleared security-based swap with a swap entity, a covered swap entity shall collect initial margin and variation margin required pursuant to this subpart solely in the form of the following types of collateral:

(1) Immediately available cash funds that are denominated in:

(i) U.S. dollars or another major currency; or

(ii) The currency of settlement for the non-cleared swap or non-cleared security-based swap;

(2) With respect to initial margin only:

(i) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury;

(ii) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a U.S. government agency

(other than the U.S. Department of Treasury) whose obligations are fully guaranteed by the full faith and credit of the United States government;

(iii) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to the covered swap entity as set forth in §349.12;

(iv) A publicly traded debt security issued by, or an asset-backed security fully guaranteed as to the payment of principal and interest by, a U.S. Government-sponsored enterprise that is operating with capital support or another form of direct financial assistance received from the U.S. government that enables the repayments of the U.S. Government-sponsored enterprise's eligible securities;

(v) A publicly traded debt security that meets the terms of 12 CFR 1.2(d) and is issued by a U.S. Government-sponsored enterprise not operating with capital support or another form of direct financial assistance from the U.S. government, and is not an asset-backed security;

(vi) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the Bank for International Settlements, the International Monetary Fund, or a multilateral development bank;

(vii) A security solely in the form of:

(A) Publicly traded debt not otherwise described in paragraph (a)(2) of this section that meets the terms of 12 CFR 1.2(d) and is not an asset-backed security;

(B) Publicly traded common equity that is included in:

(*1*) The Standard & Poor's Composite 1500 Index or any other similar index of liquid and readily marketable equity securities as determined by the FDIC; or

(*2*) An index that a covered swap entity's supervisor in a foreign jurisdiction recognizes for purposes of including publicly traded common equity as initial margin under applicable regulatory policy, if held in that foreign jurisdiction;

(viii) Securities in the form of redeemable securities in a pooled investment fund representing the security-holder's proportional interest in the fund's net assets and that are issued and redeemed only on the basis of the market value of the fund's net assets prepared each business day after the security-holder makes its investment commitment or redemption request to the fund, if:

(A) The fund's investments are limited to the following:

(*1*) Securities that are issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury, and immediately-available cash funds denominated in U.S. dollars; or

(*2*) Securities denominated in a common currency and issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to the covered swap entity as set forth in §349.12, and immediately-available cash funds denominated in the same currency; and

(B) Assets of the fund may not be transferred through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, or other means that involve the fund having rights to acquire the same or similar assets from the transferee; or

(ix) Gold.

(b) *Non-cleared swaps and non-cleared security-based swaps with a financial end user.* For a non-cleared swap or non-cleared security-based swap with a financial end user, a covered swap entity shall collect and post initial margin and variation margin required pursuant to this subpart solely in the form of the following types of collateral:

(1) Immediately available cash funds that are denominated in:

(i) U.S. dollars or another major currency; or

(ii) The currency of settlement for the non-cleared swap or non-cleared security-based swap;

(2) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury;

(3) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a U.S. government agency (other than the U.S. Department of Treasury) whose obligations are fully guaranteed by the full faith and credit of the United States government;

(4) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to the covered swap entity as set forth in §349.12;

(5) A publicly traded debt security issued by, or an asset-backed security fully guaranteed as to the payment of principal and interest by, a U.S. Government-sponsored enterprise that is operating with capital support or another form of direct financial assistance received from the U.S. government that enables the repayments of the U.S. Government-sponsored enterprise's eligible securities;

(6) A publicly traded debt security that meets the terms of 12 CFR 1.2(d) and is issued by a U.S. Government-sponsored enterprise not operating with capital support or another form of direct financial assistance from the U.S. government, and is not an asset-backed security;

(7) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the Bank for International Settlements, the International Monetary Fund, or a multilateral development bank;

(8) A security solely in the form of:

(i) Publicly traded debt not otherwise described in this paragraph (b) that meets the terms of 12 CFR 1.2(d) and is not an asset-backed security;

(ii) Publicly traded common equity that is included in:

(A) The Standard & Poor's Composite 1500 Index or any other similar index of liquid and readily marketable equity securities as determined by the FDIC; or

(B) An index that a covered swap entity's supervisor in a foreign jurisdiction recognizes for purposes of including publicly traded common equity as initial margin under applicable regulatory policy, if held in that foreign jurisdiction;

(9) Securities in the form of redeemable securities in a pooled investment fund representing the security-holder's proportional interest in the fund's net assets and that are issued and redeemed only on the basis of the market value of the fund's net assets prepared each business day after the security-holder makes its investment commitment or redemption request to the fund, if:

(i) The fund's investments are limited to the following:

(A) Securities that are issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury, and immediately-available cash funds denominated in U.S. dollars; or

(B) Securities denominated in a common currency and issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to the covered swap entity as set forth in §349.12, and immediately-available cash funds denominated in the same currency; and

(ii) Assets of the fund may not be transferred through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, or other means that involve the fund having rights to acquire the same or similar assets from the transferee; or

(10) Gold.

(c)(1) The value of any eligible collateral collected or posted to satisfy margin requirements pursuant to this subpart is subject to the sum of the following discounts, as applicable:

(i) An 8 percent discount for variation margin collateral denominated in a currency that is not the currency of settlement for the non-cleared swap or non-cleared security-based swap, except for immediately available cash funds denominated in U.S. dollars or another major currency;

(ii) An 8 percent discount for initial margin collateral denominated in a currency that is not the currency of settlement for the non-cleared swap or

non-cleared security-based swap, except for eligible types of collateral denominated in a single termination currency designated as payable to the nonposting counterparty as part of the eligible master netting agreement; and

(iii) For variation and initial margin non-cash collateral, the discounts described in appendix B of this subpart.

(2) The value of variation margin or initial margin collateral is computed as the product of the cash or market value of the eligible collateral asset times one minus the applicable discounts pursuant to paragraph (c)(1) of this section expressed in percentage terms. The total value of all variation margin or initial margin collateral is calculated as the sum of those values for each eligible collateral asset.

(d) Notwithstanding paragraphs (a) and (b) of this section, eligible collateral for initial margin and variation margin required by this subpart does not include a security issued by:

(1) The party or an affiliate of the party pledging such collateral;

(2) A bank holding company, a savings and loan holding company, a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153, a foreign bank, a depository institution, a market intermediary, a company that would be any of the foregoing if it were organized under the laws of the United States or any State, or an affiliate of any of the foregoing institutions; or

(3) A nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323).

(e) A covered swap entity shall monitor the market value and eligibility of all collateral collected and posted to satisfy the minimum initial margin and minimum variation margin requirements of this subpart. To the extent that the market value of such collateral has declined, the covered swap entity shall promptly collect or post such additional eligible collateral as is necessary to maintain compliance with the margin requirements of this subpart. To the extent that the collateral is no longer eligible, the covered swap entity shall promptly collect or post sufficient eligible replacement collateral to comply with the margin requirements of this subpart.

(f) A covered swap entity may collect or post initial margin and variation margin that is required by § 349.3(d) or § 349.4(c) or that is not required pursuant to this subpart in any form of collateral.

[80 FR 74912, Nov. 30, 2015]

§ 349.7 Segregation of collateral.

(a) A covered swap entity that posts any collateral other than for variation margin with respect to a non-cleared swap or a non-cleared security-based swap shall require that all funds or other property other than variation margin provided by the covered swap entity be held by one or more custodians that are not the covered swap entity or counterparty and not affiliates of the covered swap entity or the counterparty.

(b) A covered swap entity that collects initial margin required by § 349.3(a) with respect to a non-cleared swap or a non-cleared security-based swap shall require that such initial margin be held by one or more custodians that are not the covered swap entity or counterparty and not affiliates of the covered swap entity or the counterparty.

(c) For purposes of paragraphs (a) and (b) of this section, the custodian must act pursuant to a custody agreement that:

(1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian, except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in § 349.6(a)(2) or (b), such asset is held in compliance with this § 349.7, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and

(2) Is a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions, including in

the event of bankruptcy, insolvency, or a similar proceeding.

(d) Notwithstanding paragraph (c)(1) of this section, a custody agreement may permit the posting party to substitute or direct any reinvestment of posted collateral held by the custodian, provided that, with respect to collateral collected by a covered swap entity pursuant to §349.3(a) or posted by a covered swap entity pursuant to §349.3(b), the agreement requires the posting party to:

(1) Substitute only funds or other property that would qualify as eligible collateral under §349.6, and for which the amount net of applicable discounts described in appendix B of this subpart would be sufficient to meet the requirements of §349.3; and

(2) Direct reinvestment of funds only in assets that would qualify as eligible collateral under §349.6, and for which the amount net of applicable discounts described in appendix B of this subpart would be sufficient to meet the requirements of §349.3.

§349.8 Initial margin models and standardized amounts.

(a) *Standardized amounts.* Unless a covered swap entity's initial margin model conforms to the requirements of this section, the covered swap entity shall calculate the amount of initial margin required to be collected or posted for one or more non-cleared swaps or non-cleared security-based swaps with a given counterparty pursuant to §349.3 on a daily basis pursuant to appendix A of this subpart.

(b) *Use of initial margin models.* A covered swap entity may calculate the amount of initial margin required to be collected or posted for one or more non-cleared swaps or non-cleared security-based swaps with a given counterparty pursuant to §349.3 on a daily basis using an initial margin model only if the initial margin model meets the requirements of this section.

(c) *Requirements for initial margin model.* (1) A covered swap entity must obtain the prior written approval of the FDIC before using any initial margin model to calculate the initial margin required in this subpart.

(2) A covered swap entity must demonstrate that the initial margin model satisfies all of the requirements of this section on an ongoing basis.

(3) A covered swap entity must notify the FDIC in writing 60 days prior to:

(i) Extending the use of an initial margin model that the FDIC has approved under this section to an additional product type;

(ii) Making any change to any initial margin model approved by the FDIC under this section that would result in a material change in the covered swap entity's assessment of initial margin requirements; or

(iii) Making any material change to modeling assumptions used by the initial margin model.

(4) The FDIC may rescind its approval of the use of any initial margin model, in whole or in part, or may impose additional conditions or requirements if the FDIC determines, in its sole discretion, that the initial margin model no longer complies with this section.

(d) *Quantitative requirements.* (1) The covered swap entity's initial margin model must calculate an amount of initial margin that is equal to the potential future exposure of the non-cleared swap, non-cleared security-based swap or netting portfolio of non-cleared swaps or non-cleared security-based swaps covered by an eligible master netting agreement. Potential future exposure is an estimate of the one-tailed 99 percent confidence interval for an increase in the value of the non-cleared swap, non-cleared security-based swap or netting portfolio of non-cleared swaps or non-cleared security-based swaps due to an instantaneous price shock that is equivalent to a movement in all material underlying risk factors, including prices, rates, and spreads, over a holding period equal to the shorter of ten business days or the maturity of the non-cleared swap, non-cleared security-based swap or netting portfolio.

(2) All data used to calibrate the initial margin model must be based on an equally weighted historical observation period of at least one year and not more than five years and must incorporate a period of significant financial stress for each broad asset class that is appropriate to the non-cleared swaps and non-cleared security-based swaps

to which the initial margin model is applied.

(3) The covered swap entity's initial margin model must use risk factors sufficient to measure all material price risks inherent in the transactions for which initial margin is being calculated. The risk categories must include, but should not be limited to, foreign exchange or interest rate risk, credit risk, equity risk, and commodity risk, as appropriate. For material exposures in significant currencies and markets, modeling techniques must capture spread and basis risk and must incorporate a sufficient number of segments of the yield curve to capture differences in volatility and imperfect correlation of rates along the yield curve.

(4) In the case of a non-cleared cross-currency swap, the covered swap entity's initial margin model need not recognize any risks or risk factors associated with the fixed, physically-settled foreign exchange transaction associated with the exchange of principal embedded in the non-cleared cross-currency swap. The initial margin model must recognize all material risks and risk factors associated with all other payments and cash flows that occur during the life of the non-cleared cross-currency swap.

(5) The initial margin model may calculate initial margin for a non-cleared swap or non-cleared security-based swap or a netting portfolio of non-cleared swaps or non-cleared security-based swaps covered by an eligible master netting agreement. It may reflect offsetting exposures, diversification, and other hedging benefits for non-cleared swaps and non-cleared security-based swaps that are governed by the same eligible master netting agreement by incorporating empirical correlations within the following broad risk categories, provided the covered swap entity validates and demonstrates the reasonableness of its process for modeling and measuring hedging benefits: Commodity, credit, equity, and foreign exchange or interest rate. Empirical correlations under an eligible master netting agreement may be recognized by the initial margin model within each broad risk category, but not across broad risk categories.

(6) If the initial margin model does not explicitly reflect offsetting exposures, diversification, and hedging benefits between subsets of non-cleared swaps or non-cleared security-based swaps within a broad risk category, the covered swap entity must calculate an amount of initial margin separately for each subset within which such relationships are explicitly recognized by the initial margin model. The sum of the initial margin amounts calculated for each subset of non-cleared swaps and non-cleared security-based swaps within a broad risk category will be used to determine the aggregate initial margin due from the counterparty for the portfolio of non-cleared swaps and non-cleared security-based swaps within the broad risk category.

(7) The sum of the initial margin amounts calculated for each broad risk category will be used to determine the aggregate initial margin due from the counterparty.

(8) The initial margin model may not permit the calculation of any initial margin collection amount to be offset by, or otherwise take into account, any initial margin that may be owed or otherwise payable by the covered swap entity to the counterparty.

(9) The initial margin model must include all material risks arising from the nonlinear price characteristics of option positions or positions with embedded optionality and the sensitivity of the market value of the positions to changes in the volatility of the underlying rates, prices, or other material risk factors.

(10) The covered swap entity may not omit any risk factor from the calculation of its initial margin that the covered swap entity uses in its initial margin model unless it has first demonstrated to the satisfaction of the FDIC that such omission is appropriate.

(11) The covered swap entity may not incorporate any proxy or approximation used to capture the risks of the covered swap entity's non-cleared swaps or non-cleared security-based swaps unless it has first demonstrated to the satisfaction of the FDIC that

such proxy or approximation is appropriate.

(12) The covered swap entity must have a rigorous and well-defined process for re-estimating, re-evaluating, and updating its internal margin model to ensure continued applicability and relevance.

(13) The covered swap entity must review and, as necessary, revise the data used to calibrate the initial margin model at least annually, and more frequently as market conditions warrant, to ensure that the data incorporate a period of significant financial stress appropriate to the non-cleared swaps and non-cleared security-based swaps to which the initial margin model is applied.

(14) The level of sophistication of the initial margin model must be commensurate with the complexity of the non-cleared swaps and non-cleared security-based swaps to which it is applied. In calculating an initial margin collection amount, the initial margin model may make use of any of the generally accepted approaches for modeling the risk of a single instrument or portfolio of instruments.

(15) The FDIC may in its sole discretion require a covered swap entity using an initial margin model to collect a greater amount of initial margin than that determined by the covered swap entity's initial margin model if the FDIC determines that the additional collateral is appropriate due to the nature, structure, or characteristics of the covered swap entity's transaction(s), or is commensurate with the risks associated with the transaction(s).

(e) *Periodic review.* A covered swap entity must periodically, but no less frequently than annually, review its initial margin model in light of developments in financial markets and modeling technologies, and enhance the initial margin model as appropriate to ensure that the initial margin model continues to meet the requirements for approval in this section.

(f) *Control, oversight, and validation mechanisms.* (1) The covered swap entity must maintain a risk control unit that reports directly to senior management and is independent from the business trading units.

(2) The covered swap entity's risk control unit must validate its initial margin model prior to implementation and on an ongoing basis. The covered swap entity's validation process must be independent of the development, implementation, and operation of the initial margin model, or the validation process must be subject to an independent review of its adequacy and effectiveness. The validation process must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the initial margin model;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking by comparing the covered swap entity's initial margin model outputs (estimation of initial margin) with relevant alternative internal and external data sources or estimation techniques. The benchmark(s) must address the chosen model's limitations. When applicable, the covered swap entity should consider benchmarks that allow for non-normal distributions such as historical and Monte Carlo simulations. When applicable, validation shall include benchmarking against observable margin standards to ensure that the initial margin required is not less than what a derivatives clearing organization or a clearing agency would require for similar cleared transactions; and

(iii) An outcomes analysis process that includes backtesting the initial margin model. This analysis must recognize and compensate for the challenges inherent in back-testing over periods that do not contain significant financial stress.

(3) If the validation process reveals any material problems with the initial margin model, the covered swap entity must promptly notify the FDIC of the problems, describe to the FDIC any remedial actions being taken, and adjust the initial margin model to ensure an appropriately conservative amount of required initial margin is being calculated.

(4) The covered swap entity must have an internal audit function independent of business-line management and the risk control unit that at least annually assesses the effectiveness of

the controls supporting the covered swap entity's initial margin model measurement systems, including the activities of the business trading units and risk control unit, compliance with policies and procedures, and calculation of the covered swap entity's initial margin requirements under this subpart. At least annually, the internal audit function must report its findings to the covered swap entity's board of directors or a committee thereof.

(g) *Documentation.* The covered swap entity must adequately document all material aspects of its initial margin model, including the management and valuation of the non-cleared swaps and non-cleared security-based swaps to which it applies, the control, oversight, and validation of the initial margin model, any review processes and the results of such processes.

(h) *Escalation procedures.* The covered swap entity must adequately document internal authorization procedures, including escalation procedures, that require review and approval of any change to the initial margin calculation under the initial margin model, demonstrable analysis that any basis for any such change is consistent with the requirements of this section, and independent review of such demonstrable analysis and approval.

§ 349.9 Cross-border application of margin requirements.

(a) *Transactions to which this rule does not apply.* The requirements of §§ 349.3 through 349.8 and §§ 349.10 through 349.12 shall not apply to any foreign non-cleared swap or foreign non-cleared security-based swap of a foreign covered swap entity.

(b) For purposes of this section, a *foreign non-cleared swap* or *foreign non-cleared security-based swap* is any non-cleared swap or non-cleared security-based swap with respect to which neither the counterparty to the foreign covered swap entity nor any party that provides a guarantee of either party's obligations under the non-cleared swap or non-cleared security-based swap is:

(1) An entity organized under the laws of the United States or any State (including a U.S. branch, agency, or subsidiary of a foreign bank) or a natural person who is a resident of the United States;

(2) A branch or office of an entity organized under the laws of the United States or any State; or

(3) A swap entity that is a subsidiary of an entity that is organized under the laws of the United States or any State.

(c) For purposes of this section, a *foreign covered swap entity* is any covered swap entity that is not:

(1) An entity organized under the laws of the United States or any State, including a U.S. branch, agency, or subsidiary of a foreign bank;

(2) A branch or office of an entity organized under the laws of the United States or any State; or

(3) An entity that is a subsidiary of an entity that is organized under the laws of the United States or any State.

(d) *Transactions for which substituted compliance determination may apply*—(1) *Determinations and reliance.* For non-cleared swaps and non-cleared security-based swaps entered into by covered swap entities described in paragraph (d)(3) of this section, a covered swap entity may satisfy the provisions of this subpart by complying with the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps that the prudential regulators jointly, conditionally or unconditionally, determine by public order satisfy the corresponding requirements of §§ 349.3 through 349.8 and §§ 349.10 through 349.12.

(2) *Standard.* In determining whether to make a determination under paragraph (d)(1) of this section, the prudential regulators will consider whether the requirements of such foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps applicable to such covered swap entities are comparable to the otherwise applicable requirements of this subpart and appropriate for the safe and sound operation of the covered swap entity, taking into account the risks associated with non-cleared swaps and non-cleared security-based swaps.

(3) *Covered swap entities eligible for substituted compliance.* A covered swap entity may rely on a determination under paragraph (d)(1) of this section only if:

(i) The covered swap entity's obligations under the non-cleared swap or non-cleared security-based swap do not have a guarantee from:

(A) An entity organized under the laws of the United States or any State (other than a U.S. branch or agency of a foreign bank) or a natural person who is a resident of the United States; or

(B) A branch or office of an entity organized under the laws of the United States or any State; and

(ii) The covered swap entity is:

(A) A foreign covered swap entity;

(B) A U.S. branch or agency of a foreign bank; or

(C) An entity that is not organized under the laws of the United States or any State and is a subsidiary of a depository institution, Edge corporation, or agreement corporation.

(4) *Compliance with foreign margin collection requirement.* A covered swap entity satisfies its requirement to post initial margin under §349.3(b) by posting to its counterparty initial margin in the form and amount, and at such times, that its counterparty is required to collect pursuant to a foreign regulatory framework, provided that the counterparty is subject to the foreign regulatory framework and the prudential regulators have made a determination under paragraph (d)(1) of this section, unless otherwise stated in that determination, and the counterparty's obligations under the non-cleared swap or non-cleared security-based swap do not have a guarantee from:

(i) An entity organized under the laws of the United States or any State (including a U.S. branch, agency, or subsidiary of a foreign bank) or a natural person who is a resident of the United States; or

(ii) A branch or office of an entity organized under the laws of the United States or any State.

(e) *Requests for determinations.* (1) A covered swap entity described in paragraph (d)(3) of this section may request that the prudential regulators make a determination pursuant to this section. A request for a determination must include a description of:

(i) The scope and objectives of the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps;

(ii) The specific provisions of the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps that govern:

(A) The scope of transactions covered;

(B) The determination of the amount of initial margin and variation margin required and how that amount is calculated;

(C) The timing of margin requirements;

(D) Any documentation requirements;

(E) The forms of eligible collateral;

(F) Any segregation and rehypothecation requirements; and

(G) The approval process and standards for models used in calculating initial margin and variation margin;

(iii) The supervisory compliance program and enforcement authority exercised by a foreign financial regulatory authority or authorities in such system to support its oversight of the application of the non-cleared swap or non-cleared security-based swap regulatory framework and how that framework applies to the non-cleared swaps or non-cleared security-based swaps of the covered swap entity; and

(iv) Any other descriptions and documentation that the prudential regulators determine are appropriate.

(2) A covered swap entity described in paragraph (d)(3) of this section may make a request under this section only if the non-cleared swap or non-cleared security-based swap activities of the covered swap entity are directly supervised by the authorities administering the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps.

(f) *Segregation unavailable.* Sections ____.3(b) and ____.7 do not apply to a non-cleared swap or non-cleared security-based swap entered into by:

(1) A foreign branch of a covered swap entity that is a depository institution; or

(2) A covered swap entity that is not organized under the laws of the United States or any State and is a subsidiary of a depository institution, Edge corporation, or agreement corporation, if:

(i) Inherent limitations in the legal or operational infrastructure in the

foreign jurisdiction make it impracticable for the covered swap entity and the counterparty to post any form of eligible initial margin collateral recognized pursuant to § 349.6(b) in compliance with the segregation requirements of § 349.7;

(ii) The covered swap entity is subject to foreign regulatory restrictions that require the covered swap entity to transact in the non-cleared swap or non-cleared security-based swap with the counterparty through an establishment within the foreign jurisdiction and do not accommodate the posting of collateral for the non-cleared swap or non-cleared security-based swap outside the jurisdiction;

(iii) The counterparty to the non-cleared swap or non-cleared security-based swap is not, and the counterparty's obligations under the non-cleared swap or non-cleared security-based swap do not have a guarantee from:

(A) An entity organized under the laws of the United States or any State (including a U.S. branch, agency, or subsidiary of a foreign bank) or a natural person who is a resident of the United States; or

(B) A branch or office of an entity organized under the laws of the United States or any State;

(iv) The covered swap entity collects initial margin for the non-cleared swap or non-cleared security-based swap in accordance with § 349.3(a) in the form of cash pursuant to § 349.6(b)(1), and posts and collects variation margin in accordance with § 349.4(a) in the form of cash pursuant to § 349.6(b)(1); and

(v) The FDIC provides the covered swap entity with prior written approval for the covered swap entity's reliance on this paragraph (f) for the foreign jurisdiction.

(g) *Guarantee* means an arrangement pursuant to which one party to a non-cleared swap or non-cleared security-based swap has rights of recourse against a third-party guarantor, with respect to its counterparty's obligations under the non-cleared swap or non-cleared security-based swap. For these purposes, a party to a non-cleared swap or non-cleared security-based swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the non-cleared swap or non-cleared security-based swap. In addition, any arrangement pursuant to which the guarantor has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from any other third party guarantor with respect to the counterparty's obligations under the non-cleared swap or non-cleared security-based swap, such arrangement will be deemed a guarantee of the counterparty's obligations under the non-cleared swap or non-cleared security-based swap by the other guarantor.

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) is not subject to the requirements of § 349.3(a) or § 349.11 for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, ''affiliate'' has the same meaning provided in § 349.11(d).

[80 FR 74912, Nov. 30, 2015, as amended at 85 FR 39775, July 1, 2020]

§ 349.10 Documentation of margin matters.

A covered swap entity shall execute trading documentation with each counterparty that is either a swap entity or financial end user regarding credit support arrangements that:

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this subpart, and at such time as initial margin or variation margin is required to be collected or posted under § 349.3 or § 349.4, as applicable; and

(b) Specifies:

(1) The methods, procedures, rules, and inputs for determining the value of each non-cleared swap or non-cleared security-based swap for purposes of calculating variation margin requirements; and

(2) The procedures by which any disputes concerning the valuation of non-

cleared swaps or non-cleared security-based swaps, or the valuation of assets collected or posted as initial margin or variation margin, may be resolved; and

(c) Describes the methods, procedures, rules, and inputs used to calculate initial margin for non-cleared swaps and non-cleared security based swaps entered into between the covered swap entity and the counterparty.

[80 FR 74912, Nov. 30, 2015, as amended at 85 FR 39775, July 1, 2020]

§ 349.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under §349.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under §349.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under §45.3(c), until the earlier of:

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding §349.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity;

(4) For purposes of this paragraph (a), ''tier 1 capital'' means the sum of common equity tier 1 capital as defined in 12 CFR 324.20(b) and additional tier 1 capital as defined in 12 CFR 324.20(c), as reported in the institution's most recent Consolidated Reports of Income and Condition (Call Report); and

(5) If any subsidiary of the covered swap entity (including a subsidiary described in §349.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity:

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of this paragraph (a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under §349.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under §349.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 349.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section:

(1) An *affiliate* means:

(i) An affiliate as defined in §349.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise

of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in §349.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

[85 FR 39776, July 1, 2020]

§349.12 Capital.

A covered swap entity shall comply with the capital requirements that are applicable to the covered swap entity under part 324 of this chapter.

[80 FR 74912, Nov. 30, 2015]

APPENDIX A TO SUBPART A OF PART 349—STANDARDIZED MINIMUM INITIAL MARGIN REQUIREMENTS FOR NON-CLEARED SWAPS AND NON—CLEARED SECURITY-BASED SWAPS

TABLE A—STANDARDIZED MINIMUM GROSS INITIAL MARGIN REQUIREMENTS FOR NON-CLEARED SWAPS AND NON-CLEARED SECURITY-BASED SWAPS[1]

Asset Class	Gross initial margin (% of notional exposure)
Credit: 0–2 year duration	2
Credit: 2–5 year duration	5
Credit: 5+ year duration	10
Commodity	15
Equity	15
Foreign Exchange/Currency	6
Cross Currency Swaps: 0–2 year duration	1
Cross-Currency Swaps: 2–5 year duration	2
Cross-Currency Swaps: 5+ year duration	4
Interest Rate: 0–2 year duration	1
Interest Rate: 2–5 year duration	2
Interest Rate: 5+ year duration	4
Other	15

[1] The initial margin amount applicable to multiple non-cleared swaps or non-cleared security-based swaps subject to an eligible master netting agreement that is calculated according to Appendix A will be computed as follows:

Initial Margin=0.4xGross Initial Margin +0.6x NGRxGross Initial Margin

where;

Gross Initial Margin = the sum of the product of each non-cleared swap's or non-cleared security-based swap's effective notional amount and the gross initial margin requirement for all non-cleared swaps and non-cleared security-based swaps subject to the eligible master netting agreement;

and

NGR = the net-to-gross ratio (that is, the ratio of the net current replacement cost to the gross current replacement cost). In calculating NGR, the gross current replacement cost equals the sum of the replacement cost for each non-cleared swap and non-cleared security-based swap subject to the eligible master netting agreement for which the cost is positive. The net current replacement cost equals the total replacement cost for all non-cleared swaps and non-cleared security-based swaps subject to the eligible master netting agreement. In cases where the gross replacement cost is zero, the NGR should be set to 1.0.

APPENDIX B TO SUBPART A OF PART 349—MARGIN VALUES FOR ELIGIBLE NONCASH MARGIN COLLATERAL

TABLE B—MARGIN VALUES FOR ELIGIBLE NONCASH MARGIN COLLATERAL

Asset class	Discount (%)
Eligible government and related (e.g., central bank, multilateral development bank, GSE securities identified in §349.6(a)(2)(iv) or (b)(5) debt: residual maturity less than one-year	0.5
Eligible government and related (e.g., central bank, multilateral development bank, GSE securities identified in §349.6(a)(2)(iv) or (b)(5) debt: residual maturity between one and five years	2.0
Eligible government and related (e.g., central bank, multilateral development bank, GSE securities identified in §349.6(a)(2)(iv) or (b)(5) debt: residual maturity greater than five years	4.0
Eligible GSE debt securities not identified in §349.6(a)(2)(iv) or (b)(5): residual maturity less than one-year	1.0
Eligible GSE debt securities not identified in §349.6(a)(2)(iv) or (b)(5): residual maturity between one and five years:	4.0
Eligible GSE debt securities not identified in §349.6(a)(2)(iv) or (b)(5): residual maturity greater than five years:	8.0
Other eligible publicly traded debt: residual maturity less than one-year	1.0
Other eligible publicly traded debt: residual maturity between one and five years	4.0
Other eligible publicly traded debt: residual maturity greater than five years	8.0

TABLE B—MARGIN VALUES FOR ELIGIBLE NONCASH MARGIN COLLATERAL—Continued

Asset class	Discount (%)
Equities included in S&P 500 or related index	15.0
Equities included in S&P 1500 Composite or related index but not S&P 500 or related index	25.0
Gold	15.0

[1] The discount to be applied to an eligible investment fund is the weighted average discount on all assets within the eligible investment fund at the end of the prior month. The weights to be applied in the weighted average should be calculated as a fraction of the fund's total market value that is invested in each asset with a given discount amount. As an example, an eligible investment fund that is comprised solely of $100 of 91 day Treasury bills and $100 of 3 year US Treasury bonds would receive a discount of (100/200)*0.5+(100/200)*2.0=(0.5)*0.5+(0.5)*2.0=1.25 percent.

Subpart B—Retail Foreign Exchange Transactions

AUTHORITY: 12 U.S.C.1813(q), 1818, 1819, and 3108; 7 U.S.C. 2(c)(2)(E), 27 *et seq.*

§ 349.13 Authority, purpose, and scope.

(a) *Authority.* An FDIC-supervised insured depository institution that engages in retail forex transactions shall comply with the requirements of this part.

(b) *Purpose.* This part establishes rules applicable to retail forex transactions engaged in by FDIC-supervised insured depository institutions and applies on or after the effective date.

(c) *Scope.* Except as provided in paragraph (d) of this section, this part applies to FDIC-supervised insured depository institutions.

(d) *International applicability.* Sections 349.15 and 349.17 through 349.28 do not apply to retail foreign exchange transactions between a foreign branch of an FDIC-supervised IDI and a non-U.S. customer. With respect to those transactions, an FDIC-supervised IDI must comply with any disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign law.

[76 FR 40789, July 12, 2011. Redesignated and amended at 80 FR 74912, Nov. 30, 2015]

§ 349.14 Definitions.

For purposes of this part—

The following terms have the same meaning as in the Commodity Exchange Act: ''Affiliated person of a futures commission merchant''; ''Associated person''; ''Contract of sale''; ''Commodity''; ''Eligible contract participant''; ''Futures commission merchant''; ''Security''; and ''Security futures product''.

Affiliate has the same meaning as in §2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

Commodity Exchange Act means the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

FDIC-supervised insured depository institution means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to §3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

Forex means foreign exchange.

Institution-affiliated party or *IAP* has the same meaning as in 12 U.S.C. 1813(u)(1), (2), or (3).

Insured depository institution or *IDI* has the same meaning as in 12 U.S.C. 1813(c)(2).

Introducing broker means any person who solicits or accepts orders from a retail forex customer in connection with retail forex transactions.

Related person, when used in reference to a retail forex counterparty, means:

(1) Any general partner, officer, director, or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution;

(2) An associated person or employee of the retail forex counterparty, if the retail forex counterparty is not an FDIC-supervised insured depository institution;

(3) An IAP, if the retail forex counterparty is an FDIC-supervised insured depository institution; and

(4) Any relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons.

Retail forex account means the account of a retail forex customer, established with an FDIC-supervised insured depository institution, in which retail forex transactions with the FDIC-supervised insured depository institution

as counterparty are undertaken, or the account of a retail forex customer that is established in order to enter into such transactions.

Retail forex account agreement means the contractual agreement between an FDIC-supervised insured depository institution and a retail forex customer that contains the terms governing the customer's retail forex account with the FDIC-supervised insured depository institution.

Retail forex business means engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly.

Retail forex counterparty includes, as appropriate:

(1) An FDIC-supervised insured depository institution;

(2) A retail foreign exchange dealer;

(3) A futures commission merchant; and

(4) An affiliated person of a futures commission merchant.

Retail forex customer means a customer that is not an eligible contract participant, acting on his, her, or its own behalf and engaging in retail forex transactions.

Retail forex obligations means obligations of a retail forex customer with respect to retail forex transactions, including, but not limited to, trading losses, fees, and commissions.

Retail forex proprietary account means: a retail forex account carried on the books of an FDIC-supervised insured depository institution for one of the following persons; a retail forex account of which 10 percent or more is owned by one of the following persons; or a retail forex account of which an aggregate of 10 percent or more of which is owned by more than one of the following persons:

(1) The FDIC-supervised insured depository institution;

(2) An officer, director or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution; or

(3) An employee of the FDIC-supervised insured depository institution, whose duties include:

(i) The management of the FDIC-supervised insured depository institution's business;

(ii) The handling of the FDIC-supervised insured depository institution's retail forex transactions;

(iii) The keeping of records, including without limitation the software used to make or maintain those records, pertaining to the FDIC-supervised insured depository institution's retail forex transactions; or

(iv) The signing or co-signing of checks or drafts on behalf of the FDIC-supervised insured depository institution;

(4) A spouse or minor dependent living in the same household as of any of the foregoing persons; or

(5) An affiliate of the FDIC-supervised insured depository institution;

Retail forex transaction means an agreement, contract, or transaction in foreign currency, other than an identified banking product or a part of an identified banking product, that is offered or entered into by FDIC-supervised insured depository institution with a person that is not an eligible contract participant and that is:

(1) A contract of sale of a commodity for future delivery or an option on such a contract;

(2) An option, other than an option executed or traded on a national securities exchange registered pursuant to §6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)); or

(3) Offered or entered into on a leveraged or margined basis, or financed by an FDIC-supervised insured depository institution, its affiliate, or any person acting in concert with the FDIC-supervised insured depository institution or its affiliate on a similar basis, other than:

(i) A security that is not a security futures product as defined in §1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that—

(A) Results in actual delivery within two days; or

(B) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business; or

(iii) An agreement, contract, or transaction that the FDIC determines is not functionally or economically similar to:

(A) A contract of sale of a commodity for future delivery or an option on such a contract; or

(B) An option, other than an option executed or traded on a national securities exchange registered pursuant to Section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)).

Retail forex obligations means obligations of a retail forex customer with respect to retail forex transactions, including, but not limited to, trading losses, fees, and commissions.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.15 Prohibited transactions.

(a) *Fraudulent conduct prohibited.* No FDIC-supervised insured depository institution or its IAPs may, directly or indirectly, in or in connection with any retail forex transaction:

(1) Cheat or defraud or attempt to cheat or defraud any person;

(2) Willfully make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(3) Willfully deceive or attempt to deceive any person by any means whatsoever.

(b) *Acting as counterparty and exercising discretion prohibited.* If an FDIC-supervised insured depository institution can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then neither the FDIC-supervised insured depository institution nor its affiliates may act as the counterparty for any retail forex transaction with that retail forex customer.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.16 Filing procedures.

(a) *General.* Before commencing a retail forex business, an FDIC-supervised insured depository institution shall provide the FDIC prior written notice and obtain the FDIC's prior written consent.

(b) *Where to file.* A notice required by this section shall be submitted in writing to the appropriate FDIC office.

(c) *Contents of filing.* A complete letter notice shall include the following information:

(1) *Filings generally.* (i) A brief description of the FDIC-supervised institution's proposed retail forex business and the manner in which it will be conducted;

(ii) The amount of the institution's existing or proposed direct or indirect investment in the retail forex business as well as calculations sufficient to indicate compliance with all capital requirements in § 349.20 and all other applicable capital standards;

(iii) A copy of the FDIC-supervised insured depository institution's comprehensive business plan that includes a discussion of, among other things, how the operation of the retail forex business is consistent with the institution's overall strategy;

(iv) A description of the FDIC-supervised insured depository institution's target customers for its proposed retail forex business and related information, including without limitation credit evaluations, customer appropriateness, and ''know your customer'' documentation;

(v) A resolution by the FDIC-supervised insured depository institution's board of directors that the proposed retail forex business is an appropriate activity for the institution and that the institution's written policies, procedures, and risk measurement and management systems and controls address conducting retail forex business in a safe and sound manner and in compliance with this part;

(vi) Sample risk disclosures sufficient to demonstrate compliance with § 349.18.

(2) *Copy of application or notice filed with another agency.* If an FDIC-supervised insured depository institution has filed an application or notice with another regulatory authority which contains all of the information required by subparagraph (c)(1) of this part, the institution may submit a copy to the FDIC in lieu of a separate filing.

(3) *Additional information.* The FDIC may request additional information to complete the processing of the notification.

(d) *Treatment of Existing Retail Forex Business.* Any FDIC-supervised insured depository institution that is engaged in retail forex business on July 15, 2011 may continue to do so for up to six months, subject to an extension of time by the FDIC, provided that it notifies the FDIC of its retail forex business and requests the FDIC's written consent in accordance with paragraph (a) of this section.

(e) *Compliance with the Commodities Exchange Act.* Any FDIC-supervised insured depository institution that is engaged in retail forex business on July 15, 2011 shall be deemed, during the six-month period (including any extension) provided in paragraph (e) of this section, to be acting pursuant to a rule or regulation described in §2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

[76 FR 40789, July 12, 2011. Redesignated and amended at 80 FR 74912, Nov. 30, 2015]

§ 349.17 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* Any FDIC-supervised insured depository institution that—

(1) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(2) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex transaction for the purchase of the same currency;

(3) Purchases a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(4) Sells a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold shall:

(i) Immediately apply such purchase or sale against such previously held opposite transaction; and

(ii) Promptly furnish such retail forex customer with a statement showing the financial result of the transactions involved and the name of any introducing broker to the account.

(b) *Close-out against oldest open position.* In all instances where the short or long position in a customer's retail forex account immediately prior to an offsetting purchase or sale is greater than the quantity purchased or sold, the FDIC-supervised insured depository institution shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position.

(c) *Transactions to be applied as directed by customer.* Notwithstanding paragraphs (a) and (b) of this section, the offsetting transaction shall be applied as directed by a retail forex customer's specific instructions. These instructions may not be made by the FDIC-supervised insured depository institution or an IAP.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.18 Disclosure.

(a) *Risk disclosure statement required.* No FDIC-supervised insured depository institution may open or maintain open an account that will engage in retail forex transactions for a retail forex customer unless the FDIC-supervised insured depository institution has furnished the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (d) of this section and the disclosures required by paragraphs (e) and (f) of this section.

(b) *Acknowledgement of risk disclosure statement required.* The FDIC-supervised insured depository institution must receive from the retail forex customer a written acknowledgement signed and dated by the customer that the customer received and understood the written disclosure statement required by paragraph (a) of this section.

(c) *Placement of risk disclosure statement.* The disclosure statement may be attached to other documents as the initial page(s) of such documents and as the only material on such page(s).

(d) *Content of risk disclosure statement.* The language set forth in the written disclosure statement required by paragraph (a) of this section shall be as follows:

RISK DISCLOSURE STATEMENT

Retail forex transactions involve the leveraged trading of contracts denominated in foreign currency with an FDIC-supervised insured depository institution as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds or property you give the FDIC-supervised insured depository institution as margin for such trading and you may lose more than you pledge as margin.

Your FDIC-supervised insured depository institution is prohibited from applying losses that you experience on retail forex transactions on any funds or property of yours other than funds or property that you have given or pledged as margin for retail forex transactions.

You should be aware of and carefully consider the following points before determining whether such trading is appropriate for you.

(1) Trading is a not on a regulated market or exchange—your FDIC-supervised insured depository institution is your trading counterparty and has conflicting interests. The retail forex transaction you are entering into is not conducted on an interbank market, nor is it conducted on a futures exchange subject to regulation as a designated contract market by the Commodity Futures Trading Commission. The foreign currency trades you transact are trades with your FDIC-supervised insured depository institution as the counterparty. When you sell, the FDIC-supervised insured depository institution is the buyer. When you buy, the FDIC-supervised insured depository institution is the seller. As a result, when you lose money trading, your FDIC-supervised insured depository institution is making money on such trades, in addition to any fees, commissions, or spreads the FDIC-supervised insured depository institution may charge.

(2) An electronic trading platform for retail foreign currency transactions is not an exchange. It is an electronic connection for accessing your FDIC-supervised insured depository institution. The terms of availability of such a platform are governed only by your contract with your FDIC-supervised insured depository institution. Any trading platform that you may use to enter into off-exchange foreign currency transactions is only connected to your FDIC-supervised insured depository institution. You are accessing that trading platform only to transact with your FDIC-supervised insured depository institution. You are not trading with any other entities or customers of the FDIC-supervised insured depository institution by accessing such platform. The availability and operation of any such platform, including the consequences of the unavailability of the trading platform for any reason, is governed only by the terms of your account agreement with the FDIC-supervised insured depository institution.

(3) You may be able to offset or liquidate any trading positions only through your banking entity because the transactions are not made on an exchange or regulated contract market, and your FDIC-supervised insured depository institution may set its own prices. Your ability to close your transactions or offset positions is limited to what your FDIC-supervised insured depository institution will offer to you, as there is no other market for these transactions. Your FDIC-supervised insured depository institution may offer any prices it wishes, including prices derived from outside sources or not in its discretion. Your FDIC-supervised insured depository institution may establish its prices by offering spreads from third party prices, but it is under no obligation to do so or to continue to do so. Your FDIC-supervised insured depository institution may offer different prices to different customers at any point in time on its own terms. The terms of your account agreement alone govern the obligations your FDIC-supervised insured depository institution has to you to offer prices and offer offset or liquidating transactions in your account and make any payments to you. The prices offered by your FDIC-supervised insured depository institution may or may not reflect prices available elsewhere at any exchange, interbank, or other market for foreign currency.

(4) Paid solicitors may have undisclosed conflicts. The FDIC-supervised insured depository institution may compensate introducing brokers for introducing your account in ways that are not disclosed to you. Such paid solicitors are not required to have, and may not have, any special expertise in trading, and may have conflicts of interest based on the method by which they are compensated. You should thoroughly investigate the manner in which all such solicitors are compensated and be very cautious in granting any person or entity authority to trade on your behalf. You should always consider obtaining dated written confirmation of any information you are relying on from your FDIC-supervised insured depository institution in making any trading or account decisions.

(5) Retail forex transactions are not insured by the Federal Deposit Insurance Corporation.

(6) Retail forex transactions are not a deposit in, or guaranteed by, an FDIC-supervised insured depository institution.

(7) Retail forex transactions are subject to investment risks, including possible loss of all amounts invested.

Finally, you should thoroughly investigate any statements by any FDIC-supervised insured depository institution that minimize the importance of, or contradict, any of the terms of this risk disclosure. These statements may indicate sales fraud.

This brief statement cannot, of course, disclose all the risks and other aspects of trading off-exchange foreign currency with an FDIC-supervised insured depository institution.

I hereby acknowledge that I have received and understood this risk disclosure statement.

Date

Signature of Customer

(e)(1) *Disclosure of profitable accounts ratio.* Immediately following the language set forth in paragraph (d) of this section, the statement required by paragraph (a) of this section shall include, for each of the most recent four calendar quarters during which the FDIC-supervised insured depository institution maintained retail forex customer accounts:

(i) The total number of retail forex customer accounts maintained by the FDIC-supervised insured depository institution over which the FDIC-supervised insured depository institution does not exercise investment discretion;

(ii) The percentage of such accounts that were profitable for retail forex customer accounts during the quarter; and

(iii) The percentage of such accounts that were not profitable for retail forex customer accounts during the quarter.

(2) The FDIC-supervised insured depository institution's statement of profitable trades shall include the following legend: ''Past performance is not necessarily indicative of future results.'' Each FDIC-supervised insured depository institution shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of retail forex accounts maintained by the FDIC-supervised insured depository institution for which the FDIC-supervised insured depository institution does not exercise investment discretion, the percentage of such accounts that were profitable, and the percentage of such accounts that were not profitable for each calendar quarter during the most recent five-year period during which the FDIC-supervised insured depository institution maintained such accounts.

(f) *Disclosure of fees and other charges.* Immediately following the language required by paragraph (e) of this section, the statement required by paragraph (a) of this section shall include:

(1) The amount of any fee, charge, commission, or spreads that the FDIC-supervised insured depository institution may impose on the retail forex customer in connection with a retail forex account or retail forex transaction;

(2) An explanation of how the FDIC-supervised insured depository institution will determine the amount of such fees, charges, commissions, or spreads; and

(3) The circumstances under which the FDIC-supervised insured depository institution may impose such fees, charges, commissions, or spreads.

(g) *Future disclosure requirements.* If, with regard to a retail forex customer, the FDIC-supervised insured depository institution changes any fee, charge, commission or spreads required to be disclosed under paragraph (f) of this section, then the FDIC-supervised insured depository institution shall mail or deliver to the retail forex customer a notice of the changes at least 15 days prior to the effective date of the change.

(h) *Form of disclosure requirements.* The disclosures required by this section shall be clear and conspicuous and designed to call attention to the nature and significance of the information provided.

(i) *Other disclosure requirements unaffected.* This section does not relieve an FDIC-supervised insured depository institution from any other disclosure obligation it may have under applicable law.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.19 Recordkeeping.

(a) *General rule.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall keep full, complete and systematic records, together with all pertinent data and memoranda, pertaining to its retail forex business, including:

(1) *Retail forex account records.* For each retail forex account:

(i) The name and address of the person for whom the account is carried or introduced and the principal occupation or business of the person.

(ii) The name of any other person guaranteeing the account or exercising trading control with respect to the account;

(iii) The establishment or termination of the account; and

(iv) A means to identify the person who has solicited and is responsible for the account or assign account numbers in such a manner as to identify that person.

(v) The funds in the account, net of any commissions and fees;

(vi) The account's net profits and losses on open trades;

(vii) The funds in the account plus or minus the net profits and losses on open trades, adjusted for the net option value in the case of open options positions;

(viii) Financial ledger records that show separately for each retail forex customer all charges against and credits to such retail forex customer's account, including deposits, withdrawals, and transfers, and charges or credits resulting from losses or gains on closed transactions; and

(ix) A list of all retail forex transactions executed for the account, with the details specified in paragraph (a)(2) of this section;

(2) *Retail forex transaction records.* For each retail forex transaction:

(i) The price at which the FDIC-supervised insured depository institution placed the order, or, in the case of an option, the premium that the retail forex customer paid;

(ii) The customer account identification information;

(iii) The currency pair;

(iv) The size or quantity of the order;

(v) Whether the order was a buy or sell order;

(vi) The type of order, if the order was not a market order;

(vii) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold;

(viii) For options, whether the option is a put or call, expiration date, quantity, underlying contract for future delivery or underlying physical, strike price, and details of the purchase price of the option, including premium, mark-up, commission, and fees; and

(ix) For futures, the delivery date; and

(x) If the order was made on a trading platform:

(A) The price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(B) The date and time the order was transmitted to the trading platform; and

(C) The date and time the order was executed;

(3) *Price changes on a trading platform.* If a trading platform is used, daily logs showing each price change on the platform, the time of the change to the nearest second, and the trading volume at that time and price;

(4) *Methods or algorithms.* Any method or algorithm used to determine the bid or asked price for any retail forex transaction or the prices at which customer orders are executed, including, but not limited to, any markups, fees, commissions or other items which affect the profitability or risk of loss of a retail forex customer's transaction;

(5) *Daily records* which show for each business day complete details of:

(i) All retail forex transactions that are futures transactions executed on that day, including the date, price, quantity, market, currency pair, delivery date, and the person for whom such transaction was made;

(ii) All retail forex transactions that are option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, currency pair, delivery date, strike price, details

of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;

(iii) All other retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person for whom such transaction was made; and

(6) *Other records.* Written acknowledgements of receipt of the risk disclosure statement required by §349.18(b), records required under paragraph (b) through (f) of this section, trading cards, signature cards, street books, journals, ledgers, payment records, copies of statements of purchase, and all other records, data and memoranda that have been prepared in the course of the FDIC-supervised insured depository institution's retail forex business.

(b) *Ratio of profitable accounts.* (1) With respect to its active retail forex customer accounts over which it did not exercise investment discretion and that are not retail forex proprietary accounts open for any period of time during the quarter, an FDIC-supervised insured depository institution shall prepare and maintain on a quarterly basis (calendar quarter):

(i) A calculation of the percentage of such accounts that were profitable;

(ii) A calculation of the percentage of such accounts that were not profitable; and

(iii) Data supporting the calculations described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section.

(2) In calculating whether a retail forex account was profitable or not profitable during the quarter, the FDIC-supervised insured depository institution shall compute the realized and unrealized gains or losses on all retail forex transactions carried in the retail forex account at any time during the quarter, and subtract all fees, commissions, and any other charges posted to the retail forex account during the quarter, and add any interest income and other income or rebates credited to the retail forex account during the quarter. All deposits and withdrawals of funds made by the retail forex customer during the quarter must be excluded from the computation of whether the retail forex account was profitable or not profitable during the quarter. Computations that result in a zero or negative number shall be considered a retail forex account that was not profitable. Computations that result in a positive number shall be considered a retail forex account that was profitable.

(3) A retail forex account shall be considered ''active'' for purposes of paragraph (b)(1) of this section if and only if, for the relevant calendar quarter, a retail forex transaction was executed in that account or the retail forex account contained an open position resulting from a retail forex transaction.

(c) *Records related to possible violations of law.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall make a record of all communications, including customer complaints, received by the FDIC-supervised insured depository institution or its IAPs concerning facts giving rise to possible violations of law related to the FDIC-supervised insured depository institution's retail forex business. The record shall contain: the name of the complainant, if provided; the date of the communication; the relevant agreement, contract, or transaction; the substance of the communication; the name of the person who received the communication, and the final disposition of the matter.

(d) *Records for noncash margin.* An FDIC-supervised insured depository institution shall maintain a record of all noncash margin collected pursuant to §349.21. The record shall show separately for each retail forex customer:

(1) A description of the securities or property received;

(2) The name and address of such retail forex customer;

(3) The dates when the securities or property were received;

(4) The identity of the depositories or other places where such securities or property are segregated or held, if applicable;

(5) The dates in which the FDIC-supervised insured depository institution placed or removed such securities or property into or from such depositories; and

(6) The dates of return of such securities or property to such retail forex customer, or other disposition thereof,

together with the facts and circumstances of such other disposition.

(e) *Order Tickets.* (1) Except as provided in paragraph (e)(2) of this section, immediately upon the receipt of a retail forex transaction order, an FDIC-supervised insured depository institution must prepare an order ticket for the order (whether unfulfilled, executed, or canceled). The order ticket must include:

(i) Account identification (account or customer name with which the retail forex transaction was effected);

(ii) Order number;

(iii) Type of order (market order, limit order, or subject to special instructions);

(iv) Date and time, to the nearest minute, the retail forex transaction order was received (as evidenced by timestamp or other timing device);

(v) Time, to the nearest minute, the retail forex transaction order was executed; and

(vi) Price at which the retail forex transaction was executed.

(2) *Post-execution allocation of bunched orders.* Specific identifiers for retail forex accounts included in bunched orders need not be recorded at time of order placement or upon report of execution as required under paragraph (e)(1) of this section if the following requirements are met:

(i) The FDIC-supervised insured depository institution placing and directing the allocation of an order eligible for post-execution allocation has been granted written investment discretion with regard to participating customer accounts and makes the following information available to retail forex customers upon request:

(A) The general nature of the post-execution allocation methodology the FDIC-supervised insured depository institution will use;

(B) Whether the FDIC-supervised insured depository institution has any interest in accounts which may be included with customer accounts in bunched orders eligible for post-execution allocation; and

(C) Summary or composite data sufficient for that customer to compare its results with those of other comparable customers and, if applicable, any account in which the FDIC-supervised insured depository institution has an interest.

(ii) Post-execution allocations are made as soon as practicable after the entire transaction is executed;

(iii) Post-execution allocations are fair and equitable, with no account or group of accounts receiving consistently favorable or unfavorable treatment; and

(iv) The post-execution allocation methodology is sufficiently objective and specific to permit the FDIC to verify the fairness of the allocations using that methodology.

(f) *Record of monthly statements and confirmations.* An FDIC-supervised insured depository institution shall retain a copy of each monthly statement and confirmation required by § 349.22.

(g) *Manner of maintenance.* The records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. Record maintenance may include the use of automated or electronic records provided that the records are easily retrievable, readily available for inspection, and capable of being reproduced in hard copy.

(h) *Length of maintenance.* An FDIC-supervised insured depository institution shall keep each record required by this section for at least five years from the date the record is created.

[76 FR 40789, July 12, 2011. Redesignated and amended at 80 FR 74912, Nov. 30, 2015]

§ 349.20 Capital requirements.

An FDIC-supervised insured depository institution offering or entering into retail forex transactions must be well capitalized as defined by 12 CFR part 324, unless specifically exempted by the FDIC in writing.

[83 FR 17741, Apr. 24, 2018]

§ 349.21 Margin requirements.

(a) *Margin required.* An FDIC-supervised insured depository institution engaging, or offering to engage, in retail forex transactions must collect from each retail forex customer an amount of margin not less than:

(1) Two percent of the notional value of the retail forex transaction for major currency pairs and 5 percent of

the notional value of the retail forex transaction for all other currency pairs;

(2) For short options, 2 percent for major currency pairs and 5 percent for all other currency pairs of the notional value of the retail forex transaction, plus the premium received by the retail forex customer; or

(3) For long options, the full premium charged and received by the FDIC-supervised insured depository institution.

(b)(1) *Form of margin.* Margin collected under paragraph (a) of this section or pledged by a retail forex customer for retail forex transactions in excess of the requirements of paragraph (a) of this section must be in the form of cash or the following financial instruments:

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States;

(ii) General obligations of any State or of any political subdivision thereof;

(iii) General obligations issued or guaranteed by any enterprise, as defined in 12 U.S.C. 4502(10);

(iv) Certificates of deposit issued by an insured depository institution, as defined in §3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2));

(v) Commercial paper;

(vi) Corporate notes or bonds;

(vii) General obligations of a sovereign nation;

(viii) Interests in money market mutual funds; and

(ix) Such other financial instruments as the FDIC deems appropriate.

(2) *Haircuts.* An FDIC-supervised insured depository institution shall establish written policies and procedures that include:

(i) Haircuts for noncash margin collected under this section; and

(ii) Annual evaluation, and, if appropriate, modification of the haircuts.

(c) *Separate margin account.* Margin collected by the FDIC-supervised insured depository institution from a retail forex customer for retail forex transactions or pledged by a retail forex customer for retail forex transactions shall be placed into a separate account containing only such margin.

(d) *Margin calls; liquidation of position.* For each retail forex customer, at least once per day, an FDIC-supervised insured depository institution shall:

(1) Mark the value of the retail forex customer's open retail forex positions to market;

(2) Mark the value of the margin collected under this section from the retail forex customer to market;

(3) Determine if, based on the marks in paragraphs (c)(1) and (2) of this section, the FDIC-supervised insured depository institution has collected margin from the retail forex customer sufficient to satisfy the requirements of this section; and

(4) Collect such margin from the retail forex customer as the FDIC-supervised insured depository institution may require to satisfy the requirements of this section, or liquidate the retail forex customer's retail forex transactions.

(e) *Set-off prohibited.* An FDIC-supervised insured depository institution may not:

(1) Apply a retail forex customer's retail forex obligations against any funds or other asset of the retail forex customer other than margin in the separate margin account described in paragraph (c) of this section;

(2) Apply a retail forex customer's retail forex obligations to increase the amount owed by the retail forex customer to the FDIC-supervised insured depository institution under any loan; or

(3) Collect the margin required under this section by use of any right of set-off.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.22 Required reporting to customers.

(a) *Monthly statements.* Each FDIC-supervised insured depository institution must promptly furnish to each retail forex customer, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open positions at the end of the statement period nor any changes to the account balance since the prior statement period, but in any event not less frequently than once every three

months, a statement that clearly shows:

(1) For each retail forex customer:

(i) The open retail forex transactions with prices at which acquired;

(ii) The net unrealized profits or losses in all open retail forex transactions marked to the market;

(iii) Any money, securities or other property in the separate margin account required by §349.21(c); and

(iv) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: money, securities, or property received from or disbursed to such customer; realized profits and losses; and fees, charges, commissions, and spreads.

(2) For each retail forex customer engaging in retail forex transactions that are options:

(i) All such options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(ii) The open option positions carried for such customer and arising as of the end of the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(iii) All such option positions marked to the market and the amount each position is in the money, if any;

(iv) Any money, securities or other property in the separate margin account required by §349.21(c); and

(v) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: money, securities, or property received from or disbursed to such customer; realized profits and losses; premiums and mark-ups; and fees, charges, and commissions.

(b) *Confirmation statement.* Each FDIC-supervised insured depository institution must, not later than the next business day after any retail forex transaction, send:

(1) To each retail forex customer, a written confirmation of each retail forex transaction caused to be executed by it for the customer, including offsetting transactions executed during the same business day and the rollover of an open retail forex transaction to the next business day;

(2) To each retail forex customer engaging in forex option transactions, a written confirmation of each forex option transaction, containing at least the following information:

(i) The retail forex customer's account identification number;

(ii) A separate listing of the actual amount of the premium, as well as each mark-up thereon, if applicable, and all other commissions, costs, fees and other charges incurred in connection with the forex option transaction;

(iii) The strike price;

(iv) The underlying retail forex transaction or underlying currency;

(v) The final exercise date of the forex option purchased or sold; and

(vi) The date the forex option transaction was executed.

(3) To each retail forex customer engaging in forex option transactions, upon the expiration or exercise of any option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the option involved, and, in the case of exercise, the details of the retail forex or physical currency position which resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(c) Notwithstanding the provisions of paragraphs (b)(1) through (3) of this section, a retail forex transaction that is caused to be executed for a pooled investment vehicle that engages in retail forex transactions need be confirmed only to the operator of such pooled investment vehicle.

(d) *Controlled accounts.* With respect to any account controlled by any person other than the retail forex customer for whom such account is carried, each FDIC-supervised insured depository institution shall promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section.

(e) *Introduced accounts.* Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which

the FDIC-supervised insured depository institution was introduced by an introducing broker and the name of the introducing broker.

[76 FR 40789, July 12, 2011. Redesignated and amended at 80 FR 74912, Nov. 30, 2015]

§ 349.23 Unlawful representations.

(a) *No implication or representation of limiting losses.* No FDIC-supervised insured depository institution engaged in retail foreign exchange transactions or its IAPs may imply or represent that it will, with respect to any retail customer forex account, for or on behalf of any person:

(1) Guarantee such person or account against loss;

(2) Limit the loss of such person or account; or

(3) Not call for or attempt to collect margin as established for retail forex customers.

(b) *No implication of representation of engaging in prohibited acts.* No FDIC-supervised insured depository institution or its IAPs may in any way imply or represent that it will engage in any of the acts or practices described in paragraph (a) of this section.

(c) *No Federal government endorsement.* No FDIC-supervised insured depository institution or its IAPs may represent or imply in any manner whatsoever that any retail forex transaction or retail forex product has been sponsored, recommended, or approved by the FDIC, the Federal government, or any agency thereof.

(d) *Assuming or sharing of liability from bank error.* This section shall not be construed to prevent an FDIC-supervised insured depository institution from assuming or sharing in the losses resulting from the FDIC-supervised insured depository institution's error or mishandling of a retail forex transaction.

(e) *Certain guaranties unaffected.* This section shall not affect any guarantee entered into prior to the effective date of this part, but this section shall apply to any extension, modification or renewal thereof entered into after such date.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.24 Authorization to trade.

(a) *Specific authorization required.* No FDIC-supervised insured depository institution may directly or indirectly effect a retail forex transaction for the account of any retail forex customer unless, before the transaction occurs, the retail forex customer specifically authorized the FDIC-supervised insured depository institution to effect the retail forex transaction.

(b) Requirements for specific authorization. A retail forex transaction is ''specifically authorized'' for purposes of this section if the retail forex customer specifies:

(1) The precise retail forex transaction to be effected;

(2) The exact amount of the foreign currency to be purchased or sold; and

(3) In the case of an option, the identity of the foreign currency or contract that underlies the option.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.25 Trading and operational standards.

(a) *Internal rules, procedures, and controls required.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall establish and implement internal policies, procedures, and controls designed, at a minimum, to:

(1) Ensure, to the extent reasonable, that each order received from a retail forex transaction that is executable at or near the price that the FDIC-supervised insured depository institution has quoted to the retail forex customer is entered for execution before any order in any retail forex transaction for

(i) A any proprietary account;

(ii) An account in which a related person has an interest, or any account for which such a related person may originate orders without the prior specific consent of the account owner if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

(iii) an account in which such a related person has an interest, if the related person has gained knowledge of the retail forex customer's order prior

to the transmission of an order for a proprietary account; or

(iv) an account in which such a related person may originate orders without the prior specific consent of the account owner if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account.

(2) Prevent FDIC-supervised insured depository institution related persons from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of paragraph (a)(1) of this section;

(3) Fairly and objectively establish settlement prices for retail forex transactions; and

(b) *Disclosure of retail forex transactions.* No FDIC-supervised insured depository institution engaging in retail forex transactions may disclose that an order of another person is being held by the FDIC-supervised insured depository institution, unless the disclosure is necessary to the effective execution of such order or the disclosure is made at the request of the FDIC.

(c) *Handling of retail forex accounts of related persons of retail forex counterparties.* No FDIC-supervised insured depository institution engaging in retail forex transactions may knowingly handle the retail forex account of an employee of another retail forex counterparty's retail forex business unless the FDIC-supervised insured depository institution:

(1) Receives written authorization from a person designated by the other retail forex counterparty with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section;

(2) Prepares immediately upon receipt of an order for the account a written record of the order, including the account identification and order number, and records thereon to the nearest minute, by time-stamp or other timing device, the date and time the order is received; and

(3) Transmits on a regular basis to the other retail forex counterparty copies of all statements for the account and of all written records prepared upon the receipt of orders for such account pursuant to paragraph (a)(2) of this section.

(d) *Related person of FDIC-supervised insured depository institution establishing account at another retail forex counterparty.* No related person of an FDIC-supervised insured depository institution working in the institution's retail forex business may have an account, directly or indirectly, with another retail forex counterparty unless the other retail forex counterparty:

(1) Receives written authorization to open and maintain the an account from a person designated by the FDIC-supervised insured depository institution of which it is a related person with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section; and

(2) Transmits on a regular basis to the FDIC-supervised insured depository institution copies of all statements for such account and of all written records prepared by the other retail forex counterparty upon receipt of orders for the account pursuant to paragraph (c)(2) of this section are transmitted on a regular basis to the retail forex counterparty of which it is a related person.

(e) *Prohibited trading practices.* No FDIC-supervised insured depository institution engaging in retail forex transactions may:

(1) Enter into a retail forex transaction, to be executed pursuant to a market or limit order at a price that is not at or near the price at which other retail forex customers, during that same time period, have executed retail forex transactions with the FDIC-supervised insured depository institution;

(2) Adjust or alter prices for a retail forex transaction after the transaction has been confirmed to the retail forex customer;

(3) Provide a retail forex customer a new bid price for a retail forex transaction that is higher than its previous bid without providing a new asked price that is also higher than its previous asked price by a similar amount;

(4) Provide a retail forex customer a new bid price for a retail forex transaction that is lower than its previous bid without providing a new asked

price that is also lower than its previous asked price by a similar amount; or

(5) Establish a new position for a retail forex customer (except one that offsets an existing position for that retail forex customer) where the FDIC-supervised insured depository institution holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.26 Supervision.

(a) *Supervision by the FDIC-supervised insured depository institution.* An FDIC-supervised insured depository institution engaging in retail forex transactions shall diligently supervise the handling by its officers, employees, and agents (or persons occupying a similar status or performing a similar function) of all retail forex accounts carried, operated, or advised by at the FDIC-supervised insured depository institution and all activities of its officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to its retail forex business.

(b) *Supervision by officers, employees, or agents.* An officer, employee, or agent of an FDIC-supervised insured depository institution must diligently supervise his or her subordinates' handling of all retail forex accounts at the FDIC-supervised insured depository institution and all the subordinates' activities relating to the FDIC-supervised insured depository institution's retail forex business.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.27 Notice of transfers.

(a) *Prior notice generally required.* Except as provided in paragraph (b) of this section, an FDIC-supervised insured depository institution must provide a retail forex customer with 30 days' prior notice of any assignment of any position or transfer of any account of the retail forex customer. The notice must include a statement that the retail forex customer is not required to accept the proposed assignment or transfer and may direct the FDIC-supervised insured depository institution to liquidate the positions of the retail forex customer or transfer the account to a retail forex counterparty of the retail forex customer's selection.

(b) *Exceptions.* The requirements of paragraph (a) of this section shall not apply to transfers:

(1) Requested by the retail forex customer;

(2) Made by the Federal Deposit Insurance Corporation as receiver or conservator under the Federal Deposit Insurance Act; or

(3) Otherwise authorized by applicable law.

(c) *Obligations of transferee FDIC-supervised insured depository institution.* An FDIC-supervised insured depository institution to which retail forex accounts or positions are assigned or transferred under paragraph (a) of this section must provide to the affected retail forex customers the risk disclosure statements and forms of acknowledgment required by this part and receive the required signed acknowledgments within sixty days of such assignments or transfers. This requirement shall not apply if the FDIC-supervised insured depository institution has clear written evidence that the retail forex customer has received and acknowledged receipt of the required disclosure statements.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

§ 349.28 Customer dispute resolution.

(a) *Voluntary submission of claims to dispute or settlement procedures.* No FDIC-supervised insured depository institution may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure.

(b) *Election of forum.* (1) Within ten business days after receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, the FDIC-supervised insured depository institution must provide the customer with a list of persons qualified in dispute resolution.

(2) The customer shall, within 45 days after receipt of such list, notify the

FDIC-supervised insured depository institution of the person selected. The customer's failure to provide such notice shall give the FDIC-supervised insured depository institution the right to select a person from the list.

(c) *Enforceability.* A dispute settlement procedure may require parties using such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the voluntary procedure under paragraph (a) of this section or that agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

(d) *Time limits for submission of claims.* The dispute settlement procedure used by the parties shall not include any unreasonably short limitation period foreclosing submission of a customer's claims or grievances or counterclaims.

(e) *Counterclaims.* A procedure for the settlement of a retail forex customer's claims or grievances against an FDIC-supervised insured depository institution or employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought. Such a counterclaim may be permitted where it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties, or third persons over which the settlement process lacks jurisdiction.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

PART 350 [RESERVED]

PART 351—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

Subpart A—Authority and Definitions

Sec.

Subpart B—Proprietary Trading

Subpart C—Covered Fund Activities and Investments

Subpart D—Compliance Program Requirement; Violations

AUTHORITY: 12 U.S.C. 1851; 1811 *et seq.;* 3101 *et seq.;* and 5412.

SOURCE: 79 FR 5805, Jan. 31, 2014, unless otherwise noted.

Subpart A—Authority and Definitions

§ 351.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the FDIC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including any insured depository institution as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2)) and certain subsidiaries thereof for which the FDIC is the appropriate Federal banking agency as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to insured depository institutions for which the FDIC is the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act, and certain subsidiaries of the foregoing, but does not include such entities to the extent they are not within the definition of banking entity in § 351.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided in under section 13 of the Bank Holding Company Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of Bank Holding Company Act shall apply to the activities and investments of a banking entity, even if such activities and investments are authorized for a banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the FDIC to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 35021, July 22, 2019]

§ 351.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraph (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(vii) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(viii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(ix) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

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

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in §211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The FDIC has not determined pursuant to § 351.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The FDIC has determined pursuant to §351.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to §351.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to §351.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

[84 FR 62165, Nov. 14, 2019]

Subpart B—Proprietary Trading

§351.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a banking entity may not engage in proprietary

trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account*—(1) *Trading account.* Trading account means:

(i) Any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments described in this paragraph;

(ii) Any account that is used by a banking entity to purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule; or

(iii) Any account that is used by a banking entity to purchase or sell one or more financial instruments, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Trading account application for certain banking entities.* (i) A banking entity that is subject to paragraph (b)(1)(ii) of this section in determining the scope of its trading account is not subject to paragraph (b)(1)(i) of this section.

(ii) A banking entity that does not calculate risk-based capital ratios under the market risk capital rule and is not a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk based capital ratios under the market risk capital rule may elect to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph. A banking entity that elects under this subsection to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph is not required to apply paragraph (b)(1)(i) of this section.

(3) *Consistency of account election for certain banking entities.* (i) Any election or change to an election under paragraph (b)(2)(ii) of this section must apply to the electing banking entity and all of its wholly owned subsidiaries. The primary financial regulatory agency of a banking entity that is affiliated with but is not a wholly owned subsidiary of such electing banking entity may require that the banking entity be subject to this uniform application requirement if the primary financial regulatory agency determines that it is necessary to prevent evasion of the requirements of this part after notice and opportunity for response as provided in subpart D of this part.

(ii) A banking entity that does not elect under paragraph (b)(2)(ii) of this section to be subject to the trading account definition in (b)(1)(ii) of this section may continue to apply the trading account definition in paragraph (b)(1)(i) of this section for one year from the date on which it becomes, or becomes a consolidated affiliate for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule.

(4) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed not to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for sixty days or longer and does not transfer substantially all of the risk of the financial instrument within sixty days of the purchase (or sale).

(c) *Financial instrument*—(1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading.* Proprietary trading does not include:

(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security, foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular financial instruments to be used for liquidity management purposes, the amount, types, and risks of these financial instruments that are consistent with liquidity management, and the liquidity circumstances in which the particular financial instruments may or must be used;

(ii) Requires that any purchase or sale of financial instruments contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any financial instruments purchased or sold for liquidity management purposes be highly liquid and limited to financial instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any financial instruments purchased or sold for liquidity management purposes, together with any other financial instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of financial instruments that are not permitted under § 351.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph (d)(3); and

(vi) Is consistent with the FDIC's regulatory requirements regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in

connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity;

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the FDIC;

(10) Any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or excluded activity or is a subsequent transaction to correct such an error;

(11) Contemporaneously entering into a customer-driven swap or customer-driven security-based swap and a matched swap or security-based swap if:

(i) The banking entity retains no more than minimal price risk; and

(ii) The banking entity is not a registered dealer, swap dealer, or security-based swap dealer;

(12) Any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy; or

(13) Any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form for a banking entity as of January 1, 2020.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

(6) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(7) *Exchange*, unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(8) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(9) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(10) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(11) *Market risk capital rule covered position and trading position* means a financial instrument that meets the criteria to be a covered position and a trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is

applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3, subpart F, with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

(13) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(*1*) Engages in coordinated trading activity with a unified approach to its key elements;

(*2*) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(*3*) Submits compliance reports and other information as a unit for monitoring by management; and

(*4*) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62167, Nov. 14, 2019]

§ 351.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 351.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this paragraph (a), including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2)(iii)(B) and (C) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in §351.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties,

taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with the methodology described in § 351.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments

for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(*1*) Amount, types, and risks of its market-maker positions;

(*2*) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) Level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the FDIC on an ongoing basis.

(3) *Limit Breaches and Increases.* (i) With respect to any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, a banking entity shall maintain and make available to the FDIC upon request records regarding:

(A) Any limit that is exceeded; and

(B) Any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the FDIC.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the FDIC if the FDIC determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or

counterparties. The FDIC's rebuttal of the presumption in paragraph (c)(1)(i) must be made in accordance with the notice and response procedures in subpart D of this part.

[84 FR 62169, Nov. 14, 2019]

§ 351.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 351.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* (1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(*1*) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(*2*) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(*3*) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1)(ii) of this section and is not prohibited proprietary trading; and

(iii) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(2) The risk-mitigating hedging activities of a banking entity that does

not have significant trading assets and liabilities are permitted under paragraph (a) of this section only if the risk-mitigating hedging activity:

(i) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and

(ii) Is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading.

(c) *Documentation requirement.* (1) A banking entity that has significant trading assets and liabilities must comply with the requirements of paragraphs (c)(2) and (3) of this section, unless the requirements of paragraph (c)(4) of this section are met, with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 351.4(b)(2)(iii)(B) of this subpart as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of this paragraph (c) for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the FDIC on request, or such longer period as required under other law or this part.

(4) The requirements of paragraphs (c)(2) and (3) of this section do not apply to the purchase or sale of a financial instrument described in paragraph (c)(1) of this section if:

(i) The financial instrument purchased or sold is identified on a written list of pre-approved financial instruments that are commonly used by the trading desk for the specific type of hedging activity for which the financial instrument is being purchased or sold; and

(ii) At the time the financial instrument is purchased or sold, the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks. The limits shall be appropriate for the:

(A) Size, types, and risks of the hedging activities commonly undertaken by the trading desk;

(B) Financial instruments purchased and sold for hedging activities by the trading desk; and

(C) Levels and duration of the risk exposures being hedged.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62171, Nov. 14, 2019; 84 FR 66063, Dec. 3, 2019]

§ 351.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in section 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in §351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase (or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company.* The prohibition contained in §351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities.* (1) The prohibition contained in §351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is

not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(4) For purposes of this paragraph (e), a U.S. branch, agency, or subsidiary of a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Permitted trading activities of qualifying foreign excluded funds.* The prohibition contained in §351.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in §351.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62172, Nov. 14, 2019; 85 FR 46509, July 31, 2020]

§351.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§351.4 through 351.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest,

together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 351.8–351.9 [Reserved]

Subpart C—Covered Funds Activities and Investments

§ 351.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the FDIC; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B)(*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C)(*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in §225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term *public offering* means a distribution (as defined in §351.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is composed of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 351.2(t);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of

beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section;

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) The aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A) of this section, and debt securities held under this paragraph (c)(8)(i)(E); and

(*2*) The aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) The issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) The issuing entity's valuation methodology values similarly situated assets consistently.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E) of this section, if those securities are:

(A) Cash equivalents—which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities—for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in

any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in §211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has

received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b–3(b)(8)(A) or (B), or that has terminated its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z–2(d).

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 351.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 351.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 351.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under §351.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under §351.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in §351.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(*1*)(*iii*) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in §351.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.* (i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)–1; and

(B) Does not engage in any activity that would constitute proprietary trading under §351.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on

this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 351.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 351.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 351.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.* (i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 351.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 351.14(b) and 351.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

(A) *Closely related person* means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

(B) *Family customer* means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)–1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.* (i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under §351.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§351.14(b) and 351.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the FDIC determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An other similar interest means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund, excluding:

(*1*) The rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event; and

(*2*) The right to participate in the removal of an investment manager for

''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(*2*), ''cause'' for removal of an investment manager means one or more of the following events: *(i)* The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(ii) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(iii) The breach by the investment manager of material representations or warranties;

(iv) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(v) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(vi) A change in control with respect to the investment manager;

(vii) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(viii) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent

losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 351.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(*2*) The entitlement to payments under the terms of the interest are absolute and could not be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest; and

(*3*) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name, except as permitted under § 351.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 351.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control

the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 35021, July 22, 2019; 84 FR 62172, Nov. 14, 2019; 85 FR 46510, July 31, 2020]

§ 351.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 351.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 351.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 351.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof), except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding §351.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C.78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in §351.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of §351.4(a) or (b) of subpart B, respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C.78*o*–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of §351.12(a)(2)(ii) and (iii) and (d) of this subpart.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 35021, July 22, 2019; 84 FR 62172, Nov. 14, 2019]

§ 351.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in §351.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to §351.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 351.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 351.10(c)(1) will not be considered to be an affiliate of the banking entity so long as:

(A) The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other

services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the

securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 351.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments.* (i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) *Aggregate permitted investments in all covered funds.* (1)(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under §351.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under §351.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest*—(1) *Extension period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(4) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(5) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62172, Nov. 14, 2019; 85 FR 46514, July 31, 2020]

§ 351.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 351.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i) of this section, the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 351.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 351.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 351.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 351.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62172, Nov. 14, 2019; 85 FR 46515, July 31, 2020]

§ 351.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.* (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 351.11 of this subpart, or that continues to hold an ownership interest in accordance with § 351.11(b) of this subpart, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of § 351.11, 351.12, or 351.13;

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 351.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the FDIC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR

223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) must comply with the limitations in § 351.15.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 351.11 of this subpart, or that continues to hold an ownership interest in accordance with § 351.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (iii), or (iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity under section 23B.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62173, Nov. 14, 2019; 85 FR 46515, July 31, 2020]

§ 351.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 351.11 through 351.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if

held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 351.16 Ownership of Interests in and Sponsorship of Issuers of Certain Collateralized Debt Obligations Backed by Trust-Preferred Securities.

(a) The prohibition contained in § 351.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 351.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 351.4 and 351.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

[79 FR 5228, Jan. 31, 2014]

§§ 351.17–351.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 351.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 351.6(f) or 351.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

(b) *Banking entities with significant trading assets and liabilities.* With respect to a banking entity with significant trading assets and liabilities, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B (including those permitted under §§ 351.3 to 351.6 of subpart B), including setting, monitoring and managing required limits set out in § 351.4 and § 351.5, and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ 351.11 through 351.14 of subpart C) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act

and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the FDIC upon request and retain for a period of no less than 5 years or such longer period as required by the FDIC.

(c) *CEO attestation.* The CEO of a banking entity that has significant trading assets and liabilities must, based on a review by the CEO of the banking entity, attest in writing to the FDIC, each year no later than March 31, that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program required by paragraph (b) of this section in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity (other than a qualifying foreign excluded fund under section 351.6(f) or 351.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The FDIC notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the FDIC notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for each quarter within 30 days of the end of the quarter.

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 351.6(f) or 351.13(d)) shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by § 351.10(c)(1),351.10(c)(5), 351.10(c)(8), 351.10(c)(9), or 351.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 351.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate

as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 351.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 351.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities.* A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 351.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 351.6(a) of subpart B).

(2) *Banking entities with moderate trading assets and liabilities.* A banking entity with moderate trading assets and liabilities may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.

(g) *Rebuttable presumption of compliance for banking entities with limited trading assets and liabilities*—(1) *Rebuttable presumption.* Except as otherwise provided in this paragraph, a banking entity with limited trading assets and liabilities shall be presumed to be compliant with subpart B and subpart C of this part and shall have no obligation to demonstrate compliance with this part on an ongoing basis.

(2) *Rebuttal of presumption.* If upon examination or audit, the FDIC determines that the banking entity has engaged in proprietary trading or covered fund activities that are otherwise prohibited under subpart B or subpart C of this part, the FDIC may require the banking entity to be treated under this part as if it did not have limited trading assets and liabilities. The FDIC's rebuttal of the presumption in this paragraph must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(h) *Reservation of authority.* Notwithstanding any other provision of this part, the FDIC retains its authority to require a banking entity without significant trading assets and liabilities to apply any requirements of this part that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the FDIC determines that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of subpart B or subpart C of this part, does not warrant a presumption of compliance under paragraph (g) of this section or treatment as a banking entity with moderate trading assets and liabilities, as applicable. The FDIC's exercise of this reservation of authority must be made in accordance

with the notice and response procedures in paragraph (i) of this section.

(i) *Notice and response procedures*—(1) *Notice*. The FDIC will notify the banking entity in writing of any determination requiring notice under this part and will provide an explanation of the determination.

(2) *Response*. The banking entity may respond to any or all items in the notice described in paragraph (i)(1) of this section. The response should include any matters that the banking entity would have the FDIC consider in deciding whether to make the determination. The response must be in writing and delivered to the designated FDIC official within 30 days after the date on which the banking entity received the notice. The FDIC may shorten the time period when, in the opinion of the FDIC, the activities or condition of the banking entity so requires, provided that the banking entity is informed of the time period at the time of notice, or with the consent of the banking entity. In its discretion, the FDIC may extend the time period for good cause.

(3) *Waiver*. Failure to respond within 30 days or such other time period as may be specified by the FDIC shall constitute a waiver of any objections to the FDIC determination.

(4) *Decision*. The FDIC will notify the banking entity of the decision in writing. The notice will include an explanation of the decision.

[79 FR 5805, Jan. 31, 2014, as amended at 84 FR 62173, Nov. 14, 2019; 85 FR 46515, July 31, 2020; 85 FR 60355, Sept. 25, 2020]

§ 351.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the FDIC finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the FDIC may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

APPENDIX A TO PART 351—REPORTING AND RECORDKEEPING REQUIREMENTS FOR COVERED TRADING ACTIVITIES

I. PURPOSE

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to §351.20(d), this appendix applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the FDIC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under §351.20.

b. The purpose of this appendix is to assist banking entities and the FDIC in:

(1) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(2) Monitoring the banking entity's covered trading activities;

(3) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(4) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to §351.4(b) are consistent with the requirements governing permitted market making-related activities;

(5) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to §351.4, §351.5, or §351.6(a) and (b) (*i.e.,* underwriting and market making-related activity,

risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(6) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the FDIC of such activities; and

(7) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. Information that must be furnished pursuant to this appendix is not intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by §351.20. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (e.g., whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

e. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§351.4 through 351.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the FDIC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§351.2 and 351.3. In addition, for purposes of this appendix, the following definitions apply:

Applicability identifies the trading desks for which a banking entity is required to calculate and report a particular quantitative measurement based on the type of covered trading activity conducted by the trading desk.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under §351.4, §351.5, §351.6(a), or §351.6(b). A banking entity may include in its covered trading activity trading conducted under §351.3(d), §351.6(c), §351.6(d) or §351.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading day means a calendar day on which a trading desk is open for trading.

III. Reporting and Recordkeeping

a. Scope of Required Reporting

1. Quantitative measurements. Each banking entity made subject to this appendix by §351.20 must furnish the following quantitative measurements, as applicable, for each trading desk of the banking entity engaged in covered trading activities and calculate these quantitative measurements in accordance with this appendix:

i. Internal Limits and Usage;

ii. Value-at-Risk;

iii. Comprehensive Profit and Loss Attribution;

iv. Positions; and

v. Transaction Volumes.

2. Trading desk information. Each banking entity made subject to this appendix by §351.20 must provide certain descriptive information, as further described in this appendix, regarding each trading desk engaged in covered trading activities.

3. Quantitative measurements identifying information. Each banking entity made subject to this appendix by §351.20 must provide certain identifying and descriptive information, as further described in this appendix, regarding its quantitative measurements.

4. Narrative statement. Each banking entity made subject to this appendix by §351.20 may provide an optional narrative statement, as further described in this appendix.

5. File identifying information. Each banking entity made subject to this appendix by §351.20 must provide file identifying information in each submission to the FDIC pursuant to this appendix, including the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, and identification of the reporting period and creation date and time.

b. Trading Desk Information

1. Each banking entity must provide descriptive information regarding each trading desk engaged in covered trading activities, including:

i. Name of the trading desk used internally by the banking entity and a unique identification label for the trading desk;

ii. Identification of each type of covered trading activity in which the trading desk is engaged;

iii. Brief description of the general strategy of the trading desk;

v. A list identifying each Agency receiving the submission of the trading desk;

2. Indication of whether each calendar date is a trading day or not a trading day for the trading desk; and

3. Currency reported and daily currency conversion rate.

c. Quantitative Measurements Identifying Information

Each banking entity must provide the following information regarding the quantitative measurements:

1. An Internal Limits Information Schedule that provides identifying and descriptive information for each limit reported pursuant to the Internal Limits and Usage quantitative measurement, including the name of the limit, a unique identification label for the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported; and

2. A Risk Factor Attribution Information Schedule that provides identifying and descriptive information for each risk factor attribution reported pursuant to the Comprehensive Profit and Loss Attribution quantitative measurement, including the name of the risk factor or other factor, a unique identification label for the risk factor or other factor, a description of the risk factor or other factor, and the risk factor or other factor's change unit.

d. Narrative Statement

Each banking entity made subject to this appendix by §351.20 may submit in a separate electronic document a Narrative Statement to the FDIC with any information the banking entity views as relevant for assessing the information reported. The Narrative Statement may include further description of or changes to calculation methods, identification of material events, description of and reasons for changes in the banking entity's trading desk structure or trading desk strategies, and when any such changes occurred.

e. Frequency and Method of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement electronically to the FDIC on the reporting schedule established in §351.20 unless otherwise requested by the FDIC. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement to the FDIC in accordance with the XML Schema specified and published on the FDIC's website.

f. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the FDIC pursuant to this appendix and §351.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the FDIC to verify the accuracy of such reports, for a period of five years from the end of the calendar year for which the measurement was taken. A banking entity must retain the Narrative Statement, the Trading Desk Information, and the Quantitative Measurements Identifying Information for a period of five years from the end of the calendar year for which the information was reported to the FDIC.

IV. QUANTITATIVE MEASUREMENTS

a. Risk-Management Measurements

1. Internal Limits and Usage

i. *Description:* For purposes of this appendix, Internal Limits are the constraints that define the amount of risk and the positions that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the value of the trading desk's risk or positions that are accounted for by the current activity of the desk. Internal limits and their usage are key compliance and risk management tools used to control and monitor risk taking and include, but are not limited to, the limits set out in §§351.4 and 351.5.

A trading desk's risk limits, commonly including a limit on ''Value-at-Risk,'' are useful in the broader context of the trading desk's overall activities, particularly for the market making activities under §351.4(b) and hedging activity under §351.5. Accordingly, the limits required under §§351.4(b)(2)(iii)(C) and 351.5(b)(1)(i)(A) must meet the applicable requirements under §§351.4(b)(2)(iii)(C) and 351.5(b)(1)(i)(A) and also must include appropriate metrics for the trading desk limits including, at a minimum, ''Value-at-Risk'' except to the extent the ''Value-at-Risk'' metric is demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

A. A banking entity must provide the following information for each limit reported pursuant to this quantitative measurement: The unique identification label for the limit reported in the Internal Limits Information Schedule, the limit size (distinguishing between an upper and a lower limit), and the value of usage of the limit.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

2. Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into two categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); and (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions'').

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to (i) changes in the specific risk factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. For the attribution of comprehensive profit and loss from existing positions to specific risk factors and other factors, a banking entity must provide the following information for the factors that explain the preponderance of the profit or loss changes due to risk factor changes: The unique identification label for the risk factor or other factor listed in the Risk Factor Attribution Information Schedule, and the profit or loss due to the risk factor or other factor change.

C. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

D. The portion of comprehensive profit and loss from existing positions that is not attributed to changes in specific risk factors and other factors must be allocated to a residual category. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

c. Positions and Transaction Volumes Measurements

1. Positions

i. *Description:* For purposes of this appendix, Positions is the value of securities and derivatives positions managed by the trading desk. For purposes of the Positions quantitative measurement, do not include in the Positions calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.''[1225] A banking entity must separately report the trading

[1225] *See* §351.2(h), (aa). For example, under this part, a security-based swap is both a ''security'' and a ''derivative.'' For purposes of the Positions quantitative measurement, security-based swaps are reported as derivatives rather than securities.

desk's market value of long securities positions, short securities positions, derivatives receivables, and derivatives payables.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on §351.4(a) or §351.4(b) to conduct underwriting activity or market-making-related activity, respectively.

2. Transaction Volumes

i. *Description:* For purposes of this appendix, Transaction Volumes measures three exclusive categories of covered trading activity conducted by a trading desk. A banking entity is required to report the value and number of security and derivative transactions conducted by the trading desk with: (i) Customers, excluding internal transactions; (ii) non-customers, excluding internal transactions; and (iii) trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity. For securities, value means gross market value. For derivatives, value means gross notional value. For purposes of calculating the Transaction Volumes quantitative measurement, do not include in the Transaction Volumes calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1226] Further, for purposes of the Transaction Volumes quantitative measurement, a customer of a trading desk that relies on §351.4(a) to conduct underwriting activity is a market participant identified in §351.4(a)(7), and a customer of a trading desk that relies on §351.4(b) to conduct market making-related activity is a market participant identified in §351.4(b)(3).

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on §351.4(a) or §351.4(b) to conduct underwriting activity or market-making-related activity, respectively.

[84 FR 62174, Nov. 14, 2019]

PART 352—NONDISCRIMINATION ON THE BASIS OF DISABILITY

Sec.

AUTHORITY: 12 U.S.C. 1819(a); 29 U.S.C. 794d.

SOURCE: 69 FR 26492, May 13, 2004, unless otherwise noted.

§ 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 promulgate this final regulation to ensure that, to the extent practicable, persons with disabilities are provided with equal access to FDIC programs and activities.

(b) This part is also intended to implement section 508 of the Rehabilitation Act as amended. Section 508 requires each federal agency or department to ensure that the electronic and information technology they procure allows individuals with disabilities access to that technology comparable to the access of those who are not disabled, unless the agency would incur an undue burden.

§ 352.2 Application.

(a) This part applies to all programs, activities, and electronic and information technology developed, procured, maintained, used or conducted by the FDIC. The following programs and activities involve the direct provision of benefits and services to, or participation by, members of the public:

(1) Attending Board of Directors meetings open to the public and all other public meetings;

[1226] *See* §351.2(h), (aa).

(2) Making inquiries or filing complaints at the FDIC Office of Legislative Affairs and Office of Public Affairs;

(3) Using the FDIC library in Washington, DC;

(4) Using the FDIC Web site on the Internet;

(5) Visiting an insured bank at which they conducted business (or an alternative liquidation site selected by the FDIC) and which has become insolvent, or been purchased by another bank under FDIC supervision, for the purpose of:

(i) Collecting FDIC checks for the insured amount of their deposits previously held in such bank; and/or

(ii) Discussing with FDIC representatives matters related to the repayment of debts which they previously owed to such bank, prior to its failure or purchase by another bank under FDIC supervision;

(6) Seeking employment with the FDIC;

(b) This regulation governs the conduct of FDIC personnel in their interaction with employees of insured banks and employees of other state or federal agencies while discharging the FDIC's statutory obligations as insurer and/or receiver of financial institutions. It does not apply to financial institutions insured by the FDIC.

(c) Although application for employment and employment with the FDIC are programs and activities of the FDIC for purposes of this regulation, they shall be governed only by the standards set forth in §352.6 of this part.

§352.3 Definitions.

For purposes of this part, the term—

(a) ''Auxiliary aids'' means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, the FDIC programs or activities, and Electronic and Information Technology set forth in §352.2.

(b) ''Electronic and Information Technology'' (''EIT'') has the same meaning as ''information technology'' except EIT also includes any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term EIT includes, but is not limited to, telecommunication products (such as telephones), information kiosks and transaction machines, worldwide web sites, multimedia, and office equipment (such as copiers and fax machines).

(c) ''Facility'' means all or any portion of buildings, structures, equipment, roads, walks, parking lots and other real or personal property. As used in this definition, ''personal property'' means only furniture, carpeting and similar features not considered to be real property.

(d) ''Individual with a disability'' means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(e) ''Qualified individual with a disability'' means—

(1) With respect to any FDIC program or activity in which a person is required 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.

(f) ''Sections 504 and 508'' mean sections 504 and 508 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794 and 794d)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955), and the Workforce Investment Act of 1998 (Pub. L. 105–220, 112 Stat. 936). As used in this regulation,

sections 504 and 508 shall be applied only to the programs, activities, and EIT conducted by the FDIC as set forth in §§ 352.2 and 352.3(b) of this regulation.

§ 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 Minority and Women Inclusion (OMWI), located at 3501 Fairfax Drive, Arlington, VA 22226. The FDIC telephone number is (877) 275–3342 or (703) 562–2473 (TTY).

(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.

[69 FR 26492, May 13, 2004, as amended at 73 FR 45857, Aug. 7, 2008; 80 FR 62445, Oct. 16, 2015]

§ 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.

(b) *Employment complaints.* The FDIC shall process complaints alleging employment discrimination on the basis of disability according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR parts 1614 and 1630 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(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 Minority and Women Inclusion shall be responsible for coordinating implementation of this section. An aggrieved individual initiates the process by filing an informal complaint with OMWI 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, OMWI 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 Minority and Women Inclusion, 3501 Fairfax Drive, Arlington, VA 22226.

(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 OMWI 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 OMWI 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 OMWI 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 OMWI 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.

[69 FR 26492, May 13, 2004, as amended at 73 FR 45857, Aug. 7, 2008; 80 FR 62445, Oct. 16, 2015]

§ 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.

AUTHORITY: 12 U.S.C. 1818, 1819; 31 U.S.C. 5318.

SOURCE: 61 FR 6099, Feb. 16, 1996, unless otherwise noted.

§ 353.1 Purpose and scope.

The purpose of this part is to ensure that an FDIC supervised institution 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 FDIC supervised institutions.

[85 FR 3247, Jan. 21, 2020]

§ 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)).

(c) *FDIC-supervised institution* means an entity 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).

[61 FR 6099, Feb. 16, 1996, as amended at 85 FR 3247, Jan. 21, 2020]

§ 353.3 Reports and records.

(a) *Suspicious activity reports required.* An FDIC-supervised institution shall file a suspicious activity report with the appropriate federal law enforcement agencies and the Department of the Treasury, in accordance with the form's instructions, by sending a completed suspicious activity report to FinCEN in the following circumstances:

(1) *Insider abuse involving any amount.* Whenever the FDIC-supervised institution detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the FDIC-supervised institution or involving a transaction or transactions conducted through the FDIC-supervised institution, where the FDIC-supervised institution believes it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the FDIC-supervised institution was used to facilitate a criminal transaction, and the

FDIC-supervised institution has a substantial basis for identifying one of the FDIC-supervised institution's directors, officers, employees, agents, or other institution-affiliated parties as having committed or aided in the commission of the criminal violation, regardless of the amount involved in the violation;

(2) *Transactions aggregating $5,000 or more where a suspect can be identified.* Whenever the FDIC-supervised institution detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the FDIC-supervised institution or involving a transaction or transactions conducted through the FDIC-supervised institution, and involving or aggregating $5,000 or more in funds or other assets, where the FDIC-supervised institution believes it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the FDIC-supervised institution was used to facilitate a criminal transaction, and the FDIC-supervised institution has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an ''alias'', then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as driver's license or social security numbers, addresses and telephone numbers, must be reported;

(3) *Transactions aggregating $25,000 or more regardless of potential suspects.* Whenever the FDIC-supervised institution detects any known or suspected federal criminal violation, or pattern of criminal violations, committed or attempted against the FDIC-supervised institution or involving a transaction or transactions conducted through the FDIC-supervised institution, involving or aggregating $25,000 or more in funds or other assets, where the FDIC-supervised institution believes it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that the FDIC-supervised institution was used to facilitate a criminal transaction, even though the FDIC-supervised institution 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 FDIC-supervised institution and involving or aggregating $5,000 or more in funds or other assets, if the FDIC-supervised institution 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 FDIC-supervised institution 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) An FDIC-supervised institution 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, an FDIC-supervised institution may delay filing a suspicious activity report for an additional 30 calendar days to identify a suspect. In no case shall reporting be

delayed more than 60 calendar days after the date of initial detection of a reportable transaction.

(2) In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the FDIC-supervised institution 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.* An FDIC-supervised institution is encouraged to file a copy of the suspicious activity report with state and local law enforcement agencies where appropriate.

(d) *Exemptions.* (1) An FDIC-supervised institution need not file a suspicious activity report for a robbery or burglary committed or attempted, that is reported to appropriate law enforcement authorities.

(2) An FDIC-supervised institution 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.* An FDIC-supervised institution 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 FDIC-supervised institution as such, and shall be deemed to have been filed with the suspicious activity report. An FDIC-supervised institution must make all supporting documentation available to appropriate law enforcement authorities upon request.

(f) *Notification to board of directors.* The management of an FDIC-supervised institution 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 a foreign bank having an insured branch for purposes of this part.

(g) *Confidentiality of suspicious activity reports.* Suspicious activity reports are confidential. An FDIC-supervised institution 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 an FDIC-supervised institution 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.

[61 FR 6099, Feb. 16, 1996, as amended at 85 FR 3247, Jan. 21, 2020]

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''.

[55 FR 11161, Mar. 27, 1990, as amended at 63 FR 10295, Mar. 3, 1998; 71 FR 20527, Apr. 21, 2006]

PART 359—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.

AUTHORITY: 12 U.S.C. 1828(k).

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

§ 359.0 Scope.

(a) This part limits and/or prohibits, in certain circumstances, the ability of insured depository institutions, their subsidiaries and affiliated depository institution holding companies to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties (IAPs).

(b) The limitations on golden parachute payments apply to troubled insured depository institutions which seek to enter into contracts to pay or to make golden parachute payments to their IAPs. The limitations also apply to depository institution holding companies which are troubled and seek to enter into contracts to pay or to make golden parachute payments to their IAPs as well as healthy holding companies which seek to enter into contracts to pay or to make golden parachute payments to IAPs of a troubled insured depository institution subsidiary. A ''golden parachute payment'' is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the insured depository institution making the payment is troubled or, if the payment is being made by an affiliated holding company, either the holding company itself or the insured depository institution employing the IAP, is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, nonqualified *bona fide* deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefit plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving the hiring of a white knight and unassisted changes in control. A procedure is also set forth whereby an institution or IAP can request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all insured depository institutions, their subsidiaries and affiliated depository institution holding companies regardless of their financial health. Generally, this part prohibits insured depository institutions, their subsidiaries and affiliated holding companies from indemnifying an IAP for that portion of the costs sustained with regard to an administrative or civil enforcement action commenced by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of an insured depository institution or required to cease and desist from or take an affirmative action described in section 8(b) (12 U.S.C. 1818(b)) of the Federal

Deposit Insurance Act (FDI Act). However, there are exceptions to this general prohibition. First, an institution or holding company may purchase commercial insurance to cover such expenses, except judgments and penalties. Second, the institution or holding company may advance legal and other professional expenses to an IAP directly (except for judgments and penalties) if its board of directors makes certain specific findings and the IAP agrees in writing to reimburse the institution if it is ultimately determined that the IAP violated a law, regulation or other fiduciary duty.

§ 359.1 Definitions.

(a) *Act* means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, *et seq.*).

(b) *Appropriate federal banking agency*, *bank holding company*, *depository institution holding company* and *savings and loan holding company* have the meanings given to such terms in section 3 of the Act.

(c) *Benefit plan* means any plan, contract, agreement or other arrangement which is an ''employee welfare benefit plan'' as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2)(iii) and (v) of this section.

(d) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the insured depository institution or depository institution holding company either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (e)(1) of this section:

(i) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in § 359.4); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d)(1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(iii) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The insured depository institution or depository institution holding company has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) *Corporation* means the Federal Deposit Insurance Corporation, in its corporate capacity.

(f) *Golden parachute payment.* (1) The term *golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency (or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.101(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 Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

(2) *Exceptions.* The term *golden parachute payment* shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified)

under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country; or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a *bona fide* deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of death or by reason of termination caused by the disability of an institution-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; *provided, however,* that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Corporation shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the appropriate federal banking agency; or

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vii) Any other payment which the Corporation determines to be permissible in accordance with § 359.4.

(g) *Insured depository institution* means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(h) *Institution-affiliated party (IAP)* means:

(1) Any director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j));

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(i) *Liability or legal expense* means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(j) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of an insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of

service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(k) *Payment* means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) *Prohibited indemnification payment.* (1) The term *prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any insured depository institution or an affiliated depository institution holding company for the benefit of any person who is or was an IAP of such insured depository institution or holding company, to pay or reimburse such person for any civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or any other liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) *Exceptions.* (i) The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by any federal banking agency, but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the insured depository institution, depository institution holding company or receiver.

(ii) The term *prohibited indemnification payment* shall not include any reasonable payment by an insured depository institution or depository institution holding company that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain banking laws or regulations or has not engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

[61 FR 5930, Feb. 15, 1996, as amended at 68 FR 50461, Aug. 21, 2003]

§ 359.2 Golden parachute payments prohibited.

No insured depository institution or depository institution holding company shall make or agree to make any

golden parachute payment, except as provided in this part.

§ 359.3 Prohibited indemnification payments.

No insured depository institution or depository institution holding company shall make or agree to make any prohibited indemnification payment, except as provided in this part.

§ 359.4 Permissible golden parachute payments.

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IAP either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in §359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; *provided, however*, that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a)(1) through (3) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

§ 359.5 Permissible indemnification payments.

(a) An insured depository institution or depository institution holding company may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by any federal banking agency if:

(1) The insured depository institution's or depository institution holding company's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(2) The insured depository institution's or depository institution holding company's board of directors, respectively, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(3) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in § 359.1(l); and

(4) The IAP agrees in writing to reimburse the insured depository institution or depository institution holding company, to the extent not covered by payments from insurance or bonds purchased pursuant to § 359.1(l)(2), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in § 359.1(l)

(b) An IAP requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; *provided, however*, that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(c) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(d) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board shall authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

§ 359.6 Filing instructions.

Requests to make excess nondiscriminatory severance plan payments pursuant to § 359.1(f)(2)(v) and golden parachute payments permitted by § 359.4 shall be submitted in writing to the appropriate regional director (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 holding company, respectively, is located. In the case of savings associations and savings association holding companies, such written requests shall be submitted to the OTS regional office where the institution or holding company, respectively, is located. In cases where only the prior consent of the institution's primary federal regulator is required and that agency is not the FDIC, a written request satisfying the requirements of this section shall be submitted to the primary federal regulator as described in this section.

[63 FR 44751, Aug. 20, 1998]

§ 359.7 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted under the provisions of this part by the FDIC (in its corporate capacity), shall not in any way bind any receiver of a failed insured depository institution. Any consent or approval granted under the provisions of this part by the FDIC or any other federal banking agency shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the FDIC is appointed as receiver for any depository institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1828(k)(3).

PART 360—RESOLUTION AND RECEIVERSHIP RULES

Sec.

AUTHORITY: 12 U.S.C. 1821(d)(1), 1821(d)(10)(C), 1821(d)(11), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

§ 360.1 Least-cost resolution.

(a) *General rule.* Except as provided in section 13(c)(4)(G) of the FDI Act (12 U.S.C. 1823 (c)(4)(G)), the FDIC shall not take any action, directly or indirectly, under sections 13(c), 13(d), 13(f), 13(h) or 13(k) of the FDI Act (12 U.S.C. 1823 (c), (d), (f), (h) or (k)) with respect to any insured depository institution that would have the effect of increasing losses to any insurance fund by protecting:

(1) Depositors for more than the insured portion of their deposits (determined without regard to whether such institution is liquidated); or

(2) Creditors other than depositors.

(b) Purchase and assumption transactions. Subject to the requirement of section 13(c)(4)(A) of the FDI Act (12 U.S.C. 1823(c)(4)(A)), paragraph (a) of this section shall not be construed as prohibiting the FDIC from allowing any person who acquires any assets or

assumes any liabilities of any insured depository institution, for which the FDIC has been appointed conservator or receiver, to acquire uninsured deposit liabilities of such institution as long as the applicable insurance fund does not incur any loss with respect to such uninsured deposit liabilities in an amount greater than the loss which would have been incurred with respect to such liabilities if the institution had been liquidated.

[58 FR 67664, Dec. 22, 1993, as amended at 63 FR 37761, July 14, 1998]

§ 360.2 Federal Home Loan banks as secured creditors.

(a) Notwithstanding any other provisions of federal or state law or any other provisions of these regulations, the receiver of a borrower from a Federal Home Loan Bank shall recognize the priority of any security interest granted to a Federal Home Loan Bank by any member of any Federal Home Loan Bank or any affiliate of any such member, whether such security interest is in specifically designated assets or a blanket interest in all assets or categories of assets, over the claims and rights of any other party (including any receiver, conservator, trustee or similar party having rights of a lien creditor) other than claims and rights that

(1) Would be entitled to priority under otherwise applicable law; and

(2) Are held by actual bona fide purchasers for value or by actual secured parties that are secured by actual perfected security interests.

(b) If the receiver rather than the Bank shall have possession of any collateral consisting of notes, securities, other instruments, chattel paper or cash securing advances of the Bank, the receiver shall, upon request by the Bank, promptly deliver possession of such collateral to the Bank or its designee.

(c) In the event that a receiver is appointed for any member of a Federal Home Loan Bank, the following procedures shall apply:

(1) The receiver and the Bank shall immediately seek and develop a mutually agreeable plan for the payment of any advances made by the Bank to such borrower or for the servicing, foreclosure upon and liquidation of the collateral securing any such advances, taking into account the nature and amount of such collateral, the markets in which such collateral is normally traded or sold and other relevant factors.

(2) In the event that the receiver and the Bank shall not, in good faith, be able to develop such a mutually agreeable plan, or, in the interim, the Bank in good faith reasonably concludes that the value of such collateral is decreasing, because of interest rate or other market changes, at such a rate that to delay liquidation or other exercise of the Bank's rights as a secured party for the development of a mutually agreeable plan could reasonably cause the value of such collateral to decrease to an amount that is insufficient to satisfy the Bank's claim in full, the Bank may, at any time thereafter if permitted to do so by the terms of the advances or other security agreement with such borrower or otherwise by applicable law, proceed to foreclose upon, sell, lease or otherwise dispose of such collateral (or any portion thereof), or otherwise exercise its rights as a secured party, provided that the Bank acts in good faith and in a commercially reasonable manner and otherwise in accordance with applicable law.

(3) The foregoing provisions of this paragraph (c) shall not apply in the event that a purchase and assumption transaction is entered into regarding any such member.

(d) The Bank's rights pursuant to the second sentence of section 10(d) of the Federal Home Loan Bank Act shall not be affected or diminished by any provisions of state law that may be applicable to a security interest in property of the member.

(e) The receiver for a borrower from a Federal Home Loan Bank shall allow a claim for a prepayment fee by the Bank if, and only if:

(1) The claim is made pursuant to a written contract that provides for a prepayment fee, provided, however, that such prepayment fee allowed by the receiver shall not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the

reinvestment rate then available to the Bank; and

(2) The indebtedness owed to the Bank by such borrower is secured by sufficient collateral in which a perfected security interest in favor of the Bank exists or as to which the Bank's security interest is entitled to priority under section 306(d) of the Competitive Equality Banking Act of 1987 (CEBA) (12 U.S.C. 1430(e), footnote (1), or otherwise so that the aggregate of the outstanding principal on the advances secured by such collateral, the accrued but unpaid interest thereon and the prepayment fee applicable to such advances can be paid in full from the amounts realized from such collateral. For purposes of this paragraph (e)(2), the adequacy of such collateral shall be determined as of the date such prepayment fees shall be due and payable under the terms of the written contract providing therefor.

[54 FR 19156, May 4, 1989. Redesignated at 54 FR 42801, Oct. 18, 1989, and further redesignated at 55 FR 46496, Nov. 5, 1990. Redesignated at 58 FR 67664, Dec. 22, 1993, as amended at 63 FR 37761, July 14, 1998]

§ 360.3 Priorities.

(a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:

(1) Administrative expenses of the receiver, including the costs, expenses, and debts of the receiver;

(2) Administrative expenses of the association, *provided* that such expenses were incurred within thirty (30) days prior to the receiver's taking possession, and that such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, examiners, or management companies, or reasonable expenses incurred by employees which were authorized and reimbursable under a pre-existing expense reimbursement policy, that, in the opinion of the receiver, are of benefit to the receivership, and shall not include wages or salaries of employees of the association;

(3) Claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefit plans, earned prior to the appointment of the receiver by an employee of the association whom the receiver determines it is in the best interests of the receivership to engage or retain for a reasonable period of time;

(4) If authorized by the receiver, claims for wages and salaries, including vacation and sick leave pay and contributions to employee benefits plans, earned prior to the appointment of the receiver, up to a maximum of three thousand dollars ($3,000) per person, by an employee of the association not engaged or retained pursuant to a determination by the receiver pursuant to the third category above;

(5) Claims of governmental units for unpaid taxes, other than Federal income taxes, except to the extent subordinated pursuant to applicable law; but no other claim of a governmental unit shall have a priority higher than that of a general creditor under paragraph (a)(6) of this section;

(6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section, provided, however, that if the association is chartered and was operated under the laws of a state that provided a priority for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph (a)(6) shall be observed by the receiver; and provided further, that if deposits of a Federal association are booked or registered at an office of such association that is located in a State that provides such priority with respect to State-chartered associations, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver;

(7) Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims under paragraph (a)(6) of this section, *Provided* that any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not

accrue prior to the date of default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;

(8) Claims of the United States for unpaid Federal income taxes;

(9) Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims; and

(10) Claims by holders of nonwithdrawable accounts, including stock, which shall have priority within this paragraph (a)(10) in accordance with the terms of the written instruments that evidence such claims.

(b) Interest after the date of default on claims under paragraph (a)(6) of this section shall be at a rate or rates adjusted monthly to reflect the average rate for U.S. Treasury bills with maturities of not more than ninety-one (91) days during the preceding three (3) months.

(c) [Reserved]

(d) All unsecured claims of any category or class or priority described in paragraphs (a)(1) through (a)(10) of this section shall be paid in full, or provision made for such payment, before any claims of lesser priority are paid. If there are insufficient funds to pay all claims of a category or class in full, distribution to claimants in such category or class shall be made pro rata. Notwithstanding anything to the contrary herein, the receiver may, at any time, and from time to time, prior to the payment in full of all claims of a category or class with higher priority, make such distributions to claimants in priority classes outlined in paragraphs (a)(1) through (a)(6) of this section as the receiver believes are reasonably necessary to conduct the receivership,

Provided that the receiver determines that adequate funds exist or will be recovered during the receivership to pay in full all claims of any higher priority.

(e) If the association is in mutual form, and a surplus remains after making distribution in full of allowed claims as set forth in paragraphs (a) and (b) of this section, such surplus shall be distributed to the depositors in proportion to their accounts as of the date of default.

(f) Under the provisions of section 11(d)(11) of the Act (12 U.S.C. 1821(d)(11)), the provisions of this § 360.3 do not apply to any receivership established and liquidation or other resolution occurring after August 10, 1993.

[53 FR 25132, July 5, 1988, as amended at 53 FR 30667, Aug. 15, 1988. Redesignated and amended at 54 FR 42801, Oct. 18, 1989, and further redesignated and amended at 55 FR 46496, Nov. 5, 1990; 58 FR 43070, Aug. 13, 1993. Redesignated at 58 FR 67664, Dec. 22, 1993; 60 FR 35488, July 10, 1995]

§ 360.4 Administrative expenses.

The priority for *administrative expenses of the receiver,* as that term is used in section 11(d)(11) of the Act (12 U.S.C. 1821(d)(11), shall include those necessary expenses incurred by the receiver in liquidating or otherwise resolving the affairs of a failed insured depository institution. Such expenses shall include pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation or other resolution of the institution.

[60 FR 35488, July 10, 1995]

§ 360.5 Definition of qualified financial contracts.

(a) *Authority and purpose.* Sections 11(e) (8) through (10) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e) (8) through (10), provide special rules for the treatment of qualified financial contracts of an insured depository institution for which the FDIC is appointed conservator or receiver, including rules describing the manner in which qualified financial contracts may be transferred or closed out. Section 11(e)(8)(D)(i) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(e)(8)(D)(i), grants the Corporation authority to determine by regulation whether any agreement, other than those identified within section 11(e)(8)(D), should be recognized as qualified financial contracts under the statute. The purpose of this section is to identify additional agreements which the Corporation has determined to be qualified financial contracts.

(b) *Repurchase agreements.* The following agreements shall be deemed ''repurchase agreements'' under section 11(e)(8)(D)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(e)(8)(D)(v)): A repurchase agreement on qualified foreign government securities is an agreement or combination of agreements (including master agreements) which provides for the transfer of securities that are direct obligations of, or that are fully guaranteed by, the central governments (as set forth at 12 CFR 324.2 (definition of sovereign exposure), as may be amended from time to time) of the OECD-based group of countries (as generally discussed in 12 CFR 324.32) against the transfer of funds by the transferee of such securities with a simultaneous agreement by such transferee to transfer to the transferor thereof securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds.

(c) *Swap agreements.* The following agreements shall be deemed ''swap agreements'' under section 11(e)(8)(D)(vi) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(e)(8)(D)(vi)): A spot foreign exchange agreement is any agreement providing for or effecting the purchase or sale of one currency in exchange for another currency (or a unit of account established by an intergovernmental organization such as the European Currency Unit) with a maturity date of two days or less after the agreement has been entered into, and includes short-dated transactions such as tomorrow/next day and same day/tomorrow transactions.

(d) Nothing in this section shall be construed as limiting or changing a party's obligation to comply with all reasonable trading practices and requirements, non-insolvency law requirements and any other requirements imposed by other provisions of the FDI Act. This section in no way limits the authority of the Corporation to take supervisory or enforcement actions, or to otherwise manage the affairs of a financial institution for which the Corporation has been appointed conservator or receiver.

[60 FR 66865, Dec. 27, 1995, as amended at 78 FR 55595, Sept. 10, 2013; 83 FR 17741, Apr. 24, 2018]

§ 360.6 Treatment of financial assets transferred in connection with a securitization or participation.

(a) *Definitions—*

(1) *Applicable compliance date* means, with respect to a securitization, the date on which compliance with Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act is required with respect to that securitization.

(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) *Investor* means a person or entity that owns an obligation issued by an issuing entity.

(4) *Issuing entity* means an entity that owns a financial asset or financial assets transferred by the sponsor and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a securitization is structured as a multi-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee. Notwithstanding the foregoing, a Specified GSE or an entity established or guaranteed by a Specified GSE shall not constitute an issuing entity.

(5) *Monetary default* means a default in the payment of principal or interest when due following the expiration of any cure period.

(6) *Obligation* means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or upon the disposition of the underlying financial assets, and by any

rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term may include beneficial interests in a grantor trust, common law trust or similar issuing entity to the extent that such interests satisfy the criteria set forth in the preceding sentence, but does not include LLC interests, partnership interests, common or preferred equity, or similar instruments evidencing ownership of the issuing entity.

(7) *Participation* means the transfer or assignment of an undivided interest in all or part of a financial asset, that has all of the characteristics of a ''participating interest,'' 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 upon the borrower's default on the underlying obligation.

(8) *Securitization* means the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of transferred financial assets (together with any external credit support permitted by this section) to repay the obligations.

(9) *Servicer* means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations. The term ''servicer'' does not include a trustee for the issuing entity or the holders of obligations that makes allocations or distributions to holders of the obligations if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

(10) *Specified GSE* means each of the following:

(i) The Federal National Mortgage Association and any affiliate thereof;

(ii) Federal Home Loan Mortgage Corporation and any affiliate thereof;

(iii) The Government National Mortgage Association; and

(iv) Any federal or state sponsored mortgage finance agency.

(11) *Sponsor* means a person or entity that organizes and initiates a securitization by transferring financial assets, either directly or indirectly, including through an affiliate, to an issuing entity, whether or not such person owns an interest in the issuing entity or owns any of the obligations issued by the issuing entity.

(12) *Transfer* means:

(i) The conveyance of a financial asset or financial assets to an issuing entity or

(ii) The creation of a security interest in such asset or assets for the benefit of the issuing entity.

(b) *Coverage.* This section shall apply to securitizations that meet the following criteria:

(1) *Capital Structure and Financial Assets.* The documents creating the securitization must define the payment structure and capital structure of the transaction.

(i) *Requirements applicable to all securitizations:*

(A) The securitization shall not consist of re-securitizations of obligations or collateralized debt obligations unless the documents creating the securitization require that disclosures required in paragraph (b)(2) of this section are made available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding; and

(B) The documents creating the securitization shall require that payment of principal and interest on the securitization obligation must be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, shall not be contingent on market or credit events that are independent of such financial assets. The securitization may not be an unfunded

securitization or a synthetic transaction.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The capital structure of the securitization shall be limited to no more than six credit tranches and cannot include ''sub-tranches,'' grantor trusts or other structures. Notwithstanding the foregoing, the most senior credit tranche may include time-based sequential pay or planned amortization and companion sub-tranches; and

(B) The credit quality of the obligations cannot be enhanced at the issuing entity or pool level through external credit support or guarantees. However, the credit quality of the obligations may be enhanced by credit support or guarantees provided by Specified GSEs and the temporary payment of principal and/or interest may be supported by liquidity facilities, including facilities designed to permit the temporary payment of interest following appointment of the FDIC as conservator or receiver. Individual financial assets transferred into a securitization may be guaranteed, insured or otherwise benefit from credit support at the loan level through mortgage and similar insurance or guarantees, including by private companies, agencies or other governmental entities, or government-sponsored enterprises, and/or through co-signers or other guarantees.

(2) *Disclosures.* The documents shall require that the sponsor, issuing entity, and/or servicer, as appropriate, shall make available to investors, information describing the financial assets, obligations, capital structure, compensation of relevant parties, and relevant historical performance data set forth in paragraph (b)(2) of this section.

(i) *Requirements applicable to all securitizations:*

(A) In the case of an issuance of obligations that is subject to 17 CFR part 229, subpart 229.1100 (Regulation AB of the Securities and Exchange Commission (Regulation AB)), the documents shall require that, on or prior to issuance of obligations and at the time of delivery of any periodic distribution report and, in any event, at least once per calendar quarter, while obligations are outstanding, information about the obligations and the securitized financial assets shall be disclosed to all potential investors at the financial asset or pool level, as appropriate for the financial assets, and security-level to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents shall require that such information and its disclosure, at a minimum, shall comply with the requirements of Regulation AB. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable;

(B) The documents shall require that, on or prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations shall be disclosed, including the capital or tranche structure, the priority of payments and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for and the time permitted for cure of any breach of representations and warranties, including the repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets;

(C) The documents shall require that while obligations are outstanding, the issuing entity shall provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche, if applicable, and the percentage of each tranche in relation to the securitization as a whole; and

(D) In connection with the issuance of obligations, the documents shall require that the nature and amount of compensation paid to the originator, sponsor, rating agency or third-party advisor, any mortgage or other broker, and the servicer(s), and the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization be disclosed. The securitization documents shall require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Prior to issuance of obligations, sponsors shall disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of property; and

(B) Prior to issuance of obligations, sponsors shall affirm compliance in all material respects with applicable statutory and regulatory standards for origination of mortgage loans, including that the mortgages are underwritten at the fully indexed rate relying on documented income, and comply with supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such other or additional guidance applicable at the time of loan origination. Sponsors shall disclose a third party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets; and

(C) The documents shall require that prior to issuance of obligations and while obligations are outstanding, servicers shall disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, shall not constitute an ownership interest requiring disclosure.

(3) *Documentation and recordkeeping.* The documents creating the securitization must specify the respective contractual rights and responsibilities of all parties and include the requirements described in paragraph (b)(3) of this section and use as appropriate any available standardized documentation for each different asset class.

(i) *Requirements applicable to all securitizations.* The documents shall define the contractual rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest; and provide authority for the parties, including but not limited to the originator, sponsor, servicer, and investors, to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Servicing and other agreements must provide servicers with authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents shall require that the servicers apply industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors, that the servicer maintain records of its actions to permit full review by the trustee or other representative of the investors and that the servicer must commence action to mitigate losses no later than ninety (90) days after an

asset first becomes delinquent unless all delinquencies have been cured, *provided* that this requirement shall not be deemed to require that the documents include any provision concerning loss mitigation that requires any action that may conflict with the requirements of Regulation X (12 CFR part 1024), as Regulation X may be amended or modified from time to time.

(B) The servicing agreement shall not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such ''financing or reimbursement facilities'' under this paragraph shall not be dependent for repayment on foreclosure proceeds.

(4) *Compensation.* The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization as follows:

(i) The documents shall require that any fees or other compensation for services payable to credit rating agencies or similar third-party evaluation companies shall be payable, in part, over the five (5) year period after the first issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty (60) percent of the total estimated compensation due at closing; and

(ii) The documents shall provide that compensation to servicers shall include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.

(5) *Origination and retention requirements*—(i) *Requirements applicable to all securitizations.* (A) Prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall require that the sponsor retain an economic interest in a material portion, defined as not less than five (5) percent, of the credit risk of the financial assets. This retained interest may be either in the form of an interest of not less than five (5) percent in each of the credit tranches sold or transferred to the investors or in a representative sample of the securitized financial assets equal to not less than five (5) percent of the principal amount of the financial assets at transfer. This retained interest may not be sold, pledged or hedged, except for the hedging of interest rate or currency risk, during the term of the securitization.

(B) For any securitization that closes upon or following the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the documents creating the securitization shall instead require retention of an economic interest in the credit risk of the financial assets in accordance with such regulations, including the restrictions on sale, pledging and hedging set forth therein.

(C) Notwithstanding paragraph (b)(5)(i)(A) of this section, for any securitization that closes following November 24, 2015 and prior to the applicable compliance date for regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, at the option of the sponsor, the requirements of paragraph (b)(5)(i)(B) of this section may be satisfied if (in lieu of the requirement set forth in paragraph (b)(5)(i)(A) of this section) the

documents creating the securitization require retention of an economic interest in the credit risk of the financial assets in accordance with the requirements of the Section 15G regulations as though such regulations were then in effect.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The documents shall require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any, shall be released to the sponsor one year after the date of issuance.

(B) The documents shall include a representation that the assets shall have been originated in all material respects in compliance with statutory, regulatory, and originator underwriting standards in effect at the time of origination. The documents shall include a representation that the mortgages included in the securitization were underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all existing supervisory guidance governing the underwriting of residential mortgages, including the Interagency Guidance on Non-Traditional Mortgage Products, October 5, 2006, and the Interagency Statement on Subprime Mortgage Lending, July 10, 2007, and such other or additional regulations or guidance applicable to insured depository institutions at the time of loan origination. Residential mortgages originated prior to the issuance of such guidance shall meet all supervisory guidance governing the underwriting of residential mortgages then in effect at the time of loan origination.

(c) *Other requirements.* (1) The transaction should be an arms length, bona fide securitization transaction. The documents shall require that the obligations issued in a securitization shall not be predominantly sold to an affiliate (other than a wholly-owned subsidiary consolidated for accounting and capital purposes with the sponsor) or insider of the sponsor;

(2) The securitization agreements are in writing, approved by the board of directors of the bank or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution in the official record of the bank;

(3) The securitization was entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay or defraud the bank or its creditors;

(4) The transfer was made for adequate consideration;

(5) The transfer and/or security interest was properly perfected under the UCC or applicable state law;

(6) The transfer and duties of the sponsor as transferor must be evidenced in a separate agreement from its duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than the transferor; and

(7) The documents shall require that the sponsor separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain an electronic or paper copy of the closing documents for each securitization in a readily accessible form, a current list of all of its outstanding securitizations and issuing entities, and the most recent Form 10–K, if applicable, or other periodic financial report for each securitization and issuing entity. The documents shall provide that to the extent serving as servicer, custodian or paying agent for the securitization, the sponsor shall not comingle amounts received with respect to the financial assets with its own assets except for the time, not to exceed two business days, necessary to clear any payments received. The documents shall require that the sponsor shall make these records readily available for review by the FDIC promptly upon written request.

(d) *Safe harbor*—(1) *Participations.* With respect to transfers of financial assets made in connection with participations, the FDIC as conservator or receiver shall not, in the exercise of its

statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles, except for the ''legal isolation'' condition that is addressed by this section. The foregoing paragraph shall apply to a last-in, first-out participation, provided that the transfer of a portion of the financial asset satisfies the conditions for sale accounting treatment under generally accepted accounting principles that would have applied to such portion if it had met the definition of a ''participating interest,'' except for the ''legal isolation'' condition that is addressed by this section.

(2) *Transition period safe harbor.* With respect to:

(i) Any participation or securitization for which transfers of financial assets were made on or before December 31, 2010 or

(ii) Any obligations of revolving trusts or master trusts, for which one or more obligations were issued as of the date of adoption of this rule, or

(iii) Any obligations issued under open commitments up to the maximum amount of such commitments as of the date of adoption of this rule if one or more obligations were issued under such commitments on or before December 31, 2010, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership the transferred financial assets notwithstanding that the transfer of such financial assets does not satisfy all conditions for sale accounting treatment under generally accepted accounting principles as effective for reporting periods after November 15, 2009, provided that such transfer satisfied the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods before November 15, 2009, except for the ''legal isolation'' condition that is addressed by this paragraph and the transaction otherwise satisfied the provisions of § 360.6 in effect prior to the effective date of this regulation.

(3) *For securitizations meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after December 31, 2010, or from a master trust or revolving trust established after adoption of this rule or from any open commitments that do not meet the requirements of paragraph (d)(2) of this section, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, the FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the ''legal isolation'' condition that is addressed by this paragraph (d)(3).

(4) *For securitization not meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after December 31, 2010, or from a master trust or revolving trust established after adoption of this rule or from any open commitments that do not meet the requirements of paragraph (d)(2) or (d)(3) of this section, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, but where the transfer does not satisfy the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009:

(i) *Monetary default.* If at any time after appointment, the FDIC as conservator or receiver is in a monetary default under a securitization due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, whether as servicer or otherwise, and remains in monetary default for ten (10) business days after actual delivery of a written notice to the FDIC pursuant to paragraph (f) of this

section requesting the exercise of contractual rights because of such monetary default, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the receiver or conservator is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. Such consent shall not waive or otherwise deprive the FDIC or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the FDIC or its assignees, but shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.

(ii) *Repudiation.* If the FDIC as conservator or receiver provides a written notice of repudiation of the securitization agreement pursuant to which the financial assets were transferred, and the FDIC does not pay damages, defined in this paragraph, within ten (10) business days following the effective date of the notice, the FDIC hereby consents pursuant to 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the receiver or conservator is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. For purposes of this paragraph, the damages due shall be in an amount equal to the par value of the obligations outstanding on the date of appointment of the conservator or receiver, less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation in accordance with the contract documents to the extent actually received through payments on the financial assets received through the date of repudiation. Upon payment of such repudiation damages, all liens or claims on the financial assets created pursuant to the securitization documents shall be released. Such consent shall not waive or otherwise deprive the FDIC or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the FDIC or its assignees, but shall serve as full satisfaction of the obligations of the insured depository institution in conservatorship or receivership and the FDIC as conservator or receiver for all amounts due.

(iii) *Effect of repudiation.* If the FDIC repudiates or disaffirms a securitization agreement, it shall not assert that any interest payments made to investors in accordance with the securitization documents before any such repudiation or disaffirmance remain the property of the conservatorship or receivership.

(e) *Consent to certain actions.* Prior to repudiation or, in the case of a monetary default referred to in paragraph (d)(4)(i) of this section, prior to the effectiveness of the consent referred to therein, the FDIC as conservator or receiver consents pursuant to 12 U.S.C. 1821(e)(13)(C) to the making of, or if serving as servicer, shall make, the payments to the investors to the extent actually received through payments on the financial assets (but in the case of repudiation, only to the extent supported by payments on the financial assets received through the date of the giving of notice of repudiation) in accordance with the securitization documents, and, subject to the FDIC's rights to repudiate such agreements, consents to any servicing activity required in furtherance of the securitization or, if acting as servicer the FDIC as receiver or conservator shall perform such servicing activities in accordance with the terms of the applicable servicing agreements, with respect to the financial assets included in

securitizations that meet the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section.

(f) *Notice for consent.* Any party requesting the FDIC's consent as conservator or receiver under 12 U.S.C. 1821(e)(13)(C) and 12 U.S.C. 1825(b)(2) pursuant to paragraph (d)(4)(i) of this section shall provide notice to the Deputy Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, 550 17th Street, NW., F–7076, Washington, DC 20429–0002, and a statement of the basis upon which such request is made, and copies of all documentation supporting such request, including without limitation a copy of the applicable agreements and of any applicable notices under the contract.

(g) *Contemporaneous requirement.* The FDIC will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured depository institution in connection with a securitization or in the form of a participation solely because the agreement does not meet the ''contemporaneous'' requirement of 12 U.S.C. 1821(d)(9), 1821(n)(4)(I), or 1823(e).

(h) *Limitations.* The consents set forth in this section do not act to waive or relinquish any rights granted to the FDIC in any capacity, pursuant to any other applicable law or any agreement or contract except as specifically set forth herein. Nothing contained in this section alters the claims priority of the securitized obligations.

(i) *No waiver.* Except as specifically set forth herein, this section does not authorize, and shall not be construed as authorizing the waiver of the prohibitions in 12 U.S.C. 1825(b)(2) against levy, attachment, garnishment, foreclosure, or sale of property of the FDIC, nor does it authorize nor shall it be construed as authorizing the attachment of any involuntary lien upon the property of the FDIC. Nor shall this section be construed as waiving, limiting or otherwise affecting the rights or powers of the FDIC to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the FDIC regarding transfers or other conveyances taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of such institution, or that is a fraudulent transfer under applicable law.

(j) *No assignment.* The right to consent under 12 U.S.C. 1821(e)(13)(C) or 12 U.S.C. 1825(b)(2), may not be assigned or transferred to any purchaser of property from the FDIC, other than to a conservator or bridge bank.

(k) *Repeal.* This section may be repealed by the FDIC upon 30 days notice provided in the FEDERAL REGISTER, but any repeal shall not apply to any issuance made in accordance with this section before such repeal.

[75 FR 60297, Sept. 30, 2010, as amended at 80 FR 73089, Nov. 24, 2015; 81 FR 41423, June 27, 2016; 85 FR 12731, Mar. 4, 2020]

§ 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.

(2) The receiver shall distribute post-insolvency interest at the post-insolvency interest rate prior to making any distribution to equityholders. Post-insolvency interest distributions shall be made in the order of priority set forth in section 11(d)(11)(A) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(d)(11)(A).

(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]

§ 360.8 Method for determining deposit and other liability account balances at a failed insured depository institution.

(a) *Purpose.* The purpose of this section is to describe the process the FDIC will use to determine deposit and other liability account balances for insurance coverage and receivership purposes at a failed insured depository institution.

(b) *Definitions.* (1) The *FDIC Cutoff Point* means the point in time the FDIC establishes after it has been appointed receiver of a failed insured depository institution and takes control of the failed institution.

(2) The *Applicable Cutoff Time* for a specific type of deposit account transaction means the *earlier* of either the failed institution's normal cutoff time for that specific type of transaction or the *FDIC Cutoff Point.*

(3) *Close-of-Business Account Balance* means the closing end-of-day ledger balance of a deposit or other liability account on the day of failure of an insured depository institution determined by using the *Applicable Cutoff Times.* This balance may be adjusted to reflect steps taken by the receiver to ensure that funds are not received by or removed from the institution after the *FDIC Cutoff Point.*

(4) A *sweep account* is an account held pursuant to a contract between an insured depository institution and its customer involving the pre-arranged, automated transfer of funds from a deposit account to either another account or investment vehicle located within the depository institution (*internal sweep account*), or an investment vehicle located outside the depository institution (*external sweep account*).

(c) *Principles.* (1) In making deposit insurance determinations and in determining the value and nature of claims against the receivership on the institution's date of failure, the FDIC, as insurer and receiver, will treat deposits and other liabilities of the failed institution according to the ownership and nature of the underlying obligations based on end-of-day ledger balances for each account using, except as expressly provided otherwise in this section, the depository institution's normal posting procedures.

(2) In its role as receiver of a failed insured depository institution, in order to ensure the proper distribution of the failed institution's assets under the FDI Act (12 U.S.C. 1821(d)(11)) as of the FDIC Cutoff Point, the FDIC will use its best efforts to take all steps necessary to stop the generation, via transactions or transfers coming from or going outside the institution, of new liabilities or extinguishing existing liabilities for the depository institution.

(3) End-of-day ledger balances are subject to corrections for posted transactions that are inconsistent with the above principles.

(d) *Determining closing day balances.* (1) In determining account balances for insurance coverage and receivership purposes at a failed insured depository institution, the FDIC will use *Close-of-Business Account Balances.*

(2) A check posted to the *Close-of-Business Account Balance* but not collected by the depository institution will be included as part of the balance, subject to the correction of errors and omissions and adjustments for uncollectible items that the FDIC may make in its role as receiver of the failed depository institution.

(3) In determining *Close-of-Business Account Balances* involving sweep accounts:

(i) For internal sweep accounts, the FDIC will determine the ownership of the funds and the nature of the receivership claim based on the records established and maintained by the institution for that specific account or investment vehicle as of the closing day end-of-day ledger balance. (For example, if a sweep account entails the daily transfer of funds from a demand deposit account to a Eurodollar account at a foreign branch of the insured depository institution, if the institution should fail on that day, the FDIC would treat the funds swept to the Eurodollar account, as reflected on the institution's end-of-day records, as an unsecured general creditor's claim against the receivership.);

(ii) For external sweep accounts, the FDIC will treat swept funds consistent with their status in the end-of-day ledger balances of the depository institution and the external entity, as long as the transfer of funds is completed prior to the Applicable Cutoff Time. (For example, if funds held in connection with a money market sweep account are wired from a customer's deposit account at the insured depository institution to the mutual fund prior to the Applicable Cutoff Time, if the institution should fail on that day, the FDIC would recognize that sweep transaction as completed for claims and receivership purposes.);

(iii) For repurchase agreement sweep accounts, where, as a result of the sweep transaction, the customer becomes either the legal owner of identified assets subject to repurchase or obtains a perfected security interest in those assets, the FDIC will recognize, for receivership purposes, the customer's ownership interest or security interest in the assets.

(4) For deposit insurance and receivership purposes in connection with the failure of an insured depository institution, the FDIC will determine the rights of the depositor or other liability holder as of the point the *Close-of-Business Account Balance* is calculated.

(e) *Disclosure requirements.* Beginning July 1, 2009, in all new sweep account contracts, in renewals of existing sweep account contracts and within sixty days after July 1, 2009, and no less than annually thereafter, institutions must prominently disclose in writing to sweep account customers whether their swept funds are deposits within the meaning of 12 U.S.C. 1813(l). If the funds are not deposits, the institution must further disclose the status such funds would have if the institution failed—for example, general creditor status or secured creditor status. Such disclosures must be consistent with how the institution reports such funds on its quarterly Consolidated Reports of Condition and Income or Thrift Financial Reports. The disclosure requirements imposed under this provision do not apply to sweep accounts where: The transfers are within a single account, or a sub-account; or the sweep account involves only deposit-to-deposit sweeps, such as zero-balance accounts, unless the sweep results in a change in the customer's insurance coverage.

[74 FR 5806, Feb. 2, 2009]

§ 360.9 Large-bank deposit insurance determination modernization.

(a) *Purpose and scope.* This section is intended to allow the deposit and other operations of a large insured depository institution (defined as a ''Covered Institution'') to continue functioning on the day following failure. It also is intended to permit the FDIC to fulfill its legal mandates regarding the resolution of failed insured institutions to provide liquidity to depositors promptly, enhance market discipline, ensure equitable treatment of depositors at different institutions and reduce the FDIC's costs by preserving the franchise value of a failed institution.

(b) *Definitions.* (1) A *covered Institution* means an insured depository institution which, based on items as defined in Reports of Income and Condition or

Thrift Financial Reports filed with the applicable federal regulator, has at least $2 billion in deposits and at least either:

(i) 250,000 deposit accounts; or

(ii) $20 billion in total assets, regardless of the number of deposit accounts.

(2) *Deposits, number of deposit accounts and total assets* are as defined in the instructions for the filing of Reports of Income and Condition and Thrift Financial Reports, as applicable to the insured depository institution for determining whether it qualifies as a covered institution. A foreign deposit means an uninsured deposit liability maintained in a foreign branch of an insured depository institution. An *international banking facility deposit* is as defined by the Board of Governors of the Federal Reserve System in Regulation D (12 CFR §204.8(a)(2)). A *demand deposit account, NOW account, money market deposit account, savings deposit account and time deposit account* are as defined in the instructions for the filing of Reports of Income and Condition and Thrift Financial Reports.

(3) *Sweep account arrangements* consist of a deposit account linked to an interest-bearing investment vehicle whereby funds are swept to and from the deposit account according to prearranged rules, usually on a daily basis, where the sweep investment vehicle is not a deposit and is reflected on the books and records of the *Covered Institution*.

(4) *Automated credit account arrangements* consist of a deposit account into which funds are automatically credited from an interest-bearing investment vehicle where the funds in the interest-bearing investment vehicle were not invested by prearranged rules.

(5) *Non-covered institution* means an insured depository institution that does not meet the definition of a covered institution.

(6) *Provisional hold* means an effective restriction on access to some or all of a deposit or other liability account after the failure of an insured depository institution.

(c) *Posting and removing provisional holds.* (1) A covered institution shall have in place an automated process for implementing a provisional hold on deposit accounts, foreign deposit accounts and sweep and automated credit account arrangements immediately following the determination of the close-of-business account balances, as defined in §360.8(b)(3), at the failed covered institution.

(2) The system requirements under paragraph (c)(1) must have the capability of placing the provisional holds prescribed under that provision no later than 9 a.m. local time the day following the FDIC cutoff point, as defined in §360.8(b)(1).

(3) Pursuant to instructions to be provided by the FDIC, a covered institution must notify the FDIC of the person(s) responsible for producing the standard data download and administering provisional holds, both while the functionality is being constructed and on an on-going basis.

(4) For deposit accounts held in domestic offices of an insured depository institution, the provisional hold algorithm must be designed to exempt accounts below a specific account balance threshold, as determined by the FDIC. The account balance threshold could be any amount, including zero. For accounts above the account balance threshold determined by the FDIC, the algorithm must be designed to calculate and place a hold equal to the dollar amount of funds in excess of the account balance threshold multiplied by the provisional hold percentage determined by the FDIC. The provisional hold percentage could be any amount, from zero to one hundred percent. The account balance threshold as well as the provisional hold percentage could vary for the following four categories, as the covered institution customarily defines consumer accounts:

(i) Consumer demand deposit, NOW and money market deposit accounts;

(ii) Other consumer deposit accounts (time deposit and savings accounts, excluding NOW and money market deposit accounts);

(iii) Non-consumer demand deposit, NOW and money market deposit accounts; and

(iv) Other non-consumer deposit accounts (time deposit and savings accounts, excluding NOW and money market deposit accounts).

(5) For deposit accounts held in foreign offices of an insured depository institution, other than those connected to a sweep or automated credit arrangement, the provisional hold algorithm will apply a provisional hold percentage to the entire account balance. For deposit accounts held in foreign offices the provisional hold percentage may differ from that applied to deposit accounts. Also, the provisional hold percentage would not vary by account category (*i.e.*, consumer versus nonconsumer and transaction versus nontransaction) as is the case with deposit accounts.

(6) For international banking facility deposits, other than those connected to a sweep or automated credit arrangements, the provisional hold algorithm will apply a provisional hold percentage to the entire account balance. For IBF deposits the provisional hold percentage may differ from that applied to deposit or foreign deposit accounts. Also, the provisional hold percentage would not vary by account category (*i.e.*, consumer versus non-consumer, and transaction versus non-transaction) as is the case with deposit accounts.

(7) For the interest-bearing investment vehicle of a sweep arrangement, the provisional hold algorithm must be designed with the capability to place a provisional hold on the interest-bearing investment vehicle with possibly a different account balance threshold and a different hold percentage according to the type of interest-bearing investment vehicle.

(8) For the interest-bearing investment vehicle of an automated credit account arrangement, the provisional hold algorithm must be designed with the capability to place a provisional hold on the interest-bearing investment vehicle with possibly a different account balance threshold and a different hold percentage according to the type of interest-bearing investment vehicle.

(9) A covered institution may submit a request to the FDIC, using the address indicated in §360.9(g): to develop a provisional hold process involving memo holds or alternative account mechanisms; or to exempt from the provisional hold requirements of this section those account systems servicing a relatively small number of accounts where the manual application of provisional holds is feasible. Such requests may be in the form of a letter and must include a justification for the request and address the relative effectiveness of the alternative for posting provisional holds in the event of failure. The FDIC will consider such requests on a case-by-case basis in light of the objectives of this section.

(10) The automated process for provisional holds required by paragraph (c)(1) of this section must include the capability of removing provisional holds in batch mode and, during the same processing cycle, applying debits, credits or additional holds on the deposit or other accounts from which the provisional holds were removed, as determined by the FDIC. The FDIC will provide files listing the accounts subject to: removal of provisional holds or additional holds (file format as specified in appendix A); application of debits or credits (file format as specified in appendix B); and application of additional holds (file format as specified in appendix A). In addition to the batch process used to remove provisional holds, the Covered Institution is required to have in place a mechanism for manual removal of provisional holds on a case-by-case basis.

(d) *Providing a standard data format for generating deposit account and customer data.* (1) A covered institution must have in place practices and procedures for providing the FDIC in a standard format upon the close of any day's business with required depositor and customer data for all deposit accounts held in domestic and foreign offices and interest-bearing investment accounts connected with sweep and automated credit arrangements. Such standard data files are to be created through a mapping of pre-existing data elements and internal institution codes into standard data formats. Deposit account and customer data provided must be current as of the close of business for that day.

(2) The requirements of paragraph (d)(1) of this section shall be provided in five separate files, as indicated in the appendices C through G to this part 360.

(3) Upon request by the FDIC, a covered institution must submit the data required by paragraph (d)(1) of this section to the FDIC, in a manner prescribed by the FDIC.

(4) In providing the data required under paragraph (d)(1) of this section to the FDIC, the *Covered Institution* must be able to reconcile the total deposit balances and the number of deposit accounts to the institution's subsidiary system control totals.

(e) *Implementation requirements.* (1) A covered institution must comply with the requirements of this section no later than February 18, 2010.

(2) An insured depository institution not within the definition of a covered institution on the effective date of this section must comply with the requirements of this section no later than eighteen months following the end of the second calendar quarter for which it meets the criteria for a covered institution.

(3) Upon the merger of two or more non-covered institutions, if the resulting institution meets the criteria for a covered institution, that covered institution must comply with the requirements of this section no later than eighteen months after the effective date of the merger.

(4) Upon the merger of two or more covered institutions, the merged institution must comply with the requirements of this section within eighteen months following the effective date of the merger. This provision, however, does not supplant any preexisting implementation date requirement, in place prior to the date of the merger, for the individual covered institution(s) involved in the merger.

(5) Upon the merger of one or more covered institutions with one or more non-covered institutions, the merged institution(s) must comply with the requirements of this section within eighteen months following the effective date of the merger. This provision, however, does not supplant any preexisting implementation date requirement for the individual covered institution(s) involved in the merger.

(6) Notwithstanding the general requirements of this paragraph (e), on a case-by-case basis, the FDIC may accelerate, upon notice, the implementation timeframe of all or part of the requirements of this section for a covered institution that: Has a composite rating of 3, 4, or 5 under the Uniform Financial Institution's Rating System, or in the case of an insured branch of a foreign bank, an equivalent rating; is undercapitalized, as defined under the prompt corrective action provisions of 12 CFR part 324; or is determined by the appropriate Federal banking agency or the FDIC in consultation with the appropriate Federal banking agency to be experiencing a significant deterioration of capital or significant funding difficulties or liquidity stress, notwithstanding the composite rating of the institution by its appropriate Federal banking agency in its most recent report of examination. In implementing this paragraph (e)(6), the FDIC must consult with the covered institution's primary federal regulator and consider the: Complexity of the institution's deposit systems and operations, extent of the institution's asset quality difficulties, volatility of the institution's funding sources, expected near-term changes in the institution's capital levels, and other relevant factors appropriate for the FDIC to consider in its roles as insurer and possible receiver of the institution.

(7) Notwithstanding the general requirements of this paragraph (e), a covered institution may request, by letter, that the FDIC extend the deadline for complying with the requirements of this section. A request for such an extension is subject to the FDIC's rules of general applicability under 12 CFR. 303.251.

(f) A covered institution may apply to the FDIC for an exemption from the requirements of this §360.9 if it has a high concentration of deposits incidental to credit card operations. The FDIC will consider such applications on a case-by-case basis in light of the objectives of this section.

(g) Requests for exemptions from the requirements of this section, for flexibility in the use of provisional holds or for extensions of the implementation requirements of this section and the submission of point-of-contact information should be submitted in writing to: Office of the Director, Division of Resolutions and Receiverships, Federal

Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429–0002.

(h) *Testing requirements.* Covered institutions must provide appropriate assistance to the FDIC in its testing of the systems required by this section. The FDIC will provide testing details to covered institutions through the issuance of subsequent procedures and/or guidelines.

[73 FR 41195, July 17, 2008, as amended at 78 FR 55595, Sept. 10, 2013; 83 FR 17741, Apr. 24, 2018]

§ 360.10 Resolution plans required for insured depository institutions with $50 billion or more in total assets.

(a) *Scope and purpose.* This section requires each insured depository institution with $50 billion or more in total assets to submit periodically to the FDIC a plan for the resolution of such institution in the event of its failure. This section also establishes the rules and requirements regarding the submission and content of a resolution plan as well as procedures for review by the FDIC of a resolution plan. This section requires a covered insured depository institution to submit a resolution plan that should enable the FDIC, as receiver, to resolve the institution under Sections 11 and 13 of the Federal Deposit Insurance Act (''FDI Act''), 12 U.S.C. 1821 and 1823, in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of its assets and minimizes the amount of any loss realized by the creditors in the resolution. This rule is intended to ensure that the FDIC has access to all of the material information it needs to resolve efficiently a covered insured depository institution in the event of its failure.

(b) *Definitions*—(1) *Affiliate* has the same meaning given such term in Section 3(w)(6) of the FDI Act, 12 U.S.C. 1813(w)(6).

(2) *Company* has the same meaning given such term in §362.2(d) of the FDIC's Regulations, 12 CFR 362.2(d).

(3) *Core business lines* means those business lines of the covered insured depository institution (''CIDI''), including associated operations, services, functions and support, that, in the view of the CIDI, upon failure would result in a material loss of revenue, profit, or franchise value.

(4) *Covered insured depository institution (''CIDI'')* means an insured depository institution with $50 billion or more in total assets, as determined based upon the average of the institution's four most recent Reports of Condition and Income or Thrift Financial Reports, as applicable to the insured depository institution.

(5) *Critical services* means services and operations of the CIDI, such as servicing, information technology support and operations, human resources and personnel that are necessary to continue the day-to-day operations of the CIDI.

(6) *Foreign-based company* means any company that is not incorporated or organized under the laws of the United States.

(7) *Insured depository institution* shall have the meaning given such term in Section 3(c)(2) of the FDI Act, 12 U.S.C. 1813(c)(2).

(8) *Material entity* means a company that is significant to the activities of a critical service or core business line.

(9) *Parent company* means the company that controls, directly or indirectly, an insured depository institution. In a multi-tiered holding company structure, *parent company* means the top-tier of the multi-tiered holding company only.

(10) *Parent company affiliate* means any affiliate of the parent company other than the CIDI and subsidiaries of the CIDI.

(11) *Resolution plan* means the plan described in paragraph (c) of this section for resolving the CIDI under Sections 11 and 13 of the FDI Act, 12 U.S.C. 1821 and 1823.

(12) *Subsidiary* has the same meaning given such term in Section 3(w)(4) of the FDI Act, 12 U.S.C. 1813(w)(4).

(13) *Total assets* are defined in the instructions for the filing of Reports of Condition and Income and Thrift Financial Reports, as applicable to the insured depository institution, for determining whether it qualifies as a CIDI.

(14) *United States* means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa and the Virgin Islands.

(c) *Resolution Plans to be submitted by CIDI to FDIC*—(1) *General*—(i) *Initial Resolution Plans Required.* Each CIDI shall submit a resolution plan to the FDIC, Attention: Office of Complex Financial Institutions, 550 17th Street NW., Washington, DC 20429, on or before the date set forth below (''Initial Submission Date''):

(A) July 1, 2012, with respect to a CIDI whose parent company, as of November 30, 2011, had $250 billion or more in total nonbank assets (or in the case of a parent company that is a foreign-based company, such company's total U.S. nonbank assets);

(B) July 1, 2013, with respect to any CIDI not described paragraph (c)(1)(i)(A) of this section whose parent company, as of November 30, 2011, had $100 billion or more in total nonbank assets (or, in the case of a parent company that is a foreign-based company, such company's total U.S. nonbank assets); and

(C) December 31, 2013, with respect to any CIDI not described in of this paragraph (c)(1)(i)(A) or (B) of this section.

(ii) *Submission by New CIDIs.* An insured depository institution that becomes a CIDI after April 1, 2012 shall submit its initial resolution plan no later than the next July 1 following the date the insured depository institution becomes a CIDI, provided such date occurs no earlier than 270 days after the date on which the insured depository institution became a CIDI.

(iii) After filing its initial Resolution Plan pursuant to paragraph (c)(1)(i) or (c)(1)(ii) of this section, each CIDI shall submit a Resolution Plan to the FDIC annually on or before each anniversary date of its Initial Submission Date.

(iv) Notwithstanding anything to the contrary in this paragraph (c)(1), the FDIC may determine that a CIDI shall file its initial or annual Resolution Plan by a date other than as provided in this paragraph (c). The FDIC shall provide a CIDI with written notice of a determination under this paragraph (c)(1)(iv) no later than 180 days prior to the date on which the FDIC determines to require the CIDI to submit its Resolution Plan.

(v) *Notice of Material Events.* (A) Each CIDI shall file with the FDIC a notice no later than 45 days after any event, occurrence, change in conditions or circumstances or other change that results in, or could reasonably be foreseen to have, a material effect on the resolution plan of the CIDI. Such notice shall describe the event, occurrence or change and explain why the event, occurrence or change may require changes to the resolution plan. The CIDI shall address any event, occurrence or change with respect to which it has provided notice pursuant hereto in the following resolution plan submitted by the CIDI.

(B) A CIDI shall not be required to file a notice under paragraph (c)(1)(v)(A) of this section if the date on which the CIDI would be required to submit a notice under paragraph (c)(1)(v)(A) would be within 90 days prior to the date on which the CIDI is required to file an annual Resolution Plan under paragraph (c)(1)(iii) of this section.

(vi) *Incorporation of data and other information from a Dodd-Frank Act resolution plan.* The CIDI may incorporate data and other information from a resolution plan filed pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5365(d), by its parent company.

(2) *Content of the Resolution Plan.* The resolution plan submitted should enable the FDIC, as receiver, to resolve the CIDI in the event of its insolvency under the FDI Act in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of its assets and minimizes the amount of any loss realized by the creditors in the resolution in accordance with Sections 11 and 13 of the FDI Act, 12 U.S.C. 1821 and 1823. The resolution plan strategies should take into account that failure of the CIDI may occur under the baseline, adverse and severely adverse economic

conditions developed by the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. 5365(i)(1)(B); provided, however, a CIDI may submit its initial resolution plan assuming the baseline conditions only, or, if a baseline scenario is not then available, a reasonable substitute developed by the CIDI. At a minimum, the resolution plan shall:

(i) *Executive Summary*. Include an executive summary describing the key elements of the CIDI's strategic plan for resolution under the FDI Act in the event of its insolvency. After the CIDI files its initial plan, each annual resolution plan shall also describe:

(A) Material events, such as acquisitions, sales, litigation and operational changes, since the most recently filed plan that may have a material effect on the plan;

(B) Material changes to the CIDI's resolution plan from its most recently filed plan; and

(C) Any actions taken by the CIDI since filing of the previous plan to improve the effectiveness of its resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to the effective and timely execution of the resolution plan.

(ii) *Organizational Structure: Legal Entities; Core Business Lines and Branches*. Provide the CIDI's, parent company's, and affiliates' legal and functional structures and identify core business lines. Provide a mapping of core business lines, including material asset holdings and liabilities related thereto, to material entities. Discuss the CIDI's overall deposit activities including, among other things, unique aspects of the deposit base or underlying systems that may create operational complexity for the FDIC, result in extraordinary resolution expenses in the event of failure and a description of the branch organization, both domestic and foreign. Identify key personnel tasked with managing core business lines and deposit activities and the CIDI's branch organization.

(iii) *Critical Services*. Identify critical services and providers of critical services. Provide a mapping of critical services to material entities and core business lines. Describe the CIDI's strategy for continuing critical services in the event of the CIDI's failure. When critical services are provided by the parent company or a parent company affiliate, describe the CIDI's strategy for continuing critical services in the event of the parent company's or parent company affiliate's failure. Assess the ability of each parent company affiliate providing critical services to function on a standalone basis in the event of the parent company's failure.

(iv) *Interconnectedness to Parent Company's Organization; Potential Barriers or Material Obstacles to Orderly Resolution*. Identify the elements or aspects of the parent company's organizational structure, the interconnectedness of its legal entities, the structure of legal or contractual arrangements, or its overall business operations that would, in the event the CIDI were placed in receivership, diminish the CIDI's franchise value, obstruct its continued business operations or increase the operational complexity to the FDIC of resolution of the CIDI. Identify potential barriers or other material obstacles to an orderly resolution of the CIDI, inter-connections and inter-dependencies that hinder the timely and effective resolution of the CIDI, and include the remediation steps or mitigating responses necessary to eliminate or minimize such barriers or obstacles.

(v) *Strategy to Separate from Parent Company's Organization*. Provide a strategy to unwind or separate the CIDI and its subsidiaries from the organizational structure of its parent company in a cost-effective and timely fashion. Describe remediation or mitigating steps that could be taken to eliminate or mitigate obstacles to such separation.

(vi) *Strategy for the Sale or Disposition of Deposit Franchise, Business Lines and Assets*. Provide a strategy for the sale or disposition of the deposit franchise, including branches, core business lines and major assets of the CIDI in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution's failure (two business days if the failure occurs on a day other than Friday), maximizes the net present value return from the sale or disposition of

such assets and minimizes the amount of any loss realized in the resolution of cases.

(vii) *Least Costly Resolution Method.* Describe how the strategies for the separation of the CIDI and its subsidiaries from its parent company's organization and sale or disposition of deposit franchise, core business lines and major assets can be demonstrated to be the least costly to the Deposit Insurance Fund of all possible methods for resolving the CIDI.

(viii) *Asset Valuation and Sales.* Provide a detailed description of the processes the CIDI employs for:

(A) Determining the current market values and marketability of core business lines and material asset holdings;

(B) Assessing the feasibility of the CIDI's plans, under baseline, adverse and severely adverse economic condition scenarios for executing any sales, divestitures, restructurings, recapitalizations, or similar actions contemplated in the CIDI's resolution plan; and

(C) Assessing the impact of any sales, divestitures, restructurings, recapitalizations, or other similar actions on the value, funding and operations of the CIDI and its core business lines.

(ix) *Major Counterparties.* Identify the major counterparties of the CIDI and describe the interconnections, interdependencies and relationships with such major counterparties. Analyze whether the failure of each major counterparty would likely have an adverse impact on or result in the material financial distress or failure of the CIDI.

(x) *Off-balance-sheet Exposures.* Describe any material off-balance-sheet exposures (including unfunded commitments, guarantees and contractual obligations) of the CIDI and map those exposures to core business lines.

(xi) *Collateral Pledged.* Identify and describe processes used by the CIDI to:

(A) Determine to whom the CIDI has pledged collateral;

(B) Identify the person or entity that holds such collateral; and

(C) Identify the jurisdiction in which the collateral is located; and if different, the jurisdiction in which the security interest in the collateral is enforceable against the CIDI.

(xii) *Trading, derivatives and hedges.* Describe the practices of the CIDI and its core business lines related to the booking of trading and derivative activities. Identify each system on which the CIDI conducts a material number or value amount of trades. Map each trading system to the CIDI's legal entities and core business lines. Identify material hedges of the CIDI and its core business lines related to trading and derivative activities, including a mapping to legal entity. Describe hedging strategies of the CIDI.

(xiii) *Unconsolidated Balance Sheet of CIDI; Material Entity Financial Statements.* Provide an unconsolidated balance sheet for the CIDI and a consolidating schedule for all material entities that are subject to consolidation with the CIDI. Provide financial statements for material entities. When available, audited financial statements should be provided.

(xiv) *Payment, clearing and settlement systems.* Identify each payment, clearing and settlement system of which the CIDI, directly or indirectly, is a member. Map membership in each such system to the CIDI's legal entities and core business lines.

(xv) *Capital Structure; Funding Sources.* Provide detailed descriptions of the funding, liquidity and capital needs of, and resources available to, the CIDI and its material entities, which shall be mapped to core business lines and critical services. Describe the material components of the liabilities of the CIDI and its material entities and identify types and amounts of short-term and long-term liabilities by type and term to maturity, secured and unsecured liabilities and subordinated liabilities.

(xvi) *Affiliate Funding, Transactions, Accounts, Exposures and Concentrations.* Describe material affiliate funding relationships, accounts, and exposures, including terms, purpose, and duration, that the CIDI or any of its subsidiaries have with its parent or any parent company affiliate. Include in such description material affiliate financial exposures, claims or liens, lending or borrowing lines and relationships, guaranties, asset accounts, deposits, or derivatives transactions. Clearly identify the nature and extent to which

parent company or parent company affiliates serve as a source of funding to the CIDI and its subsidiaries, the terms of any contractual arrangements, including any capital maintenance agreements, the location of related assets, funds or deposits and the mechanisms by which funds can be downstreamed from the parent company to the CIDI and its subsidiaries.

(xvii) *Systemically Important Functions.* Describe systemically important functions that the CIDI, its subsidiaries and affiliates provide, including the nature and extent of the institution's involvement in payment systems, custodial or clearing operations, large sweep programs, and capital markets operations in which it plays a dominant role. Discuss critical vulnerabilities, estimated exposure and potential losses, and why certain attributes of the businesses detailed in previous sections could pose a systemic risk to the broader economy.

(xviii) *Cross-Border Elements.* Describe material components of the CIDI's structure that are based or located outside the United States, including foreign branches, subsidiaries and offices. Provide detail on the location and amount of foreign deposits and assets. Discuss the nature and extent of the CIDI's cross-border assets, operations, interrelationships and exposures and map to legal entities and core business lines.

(xix) *Management Information Systems; Software Licenses; Intellectual Property.* Provide a detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, accounting, and financial and regulatory reporting, used by the CIDI and its subsidiaries. Identify the legal owner or licensor of the systems identified above; describe the use and function of the system or application, and provide a listing of service level agreements and any software and systems licenses or associated intellectual property related thereto. Identify and discuss any disaster recovery or other backup plans. Identify common or shared facilities and systems as well as personnel necessary to operate such facilities and systems. Describe the capabilities of the CIDI's processes and systems to collect, maintain, and report the information and other data underlying the resolution plan to management of the CIDI and, upon request to the FDIC. Describe any deficiencies, gaps or weaknesses in such capabilities and the actions the CIDI intends to take to promptly address such deficiencies, gaps, or weaknesses, and the time frame for implementing such actions.

(xx) *Corporate Governance.* Include a detailed description of:

(A) How resolution planning is integrated into the corporate governance structure and processes of the CIDI;

(B) The CIDI's policies, procedures, and internal controls governing preparation and approval of the resolution plan; and

(C) The identity and position of the senior management official of the CIDI who is primarily responsible and accountable for the development, maintenance, implementation, and filing of the resolution plan and for the CIDI's compliance with this section.

(xxi) *Assessment of the Resolution Plan.* Describe the nature, extent, and results of any contingency planning or similar exercise conducted by the CIDI since the date of the most recently filed resolution plan to assess the viability of or improve the resolution plan.

(xxii) *Any other material factor.* Identify and discuss any other material factor that may impede the resolution of the CIDI.

(3) *Approval.* The CIDI's board of directors must approve the resolution plan. Such approval shall be noted in the Board minutes.

(4) *Review of Resolution Plan.*

(i) Each resolution plan submitted shall be credible. A resolution plan is credible if its strategies for resolving the CIDI, and the detailed information required by this section, are well-founded and based on information and data related to the CIDI that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets.

(ii) After receiving a resolution plan, the FDIC shall determine whether the submitted plan satisfies the minimum

informational requirements of paragraph (c)(2) of this section; and either acknowledge acceptance of the plan for review or return the resolution plan if the FDIC determines that it is incomplete or that substantial additional information is required to facilitate review of the resolution plan.

(iii) If the FDIC determines that a resolution plan is informationally incomplete or that additional information is necessary to facilitate review of the plan, the FDIC shall inform the CIDI in writing of the area(s) in which the plan is informationally incomplete or with respect to which additional information is required.

(iv) The CIDI shall resubmit an informationally complete resolution plan or such additional information as requested to facilitate review of the resolution plan no later than 30 days after receiving the notice described in paragraph (c)(4)(iii) of this section, or such other time period as the FDIC may determine.

(v) Upon acceptance of a resolution plan as informationally complete, the FDIC will review the resolution plan in consultation with the appropriate Federal banking agency for the CIDI and its parent company. If, after consultation with the appropriate Federal banking agency for the CIDI, the FDIC determines that the resolution plan of a CIDI submitted is not credible, the FDIC shall notify the CIDI in writing of such determination. Any notice provided under this paragraph shall identify the aspects of the resolution plan that the FDIC determines to be deficient.

(vi) Within 90 days of receiving a notice of deficiencies issued pursuant to the preceding paragraph, or such shorter or longer period as the FDIC may determine, a CIDI shall submit a revised resolution plan to the FDIC that addresses the deficiencies identified by the FDIC and discusses in detail the revisions made to address such deficiencies.

(vii) Upon its own initiative or a written request by a CIDI, the FDIC may extend any time period under this section. Each extension request shall be in writing and shall describe the basis and justification for the request.

(d) *Implementation Matters.* (1) In order to allow evaluation of the resolution plan, each CIDI must provide the FDIC such information and access to such personnel of the CIDI as the FDIC determines is necessary to assess the credibility of the resolution plan and the ability of the CIDI to implement the resolution plan. The FDIC will rely to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company.

(2) Within a reasonable period of time, as determined by the FDIC, following its Initial Submission Date, the CIDI shall demonstrate its capability to produce promptly, in a time frame and format acceptable to the FDIC, the information and data underlying its resolution plan. The FDIC shall consult with the appropriate Federal banking agency for the CIDI before finding that the CIDI's capability to produce the information and data underlying its resolution plan is unacceptable.

(3) Notwithstanding the general requirements of paragraph (c)(1) of this section, on a case-by-case basis, the FDIC may extend, on its own initiative or upon written request, the implementation and updating time frames for all or part of the requirements of this section.

(4) FDIC may, on its own initiative or upon written request, exempt a CIDI from one or more of the requirements of this section.

(e) *No limiting effect on FDIC.* No resolution plan provided pursuant to this section shall be binding on the FDIC as supervisor, deposit insurer or receiver for a CIDI or otherwise require the FDIC to act in conformance with such plan.

(f) *Form of Resolution Plans; Confidential Treatment of Resolution Plans.* (1) Each resolution plan of a CIDI shall be divided into a Public Section and a Confidential Section. Each CIDI shall segregate and separately identify the Public Section from the Confidential Section. The Public Section shall consist of an executive summary of the resolution plan that describes the business of the CIDI and includes, to the extent material to an understanding of the CIDI:

(i) The names of material entities;

(ii) A description of core business lines;

(iii) Consolidated financial information regarding assets, liabilities, capital and major funding sources;

(iv) A description of derivative activities and hedging activities;

(v) A list of memberships in material payment, clearing and settlement systems;

(vi) A description of foreign operations;

(vii) The identities of material supervisory authorities;

(viii) The identities of the principal officers;

(ix) A description of the corporate governance structure and processes related to resolution planning;

(x) A description of material management information systems; and

(xi) A description, at a high level, of the CIDI's resolution strategy, covering such items as the range of potential purchasers of the CIDI, its material entities and core business lines.

(2) The confidentiality of resolution plans shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the FDIC's Disclosure of Information Rules (12 CFR part 309).

(3) Any CIDI submitting a resolution plan or related materials pursuant to this section that desires confidential treatment of the information submitted pursuant to 5 U.S.C. 552(b)(4) and the FDIC's Disclosure of Information Rules (12 CFR part 309) and related policies may file a request for confidential treatment in accordance with those rules.

(4) To the extent permitted by law, information comprising the Confidential Section of a resolution plan will be treated as confidential.

(5) To the extent permitted by law, the submission of any nonpublicly available data or information under this section shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject. Privileges that apply to resolution plans and related materials are protected pursuant to Section 18(x) of the FDI Act, 12 U.S.C. 1828(x).

[77 FR 3084, Jan. 23, 2012]

§ 360.11 Records of failed insured depository institutions.

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

(1) *Failed insured depository institution* is an insured depository institution for which the FDIC has been appointed receiver pursuant to 12 U.S.C. 1821(c)(1).

(2) *Insured depository institution* has the same meaning as provided by 12 U.S.C. 1813(c)(2).

(3) *Records* means any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record generated or maintained by an insured depository institution in the course of and necessary to its transaction of business.

(i) Examples of records include, without limitation, board or committee meeting minutes, contracts to which the insured depository institution was a party, deposit account information, employee and employee benefits information, general ledger and financial reports or data, litigation files, and loan documents.

(ii) Records do not include:

(A) Multiple copies of records; or

(B) 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 insured depository institutions.

(b) *Determination of records.* In determining whether particular documentary material obtained from a failed insured depository institution is a record for purposes of 12 U.S.C. 1821(d)(15)(D), the FDIC in its discretion will consider the following factors:

(1) Whether the documentary material related to the business of the insured depository institution,

(2) Whether the documentary material was generated or maintained as records in the regular course of the business of the insured depository institution in accordance with its own recordkeeping practices and procedures or pursuant to standards established by its regulators,

(3) Whether the documentary material is needed by the FDIC to carry out its receivership function, and

(4) The expected evidentiary needs of the FDIC.

(c) The FDIC's determination that documentary material from a failed insured depository institution constitutes records is solely for the purpose of identifying that documentary material that must be maintained pursuant to 12 U.S.C. 1821(d)(15)(D) and shall not bear on the discoverability or admissibility of such documentary material in any court, tribunal or other adjudicative proceeding, nor on whether such documentary material is subject to release under the Freedom of Information Act, the Privacy Act or other law.

(d) *Destruction of records.* (1) Except as provided in paragraph (d)(2) of this section, after the end of the six-year period beginning on the date the FDIC is appointed as receiver of a failed insured depository institution, the FDIC may destroy any records of an institution which the FDIC, in its discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, prohibited by law, or subject to a legal hold imposed by the FDIC.

(2) Notwithstanding paragraph (d)(1) of this section, the FDIC may destroy records of a failed insured depository institution which are at least 10 years old as of the date on which the FDIC is appointed as the receiver of such institution in accordance with paragraph (d)(1) of this section at any time after such appointment is final, without regard to the six-year period of limitation contained in paragraph (d)(1) of this section.

(e) *Transfer of records.* If the FDIC transfers records to a third party in connection with a transaction involving the purchase and assumption of assets and liabilities of an insured depository institution, the recordkeeping requirements of 12 U.S.C. 1821(d)(15)(D), and paragraph (d) of this section shall be satisfied if the transferee agrees that it will not destroy such records for at least six years from the date the FDIC was appointed as receiver of such failed insured depository institution unless otherwise notified in writing by the FDIC.

(f) *Policies and procedures.* The FDIC may establish policies and procedures with respect to the retention and destruction of records that are consistent with this section.

[78 FR 54376, Sept. 4, 2013]

APPENDIX A TO PART 360—NON-MONETARY TRANSACTION FILE STRUCTURE

This is the structure of the data file the FDIC will provide to remove or add a FDIC hold for an individual account or sub-account. The file will be in a tab- or pipe-delimited ASCII format and provided through FDICconnect or Direct Connect. The file will be encrypted using an FDIC-supplied algorithm.

Field name	Field description	Comments	Format
1. DP__Acct__Identifier	Account Identifier The primary field used to identify the account. This field may be the Account Number.	The Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
2. DP__Acct__Identifier—2	Account Identifier—2 If necessary, the second element used to identify the account.		Character (25).
3. DP__Acct__Identifier—3	Account Identifier—3 If necessary, the third element used to identify the account.		Character (25).
4. DP__Acct__Identifier—4	Account Identifier—4 If necessary, the fourth element used to identify the account.		Character (25).
5. DP__Acct__Identifier—5	Account Identifier—5 If necessary, the fifth element used to identify the account.		Character (25).

Field name	Field description	Comments	Format
6. DP__Sub__Acct__Identifier	Sub-Account Identifier If available, the Sub-Account identifier for the account.	The Sub-Account Identifier may identify separate deposits tied to this account where there are different processing parameters such as interest rates or maturity dates, but all owners are the same.	Character (25).
7. PH__Hold__Action	Hold Action The requested hold action to be taken for this account or sub-account. Possible values are: • R = Remove. • A = Add.		Character (1).
8. PH__Hold__Amt	Hold Amount Dollar amount of the FDIC hold to be removed or added.		Decimal (14,2).
9. PH__Hold__Desc	Hold Description FDIC hold to be removed or added.		Character (225).

[73 FR 41197, July 17, 2008]

Appendix B to Part 360—Debit/Credit File Structure

This is the structure of the data file the FDIC will provide to apply debits and credits to an individual account or sub-account after the removal of FDIC holds. The file will be in a tab- or pipe-delimited ASCII format and provided through FDICconnect or Direct Connect. The file will be encrypted using an FDIC-supplied algorithm.

Field name	Field description	Comments	Format
1. DP__Acct__Identifier	Account Identifier The primary field used to identify the account. This field may the Account Number.	The Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
2. DP__Acct__Identifier—2	Account Identifier—2 If necessary, the second element used to identify the account.		Character (25).
3. DP__Acct__Identifier—3	Account Identifier—3 If necessary, the third element used to identify the account.		Character (25).
4. DP__Acct__Identifier—4	Account Identifier—4 If necessary, the fourth element used to identify the account.		Character (25).
5. DP__Acct__Identifier—5	Account Identifier—5 If necessary, the fifth element used to identify the account.		Character (25).
6. DP__Sub__Acct__Identifier	Sub-Account Identifier If available, the sub-account identifier for the account.	The Sub-Account Identifier may identify separate deposits tied to this account where there are different processing parameters such as interest rates or maturity dates, but all owners are the same.	Character (25).
7. DC__Debit__Amt	Debit Amount Dollar amount of the debit to be applied to the account or sub-account.		Decimal (14,2).
8. DC__Credit__Amt	Credit Amount Dollar amount of the credit to be applied to the account or sub-account.		Decimal (14,2).
9. DC__Transaction__Desc	Debit/Credit Description		Character (225).

Field name	Field description	Comments	Format
	FDIC message associated with the debit or credit transaction.		

[73 FR 41197, July 17, 2008]

APPENDIX C TO PART 360—DEPOSIT FILE STRUCTURE

This is the structure for the data file to provide deposit data to the FDIC. If data or information are not maintained or do not apply, a null value in the appropriate field should be indicated. The file will be in a tab- or pipe-delimited ASCII format. Each file name will contain the institution's FDIC Certificate Number, an indication that it is a deposit file type and the date of the extract. The files will be encrypted using an FDIC-supplied algorithm. The FDIC will transmit to the covered institution the encryption algorithm over FDIC*connect*.

The total deposit balances and the number of deposit accounts in each deposit file must be reconciled to the subsidiary system control totals.

The FDIC intends to fully utilize a covered institution's understanding of its customers and the data maintained around deposit accounts. Should additional information be available to the covered institution to help the FDIC more quickly complete its insurance determination process, it may add this information to the end of this data file. Should additional data elements be provided, a complete data dictionary for these elements must be supplied along with a description of how this information could be best used to establish account ownership or insurance category.

The deposit data elements provide information specific to deposit account balances and account data. The sequencing of these elements, their physical data structures and the field data format and field length must be provided to the FDIC along with the data structures identified below.

A header record will also be required at the beginning of this file. This record will contain the number of accounts to be included in this file, the maximum number of characters contained in largest account title field maintained within the deposit file and the maximum number of characters contained in largest address field maintained within the deposit file.

NOTE: Each record must contain the account title/name and current account statement mailing address. Fields 17–33 relate to the account name and address information. Some systems provide for separate fields for account title/name, street address, city, state, ZIP, and country, all of which are parsed out. Others systems may simply provide multiple lines for name, street address, city, state, ZIP, with no distinction. Populate fields that best fit the system's data, either fields 17–27 or fields 28–33.

Field name	Field description	Comments	Format
1. DP__Acct__Identifier	Account Identifier ..... The primary field used to identify the account. This field may be the Account Number.	The Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
2. DP__Acct__Identifier—2	Account Identifier—2 ..... If necessary, the second element used to identify the account.	.....	Character (25).
3. DP__Acct__Identifier—3	Account Identifier—3 ..... If necessary, the third element used to identify the account.	.....	Character (25).
4. DP__Acct__Identifier—4	Account Identifier—4 ..... If necessary, the fourth element used to identify the account.	.....	Character (25).
5. DP__Acct__Identifier—5	Account Identifier—5 ..... If necessary, the fifth element used to identify the account.	.....	Character (25).

Field name	Field description	Comments	Format
6. DP__Sub__Acct__Identifier	Sub-Account Identifier If available, the sub-account identifier for the account.	The Sub-Account Identifier may identify separate deposits tied to this account where there are different processing parameters such as interest rates or maturity dates, but all owners are the same.	Character (25).
7. DP__Bank__No	Bank Number The bank number assigned to the deposit account.		Character (15).
8. DP__Tax__ID	Tax ID The tax identification number maintained on the account.	For consumer accounts, typically, this would be the primary account holder's social security number (''SSN''). For business accounts it would be the federal tax identification number (''TIN''). Hyphens are optional in this field.	Character (15).
9. DP__Tax__Code	Tax ID Code The type of the tax identification number. Possible values are: • S = Social Security Number. • T = Federal Tax Identification Number. • O = Other.	Generally deposit systems have flags or indicators set to indicate whether the number is an SSN or TIN.	Character (1).
10. DP__Branch	Branch Number The branch or office associated with the account.	In lieu of a branch number this field may represent a specialty department or division.	Character (15).
11. DP__Cost__Center	Cost Center or G/L Code The identifier used for organization reporting or ownership of the account. Insert null value if the cost center is not carried in the deposit record.	This field ties to the general ledger accounts.	Character (20).
12. DP__Dep__Type	Deposit Type Indicator The type of deposit by office location. Possible values are: • D = Deposit (Domestic). • F = Foreign Deposit.	A deposit—also called a ''domestic deposit''—includes only deposit liabilities payable in the United States, typically those deposits maintained in a domestic office of an insured depository institution, as defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l)). A foreign deposit is a deposit liability in a foreign branch payable solely at a foreign branch or branches.	Character (1).
13. DP__Currency__Type	Currency Type The ISO 4217 currency code.		Character (3).

Field name	Field description	Comments	Format
14. DP__Ownership__Ind	Customer Ownership Indicator ... The type of ownership at the account level. Possible values are: • S = Single. • J = Joint Account. • P = Partnership account. • C = Corporation. • B = Brokered Deposits. • I = IRA Accounts. • U = Unincorporated Association. • R = Revocable Trust. • IR = Irrevocable Trust. • G = Government Accounts. • E = Employee Benefit Plan Accounts. • O = Other.	*Single:* Accounts owned by an individual and those accounts held as Minor Accounts, Estate Accounts, Non-Minor Custodian/Guardian Accounts, Attorney in Fact Accounts and Sole Proprietorships. *Joint Account:* Accounts owned by two or more individuals, but does not include the ownership of a Payable on Death Account or Trust Account. *Partnership Account:* Accounts owned by a Partnership. *Corporation:* Accounts owned by a Corporation (e.g. Inc., L.L.C., or P.C.). *Brokered Deposits:* Accounts placed by a deposit broker who acts as an intermediary for the actual owner or sub-broker. *IRA Accounts:* Accounts for which the owner has the right to direct how the funds are invested including Keoghs and other Self-Directed Retirement Accounts. *Unincorporated Association:* An account owned by an association of two or more persons formed for some religious, educational, charitable, social or other non-commercial purpose. *Revocable Trusts:* Including PODs and formal revocable trusts (e.g. Living Trusts, Intervivos Trusts or Family Trusts). *Irrevocable Trusts:* Accounts held by a trust established by statute or written trust in which the grantor relinquishes all power to revoke the trust. *Government Accounts:* Accounts owned by a government entity (e.g. City, State, County or Federal government entities and their sub-divisions). *Employee Benefit Plan:* Accounts established by the administrator of an Employee Benefit Plan including defined contribution, defined benefit and employee welfare plans. *Other Accounts:* Accounts owned by an entity not described above.	Character (2).
15. DP__Prod__Cat	Product Category ..... The product classification. Possible values are: • DDA = Non-Interest Bearing Checking accounts. • NOW = Interest Bearing Checking accounts. • MMA = Money Market Deposit Accounts. • SAV = Other savings accounts.	Product Category is sometimes referred to as ''application type'' or ''system type''.	Character (3).

Field name	Field description	Comments	Format
	• CDS = Time Deposit accounts and Certificate of Deposit accounts, including any accounts with specified maturity dates that may or may not be renewable.		
16. DP__Stat__Code	Status Code Status or condition of the account. Possible values are: • O = Open. • D = Dormant. • I = Inactive. • E = Escheatment. • A = Abandoned. • C = Closing. • R = Restricted/Frozen/Blocked.		Character (1).
17. DP__Acct__Title—1	Account Title Line 1 Account styling or titling of the account.	These data will be used to identify the owners and beneficiaries of the account.	Character (100).
18. DP__Acct__Title—2	Account Title Line 2 If available, the second account title line.		Character (100).
19. DP__Acct__Title—3	Account Title Line 3 If available, the third account title line.		Character (100).
20. DP__Acct__Title—4	Account Title Line 4 If available, the fourth account title line.		Character (100).
21. DP__Street__Add__Ln—1	Street Address Line 1 The current account statement mailing address of record.		Character (100).
22. DP__Street__Add__Ln—2	Street Address Line 2 If available, the second mailing address line.		Character (100).
23. DP__Street__Add__Ln—3	Street Address Line 3 If available, the third mailing address line.		Character (100).
24. DP__City	City The city associated with the mailing address.		Character (50).
25. DP__State	State The state abbreviation associated with the mailing address.	Use a two-character state code (official U.S. Postal Service abbreviations).	Character (2).
26. DP__ZIP	ZIP The ZIP + 4 code associated with the mailing address.	If the '' + 4'' code is not available provide only the 5-digit ZIP code. Hyphens are optional in this field.	Character (10).
27. DP__Country	Country The country associated with the mailing address.	Provide the country name or the standard IRS country code.	Character (10).
28. DP__NA__Line—1	Name/Address Line 1 Alternate name/address format for the current account statement mailing address of record, first line.	Fields 28–33 are to be used if address data are not parsed to populate Fields 17–27.	Character (100).
29. DP__NA__Line—2	Name/Address Line 2 Alternate name/address format, second line.		Character (100).
30. DP__NA__Line—3	Name/Address Line 3 Alternate name/address format, third line.		Character (100).
31. DP__NA__Line—4	Name/Address Line 4 Alternate name/address format, fourth line.		Character (100).
32. DP__NA__Line—5	Name/Address Line 5 Alternate name/address format, fifth line.		Character (100).
33. DP__NA__Line—6	Name/Address Line 6 Alternate name/address format, sixth line.		Character (100).

Field name	Field description	Comments	Format
34. DP__Cur__Bal	Current Balance The current balance in the account at the end of business on the effective date of this file.	This balance should not be reduced by float or holds. For CDs and time deposits, the balance should reflect the principal balance plus any interest paid and available for withdrawal not already included in the principal (do not include accrued interest). The total of all current balances in this file should reconcile to the total deposit trial balance totals or other summary reconciliation of deposits performed by the institution.	Decimal (14,2).
35. DP__Int__Rate	Interest Rate The current interest rate in effect for interest bearing accounts.	Interest rate should be expressed in decimal format, i.e., 2.0% should be represented as 0.020000000.	Decimal (10,9).
36. DP__Acc__Int	Accrued Interest The amount of interest that has been earned but not yet paid to the account as of the date of the file.		Decimal (14,2).
37. DP__Lst__Int__Pd	Date Last Interest Paid The date through which interest was last paid to the account.		Date (YYYYMMDD).
38. DP__Lst__Deposit	Date Last Deposit The date of the last deposit transaction posted to the account.	For example, a deposit that included checks and/or cash.	Date (YYYYMMDD).
39. DP__Int__Term__No	Interest Term Number The number of months in the current interest term.		Decimal (3,0).
40. DP__Nxt__Mat	Date of Next Maturity For CD and time deposit accounts, the next date the account is to mature.	For non-renewing CDs that have matured and are waiting to be redeemed this date may be in the past.	Date (YYYYMMDD).
41. DP__Open__DT	Account Open Date The date the account was opened.	If the account had previously been closed and re-opened, this should reflect the most recent re-opened date.	Date (YYYYMMDD).
42. DP__Sweep__Code	Sweep Code Indicates if the account is a sweep account. Possible values are: • Y = Yes. • N = No.		Character (1).
43. DP__Hold__To__Post	Full Hold on the account: Indicator if all postings to this account are restricted. Possible values are: • Y = Yes. • N = No.		Character (1).
44. DP__Issue__Val__Amt	Issued Value Amount The value of the current CD when issued.	For CDs only.	Decimal (14,2).
45. DP__Int__CD__Cde	Type of Interest for CD Possible values are: • C = Rate Change Allowed. • N = Rate Change Not Allowed. • R = Change Rate to Default at Renewal. • T = Rate Change Allowed Only During the Term.	For CDs only.	Character (1).

Field name	Field description	Comments	Format
46. DP__IRA__Cde	IRA Code The type of IRA. Possible values are: • C = Corporate Retirement • E = Educational IRA. • I = IRA Account. • K = Keogh Account. • R = Roth IRA Account. • S = SEP Account. • T = Transitional Roth IRA. • V = Versa Account. • H = Health Savings Account.	Optional code field to be used if available to help further identify the types of IRA accounts.	Character (1).
47. DP__Deposit__Class__Type	Deposit Class Type The deposit class. Possible values are: • RTL = Retail. • FED = Federal government. • STATE = State government. • COMM = Commercial. • CORP = Corporate. • BANK = Bank Owned. • DUE TO = Other Banks.	The institution may also use more or fewer class types.	Character (10).
48. DP__Product__Class__Cde	Deposit Class Codes The deposit class codes. Possible values are: RTL • 1 = Payable on Death. • 2 = Individual. • 3 = Living Trust—Intervivos or Family. • 4 = Irrevocable Trust (includes Educational IRAs). • 5 = Estate. • 6 = Attorney in Fact. • 7 = Minor—(includes all variations of Uniform Gifts to Minor Accounts). • 8 = Bankruptcy Personal. • 9 = Pre-Need Burial. • 10 = Escrow. • 11 = Representative Payee/Beneficiary. • 12 = Sole Proprietorship. • 13 = Joint. • 14 = Non-Minor Custodian/Guardian. • 15 = Other Retail.	These Product Class codes are used in conjunction with the Deposit Class Types in field 51. This field is to be used in concert with fields 12 and 13 identified above to enable the financial institution to capture more detailed information concerning account types. It is the intent of the FDIC to have the financial institution map its detailed account types to the codes identified in this field. The institution may also use additional codes, but in this event the institution must supply the detailed description and code value for each additional code used. If no additional account product type detail is available then this field should be left blank.	Character (2).

Field name	Field description	Comments	Format
	FED • 16 = FHA. • 17 = Federal Government. STATE • 18 = City. • 19 = State. • 20 = County, Clerk of Court. • 21 = Other State. COMMERCIAL • 22 = Business Escrow. • 23 = Bankruptcy. • 24 = Club. • 25 = Church. • 26 = Unincorporated Association. • 27 = Unincorporated Non-Profit. • • 28 = Other Commercial. CORPORATION • 29 = Business Trust. • 30 = Business Agent. • 31 = Business Guardian. • 32 = Incorporated Association. • 33 = Incorporated Non-Profit. • 33 = Incorporated Non-Profit. • 34 = Corporation. • 35 = Corporate Partnership. • 36 = Corporate Partnership Trust. • 37 = Corporate Agent. • 38 = Corporate Guardian. • 39 = Pre-Need Funeral Trust. • 40 = Limited Liability Incorporation. • 41 = LLC partnership. • 42 = Lawyer Trust. • 43 = Realtor Trust. • 44 = Other Corporation. BANK • 45 = Certified & Official Checks, Money Orders, Loan Disbursements Checks, and Expense Checks. • 46 = ATM Settlement. • 47 = Other Bank Owned Accounts. DUE TO (Other Banks) • 48 = Due to U.S. Banks. • 49 = Due to U.S. Branches of Foreign Banks. • 50 = Due to Other Depository Institutions. • 51 = Due to Foreign Banks. • 52 = Due to Foreign Branches of U.S. banks. • 53 = Due to Foreign Governments and Official Institutions.		

[73 FR 41197, July 17, 2008]

APPENDIX D TO PART 360—SWEEP/AUTOMATED CREDIT ACCOUNT FILE STRUCTURE

This is the structure of the data file to provide information to the FDIC on funds residing in investment vehicles linked to each non-closed deposit account or sub-account: (1) Involved in sweep activity where the sweep investment vehicle is not a deposit and is reflected on the books and records of the covered institution or (2) which accepts automated credits. A single record should be used for each instance where funds affiliated with the deposit account are held in an alternative investment vehicle. For any alternative investment vehicle, a separate account may or may not exist. If an account

exists for the investment vehicle, it should be noted in the record. If no account exists, then a null value for the Sweep/Automated Credit Account Identifiers should be provided, but the remainder of the data fields defined below should be populated.

For data provided in the Sweep/Automated Credit Account File, the total account balances and the number of accounts must be reconciled to subsidiary system control totals. The file will be in a tab- or pipe-delimited ASCII format. The files will be encrypted using an FDIC-supplied algorithm. The FDIC will transmit the encryption algorithm over FDIC*connect*.

Field name	Field description	Comments	Format
1. DP__Acct__Identifier	Account Identifier The primary field used to identify the account from which funds are swept or debited. The field may be the Account number.	The Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
2. DP__Acct__Identifier—2	Account Identifier—2 If necessary, the second element used to identify the account from which funds are swept or debited.		Character (25).
3. DP__Acct__Identifier—3	Account Identifier—3 If necessary, the third element used to identify the account from which funds are swept or debited.		Character (25).
4. DP__Acct__Identifier—4	Account Identifier—4 If necessary, the fourth element used to identify the account from which funds are swept or debited.		Character (25).
5. DP__Acct__Identifier—5	Account Identifier—5 If necessary, the fifth element used to identify the account from which funds are swept or debited.		Character (25).
6. DP__Sub__Acct__Identifier	Sub-Account Identifier If available, the sub-account identifier for the account.	The Sub-Account Identifier may identify separate deposits tied to this account where there are different processing parameters such as interest rates or maturity dates, but all owners are the same.	Character (25).
7. SW__Acct__Identifier	Sweep/Automated Credit Account Identifier. The primary field used to identify the account into which funds are swept or credited. This field may be the Account Number.	Funds may be swept into an investment vehicle not represented as an account. In this case this field should be a null value. The Sweep/Automated Credit Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
8. SW__Acct__Identifier—2	Sweep/Automated Credit Account Identifier—2. If necessary, the second element of the account identifier used to identify the account into which funds are swept or credited.		Character (25).
9. SW__Acct__Identifier—3	Sweep/Automated Credit Account Identifier—3. If necessary, the third element of the account identifier used to identify the account into which funds are swept or credited.		Character (25).

Field name	Field description	Comments	Format
10. SW__Acct__Identifier—4	Sweep/Automated Credit Account Identifier—4. If necessary, the fourth element of the account identifier used to identify the account into which funds are swept or credited.		Character (25).
11. SW__Acct__Identifier—5	Sweep/Automated Credit Account Identifier–5. If necessary, the fifth element of the account identifier used to identify the account into which funds are swept or credited.		Character (25).
12. SW__Sub__Acct__Identifier	Sweep/Automated Credit Sub-Account Identifier. If available, the sub-account identifier for the account.		Character (25).
13. SW__Type	Sweep/Automated Credit Type	The investment vehicle. Possible values are: • RE = Repurchase Agreement. • DD = Deposit Held in a Domestic Office. • DF = Deposit Held in a Foreign Office. • IBF = Deposit Held in an International Banking Facility. • AI = Deposit Held in an affiliated depository institution. • FF = Federal Funds. • CP = Commercial Paper. • OT = Other.	Character (3).
14. SW__Inv__Amount	Fund Balance in Sweep/Automated Credit Investment Vehicle. Dollar amount residing in the investment vehicle.		Decimal (14,2).
15. SW__Currency__Type	Currency Type The ISO 4217 currency code.		Character (3).
16. SW__Hold__Amount	FDIC Hold Amount Amount of FDIC hold on funds residing in the investment vehicle.		Decimal (14,2).
17. SW__Sweep__Interval	Sweep/Investment Frequency The frequency with which the sweep or investment occurs. Possible values are: • D = Daily. • W = Weekly. • BW = Bi-Weekly. • M = Monthly. • BM = Bi-Monthly. • Q = Quarterly. • O = Other.		Character (2).

[73 FR 41197, July 17, 2008]

APPENDIX E TO PART 360—HOLD FILE STRUCTURE

This is the structure of the data file to provide information to the FDIC for each legal or collateral hold placed on a deposit account or sub-account. If data or information are not maintained or do not apply, a null value in the appropriate field should be indicated. The file will be in a tab-or pipe-delimited ASCII format. Each file name will contain the institution's FDIC Certificate Number, an indication that it is a hold data file type and the date of the extract. The files will be encrypted using an FDIC-supplied algorithm. The FDIC will transmit the encryption algorithm over FDIC*connect*.

Field name	Field description	Comments	Format
1. DP__Acct__Identifier	Account Identifier The primary field used to identify the account. This field may be the Account Number.	The Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
2. DP__Acct__Identifier—2	Account Identifier—2 If necessary, the second element used to identify the account.		Character (25).
3. DP__Acct__Identifier—3	Account Identifier—3 If necessary, the third element used to identify the account.		Character (25).
4. DP__Acct__Identifier—4	Account Identifier—4 If necessary, the fourth element used to identify the account.		Character (25).
5. DP__Acct__Identifier—5	Account Identifier—5 If necessary, the fifth element used to identify the account.		Character (25).
6. DP__Sub__Acct__Identifier	Sub-Account Identifier If available, the sub-account identifier for the account.	The Sub-Account Identifier may identify separate deposits tied to this account where there are different processing parameters such as interest rates or maturity dates, but all owners are the same.	Character (25).
7. HD__Hold__Amt	Hold Amount Dollar amount of the hold.		Decimal (14,2).
8. HD__Hold__Reason	Hold Reason Reason for the hold. Possible values are: • LN = Loan Collateral Hold. • LG = Court Order Hold. • FD = FDIC hold. • OT = Other (do not include daily operational type holds).		Character (2).
9. HD__Hold__Desc	Hold Description Description of the hold available on the system.		Character (255).
10. HD__Hold__Start__Dt	Hold Start Date The date the hold was initiated.		Date (YYYYMMDD).
11. HD__Hold__Exp__Dt	Hold Expiration Date The date the hold is to expire.		Date (YYYYMMDD)

[73 FR 41197, July 17, 2008]

Appendix F to Part 360—Customer File Structure

This is the structure of the data file to provide to the FDIC information related to each customer who has an account or sub-account reported in the deposit data or sweep/automated credit account file. If data or information are not maintained or do not apply, a null value in the appropriate field should be indicated. The file will be in a tab-or pipe-delimited ASCII format. Each file name will contain the institution's FDIC Certificate Number, an indication that it is a customer file type and the date of the extract. The files will be encrypted using an FDIC-supplied algorithm. The FDIC will transmit the encryption algorithm over FDIC*connect*.

Note: Each record must contain the customer's name and permanent legal address. Fields 4–12 relate to the customer name for individuals only. Fields 13–14 relate to the customer name for entities other than individuals. Some systems provide for separate fields for name, street address, city, state, ZIP, and country, all of which are parsed out. Others systems may simply provide multiple lines for name, street address, city, state, ZIP, with no distinction. In this case, certain name and address data elements must be parsed and provided in the appropriate fields.

Field name	Field description	Comments	Format
1. CS__Cust__Identifier	Customer Identifier		Character (25).

Field name	Field description	Comments	Format
	The unique field used by the institution to identify the customer.		
2. CS__Tax__ID	Customer Tax ID Number The tax identification number on record for the customer.	Hyphens are optional in this field.	Character (11).
3. CS__Tax__Code	Customer Tax ID Code The type of the tax identification number of the customer. Possible values are: • S = Social Security Number. • T = Federal Tax Identification Number. • O = Other.		Character (1).
4. CS__Name__Line—1	Individual Customer Name Line 1 If available, the free-form name narrative of the customer, first line.		Character (100).
5. CS__Name__Line—2	Individual Customer Name Line 2 If available, the free-form name narrative of the customer, second line.		Character (100).
6. CS__Last__Name	Individual Customer Last Name For individuals, the customer's last name.	This field is required if the data element is in the institution's records. If necessary, data should be parsed from fields 4 or 5 to obtain this element.	Character (50).
7. CS__First__Name	Individual Customer First Name For individuals, the customer's first name.	This field is required if the data element is in the institution's records. If necessary, data should be parsed from fields 4 or 5 to obtain this element.	Character (50).
8. CS__Middle__Name	Individual Customer Middle Name For individuals, the customer's middle name.	This field is required if the data element is in the institution's records. If necessary, data should be parsed from fields 4 or 5 to obtain this element.	Character (50).
9. CS__Suffix	Individual Professional Suffix For individuals, the suffix designating customer's academic, professional or honorary status, such as Esq., Ph.D., M.D., and D.D.S.	This field is required if the data element is in the institution's records. If necessary, data should be parsed from fields 4 or 5 to obtain this element.	Character (20).
10. CS__Generation	Individual Generational Suffix For individuals, the suffix designating the customer's generational status, such as Jr., Sr. or III.	This field is required if the data element is in the institution's records. If necessary, data should be parsed from fields 4 or 5 to obtain this element.	Character (10).
11. CS__Prefix	Individual Customer Prefix For individuals, the prefix of the customer, such as Rev., Dr., Mrs., Mr. or Ms.	This field is required if the data element is in the institution's records. If necessary, data should be parsed from fields 4 or 5 to obtain this element.	Character (10).
12. CS__Birth__Dt	Individual Customer Birth Date For individuals, the customer's birth date.		Date (YYYYMMDD).
13. CS__Ent__Name__Line—1	Entity Name Line 1 For entities other than individuals, the free-form name narrative of the customer, first line.		Character (100).
14. CS__Ent__Name__Line—2	Entity Name Line 2 If available for entities other than individuals, the free-form name narrative of the customer, second line.		Character (100).
15. CS__Nar__Addr__Line—1	Customer Address Line 1 If available, the free-form permanent legal address narrative for the customer, line one.		Character (100).
16. CS__Nar__Addr__Line—2	Customer Address Line 2 If available, the free-form permanent legal address narrative of the customer, line two.		Character (100).
17. CS__Nar__Addr__Line—3	Customer Address Line 3		Character (100).

Field name	Field description	Comments	Format
	If available, the free-form permanent legal address narrative of the customer, line three.		
18. CS__Street__Address—1	Street Address Line 1 The permanent legal address of the customer, line one.	This field is required. If necessary, data should be parsed from fields 16 or 17 to obtain this element.	Character (100).
19. CS__Street__Address—2	Street Address Line 2 The permanent legal address of the customer, line two.	This field is required. If necessary, data should be parsed from fields 16 or 17 to obtain this element.	Character (100).
20. CS__City	City The city associated with the permanent legal address.	This field is required. If necessary, data should be parsed from fields 16 or 17 to obtain this element.	Character (25).
21. CS__State	State The state abbreviation associated with the permanent legal address.	This field is required. If necessary, data should be parsed from fields 16 or 17 to obtain this element. Use a two-character state code (official U.S. Postal Service abbreviations).	Character (2).
22. CS__ZIP	ZIP The ZIP + 4 code associated with the permanent legal address.	This field is required. If necessary, data should be parsed from fields 16 or 17 to obtain this element. If the '' + 4'' code is not available, provide only the 5-digit ZIP code. Hyphens are optional in this field.	Character (10).
23. CS__Country	Country The country associated with the permanent legal address.	This field is required. If necessary, data should be parsed from fields 16 or 17 to obtain this element. Provide the name of the country or the standard IRS country code.	Character (10).
24. CS__Telephone	Customer Telephone Number The telephone number on record for the customer.		Character (20).
25. CS__Email	Customer Email Address The e-mail address on record for the customer.		Character (150).

[73 FR 41197, July 17, 2008]

APPENDIX G TO PART 360—DEPOSIT-CUSTOMER JOIN FILE STRUCTURE

This is the structure of the data file to provide to the FDIC information necessary to link the records in the deposit and customer files. If data or information are not maintained or do not apply, a null value in the appropriate field should be indicated. The file will be in a tab- or pipe-delimited ASCII format. Each file name will contain the institution's FDIC Certificate Number, an indication that it is a join file type and the date of the extract. The files will be encrypted using an FDIC-supplied algorithm. The FDIC will transmit the encryption algorithm over FDIC*connect*.

The deposit-customer join file will have one or more records for each deposit account, depending on the number of relationships to each account. A simple individual account, for example, will be associated with only one record in the deposit-customer join file indicating the owner of the account. A joint account with two owners will be associated with two records in the deposit-customer join file, one for each owner. The deposit-customer join file will contain other records associated with a deposit account to designate, among other things, beneficiaries, custodians, trustees and agents. This methodology allows the FDIC to know all of the possible relationships for an individual account and also whether a single customer is involved in many accounts.

Field name	FDIC field description	Comments	Format
1. CS__Cust__Identifier	Customer Identifier		Character (25).

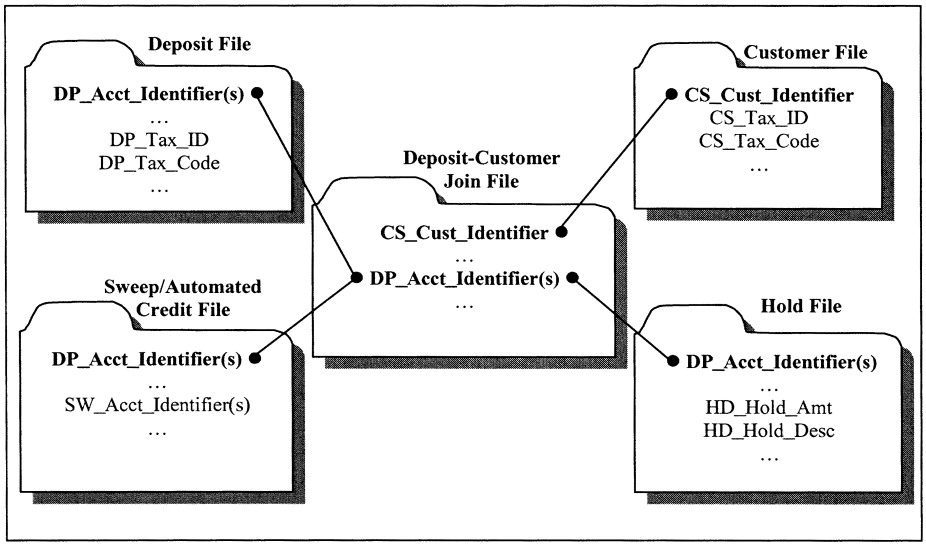
Field name	FDIC field description	Comments	Format
	The unique field used by the institution to identify the customer.		
2. DP__Acct__Identifier	Account Identifier The primary field used to identify the account. This field may be the Account Number.	The Account Identifier may be composed of more than one physical data element. If multiple fields are required to identify the account, the data should be placed in separate fields and the FDIC instructed how these fields are combined to uniquely identify the account.	Character (25).
3. DP__Acct__Identifier—2	Account Identifier—2 If necessary, the second element used to identify the account.		Character (25).
4. DP__Acct__Identifier—3	Account Identifier—3 If necessary, the third element used to identify the account.		Character (25).
5. DP__Acct__Identifier—4	Account Identifier—4 If necessary, the fourth element used to identify the account.		Character (25).
6. DP__Acct__Identifier—5	Account Identifier—5 If necessary, the fifth element used to identify the account.		Character (25).
7. DP__Sub__Acct__Identifier	Sub-Account Identifier If available, the sub-account identifier for the account.	The Sub-Account Identifier may identify separate deposits tied to this account where there are different processing parameters such as interest rates or maturity dates, but all owners are the same.	Character (25).
8. CS__Rel__Code	Relationship Code The code indicating how the customer is related to the account. Possible values are: • ADM = Administrator. • AGT = Agent/Representative. • ATF = Attorney For. • AUT = Authorized Signer. • BNF = Beneficiary. • CSV = Conservator. • CUS = Custodian. • DBA = Doing Business As. • EXC = Executor. • GDN = Guardian. • MIN = Minor. • PRI = Primary Owner. • SEC = Secondary Owner(s). • TTE = Trustee.	Institutions must map their relationship codes to the codes in the list to the left. If the institution maintains more relationships they must supply the additional relationship codes being utilized along with the code definition.	Character (5).
9. CS__Bene__Code	Beneficiary Type Code If the customer is considered a beneficiary, the type of account associated with this customer. Possible values are: • I = IRA. • T = Trust—Irrevocable. • R = Trust—Revocable. • M = Uniform Gift to Minor. • P = Payable on Death. • O = Other.	This includes beneficiaries on retirement accounts, trust accounts, minor accounts, and payable-on-death accounts.	Character (1).

[73 FR 41197, July 17, 2008]

APPENDIX H TO PART 360—POSSIBLE FILE COMBINATIONS FOR DEPOSIT DATA

A covered institution must provide deposit data using separate deposit, sweep/automated credit, hold, customer, and deposit-customer join files. The simplest file structure involves providing one of each file. This basic file format is shown in Figure 1.

Figure 1. Basic File Structure.



Multiple combinations of deposit, sweep/automated credit, hold, customer, and deposit-customer join files are permissible, but only in the following circumstances:

1. Each separate deposit file must have companion sweep/automated credit and hold files covering the same deposit accounts.

2. A single customer file may be submitted covering customers affiliated with deposit accounts in one or more deposit files as long as the customer file contains information on all of the customers affiliated with the deposit files.

3. Several customer files may be submitted as long as each separate customer file contains information on all of the customers affiliated with the associated deposit files.

Figure 2 shows a permissible file configuration using a single Customer File affiliated with Deposit File A and Deposit File B. As required, Deposit File A has a companion Sweep/Automated Credit File A and Hold File A. The same is true for Deposit File B.

Another permissible combination of files is shown in Figure 3, which is a variation of the basic data file structure shown in Figure 1.

Figure 2. Multiple Deposit Files, Single Customer File.

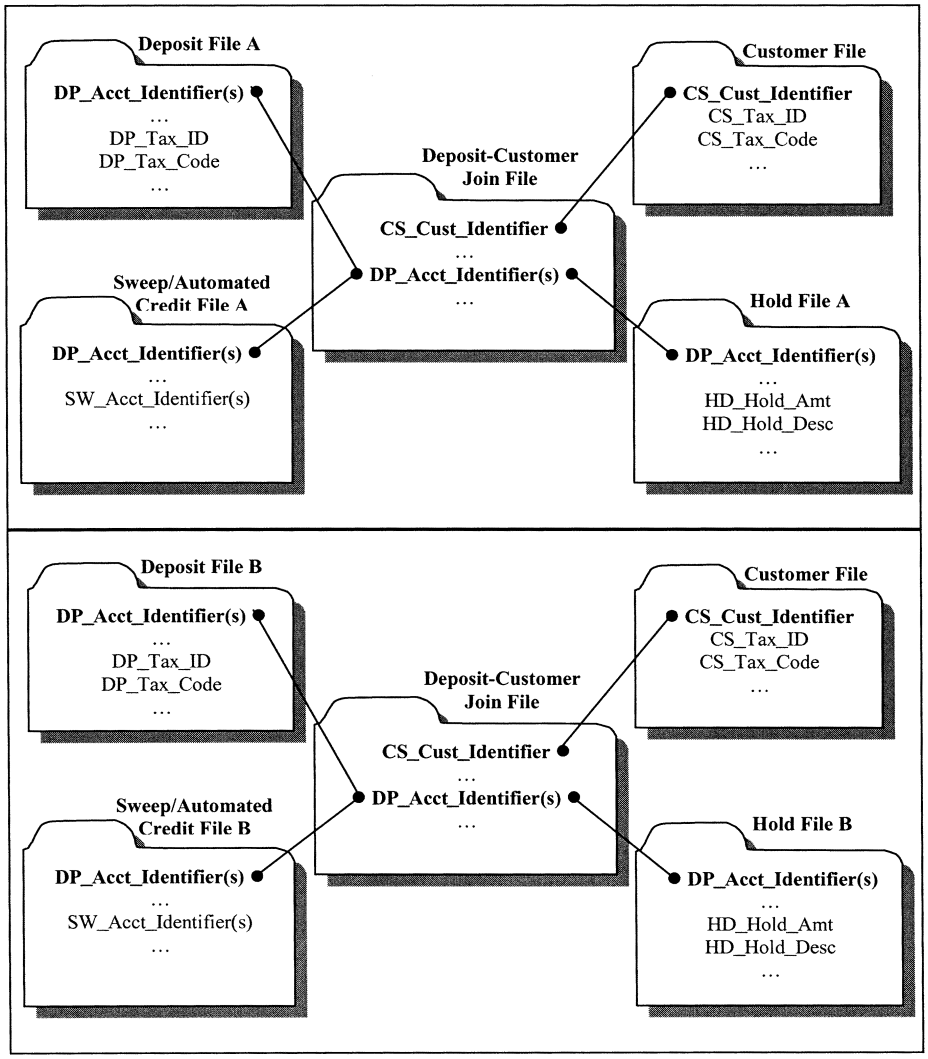
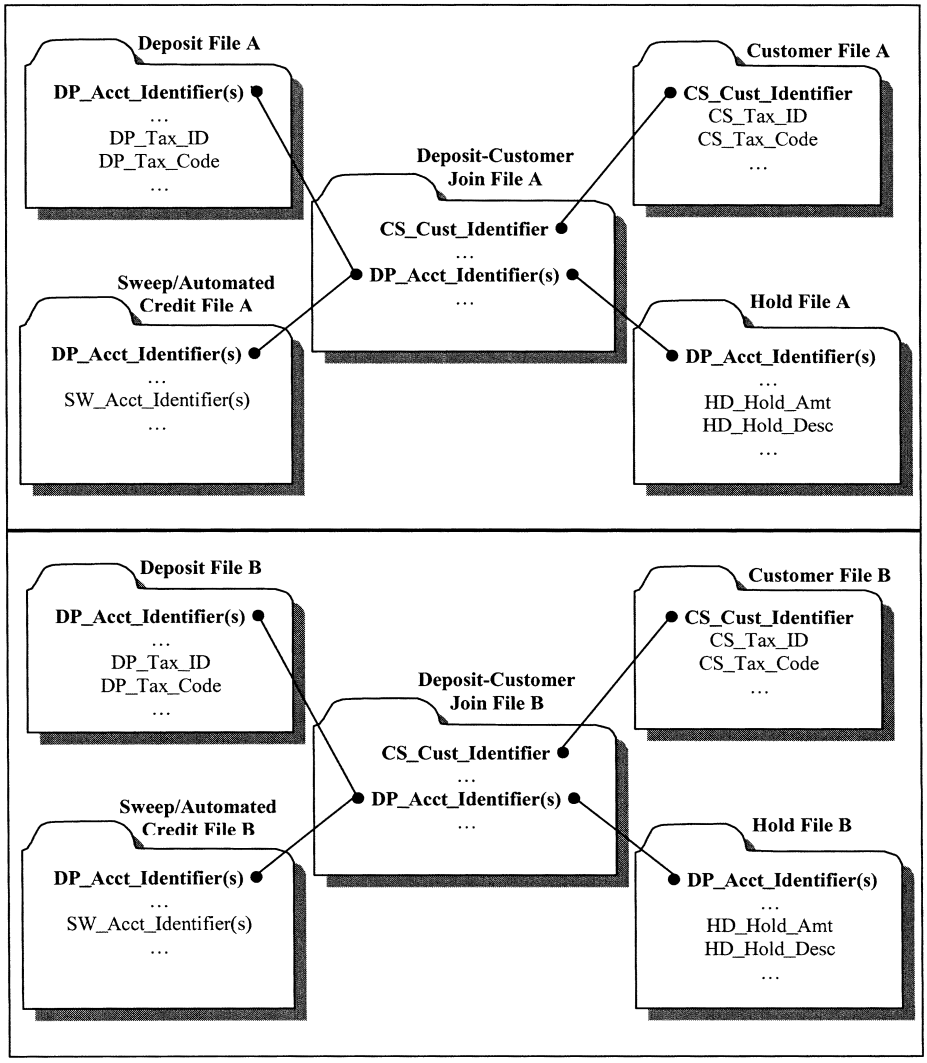


Figure 3. Multiple File Sets.



[73 FR 41197, July 17, 2008]

PART 361—MINORITY AND WOMEN OUTREACH PROGRAM CONTRACTING

Sec.

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 Minority and Women Inclusion (OMWI) 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 OMWI 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 OMWI 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.

[65 FR 31253, May 17, 2000, as amended at 80 FR 62445, Oct. 16, 2015]

§ 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 OMWI, the coordinators will report to the OMWI 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.

[65 FR 31253, May 17, 2000, as amended at 80 FR 62445, Oct. 16, 2015]

PART 362—ACTIVITIES OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

Subpart A—Activities of Insured State Banks

Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

Subpart C—Activities of Insured State Savings Associations

Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

Subpart E—Financial Subsidiaries of Insured State Nonmember Banks

AUTHORITY: 12 U.S.C. 1816, 1818, 1819(a)(Tenth), 1828(j), 1828(m), 1828a, 1831a, 1831e, 1831w, 1843(l).

SOURCE: 63 FR 66326, Dec. 1, 1998, unless otherwise noted.

Subpart A—Activities of Insured State Banks

§ 362.1 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter, implements the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) that restrict and prohibit insured State banks and their subsidiaries from engaging in activities and investments that are not permissible for national banks and their subsidiaries. The phrase ''activity permissible for a national bank'' means any activity authorized for national banks under any statute including the National Bank Act (12 U.S.C. 21 *et seq.*), as well as activities recognized as permissible for a national bank in regulations, official circulars, bulletins, orders or written interpretations issued by the Office of the Comptroller of the Currency (OCC).

(b) This subpart does not cover the following activities:

(1) Activities conducted other than ''as principal,'' defined for purposes of this subpart as activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, or conducted as trustee, or in any substantially similar capacity. For example, this subpart does not cover acting solely as agent for the sale of insurance, securities, real estate, or travel services; nor does it cover acting as trustee, providing personal financial planning advice, or safekeeping services;

(2) Interests in real estate in which the real property is used or intended in good faith to be used within a reasonable time by an insured State bank or its subsidiaries as offices or related facilities for the conduct of its business or future expansion of its business or used as public welfare investments of a type permissible for national banks; and

(3) Equity investments acquired in connection with debts previously contracted (DPC) if the insured State bank does not hold the property for speculation and takes only such actions as would be permissible for a national bank's DPC. The bank must dispose of the property within the shorter of the period set by Federal law for national banks or the period allowed under State law. For real estate, national banks may not hold DPC for more than 10 years. For equity securities, national banks must generally divest

DPC as soon as possible consistent with obtaining a reasonable return.

(c) A subsidiary of an insured state bank may not engage in real estate investment activities that are not permissible for a subsidiary of a national bank unless the bank does so through a subsidiary of which the bank is a majority owner, is in compliance with applicable capital standards, and the FDIC has determined that the activity poses no significant risk to the appropriate deposit insurance fund. This subpart provides standards for majority-owned subsidiaries of insured state banks engaging in real estate investment activities that are not permissible for a subsidiary of a national bank.

(d) The FDIC intends to allow insured State banks and their subsidiaries to undertake only safe and sound activities and investments that do not present significant risks to the Deposit Insurance Fund and that are consistent with the purposes of Federal deposit insurance and other applicable law. This subpart does not authorize any insured State bank to make investments or to conduct activities that are not authorized or that are prohibited by either State or Federal law.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1028, Jan. 5, 2001; 71 FR 20527, Apr. 21, 2006]

§ 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 324 of this chapter for an insured State nonmember bank or insured state savings association. 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 324 of this chapter for an insured State nonmember bank or insured state savings association. 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.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1028, Jan. 5, 2001; 71 FR 20527, Apr. 21, 2006; 78 FR 55596, Sept. 10, 2013; 83 FR 17741, Apr. 24, 2018]

§ 362.3 Activities of insured State banks.

(a) *Equity investments*—(1) *Prohibited equity investments.* No insured State bank may directly or indirectly acquire or retain as principal any equity investment of a type that is not permissible for a national bank unless one of the exceptions in paragraph (a)(2) of this section applies.

(2) *Exceptions*—(i) *Equity investment in majority-owned subsidiaries.* An insured State bank may acquire or retain an equity investment in a subsidiary of which the bank is a majority owner, provided that the subsidiary is engaging in activities that are allowed pursuant to the provisions of or by application under § 362.4(b).

(ii) *Investments in qualified housing projects.* An insured State bank may invest as a limited partner in a partnership, or as a noncontrolling interest holder of a limited liability company, the sole purpose of which is to invest in the acquisition, rehabilitation, or new construction of a qualified housing project, provided that the bank's aggregate investment (including legally binding commitments) does not exceed, when made, 2 percent of total assets as of the date of the bank's most recent consolidated report of condition prior to making the investment. For the purposes of this paragraph (a)(2)(ii), *Aggregate investment* means the total book value of the bank's investment in the real estate calculated in accordance with the instructions for the preparation of the consolidated report of condition. *Qualified housing project* means residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment including any project that has received an award of low income housing tax credits under section 42 of the Internal Revenue Code (26 U.S.C. 42) (such as a reservation or allocation of credits) from a State or local housing credit agency. A residential real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code will qualify under this exception if 50 percent or more of the housing units are to be occupied by lower income persons. A project will be considered residential despite the fact that some portion of the total square footage of the project is utilized for commercial purposes, provided that such commercial use is not the primary purpose of the project. *Lower income* has the same meaning as ''low income'' and ''moderate income'' as defined for the purposes of § 345.12(n)(1) and (2) of this chapter.

(iii) *Grandfathered investments in common or preferred stock; shares of investment companies*—(A) *General.* An insured State bank that is located in a State which as of September 30, 1991, authorized investment in:

(*1*)(*i*) Common or preferred stock listed on a national securities exchange (listed stock); or

(*ii*) Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (registered shares); and

(*2*) Which during the period beginning on September 30, 1990, and ending on November 26, 1991, made or maintained an investment in listed stock or registered shares, may retain whatever lawfully acquired listed stock or registered shares it held and may continue to acquire listed stock and/or registered shares, provided that the bank files a notice in accordance with section 24(f)(6) of the Federal Deposit Insurance Act in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122 of this chapter. Approval will be granted only if the FDIC determines that acquiring or retaining the stock or shares does not pose a significant risk to the Deposit Insurance Fund. Approval may be subject to whatever conditions or restrictions the FDIC determines are necessary or appropriate.

(B) *Loss of grandfather exception.* The exception for grandfathered investments under paragraph (a)(2)(iii)(A) of this section shall no longer apply if the bank converts its charter or the bank or its parent holding company undergoes a change in control. If any of these events occur, the bank may retain its existing investments unless directed by the FDIC or other applicable authority to divest the listed stock or registered shares.

(C) *Maximum permissible investment.* A bank's aggregate investment in listed

stock and registered shares under paragraph (a)(2)(iii)(A) of this section shall in no event exceed, when made, 100 percent of the bank's tier one capital as measured on the bank's most recent consolidated report of condition (call report) prior to making any such investment. The lower of the bank's cost as determined in accordance with call report instructions or the market value of the listed stock and shares shall be used to determine compliance. The FDIC may determine when acting upon a notice filed in accordance with paragraph (a)(2)(iii)(A)(*2*) of this section that the permissible limit for any particular insured State bank is something less than 100 percent of tier one capital.

(iv) *Stock investment in insured depository institutions owned exclusively by other banks and savings associations.* An insured State bank may acquire or retain the stock of an insured depository institution if the insured depository institution engages only in activities permissible for national banks; the insured depository institution is subject to examination and regulation by a State bank supervisor; the voting stock is owned by 20 or more insured depository institutions, but no one institution owns more than 15 percent of the voting stock; and the insured depository institution's stock (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees) is owned only by insured depository institutions.

(v) *Stock investment in insurance companies*—(A) *Stock of director and officer liability insurance company.* An insured State bank may acquire and retain up to 10 percent of the outstanding stock of a corporation that solely provides or reinsures directors', trustees', and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions.

(B) *Stock of savings bank life insurance company.* An insured State bank located in Massachusetts, New York, or Connecticut may own stock in a savings bank life insurance company, provided that the savings bank life insurance company provides written disclosures to purchasers or potential purchasers of life insurance policies, other insurance products, and annuities that are consistent with the disclosures described in the Interagency Statement on the Retail Sale of Nondeposit Investment Products (FIL–9–94,[1] February 17, 1994) or any successor requirement which indicates that the policies, products, and annuities are not FDIC insured deposits, are not guaranteed by the bank and are subject to investment risks, including possible loss of the principal amount invested.

(b) *Activities other than equity investments*—(1) *Prohibited activities.* An insured State bank may not directly or indirectly engage as principal in any activity, that is not an equity investment, and is of a type not permissible for a national bank unless one of the exceptions in paragraph (b)(2) of this section applies.

(2) *Exceptions*—(i) *Consent obtained through application.* An insured State bank that meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency may conduct activities prohibited by paragraph (b)(1) of this section if the bank obtains the FDIC's prior written consent. Consent will be given only if the FDIC determines that the activity poses no significant risk to the 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.

(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

[1] Financial institution letters (FILs) are available in the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C. 20429.

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 separate and distinct from those of the remainder of the bank;

(4) The department is subject to State statute that requires its obligations, liabilities and expenses be satisfied only with the assets of the department; and

(5) The department informs its customers that only the assets of the department may be used to satisfy the obligations of the department.

[63 FR 66326, Dec. 1, 1998, as amended at 71 FR 20527, Apr. 21, 2006]

§ 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)(*1*) The bank meets the capital requirements of paragraph (e) of this section; and

(*2*) The subsidiary is an ''eligible subsidiary'' as described in paragraph (c)(2) of this section; or

(B) The bank submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter.

(ii) Continue to provide as principal title insurance, provided the bank was required before June 1, 1991, to provide title insurance as a condition of the bank's initial chartering under State law and neither the bank nor its parent holding company undergoes a change in control.

(iii) May continue to provide as principal insurance which is reinsured in whole or in part by the Federal Crop Insurance Corporation if the subsidiary was engaged in the activity on or before September 30, 1991.

(3) *Majority-owned subsidiaries' ownership of equity investments that represent a control interest in a company.* The FDIC has determined that investment in the following by a majority-owned subsidiary of an insured State bank does not represent a significant risk to the Deposit Insurance 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 change. Investment under this paragraph is authorized if:

(A) The majority-owned subsidiary controls the company;

(B) The bank meets the core eligibility criteria of paragraph (c)(1) of this section;

(C) The majority-owned subsidiary meets the core eligibility criteria of paragraph (c)(2) of this section (including any modifications thereof applicable under paragraph (b)(5)(i) of this section), or the company is a corporation meeting such criteria;

(D) The bank's transactions with the majority-owned subsidiary, and the bank's transactions with the company, comply with the investment and transaction limits of paragraph (d) of this section;

(E) The bank complies with the capital requirements of paragraph (e) of this section with respect to the majority-owned subsidiary and the company; and

(F) To the extent the company is engaged in securities activities authorized by paragraph (b)(5)(ii) of this section, the bank and the company comply with the additional requirements therein as if the company were a majority-owned subsidiary.

(ii) Equity securities of a company engaged in the following activities, if the majority-owned subsidiary controls the company or the company is controlled by insured depository institutions, and the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The FDIC consents that a majority-owned subsidiary may conduct such activity without first obtaining the FDIC's consent. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action:

(A) Any activity that is permissible for a national bank, including such permissible activities that may require the company to register as a securities broker;

(B) Acting as an insurance agency;

(C) Engaging in any activity permissible for an insured State bank under §362.3(b)(2)(iii) to the same extent permissible for the insured bank thereunder, so long as instruments held under this paragraph (b)(3)(ii)(C), paragraph (b)(7) of this section, and §362.3(b)(2)(iii) in the aggregate do not exceed the limit set by §362.3(b)(2)(iii);

(D) Engaging in any activity permissible for a majority-owned subsidiary of an insured State bank under paragraph (b)(6) of this section to the same extent and manner permissible for the majority-owned subsidiary thereunder; and

(4) *Majority-owned subsidiary's ownership of certain securities that do not represent a control interest*—(i) *Grandfathered investments in common or preferred stock and shares of investment companies.* Any insured State bank that has received approval to invest in common or preferred stock or shares of an investment company pursuant to §362.3(a)(2)(iii) may conduct the approved investment activities through a majority-owned subsidiary of the bank without any additional approval from the FDIC provided that any conditions or restrictions imposed with regard to the approval granted under §362.3(a)(2)(iii) are met.

(ii) *Bank stock.* An insured State bank may indirectly through a majority-owned subsidiary organized for such purpose invest in up to ten percent of the outstanding stock of another insured bank.

(5) *Majority-owned subsidiaries conducting real estate investment activities and securities underwriting.* The FDIC has determined that the following activities do not represent a significant risk to the Deposit Insurance 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)(ii), (v), (vi), and (xi) of this section need not be met if the bank's investment in the equity securities of the subsidiary does not exceed 2 percent of the bank's tier one capital; the bank has only one subsidiary engaging in real estate investment activities; and the bank's total investment in the subsidiary does not include any extensions of credit from the bank to the subsidiary, any debt instruments issued by the subsidiary, or any other transaction originated by the bank that is used to benefit the subsidiary.

(ii) *Securities activities.* Engage in the public sale, distribution or underwriting of securities that are not permissible for a national bank under section 16 of the Banking Act of 1933 (12 U.S.C. 24 Seventh), provided that the 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 requirement of paragraph (b)(6)(i)(B) of this section; or

(*2*) Divest itself of all interest in the property.

(7) *Acquiring and retaining adjustable rate and money market preferred stock and similar instruments.* The FDIC has determined it does not present a significant risk to the Deposit Insurance 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), so long as instruments held under this paragraph, paragraph (b)(3)(ii)(C) of this section, and §362.3(b)(2)(iii) in the aggregate do not exceed the limit set by §362.3(b)(2)(iii). A majority-owned subsidiary may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action.

(c) *Core eligibility requirements.* If specifically required by this part or by FDIC order, any state-chartered depository institution that wishes to be eligible and continue to be eligible to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank must be an ''eligible depository institution'' and the subsidiary must be an ''eligible subsidiary''.

(1) A state-chartered depository institution is an ''eligible depository institution'' if it:

(i) Has been chartered and operating for three or more years, unless the appropriate regional director (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.

(3) *Transaction requirements*—(i) *Arm's length transaction requirement.* With the exception of giving the subsidiary immediate credit for uncollected items received in the ordinary course of business, an insured State bank may not carry out any of the following transactions with a subsidiary subject to this paragraph (d) unless the transaction is on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with unaffiliated parties:

(A) Make an investment in the subsidiary;

(B) Purchase from or sell to the subsidiary any assets (including securities);

(C) Enter into a contract, lease, or other type of agreement with the subsidiary;

(D) Pay compensation to a majority-owned subsidiary or any person or company who has an interest in the subsidiary; or

(E) Engage in any such transaction in which the proceeds thereof are used for the benefit of, or are transferred to, the subsidiary.

(ii) *Prohibition on purchase of low quality assets.* An insured State bank is prohibited from purchasing a low quality asset from a subsidiary subject to this paragraph (d). For purposes of this subsection, ''low quality asset'' means:

(A) An asset classified as ''substandard'', ''doubtful'', or ''loss'' or treated as ''other assets especially mentioned'' in the most recent report of examination of the bank;

(B) An asset in a nonaccrual status;

(C) An asset on which principal or interest payments are more than 30 days past due; or

(D) An asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(iii) *Insider transaction restriction.* Neither the insured State bank nor the subsidiary subject to this paragraph (d) may enter into any transaction (exclusive of those covered by §337.3 of this chapter) with the bank's executive officers, directors, principal shareholders or related interests of such persons which relate to the subsidiary's activities unless:

(A) The transactions are on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with persons not affiliated with the insured State bank; or

(B) The transactions are pursuant to a benefit or compensation program that is widely available to employees of the bank, and that does not give preference to the bank's executive officers, directors, principal shareholders or related interests of such persons over other bank employees.

(iv) *Anti-tying restriction.* Neither the insured State bank nor the majority-owned subsidiary may require a customer to either buy any product or use any service from the other as a condition of entering into a transaction.

(4) *Collateralization requirements.* (i) An insured State bank is prohibited from making an investment in a subsidiary subject to this paragraph (d) unless such transaction is fully-collateralized at the time the transaction is entered into. No insured State bank may accept a low quality asset as collateral. An extension of credit is fully collateralized if it is secured at the time of the transaction by collateral having a market value equal to at least:

(A) 100 percent of the amount of the transaction if the collateral is composed of:

(*1*) Obligations of the United States or its agencies;

(*2*) Obligations fully guaranteed by the United States or its agencies as to principal and interest;

(*3*) Notes, drafts, bills of exchange or bankers acceptances that are eligible for rediscount or purchase by the Federal Reserve Bank; or

(*4*) A segregated, earmarked deposit account with the insured State bank;

(B) 110 percent of the amount of the transaction if the collateral is composed of obligations of any State or political subdivision of any State;

(C) 120 percent of the amount of the transaction if the collateral is composed of other debt instruments, including receivables; or

(D) 130 percent of the amount of the transaction if the collateral is composed of stock, leases, or other real or personal property.

(ii) An insured State bank may not release collateral prior to proportional payment of the extension of credit; however, collateral may be substituted if there is no diminution of collateral coverage.

(5) *Investment and transaction limits extended to insured State bank subsidiaries.* For purposes of applying paragraphs (d)(2) through (d)(4) of this section, any reference to ''insured State bank'' means the insured State bank and any subsidiaries of the insured State bank which are not themselves subject under this part or FDIC order to the restrictions of this paragraph (d).

(e) *Capital requirements.* If specifically required by this part or by FDIC order, any insured State bank that wishes to conduct or continue to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank must:

(1) Be well-capitalized after deducting from its tier one capital the investment in equity securities of the subsidiary as well as the bank's pro rata share of any retained earnings of the subsidiary;

(2) Reflect this deduction on the appropriate schedule of the bank's consolidated report of income and condition; and

(3) Use such regulatory capital amount for the purposes of the bank's assessment risk classification under part 327 of this chapter and its categorization as a ''well-capitalized'', an ''adequately capitalized'', an ''undercapitalized'', or a ''significantly undercapitalized'' institution as defined in §324.403(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 324 of this chapter.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1028, Jan. 5, 2001; 71 FR 20527, Apr. 21, 2006; 78 FR 55596, Sept. 10, 2013; 83 FR 17741, Apr. 24, 2018]

§362.5 Approvals previously granted.

(a) *FDIC consent by order or notice.* An insured State bank that previously filed an application or notice under part 362 in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), and obtained the FDIC's consent to engage in an activity or to acquire or retain a majority-owned subsidiary engaging as principal in an activity or acquiring and retaining any investment that is prohibited under this subpart may continue that activity or retain that investment without seeking the FDIC's consent, provided that the insured State bank and its subsidiary, if applicable, continue to meet the conditions and restrictions of the approval. An insured State bank which was granted approval based on conditions which differ from the requirements of §362.4(c)(2), (d) and (e) will be considered to meet the conditions and restrictions of the approval relating to being an eligible subsidiary, meeting investment and transactions limits, and meeting capital requirements if the insured State bank and subsidiary meet the requirements of §362.4(c)(2), (d) and (e). If the majority-owned subsidiary is engaged in real estate investment activities not exceeding 2 percent of the tier one capital of a bank and meeting the other conditions of §362.4(b)(5)(i), the majority-owned subsidiary's compliance with §362.4(c)(2) under the preceding sentence may be pursuant to the modifications authorized by §362.4(b)(5)(i). Once an insured State bank elects to comply with §362.4(c)(2), (d), and (e), it may not revert to the corresponding provisions of the approval order.

(b) *Approvals by regulation—*

(1)–(5) [Reserved]

(6) *Adjustable rate or money market preferred stock.* An insured State bank owning adjustable rate or money market (auction rate) preferred stock pursuant to §362.4(c)(3)(v) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), in excess of the amount limit in §362.3(b)(2)(iii) may continue to hold any overlimit shares of such stock acquired before January 1, 1999, until redeemed or repurchased by the issuer, but such stock shall be included as part of the amount

limit in §362.3(b)(2)(iii) when determining whether the bank may acquire new stock thereunder.

(c) *Charter conversions.* (1) An insured State bank that has converted its charter from an insured state savings association may continue activities through a majority-owned subsidiary that were permissible prior to the time it converted its charter only if the insured State bank receives the FDIC's consent. Except as provided in paragraph (c)(2) of this section, the insured State bank should apply under §362.4(b)(1), submit any notice required under §362.4(b)(4) or (5), or comply with the provisions of §362.4(b)(3), (6), or (7) if applicable, to continue the activity.

(2) *Exception for prior consent.* If the FDIC had granted consent to the savings association under section 28 of the Federal Deposit Insurance Act (12 U.S.C. 1831(e)) prior to the time the savings association converted its charter, the insured State bank may continue the activities without providing notice or making application to the FDIC, provided that the bank and its subsidiary as applicable are in compliance with:

(i) The terms of the FDIC approval order; and

(ii) The provisions of §362.4(c)(2), (d), and (e) regarding operating as an ''eligible subsidiary'', ''investment and transaction limits'', and ''capital requirements'.

(3) *Divestiture.* An insured State bank that does not receive FDIC consent shall divest of the nonconforming investment as soon as practical but in no event later than two years from the date of charter conversion.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1028, Jan. 5, 2001]

Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

§362.6 Purpose and scope.

This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter apply to certain banking practices that may have adverse effects on the safety and soundness of insured state nonmember banks. This subpart contains the required prudential separations between certain securities underwriting affiliates and insured state nonmember banks. The standards only will apply to affiliates of insured state nonmember banks that are not controlled by an entity that is supervised by a federal banking agency.

[66 FR 1028, Jan. 5, 2001]

§362.7 Definitions.

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

(a) *Affiliate* has the same meaning contained in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(b) *Activity, company, control, equity security, insured state nonmember bank, security and subsidiary* have the same meaning as provided in subpart A of this part.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1028, Jan. 5, 2001]

§362.8 Restrictions on activities of insured state nonmember banks affiliated with certain securities companies.

(a) The FDIC has found that an unrestricted affiliation between an insured state nonmember bank and certain companies may have adverse effects on the safety and soundness of insured state nonmember banks.

(b) An insured state nonmember bank is prohibited from becoming or remaining affiliated with any securities underwriting affiliate company that directly engages in the public sale, distribution or underwriting of stocks, bonds, debentures, notes, or other securities activity, of a type not permissible for a national bank directly, unless the company is controlled by an entity that is supervised by a federal banking agency or the state nonmember 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 nonmember 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; and

(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(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831e(a)) 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 a Federal savings association and their service corporations. This subpart also implements the provision of section 28(d) of the Federal Deposit Insurance Act (12 U.S.C. 1831e(d)) that restricts state and federal savings associations from investing in certain corporate debt securities. The phrase ''activity permissible for a Federal savings association'' means any activity authorized for a Federal savings association 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 issued by the Office of the Comptroller of the Currency (OCC) or in bulletins, orders or written interpretations issued by the OCC, or by the former Office of Thrift Supervision until modified, terminated, set aside, or superseded by the OCC.

(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.

[63 FR 66326, Dec. 1, 1998, as amended at 71 FR 20527, Apr. 21, 2006; 77 FR 43155, July 24, 2012]

§ 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.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1029, Jan. 5, 2001]

§ 362.11 Activities of insured 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. On and after July 21, 2012, an insured savings association directly or through a subsidiary (other than, in the case of a mutual savings association, a subsidiary that is a qualified affiliate), shall not acquire or retain a corporate debt security unless the savings association, prior to acquiring the security and periodically thereafter, determines that the issuer of the security has adequate capacity to meet all financial commitments under the security for the projected life of the security. Saving associations have until January 1, 2013 to come into compliance with this treatment of corporate debt securities.

(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 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.

(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)(iii)(A) of this section. An insured state savings association may conduct this activity without first obtaining the FDIC's consent, provided that the association meets and continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(3) *Activities permissible for a Federal savings association conducted in an*

amount not permissible. Except as provided in paragraph (b)(2)(ii) of this section, an insured state savings association may engage as principal in any activity, which is not an equity investment of a type permissible for a Federal savings association, in an amount in excess of that permissible for a Federal savings association, if the savings association meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency, the institution has advised the appropriate regional director (DSC) under the procedure in §303.142(c) of this chapter within thirty days before engaging in the activity, and the FDIC has not advised the insured state savings association that conducting the activity in the amount indicated poses a significant risk to the Deposit Insurance Fund. This section shall not be read to require the divestiture of any asset if the asset was acquired prior to August 9, 1989; however, any activity conducted with such asset must be conducted in accordance with this subpart.

[63 FR 66326, Dec. 1, 1998, as amended at 71 FR 20527, Apr. 21, 2006; 77 FR 43155, July 24, 2012]

§362.12 Service corporations of insured State savings associations.

(a) *Prohibition.* A service corporation of an insured state savings association may not engage in any activity that is not permissible for a service corporation of a Federal savings association, unless it meets one of the exceptions in paragraph (b) of this section.

(b) *Exceptions*—(1) *Consent obtained through application.* A service corporation of an insured state savings association may conduct activities prohibited by paragraph (a) of this section if the savings association obtains the FDIC's prior written consent and the insured state savings association meets and continues to meet the applicable capital standards set by the appropriate Federal banking agency. Consent will be given only if the FDIC determines that the activity poses no significant risk to the Deposit Insurance Fund. Applications for consent should be filed in accordance with §303.141 of this chapter and will be processed under §303.142(b) of this chapter. Approvals granted under §303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the Deposit Insurance 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 the following activities, if the service corporation controls the company or the company is controlled by insured depository institutions, and the association continues to meet the applicable capital standards as prescribed by the appropriate Federal banking agency. The FDIC consents that such activity may be conducted by a service corporation of an insured state savings association without first obtaining the FDIC's consent. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(A) *Equity securities of a company that engages in permissible activities.* A service corporation may own the equity securities of a company that engages in any activity permissible for a Federal savings association.

(B) *Equity securities of a company that acquires and retains adjustable-rate and money market preferred stock.* A service corporation may own the equity securities of a company that engages in any activity permissible for an insured state savings association under §362.11(b)(2)(iii) so long as instruments held under this paragraph (b)(2)(ii)(B), paragraph (b)(2)(iv) of this section, and §362.11(b)(2)(iii) in the aggregate do not exceed the limit set by §362.11(b)(2)(iii).

(C) *Equity securities of a company acting as an insurance agency.* A service corporation may own the equity securities of a company that acts as an insurance agency.

(iii) *Activities that are not conducted ''as principal''.* A service corporation controlled by the insured state savings association may engage in activities which are not conducted ''as principal'' such as acting as an agent for a customer, acting in a brokerage, custodial, advisory, or administrative capacity, or acting as trustee, or in any substantially similar capacity.

(iv) *Acquiring and retaining adjustable-rate and money market preferred stock.* A service corporation may engage in any activity permissible for an insured state savings association under §362.11(b)(2)(iii) so long as instruments held under this paragraph (b)(2)(iv), paragraph (b)(2)(ii)(B) of this section, and §362.11(b)(2)(iii) in the aggregate do not exceed the limit set by §362.11(b)(2)(iii).

(3)–(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.

[63 FR 66326, Dec. 1, 1998, as amended at 66 FR 1029, Jan. 5, 2001; 71 FR 20527, Apr. 21, 2006]

§ 362.13 Approvals previously granted.

FDIC consent by order or notice. An insured state savings association that previously filed an application and obtained the FDIC's consent to engage in an activity or to acquire or retain an investment in a service corporation engaging as principal in an activity or acquiring and retaining any investment that is prohibited under this subpart may continue that activity or retain that investment without seeking the FDIC's consent, provided the insured state savings association and the service corporation, if applicable, continue to meet the conditions and restrictions of approval. An insured state savings association which was granted approval based on conditions which differ from the requirements of §§362.4(c)(2) and 362.12 (c) and (d) will be considered to meet the conditions and restrictions of the approval if the insured state savings association and any applicable service corporation meet the requirements of §§362.4(c)(2) and 362.12 (c) and (d). For the purposes of applying §362.4(c)(2), references to the terms ''eligible subsidiary'' and ''subsidiary'' in §362.4(c)(2) shall be deemed to refer, respectively, to the eligible service corporation and the service corporation.

Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

§ 362.14 Purpose and scope.

This subpart implements section 18(m) of the Federal Deposit Insurance

Act (12 U.S.C. 1828(m)) which requires that prior notice be given the FDIC when an insured savings association establishes or acquires a subsidiary or engages in any new activity in a subsidiary. For the purposes of this subpart, the term ''subsidiary'' does not include any insured depository institution as that term is defined in the Federal Deposit Insurance Act. Unless otherwise indicated, the definitions provided in § 362.2 apply to this subpart.

§ 362.15 Acquiring or establishing a subsidiary; conducting new activities through a subsidiary.

No state or Federal insured savings association may establish or acquire a subsidiary, or conduct any new activity through a subsidiary, unless it files a notice in compliance with § 303.142(c) of this chapter at least 30 days prior to establishment of the subsidiary or commencement of the activity and the FDIC does not object to the notice. This requirement does not apply to any Federal savings bank that was chartered prior to October 15, 1982, as a savings bank under State law or any savings association that acquired its principal assets from such an institution.

Subpart E—Financial Subsidiaries of Insured State Nonmember Banks

SOURCE: 66 FR 1029, Jan. 5, 2001, unless otherwise noted.

§ 362.16 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter, implements section 46 of the Federal Deposit Insurance Act (12 U.S.C. 1831w) and requires that an insured state nonmember bank certify certain facts and file a notice with the FDIC before the insured state nonmember bank may control or hold an interest in a financial subsidiary under section 46(a) of the Federal Deposit Insurance Act. This subpart also implements the statutory Community Reinvestment Act (CRA) (12 U.S.C. 2901 *et seq.*) requirement set forth in subsection (4)(l)(2) of the Bank Holding Company Act (12 U.S.C. 1843(l)(2)), which is applicable to state nonmember banks that commence new activities through a financial subsidiary or directly or indirectly acquire control of a company engaged in an activity under section 46(a).

(b) This subpart does not cover activities conducted other than ''as principal''. For purposes of this subpart, activities conducted other than ''as principal'' are defined 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.

§ 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 324 of this chapter.

(e) *Well-managed* means:

(1) Unless otherwise determined in writing by the appropriate federal

banking agency, the institution has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (or an equivalent rating under an equivalent rating system) in connection with the most recent state or federal examination or subsequent review of the depository institution and at least a rating of 2 for management, if such a rating is given; or

(2) In the case of any depository institution that has not been examined by its appropriate federal banking agency, the existence and use of managerial resources that the appropriate federal banking agency determines are satisfactory.

[63 FR 66326, Dec. 1, 1998, as amended at 78 FR 55596, Sept. 10, 2013; 83 FR 17741, Apr. 24, 2018]

§ 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 Act (12 U.S.C. 1831w(a)), 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) or from common equity tier 1 capital in accordance with 12 CFR part 324, subpart C, as applicable.

(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 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 FDIC.* 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.

[63 FR 66326, Dec. 1, 1998, as amended at 78 FR 55596, Sept. 10, 2013]

PART 363—ANNUAL INDEPENDENT AUDITS AND REPORTING REQUIREMENTS

Sec.

AUTHORITY: 12 U.S.C. 1819, 1831m.

EFFECTIVE DATE NOTE: At 85 FR 67433, Oct. 23, 2020, the part 363 authority citation was revised, effective Oct. 23, 2020 through Dec. 31, 2021.

SOURCE: 74 FR 35745, July 20, 2009, unless otherwise noted.

§ 363.0 OMB control number.

The information collection requirements in this part have been approved by the Office of Management and Budget under OMB control number 3064–0113.

§ 363.1 Scope and definitions.

(a) *Applicability.* (1) This part applies to any insured depository institution with respect to any fiscal year in which its consolidated total assets as of the beginning of such fiscal year are $500 million or more. Notwithstanding the foregoing and for all requirements in this part, with respect to any fiscal year ending in 2021, an insured depository institution's consolidated total assets shall be determined based on the lesser of (a) an insured depository institution's consolidated total assets as of December 31, 2019, or (b) an insured depository institution's consolidated total assets as of the beginning of its fiscal year ending in 2021. The requirements specified in this part are in addition to any other statutory and regulatory requirements otherwise applicable to an insured depository institution.

(2) Until December 31, 2021, the FDIC reserves the authority to require an insured depository institution to comply with one or more requirements under this part if the FDIC determines that asset growth was related to a merger or acquisition.

(b) *Compliance by subsidiaries of holding companies.* (1) For an insured depository institution that is a subsidiary of a holding company, the audited financial statements requirement of § 363.2(a) may be satisfied:

(i) For fiscal years ending on or before June 14, 2010, by audited consolidated financial statements of the top-tier or any mid-tier holding company.

(ii) For fiscal years ending on or after June 15, 2010, by audited consolidated financial statements of the top-tier or any mid-tier holding company provided that the consolidated total assets of the insured depository institution (or the consolidated total assets of all of the holding company's insured depository institution subsidiaries, regardless of size, if the holding company owns or controls more than one insured depository institution) comprise 75 percent or more of the consolidated total assets of this top-tier or mid-tier holding company as of the beginning of its fiscal year.

(2) The other requirements of this part for an insured depository institution that is a subsidiary of a holding company may be satisfied by the top-tier or any mid-tier holding company if the insured depository institution meets the criterion specified in §363.1(b)(1) and if:

(i) The services and functions comparable to those required of the insured depository institution by this part are provided at this top-tier or mid-tier holding company level; and

(ii) The insured depository institution has as of the beginning of its fiscal year:

(A) Total assets of less than $5 billion; or

(B) Total assets of $5 billion or more and a composite CAMELS rating of 1 or 2.

(3) The appropriate Federal banking agency may revoke the exception in paragraph (b)(2) of this section for any institution with total assets in excess of $9 billion for any period of time during which the appropriate Federal banking agency determines that the institution's exemption would create a significant risk to the Deposit Insurance Fund.

(c) *Financial reporting.* For purposes of the management report requirement of §363.2(b) and the internal control reporting requirement of §363.3(b), ''financial reporting,'' at a minimum, includes both financial statements prepared in accordance with generally accepted accounting principles for the insured depository institution or its holding company and financial statements prepared for regulatory reporting purposes. For recognition and measurement purposes, financial statements prepared for regulatory reporting purposes shall conform to generally accepted accounting principles and section 37 of the Federal Deposit Insurance Act.

(d) *Definitions.* For purposes of this part, the following definitions apply:

(1) *AICPA* means the American Institute of Certified Public Accountants.

(2) *GAAP* means generally accepted accounting principles.

(3) *PCAOB* means the Public Company Accounting Oversight Board.

(4) *Public company* means an insured depository institution or other company that has a class of securities registered with the U.S. Securities and Exchange Commission or the appropriate Federal banking agency under Section 12 of the Securities Exchange Act of 1934 and *nonpublic company* means an insured depository institution or other company that does not meet the definition of a *public company*.

(5) *SEC* means the U.S. Securities and Exchange Commission.

(6) *SOX* means the Sarbanes-Oxley Act of 2002.

[74 FR 35745, July 20, 2009, as amended at 85 FR 67433, Oct. 23, 2020]

EFFECTIVE DATE NOTE: At 85 FR 67433, Oct. 23, 2020, §363.1 was amended by revising paragraph (a), effective Oct. 23, 2020 through Dec. 31, 2021.

§363.2 Annual reporting requirements.

(a) *Audited financial statements.* Each insured depository institution shall prepare annual financial statements in accordance with GAAP, which shall be audited by an independent public accountant. The annual financial statements must reflect all material correcting adjustments necessary to conform with GAAP that were identified by the independent public accountant.

(b) *Management report.* Each insured depository institution annually shall prepare, as of the end of the institution's most recent fiscal year, a management report that must contain the following:

(1) A statement of management's responsibilities for preparing the institution's annual financial statements, for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and for complying with laws and regulations relating to safety and soundness that are designated by the FDIC and the appropriate Federal banking agency;

(2) An assessment by management of the insured depository institution's compliance with such laws and regulations during such fiscal year. The assessment must state management's conclusion as to whether the insured depository institution has complied with the designated safety and soundness laws and regulations during the fiscal year and disclose any noncompliance with these laws and regulations; and

(3) For an insured depository institution with consolidated total assets of $1 billion or more as of the beginning of such fiscal year, an assessment by management of the effectiveness of such internal control structure and procedures as of the end of such fiscal year that must include the following:

(i) A statement identifying the internal control framework[14] used by management to evaluate the effectiveness of the insured depository institution's internal control over financial reporting;

(ii) A statement that the assessment included controls over the preparation of regulatory financial statements in accordance with regulatory reporting instructions including identification of such regulatory reporting instructions; and

(iii) A statement expressing management's conclusion as to whether the insured depository institution's internal control over financial reporting is effective as of the end of its fiscal year. Management must disclose all material weaknesses in internal control over financial reporting, if any, that it has identified that have not been remediated prior to the insured depository institution's fiscal year-end. Management is precluded from concluding that the institution's internal control over financial reporting is effective if there are one or more material weaknesses.

(c) *Management report signatures.* Subject to the criteria specified in § 363.1(b):

(1) If the audited financial statements requirement specified in § 363.2(a) is satisfied at the insured depository institution level and the management report requirement specified in § 363.2(b) is satisfied in its entirety at the insured depository institution level, the management report must be signed by the chief executive officer and the chief accounting officer or chief financial officer of the insured depository institution;

(2) If the audited financial statements requirement specified in § 363.2(a) is satisfied at the holding company level and the management report requirement specified in § 363.2(b) is satisfied in its entirety at the holding company level, the management report must be signed by the chief executive officer and the chief accounting officer or chief financial officer of the holding company; and

(3) If the audited financial statements requirement specified in § 363.2(a) is satisfied at the holding company level and (i) the management report requirement specified in § 363.2(b) is satisfied in its entirety at the insured depository institution level or (ii) one or more of the components of the management report specified in § 363.2(b) is satisfied at the holding company level and the remaining components of the management report are satisfied at the insured depository institution level, the management report must be signed by the chief executive officers and the chief accounting officers or chief financial officers of both the holding company and the insured depository institution and the management report must clearly indicate the level (institution or holding company) at which each of its components is being satisfied.

[14] For example, in the United States, the Committee of Sponsoring Organizations (COSO) of the Treadway Commission has published *Internal Control—Integrated Framework*, including an addendum on safeguarding assets. Known as the COSO report, this publication provides a suitable and available framework for purposes of management's assessment.

§ 363.3 Independent public accountant.

(a) *Annual audit of financial statements.* Each insured depository institution shall engage an independent public accountant to audit and report on its annual financial statements in accordance with generally accepted auditing standards or the PCAOB's auditing standards, if applicable, 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 GAAP.

(b) *Internal control over financial reporting.* For each insured depository institution with total assets of $1 billion or more at the beginning of the institution's fiscal year, the independent public accountant who audits the institution's financial statements shall examine, attest to, and report separately on the assertion of management concerning the effectiveness of the institution's internal control structure and procedures for financial reporting. The attestation and report shall be made in accordance with generally accepted standards for attestation engagements or the PCAOB's auditing standards, if applicable. The accountant's report must not be dated prior to the date of the management report and management's assessment of the effectiveness of internal control over financial reporting. Notwithstanding the requirements set forth in applicable professional standards, the accountant's report must include the following:

(1) A statement identifying the internal control framework used by the independent public accountant, which must be the same as the internal control framework used by management, to evaluate the effectiveness of the insured depository institution's internal control over financial reporting;

(2) A statement that the independent public accountant's evaluation included controls over the preparation of regulatory financial statements in accordance with regulatory reporting instructions including identification of such regulatory reporting instructions; and

(3) A statement expressing the independent public accountant's conclusion as to whether the insured depository institution's internal control over financial reporting is effective as of the end of its fiscal year. The report must disclose all material weaknesses in internal control over financial reporting that the independent public accountant has identified that have not been remediated prior to the insured depository institution's fiscal year-end. The independent public accountant is precluded from concluding that the insured depository institution's internal control over financial reporting is effective if there are one or more material weaknesses.

(c) *Notice by accountant of termination of services.* An independent public accountant performing an audit under this part who ceases to be the accountant for an insured depository institution shall notify the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor in writing of such termination within 15 days after the occurrence of such event, and set forth in reasonable detail the reasons for such termination. The written notice shall be filed at the place identified in § 363.4(f).

(d) *Communications with audit committee.* In addition to the requirements for communications with audit committees set forth in applicable professional standards, the independent public accountant must report the following on a timely basis to the audit committee:

(1) All critical accounting policies and practices to be used by the insured depository institution,

(2) All alternative accounting treatments within GAAP for policies and practices related to material items that the independent public accountant has discussed with management, including the ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the independent public accountant, and

(3) Other written communications the independent public accountant has provided to management, such as a management letter or schedule of unadjusted differences.

(e) *Retention of working papers.* The independent public accountant must retain the working papers related to

the audit of the insured depository institution's financial statements and, if applicable, the evaluation of the institution's internal control over financial reporting for seven years from the report release date, unless a longer period of time is required by law.

(f) *Independence.* The independent public accountant must comply with the independence standards and interpretations of the AICPA, the SEC, and the PCAOB. To the extent that any of the rules within any one of these independence standards (AICPA, SEC, and PCAOB) is more or less restrictive than the corresponding rule in the other independence standards, the independent public accountant must comply with the more restrictive rule.

(g) *Peer reviews and inspection reports.* (1) Prior to commencing any services for an insured depository institution under this part, the independent public accountant must have received a peer review, or be enrolled in a peer review program, that meets acceptable guidelines. Acceptable peer reviews include peer reviews performed in accordance with the AICPA's Peer Review Standards and inspections conducted by the PCAOB.

(2) Within 15 days of receiving notification that a peer review has been accepted or a PCAOB inspection report has been issued, or before commencing any audit under this part, whichever is earlier, the independent public accountant must file two copies of the most recent peer review report and the public portion of the most recent PCAOB inspection report, if any, accompanied by any letters of comments, response, and acceptance, with the FDIC, Accounting and Securities Disclosure Section, 550 17th Street, NW., Washington, DC 20429, if the report has not already been filed. The peer review reports and the public portions of the PCAOB inspection reports will be made available for public inspection by the FDIC.

(3) Within 15 days of the PCAOB making public a previously nonpublic portion of an inspection report, the independent public accountant must file two copies of the previously nonpublic portion of the inspection report with the FDIC, Accounting and Securities Disclosure Section, 550 17th Street, NW., Washington, DC 20429. Such previously nonpublic portion of the PCAOB inspection report will be made available for public inspection by the FDIC.

§ 363.4 Filing and notice requirements.

(a) *Part 363 Annual Report.* (1) 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 its Part 363 Annual Report. A Part 363 Annual Report must contain audited comparative annual financial statements, the independent public accountant's report thereon, a management report, and, if applicable, the independent public accountant's attestation report on management's assessment 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.

(2) Subject to the criteria specified in § 363.1(b), each insured depository institution with consolidated total assets of less than $1 billion as of the beginning of its fiscal year that is required to file, or whose parent holding company is required to file, management's assessment of the effectiveness of internal control over financial reporting with the SEC or the appropriate Federal banking agency in accordance with section 404 of SOX must submit a copy of such assessment to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor with its Part 363 Annual Report as additional information. This assessment will not be considered part of the institution's Part 363 Annual Report.

(3)(i) Each insured depository institution that is neither a public company nor a subsidiary of a public company that meets the criterion specified in § 363.1(b)(1) shall file its Part 363 Annual Report within 120 days after the end of its fiscal year. (ii) Each insured depository institution that is a public company or a subsidiary of public company that meets the criterion specified in § 363.1(b)(1) shall file its Part 363 Annual Report within 90 days after the end of its fiscal year.

(b) *Public availability.* Except for the annual report in paragraph (a)(1) of this section and the peer reviews and inspection reports in §363.3(g), which shall be available for public inspection, the FDIC has determined that all other reports and notifications required by this part are exempt from public disclosure by the FDIC.

(c) *Independent public accountant's letters and reports.* Except for the independent public accountant's reports that are included in its Part 363 Annual Report, each insured depository institution shall file with the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor, a copy of any management letter or other report issued by its independent public accountant with respect to such institution and the services provided by such accountant pursuant to this part within 15 days after receipt. Such reports include, but are not limited to:

(1) Any written communication regarding matters that are required to be communicated to the audit committee (for example, critical accounting policies, alternative accounting treatments discussed with management, and any schedule of unadjusted differences),

(2) Any written communication of significant deficiencies and material weaknesses in internal control required by the AICPA's or the PCAOB's auditing standards;

(3) For institutions with total assets of less than $1 billion as of the beginning of their fiscal year that are public companies or subsidiaries of public companies that meet the criterion specified in §363.1(b)(1), any independent public accountant's report on the audit of internal control over financial reporting required by section 404 of SOX and the PCAOB's auditing standards; and

(4) For all institutions that are public companies or subsidiaries of public companies that meet the criterion specified in §363.1(b)(1), any independent public accountant's written communication of all deficiencies in internal control over financial reporting that are of a lesser magnitude than significant deficiencies required by the PCAOB's auditing standards.

(d) *Notice of engagement or change of accountants.* Each insured depository institution shall provide, within 15 days after the occurrence of any such event, written notice to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor of the engagement of an independent public accountant, or the resignation or dismissal of the independent public accountant previously engaged. The notice shall include a statement of the reasons for any such resignation or dismissal in reasonable detail.

(e) *Notification of late filing.* No extensions of time for filing reports required by §363.4 shall be granted. An insured depository institution that is unable to timely file all or any portion of its Part 363 Annual Report or any other report or notice required by §363.4 shall submit a written notice of late filing to the FDIC, the appropriate Federal banking agency, and any appropriate State bank supervisor. The notice shall disclose the institution's inability to timely file all or specified portions of its Part 363 Annual Report or any other report or notice and the reasons therefore in reasonable detail. The late filing notice shall also state the date by which the report or notice will be filed. The written notice shall be filed on or before the deadline for filing the Part 363 Annual Report or any other report or notice, as appropriate.

(f) *Place for filing.* The Part 363 Annual Report, any written notification of late filing, and any other report or notice required by §363.4 should be filed as follows:

(1) *FDIC:* Appropriate FDIC Regional or Area Office (Division of 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.

(2) *Office of the Comptroller of the Currency (OCC):* Appropriate OCC Supervisory Office.

(3) *Federal Reserve:* Appropriate Federal Reserve Bank.

(4) *Office of Thrift Supervision (OTS):* Appropriate OTS District Office.

(5) *State bank supervisor:* The filing office of the appropriate State bank supervisor.

§ 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 complies with paragraphs (a)(1), (2), and (3) of this section. The duties of the audit committee shall include the appointment, compensation, and oversight of the independent public accountant who performs services required under this part, and 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 with total assets of more than $3 billion as of the beginning of its 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's audit committee shall not include any members who are large customers of the subsidiary institution.

(c) *Independent public accountant engagement letters.* (1) In performing its duties with respect to the appointment of the institution's independent public accountant, the audit committee shall ensure that engagement letters and any related agreements with the independent public accountant for services to be performed under this part do not contain any limitation of liability provisions that:

(i) Indemnify the independent public accountant against claims made by third parties;

(ii) Hold harmless or release the independent public accountant from liability for claims or potential claims that might be asserted by the client insured depository institution, other than claims for punitive damages; or

(iii) Limit the remedies available to the client insured depository institution.

(2) Alternative dispute resolution agreements and jury trial waiver provisions are not precluded from engagement letters provided that they do not incorporate any limitation of liability provisions set forth in paragraph (c)(1) of this section.

APPENDIX A TO PART 363—GUIDELINES AND INTERPRETATIONS

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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 AND DEFINITIONS (§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 that are submitted by a holding company for any subsidiary institution should be accompanied by a cover letter identifying all subsidiary institutions subject to part 363 that are included in the holding company's submission. When submitting a Part 363 Annual Report, the cover letter should identify all subsidiary institutions subject to part 363 included in the consolidated financial statements and state whether the other annual report requirements (*i.e.*, management's statement of responsibilities,

management's assessment of compliance with designated safety and soundness laws and regulations, and, if applicable, management's assessment of the effectiveness of internal control over financial reporting and the independent public accountant's attestation report on management's internal control assessment) are being satisfied for these institutions at the holding company level or at the institution level. An institution filing holding company consolidated financial statements as permitted by §363.1(b)(1) also may report on changes in its independent public accountant on a holding company basis. An institution that does not meet the criteria in §363.1(b)(2) must satisfy the remaining provisions of this part on an individual institution basis and maintain its own audit committee. Subject to the criteria in §§363.1(b)(1) and (2), a multi-tiered holding company may satisfy all of the requirements of this part at the top-tier or any mid-tier holding company 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 management's assessment of compliance with the Designated Laws and Regulations defined in guideline 7A and, if applicable, management's assessment of the effectiveness of internal control over financial reporting based on information concerning the relevant activities and operations of those subsidiary institutions within the scope of the Rule.

4A. *Financial Statements Prepared for Regulatory Reporting Purposes.* (a) As set forth in §363.3(c) of this part, ''financial reporting,'' at a minimum, includes both financial statements prepared in accordance with generally accepted accounting principles for the insured depository institution or its holding company and financial statements prepared for regulatory reporting purposes. More specifically, financial statements prepared for regulatory reporting purposes include the schedules equivalent to the basic financial statements that are included in an insured depository institution's or its holding company's appropriate regulatory report (for example, Schedules RC, RI, and RI–A in the Consolidated Reports of Condition and Income (Call Report) for an insured bank; and Schedules SC and SO, and the Summary of Changes in Equity Capital section in Schedule SI in the Thrift Financial Report (TFR) for an insured thrift institution). For recognition and measurement purposes, financial statements prepared for regulatory reporting purposes shall conform to generally accepted accounting principles and section 37 of the Federal Deposit Insurance Act.

(b) Financial statements prepared for regulatory reporting purposes do not include regulatory reports prepared by a non-bank subsidiary of a holding company or an institution. For example, if a bank holding company or an insured depository institution owns an insurance subsidiary, financial statements prepared for regulatory reporting purposes would not include any regulatory reports that the insurance subsidiary is required to submit to its appropriate insurance regulatory agency.

ANNUAL REPORTING REQUIREMENTS (§363.2)

5. *Annual Financial Statements.* Each institution (other than an insured branch of a foreign bank) should prepare comparative annual consolidated financial statements (balance sheets and statements of income, changes in equity capital, and cash flows, with accompanying footnote disclosures) in accordance with 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.

5A. *Institutions Merged Out of Existence.* An institution that is merged out of existence after the end of its fiscal year, but before the deadline for filing its Part 363 Annual Report (120 days after the end of its fiscal year for an institution that is neither a public company nor a subsidiary of a public company that meets the criterion specified in §363.1(b)(1), and 90 days after the end of its fiscal year for an institution that is a public company or a subsidiary of a public company that meets the criterion specified in §363.1(b)(1)), is not required to file a Part 363 Annual Report for the last fiscal year of its existence.

6. *Holding Company Statements.* Subject to the criterion specified in §363.1(b)(1), subsidiary institutions may file copies of their holding company's audited financial statements filed with the SEC or prepared for their FR Y–6 Annual Report under the Bank Holding Company Act of 1956 to satisfy the audited financial statements requirement of §363.2(a).

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 each of its two most recent 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.

7A. *Compliance with Designated Laws and Regulations.* The designated laws and regulations are the Federal laws and regulations concerning loans to insiders and the Federal and, if applicable, State laws and regulations concerning dividend restrictions (the Designated Laws and Regulations). Table 1 to this Appendix A lists the designated Federal laws and regulations pertaining to insider loans and dividend restrictions (but not the State laws and regulations pertaining to dividend restrictions) that are applicable to each type of institution.

8. *Management Report.* Management should perform its own investigation and review of compliance with the Designated Laws and Regulations and, if required, the effectiveness of internal control over financial reporting. Management 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 the appropriate Federal banking agency. Management should provide in its assessment of the effectiveness of internal control over financial reporting, or supplementally, sufficient information to enable the accountant to report on its assertions. The management report of an insured branch of a foreign bank should be signed by the branch's managing official if the branch does not have a chief executive officer or a chief accounting or financial officer.

8A. *Management's Reports on Internal Control over Financial Reporting under Part 363 and Section 404 of SOX.* An institution with $1 billion or more in total assets as of the beginning of its fiscal year that is subject to both part 363 and the SEC's rules implementing section 404 of SOX (as well as a public holding company permitted under the holding company exception in §363.1(b)(2) to file an internal control report on behalf of one or more subsidiary institutions with $1 billion or more in total assets) can choose either of the following two options for filing management's report on internal control over financial reporting.

(i) Management can prepare two separate reports on the institution's or the holding company's internal control over financial reporting to satisfy the FDIC's part 363 requirements and the SEC's section 404 requirements; or

(ii) Management can prepare a single report on internal control over financial reporting provided that it satisfies all of the FDIC's part 363 requirements and all of the SEC's section 404 requirements.

8B. *Internal Control Reports and Part 363 Annual Reports for Acquired Businesses.* Generally, the FDIC expects management's and the related independent public accountant's report on an institution's internal control over financial reporting to include controls at an institution in its entirety, including all of its consolidated entities. However, it may not always be possible for management to conduct an assessment of the internal control over financial reporting of an acquired business in the period between the consummation date of the acquisition and the due date of management's internal control assessment.

(a) In such instances, the acquired business's internal control structure and procedures for financial reporting may be excluded from management's assessment report and the accountant's attestation report on internal control over financial reporting. However, the FDIC expects management's assessment report to identify the acquired business, state that the acquired business is excluded, and indicate the significance of this business to the institution's consolidated financial statements. Notwithstanding management's exclusion of the acquired business's internal control from its assessment, management should disclose any material change to the institution's internal control over financial reporting due to the acquisition of this business. Also, management may not omit the assessment of the acquired business's internal control from more than one annual part 363 assessment report on internal control over financial reporting. When the acquired business's internal control over financial reporting is excluded from management's assessment, the independent public accountant may likewise exclude this acquired business's internal control over financial reporting from the accountant's evaluation of internal control over financial reporting.

(b) If the acquired business is or has a consolidated subsidiary that is an insured depository institution subject to part 363 and the institution is not merged out of existence before the deadline for filing its Part 363 Annual Report (120 days after the end of its fiscal year for an institution that is neither a public company nor a subsidiary of a public company that meets the criterion specified in §363.1(b)(1), and 90 days after the end of its fiscal year for an institution that is a public company or a subsidiary of public company that meets the criterion specified in §363.1(b)(1)), the acquired institution must continue to comply with all of the applicable requirements of part 363, including filing its Part 363 Annual Report.

8C. *Management's Disclosure of Noncompliance with the Designated Laws and Regulations.* Management's disclosure of noncompliance, if any, with the Designated Laws and Regulations should separately indicate the number of instances or frequency of noncompliance with the Federal laws and regulations pertaining to insider loans and the Federal (and, if applicable, State) laws and regulations pertaining to dividend restrictions. The disclosure is not required to specifically identify by name the individuals

(*e.g.*, officers or directors) who were responsible for or were the subject of any such noncompliance. However, the disclosure should include appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amount of the insider loan(s) or dividend(s) involved. Similar instances of noncompliance may be aggregated as to number of instances and quantified as to the dollar amounts or the range of dollar amounts of insider loans and/or dividends for which noncompliance occurred. Management may also wish to describe any corrective actions taken in response to the instances of noncompliance as well any controls or procedures that are being developed or that have been developed and implemented to prevent or detect and correct future instances of noncompliance on a timely basis.

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 and auditing 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.[15]

10. *Standards for Internal Control.* The management of each insured depository institution with $1 billion or more in total assets as of the beginning of its fiscal year should base its assessment of the effectiveness of the institution's internal control over financial reporting on a suitable, recognized control framework established by a body of experts that followed due-process procedures, including the broad distribution of the framework for public comment. In addition to being available to users of management's reports, a framework is suitable only when it:

- Is free from bias;
- Permits reasonably consistent qualitative and quantitative measurements of an institution's internal control over financial reporting;
- Is sufficiently complete so that those relevant factors that would alter a conclusion about the effectiveness of an institution's internal control over financial reporting are not omitted; and
- Is relevant to an evaluation of internal control over financial reporting.

In the United States, *Internal Control—Integrated Framework*, including its addendum on safeguarding assets, which was published by the Committee of Sponsoring Organizations of the Treadway Commission, and is known as the COSO report, provides a suitable and recognized framework for purposes of management's assessment. Other suitable frameworks have been published in other countries or may be developed in the future. Such other suitable frameworks may be used by management and the institution's independent public accountant in assessments, attestations, and audits of internal control over financial reporting.

11. *Service Organizations.* Although service organizations should be considered in determining if internal control over financial reporting is effective, an institution's independent public accountant, its management, and its audit committee should exercise independent judgment concerning that determination. Onsite reviews of service organizations may not be necessary to prepare the report required by the Rule, and the FDIC does not intend that the Rule establish any such requirement.

12. [Reserved]

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 working papers, policies, and procedures relating to services performed under this part.

14. [Reserved]

15. *Peer Review 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 (other than a PCAOB inspection) should be generally consistent with AICPA Peer Review Standards; and

(c) The review should include, if available, at least one audit on an insured depository institution or consolidated depository institution holding company.

[15] It is management's responsibility to establish policies concerning underwriting and asset management and to make credit decisions. The auditor's role is to test compliance with management's policies relating to financial reporting.

16. [Reserved]

17. *Information to be Provided to the 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 and Management Letters.* The independent public accountant should provide the institution with any management letter and, if applicable, an internal control attestation report (as required by section 36(c)(1)) at the conclusion of the audit. The independent public accountant's attestation report on internal control over financial reporting must specifically include a statement as to regulatory reporting. If a holding company subsidiary relies on its holding company's management report to satisfy the Part 363 Annual Report requirements, the accountant may attest to and report on the 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.

18A. *Internal Control Attestation Standards for Independent Auditors.* (a) §363.3(b) provides that the independent public accountant's attestation and report on management's assertion concerning the effectiveness of an institution's internal control structure and procedures for financial reporting shall be made in accordance with generally accepted standards for attestation engagements or the PCAOB's auditing standards, if applicable. The standards that should be followed by the institution's independent public accountant concerning internal control over financial reporting for institutions with $1 billion or more in total assets can be summarized as follows:

(1) For an insured institution that is neither a public company nor a subsidiary of a public company, its independent public accountant need only follow the AICPA's attestation standards.

(2) For an insured institution that is a public company that is required to comply with the auditor attestation requirement of section 404 of SOX, its independent public accountant should follow the PCAOB's auditing standards.

(3) For an insured institution that is a public company but is not required to comply with the auditor attestation requirement of section 404 of SOX, its independent public accountant is not required to follow the PCAOB's auditing standards. In this case, the accountant need only follow the AICPA's attestation standards.

(4) For an insured institution that is a subsidiary of a public company that is required to comply with the auditor attestation requirement of section 404 of SOX, but is not itself a public company, the institution and its independent public accountant have flexibility in complying with the internal control requirements of part 363. If the conditions specified in §363.1(b)(2) are met, management and the independent public accountant may choose to report on internal control over financial reporting at the consolidated holding company level. In this situation, the independent public accountant's work would be performed for the public company in accordance with the PCAOB's auditing standards. Alternatively, the institution may choose to comply with the internal control reporting requirements of part 363 at the institution level and its independent public accountant could follow the AICPA's attestation standards.

(b) If an independent public accountant need only follow the AICPA's attestation standards, the accountant and the insured institution may instead agree to have the internal control attestation performed under the PCAOB's auditing standards.

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 of termination required by §363.3(c) should state whether the independent public accountant agrees with the assertions contained in any notice filed by the institution under §363.4(d), and whether the institution's notice discloses all relevant reasons for the accountant's termination. Subject to the criterion specified in §363.1(b)(1) regarding compliance with the audited financial statements requirement at the holding company level, the independent public accountant for an insured depository institution that is a public company and files reports with its appropriate Federal banking agency, or is a subsidiary of a public company that files reports with the SEC, may submit the letter it furnished to management to be filed with the institution's or the holding company's current report (*e.g.*, SEC Form 8–K) concerning a change in accountant to satisfy the notice requirements of §363.3(c). Alternatively, if the independent public accountant confirms that management has filed a current report (*e.g.*, SEC Form 8–K) concerning a change in accountant that satisfies the notice requirements of §363.4(d) and includes an independent public accountant's letter that satisfies the requirements of §363.3(c), the independent public accountant may rely on the

current report (*e.g.*, SEC Form 8–K) filed with the FDIC by management concerning a change in accountant to satisfy the notice requirements of §363.3(c).

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. [Reserved]

23. *Notification of Late Filing.* (a) An institution's submission of a written notice of late filing does not cure the requirement to timely file the Part 363 Annual Report or other reports or notices required by §363.4. An institution's failure to timely file is considered an apparent violation of part 363.

(b) If the late filing notice submitted pursuant to §363.4(e) relates only to a portion of a Part 363 Annual Report or any other report or notice, the insured depository institution should file the other components of the report or notice within the prescribed filing period together with a cover letter that indicates which components of its Part 363 Annual Report or other report or notice are omitted. An institution may combine the written late filing notice and the cover letter into a single notice that is submitted together with the other components of the report or notice that are being timely filed.

24. *Public Availability.* Each institution's Part 363 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 Part 363 Annual Report to any person who requests it. The Part 363 Annual Report should remain available to the public until the Part 363 Annual Report for the next year is available. An institution may use its Part 363 Annual Report under this part to meet the annual disclosure statement required by 12 CFR 350.3, if the institution satisfies all other requirements of 12 CFR Part 350.

25. [Reserved]

26. *Notices Concerning Accountants.* With respect to any selection, change, or termination of an independent public accountant, an institution's management and audit committee should be familiar with the notice requirements in §363.4(d) and guideline 20, and management should send a copy of any notice required under §363.4(d) to the independent public accountant when it is filed with the FDIC. An insured depository institution that is a public company and files reports required under the Federal securities laws with its appropriate Federal banking agency, or is a subsidiary of a public company that files such reports with the SEC, may use its current report (*e.g.*, SEC Form 8–K) concerning a change in accountant to satisfy the notice requirements of §363.4(d) subject to the criterion of §363.1(b)(1) regarding compliance with the audited financial statements requirement at the holding company level.

AUDIT COMMITTEES (§363.5)

27. *Composition.* The board of directors of each institution should determine whether each existing or potential audit committee member meets the requirements of section 36 and this part. To do so, the board of directors should maintain an approved set of written criteria for determining whether a director who is to serve on the audit committee is an outside director (as defined in §363.5(a)(3)) and is independent of management. At least annually, the board of each institution should determine whether each existing or potential audit committee member is an outside director. In addition, at least annually, the board of an institution with $1 billion or more in total assets as of 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.'' The minutes of the board of directors should contain the results of and the basis for its determinations with respect to each existing and potential audit committee member. 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.* It is not possible to anticipate, or explicitly provide for, all circumstances that might signal potential conflicts of interest in, or that might bear on, an outside director's relationship to an insured depository institution and whether the outside director should be deemed ''independent of management.'' When assessing an outside director's relationship with an institution, the board of directors should consider the issue not merely from the standpoint of the director himself or herself, but also from the standpoint of persons or organizations with which the director has an affiliation. These relationships can include, but are not limited to, commercial, banking, consulting, charitable, and family relationships. To assist boards of directors in fulfilling their responsibility to determine whether existing and potential

members of the audit committee are ''independent of management,'' paragraphs (a) through (d) of this guideline provide guidance for making this determination.

(a) If an outside director, either directly or indirectly, owns or controls, or has owned or controlled within the preceding fiscal year, 10 percent or more of any outstanding class of voting securities of the institution, the institution's board of directors should determine, and document its basis and rationale for such determination, whether such ownership of voting securities would interfere with the outside director's exercise of independent judgment in carrying out the responsibilities of an audit committee member, including the ability to evaluate objectively the propriety of management's accounting, internal control, and reporting policies and practices. Notwithstanding the criteria set forth in paragraphs (b), (c), and (d) of this guideline, if the board of directors determines that such ownership of voting securities would interfere with the outside director's exercise of independent judgment, the outside director will not be considered ''independent of management.''

(b) The following list sets forth additional criteria that, at a minimum, a board of directors should consider when determining whether an outside director is ''independent of management.'' The board of directors may conclude that additional criteria are also relevant to this determination in light of the particular circumstances of its institution. Accordingly, an outside director will not be considered ''independent of management'' if:

(1) The director serves, or has served within the last three years, as a consultant, advisor, promoter, underwriter, legal counsel, or trustee of or to the institution or its affiliates.

(2) The director has been, within the last three years, an employee of the institution or any of its affiliates or an immediate family member is, or has been within the last three years, an executive officer of the institution or any of its affiliates.

(3) The director has participated in the preparation of the financial statements of the institution or any of its affiliates at any time during the last three years.

(4) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $100,000 in direct and indirect compensation from the institution, its subsidiaries, and its affiliates for consulting, advisory, or other services other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service). Direct compensation also would not include compensation received by the director for former service as an interim chairman or interim chief executive officer.

(5) The director or an immediate family member is a current partner of a firm that performs internal or external auditing services for the institution or any of its affiliates; the director is a current employee of such a firm; the director has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance, or tax compliance practice; or the director or an immediate family member was within the last three years (but no longer is) a partner or employee of such a firm and personally worked on the audit of the insured depository institution or any of its affiliates within that time.

(6) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another entity where any of the present executive officers of the institution or any of its affiliates at the same time serves or served on that entity's compensation committee.

(7) The director is a current employee, or an immediate family member is a current executive officer, of an entity that has made payments to, or received payments from, the institution or any of its affiliates for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $200 thousand, or 5 percent of such entity's consolidated gross revenues. This would include payments made by the institution or any of its affiliates to not-for-profit entities where the director is an executive officer or where an immediate family member of the director is an executive officer.

(8) For purposes of paragraph (b) of this guideline:

(i) An ''immediate family member'' includes a person's spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person's home.

(ii) The term affiliate of, or a person affiliated with, a specified person, means a person or entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(iii) The term indirect compensation for consulting, advisory, or other services includes the acceptance of a fee for such services by a director's immediate family member or by an organization in which the director is a partner or principal that provides accounting, consulting, legal, investment banking, or financial advisory services to the institution, any of its subsidiaries, or any of its affiliates.

(iv) The terms direct and indirect compensation and payments do not include payments such as dividends arising solely from investments in the institution's equity securities, provided the same per share amounts

are paid to all shareholders of that class; interest income from investments in the institution's deposit accounts and debt securities; loans from the institution that conform to all regulatory requirements applicable to such loans except that interest payments or other fees paid in association with such loans would be considered payments; and payments under non-discretionary charitable contribution matching programs.

(c) An insured depository institution that is a public company and a listed issuer (as defined in Rule 10A–3 of the Securities Exchange Act of 1934 (Exchange Act)), or is a subsidiary of a public company that meets the criterion specified in §363.1(b)(1) and is a listed issuer, may choose to use the definition of audit committee member independence set forth in the listing standards applicable to the public institution or its public company parent for purposes of determining whether an outside director is ''independent of management.''

(d) All other insured depository institutions may choose to use the definition of audit committee member independence set forth in the listing standards of a national securities exchange that is registered with the SEC pursuant to section 6 of the Exchange Act or a national securities association that is registered with the SEC pursuant to section 15A(a) of the Exchange Act for purposes of determining whether an outside director is ''independent of management.''

29. [Reserved]

30. *Holding Company Audit Committees.* (a) When an insured depository institution satisfies the requirements for the holding company exception specified in §§363.1(b)(1) and (2), the audit committee requirement of this part may be satisfied by the audit committee of the top-tier or any mid-tier holding company. Members of the audit committee of the holding company should meet all the membership requirements applicable to the largest subsidiary depository institution subject to part 363 and should perform all the duties of the audit committee of a subsidiary institution subject to part 363, even if the holding company directors are not directors of the institution.

(b) When an insured depository institution subsidiary with total assets of $1 billion or more as of the beginning of its fiscal year does not meet the requirements for the holding company exception specified in §§363.1(b)(1) and (2) or maintains its own separate audit committee to satisfy the requirements of this part, the members of the audit committee of the top-tier or any mid-tier holding company may serve on the audit committee of the subsidiary institution if they are otherwise independent of management of the subsidiary institution, and, if applicable, meet any other requirements for a large subsidiary institution covered by this part.

(c) When an insured depository institution with total assets of $500 million or more but less than $1 billion as of the beginning of its fiscal year does not meet the requirements for the holding company exception specified in §§363.1(b)(1) and (2) or maintains its own separate audit committee to satisfy the requirements of this part, the members of the audit committee of the top-tier or any mid-tier holding company may serve on the audit committee of the subsidiary institution provided a majority of the institution's audit committee members are independent of management of the subsidiary institution.

(d) Officers and employees of a top-tier or any mid-tier holding company may not serve on the audit committee of a subsidiary institution subject to part 363.

31. *Duties.* The audit committee should perform all duties determined by the institution's board of directors and it should maintain minutes and other relevant records of its meetings and decisions. The duties of the audit committee should be appropriate to the size of the institution and the complexity of its operations, and, at a minimum, should include the appointment, compensation, and oversight of the independent public accountant; 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); reviewing and satisfying itself as to the independent public accountant's compliance with the required qualifications for independent public accountants set forth in §§363.3(f) and (g) and guidelines 13 through 16; ensuring that audit engagement letters comply with the provisions of §363.5(c) before engaging an independent public accountant; being familiar with the notice requirements in §363.4(d) and guideline 20 regarding the selection, change, or termination of an independent public accountant; and ensuring that management sends a copy of any notice required under §363.4(d) to the independent public accountant when it is filed with the FDIC. 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 effectiveness of internal control over financial reporting, and the resolution of identified material weaknesses and significant deficiencies in internal control over financial reporting, including the prevention or detection of management override or compromise of the internal control system;

(c) Reviewing with management the institution's compliance with the Designated Laws and Regulations identified in guideline 7A;

(d) Discussing with management and the independent public accountant any significant disagreements between management and the independent public accountant; and

(e) Overseeing the internal audit function.

32. *Banking or Related Financial Management Expertise.* At least two members of the audit committee of a large institution shall have ''banking or related financial management expertise'' as required by section 36(g)(1)(C)(i). This determination is to be made by the board of directors of the insured depository institution. A person will be considered to have such required expertise if the person has significant executive, professional, educational, or regulatory experience in financial, auditing, accounting, or banking matters as determined by the board of directors. Significant experience as an officer or member of the board of directors or audit committee of a financial services company would satisfy these criteria. A person who has the attributes of an ''audit committee financial expert'' as set forth in the SEC's rules would also satisfy these criteria.

33. *Large Customers.* Any individual or entity (including a controlling person of any such entity) which, in the determination of the board of directors, has such significant direct or indirect credit or other relationships with the institution, the termination of which likely would materially and adversely affect the institution's financial condition or results of operations, should be considered a ''large customer'' for purposes of §363.5(b).

34. *Access to Counsel.* The audit committee should be able to retain counsel at its discretion without prior permission of the institution's board of directors or its management. Section 36 does not preclude advice from the institution's internal counsel or regular outside counsel. It also does not require retaining or consulting counsel, but if the committee elects to do either, it also may elect to consider issues affecting the counsel's independence. Such issues would include whether to retain or consult only counsel not concurrently representing the institution or any affiliate, and whether to place limitations on any counsel representing the institution concerning matters in which such counsel previously participated personally and substantially as outside counsel to the committee.

35. *Transition Period for Forming and Restructuring Audit Committees.*

(a) When an insured depository institution's total assets as of the beginning of its fiscal year are $500 million or more for the first time and it thereby becomes subject to part 363, no regulatory action will be taken if the institution (1) develops and approves a set of written criteria for determining whether a director who is to serve on the audit committee is an outside director and is independent of management and (2) forms or restructures its audit committee to comply with §363.5(a)(2) by the end of that fiscal year.

(b) When an insured depository institution's total assets as of the beginning of its fiscal year are $1 billion or more for the first time, no regulatory action will be taken if the institution forms or restructures its audit committee to comply with §363.5(a)(1) by the end of that fiscal year, provided that the composition of its audit committee meets the requirements specified in §363.5(a)(2) at the beginning of that fiscal year, if such requirements were applicable.

(c) When an insured depository institution's total assets as of the beginning of its fiscal year are $3 billion or more for the first time, no regulatory action will be taken if the institution forms or restructures its audit committee to comply with §363.5(b) by the end of that fiscal year, provided that the composition of its audit committee meets the requirements specified in §363.5(a)(1) at the beginning of that fiscal year, if such requirements were applicable.

OTHER

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 authority to make and publish in the FEDERAL REGISTER minor technical amendments to the Guidelines in this Appendix and the guidance and illustrative reports in Appendix B, in consultation with the other appropriate Federal banking agencies, to reflect the practical experience gained from implementation of this part. It is not anticipated any such modification would be effective until affected institutions have been given reasonable advance notice of the modification. Any material modification or amendment will be subject to review and approval of the FDIC Board of Directors.

TABLE 1 TO APPENDIX A—DESIGNATED FEDERAL LAWS AND REGULATIONS APPLICABLE TO:

		National banks	State member banks	State non-member banks	Savings associations
Insider Loans—Parts and/or Sections of Title 12 of the United States Code					
375a	Loans to Executive Officers of Banks	√	√	(A)	(A)

TABLE 1 TO APPENDIX A—DESIGNATED FEDERAL LAWS AND REGULATIONS APPLICABLE TO:—Continued

		National banks	State member banks	State non-member banks	Savings associations
375b	Extensions of Credit to Executive Officers, Directors, and Principal Shareholders of Banks.	√	√	(A)	(A)
1468(b)	Extensions of Credit to Executive Officers, Directors, and Principal Shareholders.				√
1828(j)(2)	Extensions of Credit to Officers, Directors, and Principal Shareholders.			√	
1828(j)(3)(B)	Extensions of Credit to Officers, Directors, and Principal Shareholders.	(B)		(C)	
Parts and/or Sections of Title 12 of the Code of Federal Regulations					
31	Extensions of Credit to Insiders	√			
32	Lending Limits	√			
215	Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks.	√	√	(D)	(E)
337.3	Limits on Extensions of Credit to Executive Officers, Directors, and Principal Shareholders of Insured Nonmember Banks.			√	
390.338 (state savings associations).	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 Fund	√	√		
1467a(f)	Declaration of Dividend				√
1831o(d)(1)	Prompt Corrective Action—Capital Distributions Restricted.	√	√	√	√
Parts and/or Sections of Title 12 of the Code of Federal Regulations					
5 Subpart E	Payment of Dividends	√			
6.6	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.	√			
208.5	Dividends and Other Distributions		√		
208.45	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.		√		
324.405	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.			√	
390.342–.348 (state savings associations).	Capital Distributions				√
390.455 (state savings associations).	Prompt Corrective Action—Restrictions on Undercapitalized Institutions.				√

(A) Subsections (g) and (h) of section 22 of the Federal Reserve Act [12 U.S.C. 375a, 375b]
(B) Applies only to insured Federal branches of foreign banks.
(C) Applies only to insured State branches of foreign banks.
(D) See 12 CFR 337.3.
(E) See 12 CFR 390.338 (state savings associations).

[74 FR 35745, July 20, 2009, as amended at 78 FR 55596, Sept. 10, 2013; 83 FR 17742, Apr. 24, 2018]

APPENDIX B TO PART 363—ILLUSTRATIVE MANAGEMENT REPORTS

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1. *General.* The reporting scenarios, illustrative management reports, and the cover letter (when complying at the holding company level) in Appendix B to part 363 are intended to assist managements of insured depository institutions in complying with the annual reporting requirements of §363.2 and guideline 3, *Compliance by Holding Company Subsidiaries,* of Appendix A to part 363. However, use of the illustrative management reports and cover letter is not required. The managements of insured depository institutions are encouraged to tailor the wording of their management reports and cover letters to fit their particular circumstances, especially when reporting on material weaknesses in internal control over financial reporting or noncompliance with designated laws and regulations. Terms that are not explained in Appendix B have the meanings given them in part 363, the FDI Act, or professional accounting and auditing literature. Instructions to the preparer of the management reports are shown in brackets within the illustrative reports.

2. *Reporting Scenarios for Institutions that are Holding Company Subsidiaries.* (a) Subject to the criteria specified in §363.1(b), an insured depository institution that is a subsidiary of a holding company has flexibility in satisfying the reporting requirements of part 363. When reporting at the holding company level, the management report, or the individual components thereof, should identify those subsidiary institutions that are subject to part 363 and the extent to which they are included in the scope of the management report or a component of the report. The following reporting scenarios reflect how an insured depository institution that meets the criteria set forth in §363.1(b) could satisfy the annual reporting requirements of §363.2. Other reporting scenarios are possible.

(i) An institution that is a subsidiary of a holding company may satisfy the requirements for audited financial statements; management's statement of responsibilities; management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; management's assessment of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the insured depository institution level.

(ii) An institution that is a subsidiary of a holding company may satisfy the requirements for audited financial statements; management's statement of responsibilities; management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; management's assessment of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the holding company level.

(iii) An institution that is a subsidiary of a holding company may satisfy the requirement for audited financial statements at the holding company level and may satisfy the requirements for management's statement of responsibilities; management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; management's assessment of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the insured depository institution level.

(iv) An institution that is a subsidiary of a holding company may satisfy the requirements for audited financial statements; management's statement of responsibilities; and management's assessment of the institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions at the insured depository institution level and may satisfy the requirements for the assessment by management of the effectiveness of internal control over financial reporting, if applicable; and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, at the holding company level.

(b) For an institution with total assets of $1 billion or more as of the beginning of its fiscal year, the assessment by management of the effectiveness of internal control over financial reporting and the independent public accountant's attestation on management's assertion as to the effectiveness of internal control over financial reporting, if applicable, must both be performed at the same level, *i.e.*, either at the insured depository institution level or at the holding company level.

(c) Financial statements prepared for regulatory reporting purposes encompass the schedules equivalent to the basic financial statements in an institution's appropriate regulatory report, *e.g.*, the bank Consolidated Reports of Condition and Income (Call Report) and the Thrift Financial Report (TFR). Guideline 4A in Appendix A to part 363 identifies the schedules equivalent to the basic financial statements in the Call Report and TFR. When internal control assessments and attestations are performed at the holding company level, the FDIC believes that holding companies have flexibility in interpreting ''financial reporting'' as it relates to ''regulatory reporting'' and has not objected to several reporting approaches employed by holding companies to cover ''regulatory reporting.'' Certain holding companies have had management's assessment and the accountant's attestation cover the schedules equivalent to the basic financial statements that are included in the appropriate regulatory report, *e.g.*, Call Report and the TFR, of each subsidiary institution subject to part 363. Other holding companies have had management's assessment and the accountant's attestation cover the schedules equivalent to the basic financial statements that are included in the holding company's year-end regulatory report (FR Y–9C report) to the Federal Reserve Board.

3. *Illustrative Statements of Management's Responsibilities.* The following illustrative statements of management's responsibilities satisfy the requirements of §363.2(b)(1).

(a) Statement Made at Insured Depository Institution Level

STATEMENT OF MANAGEMENT'S RESPONSIBILITIES

The management of ABC Depository Institution (the ''Institution'') is responsible for preparing the Institution's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions.

ABC Depository Institution

John Doe, Chief Executive Officer
Date: _____

Jane Doe, Chief Financial Officer
Date: _____

(b) Statement Made at Holding Company Level

STATEMENT OF MANAGEMENT'S RESPONSIBILITIES

The management of BCD Holding Company (the ''Company'') is responsible for preparing the Company's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions. The following subsidiary institutions of the Company that are subject to Part 363 are included in this statement of management's responsibilities: [Identify the subsidiary institutions.]

BCD Holding Company

John Doe, Chief Executive Officer
Date: _____

Jane Doe, Chief Financial Officer
Date: _____

4. *Illustrative Reports on Management's Assessment of Compliance with Designated Laws and Regulations.* The following illustrative reports on management's assessment of compliance with Designated Laws and Regulations satisfy the requirements of §363.2(b)(2).

(a) Statement Made at Insured Depository Institution Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable,

State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Institution complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

ABC Depository Institution

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(b) Statement Made at Insured Depository Institution Level—Noncompliance With Designated Laws and Regulations Pertaining to Both Insider Loans and Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Institution did not comply with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amounts of the insider loan(s) and dividend(s) involved.]

ABC Depository Institution

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(c) Statement Made at Insured Depository Institution Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Noncompliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Institution complied with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Institution did not comply with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the dividend(s) involved.]

ABC Depository Institution

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(d) Statement Made at Insured Depository Institution Level—Noncompliance With Designated Laws and Regulations Pertaining to Insider Loans and Compliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of ABC Depository Institution (the ''Institution'') has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Institution did

not comply with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has concluded that the Institution complied with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans, including appropriate qualitative and quantitative information to describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the insider loan(s) involved.]

ABC Depository Institution

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(e) Statement Made at Holding Company Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Company complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

BCD Holding Company

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(f) Statement Made at Holding Company Level—Noncompliance With Designated Laws and Regulations Pertaining to Both Insider Loans and Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Company did not comply with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to identify the subsidiary institutions of the Company that are subject to Part 363 that had instances of noncompliance and describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the insider loan(s) and dividend(s) involved.]

BCD Holding Company

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(g) Statement Made at Holding Company Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Noncompliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and

regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

Based upon its assessment, management has concluded that the Company complied with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Company did not comply with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions, including appropriate qualitative and quantitative information to identify the subsidiary institutions of the Company that are subject to Part 363 that had instances of noncompliance and describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the dividend(s) involved.]

BCD Holding Company

John Doe, Chief Executive Officer
Date:

Jane Doe, Chief Financial Officer
Date:

(h) Statement Made at Holding Company Level—Noncompliance With Designated Laws and Regulations Pertaining to Insider Loans and Compliance With Designated Laws and Regulations Pertaining to Dividend Restrictions

MANAGEMENT'S ASSESSMENT OF COMPLIANCE WITH DESIGNATED LAWS AND REGULATIONS

The management of BCD Holding Company (the ''Company'') has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of compliance with these designated laws and regulations: [Identify the subsidiary institutions.]

Based upon its assessment, management has determined that, because of the instance(s) of noncompliance noted below, the Company did not comply with the Federal laws and regulations pertaining to insider loans during the fiscal year that ended on December 31, 20XX. Also, based upon its assessment, management has concluded that the Company complied with the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

[Identify and describe the instance or instances of noncompliance with the Federal laws and regulations pertaining to insider loans, including appropriate qualitative and quantitative information to identify the subsidiary institutions of the Company that are subject to Part 363 that had instances of noncompliance and describe the nature, type, and severity of the noncompliance and the dollar amount(s) of the insider loan(s) involved.]

BCD Holding Company

John Doe, Chief Executive Officer
Date:

Jane Doe, Chief Financial Officer
Date:

5. *Illustrative Reports on Management's Assessment of Internal Control Over Financial Reporting.* The following illustrative reports on management's assessment of internal control over financial reporting satisfy the requirements of §363.2(b)(3).

(a) Statement Made at Insured Depository Institution Level—No Material Weaknesses

MANAGEMENT'S ASSESSMENT OF INTERNAL CONTROL OVER FINANCIAL REPORTING

ABC Depository Institution's (the ''Institution'') internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.,* [specify the regulatory reports]. The Institution's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Institution; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Institution are being

made only in accordance with authorizations of management and directors of the Institution; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Institution's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework*. Based upon its assessment, management has concluded that, as of December 31, 20XX, the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework*.

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

ABC Depository Institution

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(b) Statement Made at Insured Depository Institution Level—One or More Material Weaknesses

MANAGEMENT'S ASSESSMENT OF INTERNAL CONTROL OVER FINANCIAL REPORTING

ABC Depository Institution's (the ''Institution'') internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.*, [specify the regulatory reports]. The Institution's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Institution; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Institution are being made only in accordance with authorizations of management and directors of the Institution; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Institution's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework*. Because of the material weakness (or

weaknesses) noted below, management determined that the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], was not effective as of December 31, 20XX.

[Identify and describe the material weakness or weaknesses.]

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

ABC Depository Institution

John Doe, Chief Executive Officer
Date:

Jane Doe, Chief Financial Officer
Date:

(c) Statement Made at Holding Company Level—No Material Weaknesses

MANAGEMENT'S ASSESSMENT OF INTERNAL CONTROL OVER FINANCIAL REPORTING

BCD Holding Company's (the ''Company'') internal control over financial reporting is a process designed and effected by those charged with governance, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.*, [specify the regulatory reports]. The Company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework*. Based on that assessment, management concluded that, as of December 31, 20XX, the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework*. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of the effectiveness of internal control over financial reporting: [Identify the subsidiary institutions.]

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

BCD Holding Company

John Doe, Chief Executive Officer
Date:

Jane Doe, Chief Financial Officer
Date:

(d) Statement Made at Holding Company Level—One or More Material Weaknesses

MANAGEMENT'S ASSESSMENT OF INTERNAL CONTROL OVER FINANCIAL REPORTING

BCD Holding Company's (the ''Company'') internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.*, [specify the regulatory reports]. The Company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management is responsible for establishing and maintaining effective internal control over financial reporting including controls over the preparation of regulatory financial statements. Management assessed the effectiveness of the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework*. Because of the material weakness (or weaknesses) noted below, management determined that the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], was not effective as of December 31, 20XX. The following subsidiary institutions of the Company that are subject to Part 363 are included in this assessment of the effectiveness of internal control over financial reporting: [Identify the subsidiary institutions.]

[Identify and describe the material weakness or weaknesses.]

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

BCD Holding Company

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

6. *Illustrative Management Report—Combined Statement of Management's Responsibilities, Report on Management's Assessment of Compliance With Designated Laws and Regulations, and Report on Management's Assessment of Internal Control Over Financial Reporting*, if applicable. The following illustrative management reports satisfy the requirements of §§363.2(b)(1), (2), and (3).

(a) Management Report Made at Insured Depository Institution Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions and No Material Weaknesses in Internal Control Over Financial Reporting

MANAGEMENT REPORT

Statement of Management's Responsibilities

The management of ABC Depository Institution (the ''Institution'') is responsible for preparing the Institution's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and

regulations pertaining to dividend restrictions.

Management's Assessment of Compliance With Designated Laws and Regulations

The management of the Institution has assessed the Institution's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Institution complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

Management's Assessment of Internal Control Over Financial Reporting

The Institution's internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.*, [specify the regulatory reports]. The Institution's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Institution; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Institution are being made only in accordance with authorizations of management and directors of the Institution; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Institution's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management assessed the effectiveness of the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework*.

Based upon its assessment, management has concluded that, as of December 31, 20XX, the Institution's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework*.

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

ABC Depository Institution

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

(b) Management Report Made at Holding Company Level—Compliance With Designated Laws and Regulations Pertaining to Insider Loans and Dividend Restrictions and No Material Weaknesses in Internal Control Over Financial Reporting

MANAGEMENT REPORT

[*Instruction*—The following illustrative introductory paragraph for the management report is applicable only if the same group of subsidiary institutions of the holding company that are subject to Part 363 are included in all three components of the management report required by Part 363: the statement of management's responsibilities, the report on management's assessment of compliance with the Designated Laws and Regulations pertaining to insider loans and dividend restrictions, and the report on management's assessment of internal control over financial reporting.]

In this management report, the following subsidiary institutions of the BCD Holding Company (the ''Company'') that are subject to Part 363 are included in the statement of management's responsibilities; the report on management's assessment of compliance

with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions; and the report on management's assessment of internal control over financial reporting: [Identify the subsidiary institutions.]

[*Instruction*—The following illustrative introductory paragraph for the management report is applicable if the same group of subsidiary institutions of the holding company that are subject to Part 363 are included in the statement of management's responsibilities and management's assessment of compliance with the Designated Laws and Regulations pertaining to insider loans and dividend restrictions, but only some of the subsidiary institutions in the group are included in management's assessment of internal control over financial reporting.]

In this management report, the following subsidiary institutions of BCD Holding Company (the ''Company'') that are subject to Part 363 are included in the statement of management's responsibilities and the report on management's assessment of compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions: [Identify the subsidiary institutions.] In addition, the following subsidiary institutions of the Company that are subject to Part 363 are included in the report on management's assessment of internal control over financial reporting: [Identify the subsidiary institutions.]

Statement of Management's Responsibilities

The management of the Company is responsible for preparing the Company's annual financial statements in accordance with generally accepted accounting principles; for establishing and maintaining an adequate internal control structure and procedures for financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report]; and for complying with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions.

Management's Assessment of Compliance With Designated Laws and Regulations

The management of the Company has assessed the Company's compliance with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX. Based upon its assessment, management has concluded that the Company complied with the Federal laws and regulations pertaining to insider loans and the Federal and, if applicable, State laws and regulations pertaining to dividend restrictions during the fiscal year that ended on December 31, 20XX.

Management's Assessment of Internal Control Over Financial Reporting

The Company's internal control over financial reporting is a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, *i.e.*, [specify the regulatory reports]. The Company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the Company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America and financial statements for regulatory reporting purposes, and that receipts and expenditures of the Company are being made only in accordance with authorizations of management and directors of the Company; and (3) provide reasonable assurance regarding prevention, or timely detection and correction of unauthorized acquisition, use, or disposition of the Company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent, or detect and correct misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies and procedures may deteriorate.

Management assessed the effectiveness of the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, based on the framework set forth by the Committee of Sponsoring Organizations of the Treadway Commission in *Internal Control—Integrated Framework*. Based upon its assessment, management has concluded that, as of December 31, 20XX, the Company's internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the

[specify the regulatory report], is effective based on the criteria established in *Internal Control—Integrated Framework*.

Management's assessment of the effectiveness of internal control over financial reporting, including controls over the preparation of regulatory financial statements in accordance with the instructions for the [specify the regulatory report], as of December 31, 20XX, has been audited by [name of auditing firm], an independent public accounting firm, as stated in their report dated March XX, 20XY.

BCD Holding Company

John Doe, Chief Executive Officer

Date:

Jane Doe, Chief Financial Officer

Date:

7. *Illustrative Cover Letter—Compliance by Holding Company Subsidiaries.* The following illustrative cover letter satisfies the requirements of guideline 3, *Compliance by Holding Company Subsidiaries*, of Appendix A to part 363.

To: (Appropriate FDIC Regional or Area Office) Division of Supervision and Consumer Protection, FDIC, and (Appropriate District or Regional Office of the Primary Federal Regulator(s), if not the FDIC), and

(Appropriate State Bank Supervisor(s), if applicable)

Dear [Insert addressees]:

BCD Holding Company (the ''Company'') is filing two copies of the Part 363 Annual Report for the fiscal year ended December 31, 20XX, on behalf of its insured depository institution subsidiaries listed in the chart below that are subject to Part 363. The Part 363 Annual Report contains audited comparative annual financial statements, the independent public accountant's report on the audited financial statements, management's statement of responsibilities, management's assessment of compliance with the Designated Laws and Regulations pertaining to insider loans and dividend restrictions, and [if applicable] management's assessment of and the independent public accountant's attestation report on internal control over financial reporting. The chart below also indicates the level (institution or holding company) at which the requirements of Part 363 are being satisfied for each listed insured depository institution subsidiary. [If applicable] The Company's other insured depository institution subsidiaries that are subject to Part 363, which comply with all of the Part 363 annual reporting requirements at the institution level, have filed [or will file] their Part 363 Annual Reports separately.

Institutions subject to Part 363	Audited financial statements	Management's statement of responsibilities	Management's assessment of compliance with designated laws and regulations	Management's internal control assessment	Independent auditor's internal control attestation report
ABC Depository Institution.	Holding Company Level.	Holding Company Level.	Holding Company Level.	Holding Company Level.	Holding Company Level.
DEF Depository Institution.	Holding Company Level.	Institution Level	Institution Level	Institution Level	Institution Level.

If you have any questions regarding the annual report [or reports] of the Company's insured depository institution subsidiaries subject to Part 363 or if you need any further information, you may contact me at 987–654–3210.

BCD Holding Company

Date:

[Insert officer's name and title.]

PART 364—STANDARDS FOR SAFETY AND SOUNDNESS

AUTHORITY: 12 U.S.C. 1818 and 1819 (Tenth), 1831p–1; 15 U.S.C. 1681b, 1681s, 1681w, 6801(b), 6805(b)(1).

SOURCE: 80 FR 65907, Oct. 28, 2015, unless otherwise noted.

§ 364.100 Purpose.

Section 39 of the Federal Deposit Insurance Act requires the Federal Deposit Insurance Corporation to establish safety and soundness standards.

Pursuant to section 39, this part establishes safety and soundness standards by guideline.

§ 364.101 Standards for safety and soundness.

(a) *General standards.* The Interagency Guidelines Establishing Standards for Safety and Soundness prescribed pursuant to section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1), as set forth as appendix A to this part, apply to all insured state nonmember banks, to state-licensed insured branches of foreign banks, that are subject to the provisions of section 39 of the Federal Deposit Insurance Act, and to state savings associations (in aggregate, bank or banks and savings association or savings associations).

(b) *Interagency Guidelines Establishing Information Security Standards.* The Interagency Guidelines Establishing Information Security Standards prescribed pursuant to section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1), and sections 501 and 505(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801, 6805(b)), and with respect to the proper disposal of consumer information requirements pursuant to section 628 of the Fair Credit Reporting Act (15 U.S.C. 1681w), as set forth in appendix B to this part, apply to all insured state nonmember banks, insured state licensed branches of foreign banks, any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers), and to state savings associations. The interagency regulations and guidelines on identity theft detection, prevention, and mitigation prescribed pursuant to section 114 of the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. 1681m(e), are set forth in §§ 334.90, 334.91, and appendix J of part 334.

APPENDIX A TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING STANDARDS FOR SAFETY AND SOUNDNESS

I. INTRODUCTION

i. Section 39 of the Federal Deposit Insurance Act[1] (FDI Act) requires each Federal banking agency (collectively, the agencies) to establish certain safety and soundness standards by regulation or by guidelines 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 guidelines under subsection (a) or (b) of section 39, the agency may require the institution to submit to the agency an acceptable plan to achieve compliance with the standard. In the event that an institution fails to submit an acceptable plan within the time allowed by the agency or fails in any material respect to implement an accepted plan, the agency must, by order, require the institution to correct the deficiency. The agency

may, and in some cases must, take other supervisory actions until the deficiency has been corrected.

v. The agencies have adopted amendments to their rules and regulations to establish deadlines for submission and review of compliance plans.[2]

vi. The following Guidelines set out the safety and soundness standards that the agencies use to identify and address problems at insured depository institutions before capital becomes impaired. The agencies believe that the standards adopted in these Guidelines serve this end without dictating how institutions must be managed and operated. These standards are designed to identify potential safety and soundness concerns and ensure that action is taken to address those concerns before they pose a risk to the Deposit Insurance 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. 1831o) and part 324 of title 12 of the Code of Federal Regulations.

B. Definitions

1. *In general.* For purposes of these Guidelines, except as modified in the Guidelines or unless the context otherwise requires, the terms used have the same meanings as set forth in sections 3 and 39 of the FDI Act (12 U.S.C. 1813 and 1831p–1).

2. *Board of directors*, in the case of a state-licensed insured branch of a foreign bank and in the case of a federal branch of a foreign bank, means the managing official in charge of the insured foreign branch.

3. *Compensation* means all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

4. *Director* shall have the meaning described in 12 CFR 215.2(d).[3]

5. *Executive officer* shall have the meaning described in 12 CFR 215.2(e).[4]

6. *Principal shareholder* shall have the meaning described in 12 CFR 215.2(m).[5]

II. Operational and Managerial Standards

A. *Internal controls and information systems.* An institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities and that provide for:

1. An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies;

2. Effective risk assessment;

3. Timely and accurate financial, operational and regulatory reports;

4. Adequate procedures to safeguard and manage assets; and

5. Compliance with applicable laws and regulations.

B. *Internal audit system.* An institution should have an internal audit system that is appropriate to the size of the institution and the nature and scope of its activities and that provides for:

1. Adequate monitoring of the system of internal controls through an internal audit function. For an institution whose size, complexity or scope of operations does not warrant a full scale internal audit function, a system of independent reviews of key internal controls may be used;

2. Independence and objectivity;

3. Qualified persons;

4. Adequate testing and review of information systems;

5. Adequate documentation of tests and findings and any corrective actions;

6. Verification and review of management actions to address material weaknesses; and

7. Review by the institution's audit committee or board of directors of the effectiveness of the internal audit systems.

C. *Loan documentation.* An institution should establish and maintain loan documentation practices that:

1. Enable the institution to make an informed lending decision and to assess risk, as necessary, on an ongoing basis;

2. Identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner;

3. Ensure that any claim against a borrower is legally enforceable;

4. Demonstrate appropriate administration and monitoring of a loan; and

5. Take account of the size and complexity of a loan.

D. *Credit underwriting.* An institution should establish and maintain prudent credit underwriting practices that:

1. Are commensurate with the types of loans the institution will make and consider the terms and conditions under which they will be made;

2. Consider the nature of the markets in which loans will be made;

3. Provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed;

4. Establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors;

5. Take adequate account of concentration of credit risk; and

6. Are appropriate to the size of the institution and the nature and scope of its activities.

E. *Interest rate exposure.* An institution should:

1. Manage interest rate risk in a manner that is appropriate to the size of the institution and the complexity of its assets and liabilities; and

2. Provide for periodic reporting to management and the board of directors regarding interest rate risk with adequate information for management and the board of directors to assess the level of risk.

F. *Asset growth.* An institution's asset growth should be prudent and consider:

1. The source, volatility and use of the funds that support asset growth;

2. Any increase in credit risk or interest rate risk as a result of growth; and

3. The effect of growth on the institution's capital.

G. *Asset quality.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration in those assets. The institution should:

1. Conduct periodic asset quality reviews to identify problem assets;

2. Estimate the inherent losses in those assets and establish reserves that are sufficient to absorb estimated losses;

3. Compare problem asset totals to capital;

4. Take appropriate corrective action to resolve problem assets;

5. Consider the size and potential risks of material asset concentrations; and

6. Provide periodic asset reports with adequate information for management and the board of directors to assess the level of asset risk.

H. *Earnings.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to evaluate and monitor earnings and ensure that earnings are sufficient to maintain adequate capital and reserves. The institution should:

1. Compare recent earnings trends relative to equity, assets, or other commonly used benchmarks to the institution's historical results and those of its peers;

2. Evaluate the adequacy of earnings given the size, complexity, and risk profile of the institution's assets and operations;

3. Assess the source, volatility, and sustainability of earnings, including the effect of nonrecurring or extraordinary income or expense;

4. Take steps to ensure that earnings are sufficient to maintain adequate capital and reserves after considering the institution's asset quality and growth rate; and

5. Provide periodic earnings reports with adequate information for management and the board of directors to assess earnings performance.

I. *Compensation, fees and benefits.* An institution should maintain safeguards to prevent the payment of compensation, fees, and benefits that are excessive or that could lead to material financial loss to the institution.

III. Prohibition on Compensation That Constitutes an Unsafe and Unsound Practice

A. Excessive Compensation

Excessive compensation is prohibited as an unsafe and unsound practice. Compensation shall be considered excessive when amounts paid are unreasonable or disproportionate to the services performed by an executive officer, employee, director, or principal shareholder, considering the following:

1. The combined value of all cash and noncash benefits provided to the individual;

2. The compensation history of the individual and other individuals with comparable expertise at the institution;

3. The financial condition of the institution;

4. Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the loan portfolio or other assets;

5. For postemployment benefits, the projected total cost and benefit to the institution;

6. Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the institution; and

7. Any other factors the agencies determine to be relevant.

B. *Compensation Leading to Material Financial Loss*

Compensation that could lead to material financial loss to an institution is prohibited as an unsafe and unsound practice.

[1] Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) was added by section 132 of the Federal Deposit Insurance

Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, 105 Stat. 2236 (1991), and amended by section 956 of the Housing and Community Development Act of 1992, Pub. L. 102–550, 106 Stat. 3895 (1992) and section 318 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325, 108 Stat. 2160 (1994).

[2] For the Office of the Comptroller of the Currency, these regulations appear at 12 CFR Part 30; for the Board of Governors of the Federal Reserve System, these regulations appear at 12 CFR Part 263; and for the Federal Deposit Insurance Corporation, these regulations appear at 12 CFR Part 308, subpart R.

[3] In applying these definitions for savings associations, pursuant to 12 U.S.C. 1464, savings associations shall use the terms ''savings association'' and ''insured savings association'' in place of the terms ''member bank'' and ''insured bank''.

[4] See footnote 3 in section I.B.4. of this appendix.

[5] See footnote 3 in section I.B.4. of this appendix.

[80 FR 65907, Oct. 28, 2015, as amended at 83 FR 17742, Apr. 24, 2018]

APPENDIX B TO PART 364—INTERAGENCY GUIDELINES ESTABLISHING INFORMATION SECURITY STANDARDS

TABLE OF CONTENTS

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. 1681s 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 the behalf of, entities over which the Federal Deposit Insurance Corporation (FDIC) has authority. Such entities, referred to as ''insured depository institution'' or ''institution'' are banks insured by the FDIC (other than members of the Federal Reserve System), state savings associations insured by the FDIC, 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.* 1. 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 a consumer report or is derived from a consumer report and that is maintained or otherwise possessed by or on behalf of the institution 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 an institution obtains;

(B) information from a consumer report that the institution 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 institution 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 institution obtains about an individual who guarantees a loan (including a loan to a business entity); or

(E) information from a consumer report that the institution 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 institution as defined in §332.3(h) of this chapter.

e. *Customer information* means any record containing nonpublic personal information, as defined in §332.3(n) of this chapter, about a customer, whether in paper, electronic, or other form, that is maintained by or on behalf of the institution.

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 institution.

II. Standards for Information Security

A. *Information Security Program.* Each insured depository institution shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the institution and the nature and scope of its activities. While all parts of the institution are not required to implement a uniform set of policies, all elements of the information security program must be coordinated.

B. *Objectives.* An institution'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 insured depository institution shall:

1. Approve the institution's written information security program; and

2. Oversee the development, implementation, and maintenance of the institution's information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.*

Each institution 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 institution 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 institution's activities. Each institution must consider whether the following security measures are appropriate for the institution and, if so, adopt those measures the institution 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 institution'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 institution 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 institution'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 institution'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 institution 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 institution'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, an institution should review audits, summaries of test results, or other equivalent evaluations of its service providers.

E. *Adjust the Program.* Each institution 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 institution'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 institution 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 institution's compliance with these Guidelines. The report, which will vary depending upon the complexity of each institution'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 institution must implement an information 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 an institution has entered into with a service provider to perform services for it or functions 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 institution entered into the contract on or before March 5, 2001.

3. *Effective date for measures relating to the disposal of consumer information.* Each institution 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., an institution'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[1] interprets section 501(b) of the Gramm-Leach-Bliley Act (GLBA) and the Interagency Guidelines Establishing Information Security Standards (the Security Guidelines)[2] 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. For example, the term ''customer information'' is the same term used 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,[4] 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 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.[5]

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 customers.[6]

II. Response Program

Millions of Americans, throughout the country, have been victims of identity theft.[7] 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.[8] 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[9] that occur nonetheless. A response program should be a key part of an institution's information security program.[10] 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,[11] 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;

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,[12] 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;[13] 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 the institutions' customers or regulator on its behalf.

III. Customer Notice

Financial institutions have an affirmative duty to protect their customers' information against unauthorized access or use. Notifying customers of a security incident involving the unauthorized access or use of the customer's information in accordance with the standard set forth below is a key part of that duty. Timely notification of customers is important to manage an institution's reputation risk. Effective notice also may reduce an institution's legal risk, assist in maintaining good customer relations, and enable the institution's customers to take steps to protect themselves against the consequences of identity theft. When customer notification is warranted, an institution may not forgo notifying its customers of an incident because the institution believes that it may be potentially embarrassed or inconvenienced by doing so.

A. Standard for Providing Notice

When a financial institution becomes aware of an incident of unauthorized access to sensitive customer information, the institution should conduct a reasonable investigation to promptly determine the likelihood that the information has been or will be misused. If the institution determines that misuse of its information about a customer has occurred or is reasonably possible, it should notify the affected customer as soon as possible. Customer notice may be delayed if an appropriate law enforcement agency determines that notification will interfere with a criminal investigation and provides the institution with a written request for the delay. However, the institution should notify its customers as soon as notification will no longer interfere with the investigation.

1. Sensitive Customer Information

Under the Guidelines, an institution must protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer. Substantial harm or inconvenience is most likely to result from improper access to *sensitive customer information* because this type of information is most likely to be misused, as in the commission of identity theft. For purposes of this Guidance, *sensitive customer information* means a customer's name, address, or telephone number, in conjunction with the customer's social security number, driver's license number, account number, credit or debit card number, or a personal identification number or password that would permit 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 or password or password and 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.[14] 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 identify 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.[15]

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 email address and who have agreed to receive communications electronically.

[1] This Guidance was 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). Pursuant to 12 U.S.C. 5412, the OTS is no longer a party to this Guidance.

[2] 12 CFR part 30, app. B (OCC); 12 CFR part 208, app. D–2 and part 225, app. F (Board); and 12 CFR part 364, app. B (FDIC). The ''Interagency Guidelines Establishing Information Security Standards'' were formerly known as ''The Interagency Guidelines Establishing Standards for Safeguarding Customer Information.''

[3] *See* Security Guidelines, III.B.

[4] *See* Security Guidelines, III.C.

[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), 12 CFR part 314.

[7] The FTC estimates that nearly 10 million Americans discovered they were victims of some form of identity theft in 2002. *See* The Federal Trade Commission. *Identity Theft Survey Report* (September 2003), available at *http://www.ftc.gov/os/2003/09/synovatereport.pdf*.

[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.

[10] *See* FFIEC Information Technology Examination Handbook, Information Security Booklet, Dec. 2002 available at *http://ithandbook.ffiec.gov/it-booklets/information-security.aspx*. Federal Reserve SR 97–32, Sound Practice Guidance for Information Security for Networks, Dec. 4, 1997; OCC Bulletin 2000–14, ''Infrastructure Threats—Intrusion Risks'' (May 15, 2000), for additional guidance on preventing, detecting, and responding to intrusions into financial institutions computer systems.

[11] *See* Federal Reserve SR Ltr. 13-19, Guidance on Managing Outsourcing Risk, Dec. 5, 2013; OCC Bulletin 2013–29, ''Third-Party Relationships—Risk Management Guidance,'' Oct. 30, 2013; and FDIC FIL 44–08, Guidance for Managing Third Party Risk, June 6, 2008 and FIL 68–99, Risk Assessment Tools and Practices for Information System Security, July 7, 1999.

[12] An institution's obligations to file a SAR is set out in the Agencies' SAR regulations and Agency guidance. *See, for example, 12 CFR 21.11* (national banks, Federal branches and agencies); 12 CFR 163.180 (Federal savings associations); 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); and 12 CFR part 353 (FDIC-supervised institutions). 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 97–9, ''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.

[13] *See* FFIEC Information Technology Examination Handbook, Information Security Booklet, Dec. 2002, pp. 68–74.

[14] The institution should, therefore, ensure that it has reasonable policies and procedures in place, including trained personnel, to respond appropriately to customer inquiries and requests for assistance.

[15] Currently, the FTC Web site for the ID Theft brochure and the FTC Hotline phone number are *http://www.consumer.gov/idtheft* and 1–877–IDTHEFT. The institution may also refer customers to any materials developed pursuant to section 151(b) of the FACT Act (educational materials developed by the FTC to teach the public how to prevent identity theft).

PART 365—REAL ESTATE LENDING STANDARDS

Subpart A—Real Estate Lending Standards

Subpart B [Reserved]

AUTHORITY: 12 U.S.C. 1828(o) and 5101 *et seq.*

SOURCE: 57 FR 62896, 62900, Dec. 31, 1992, unless otherwise noted.

Subpart A—Real Estate Lending Standards

§ 365.1 Purpose and scope.

This subpart, issued pursuant to section 304 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribes standards for real estate lending to be used by FDIC-supervised institutions in adopting internal real estate lending policies. For purposes of this subpart, the term ''FDIC-supervised institution'' means any insured depository institution for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

[84 FR 31173, July 1, 2019]

§ 365.2 Real estate lending standards.

(a) Each FDIC-supervised institution 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 FDIC-supervised institution'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 FDIC-supervised institution's real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the FDIC-supervised institution's real estate lending policies.

(c) Each FDIC-supervised institution 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.

[57 FR 62896, 62900, Dec. 31, 1992, as amended at 84 FR 31173, July 1, 2019]

APPENDIX A TO SUBPART A OF 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.[1] These guidelines are intended to assist institutions in the formulation and maintenance of a real estate lending policy that is appropriate to the size of the institution and the nature and scope of its individual operations, as well as satisfies the requirements of the regulation.

Each institution's policies must be comprehensive, and consistent with safe and sound lending practices, and must ensure that the institution operates within limits and according to standards that are reviewed and approved at least annually by the board of directors. Real estate lending is an integral part of many institutions' business plans and, when undertaken in a prudent manner, will not be subject to examiner criticism.

LOAN PORTFOLIO MANAGEMENT CONSIDERATIONS

The lending policy should contain a general outline of the scope and distribution of the institution's credit facilities and the manner in which real estate loans are made, serviced, and collected. In particular, the institution's policies on real estate lending should:

- Identify the geographic areas in which the institution will consider lending.
- Establish a loan portfolio diversification policy and set limits for real estate loans by type and geographic market (e.g., limits on higher risk loans).
- Identify appropriate terms and conditions by type of real estate loan.
- Establish loan origination and approval procedures, both generally and by size and type of loan.
- Establish prudent underwriting standards that are clear and measurable, including loan-to-value limits, that are consistent with these supervisory guidelines.
- Establish review and approval procedures for exception loans, including loans with loan-to-value percentages in excess of supervisory limits.
- Establish loan administration procedures, including documentation, disbursement, collateral inspection, collection, and loan review.
- Establish real estate appraisal and evaluation programs.
- Require that management monitor the loan portfolio and provide timely and adequate reports to the board of directors.

The institution should consider both internal and external factors in the formulation of its loan policies and strategic plan. Factors that should be considered include:

- 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

[1] 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).

credit factors. The underwriting standards should address:

- The maximum loan amount by type of property.
- Maximum loan maturities by type of property.
- Amortization schedules.
- Pricing structure for different types of real estate loans.
- Loan-to-value limits by type of property.

For development and construction projects, and completed commercial properties, the policy should also establish, commensurate with the size and type of the project or property:

- Requirements for feasibility studies and sensitivity and risk analyses (*e.g.*, sensitivity of income projections to changes in economic variables such as interest rates, vacancy rates, or operating expenses).
- Minimum requirements for initial investment and maintenance of hard equity by the borrower (*e.g.*, cash or unencumbered investment in the underlying property).
- Minimum standards for net worth, cash flow, and debt service coverage of the borrower or underlying property.
- Standards for the acceptability of and limits on non-amortizing loans.
- Standards for the acceptability of and limits on the use of interest reserves.
- Pre-leasing and pre-sale requirements for income-producing property.
- Pre-sale and minimum unit release requirements for non-income-producing property loans.
- Limits on partial recourse or non-recourse loans and requirements for guarantor support.
- Requirements for takeout commitments.
- Minimum covenants for loan agreements.

LOAN ADMINISTRATION

The institution should also establish loan administration procedures for its real estate portfolio that address:

- Documentation, including:

  Type and frequency of financial statements, including requirements for verification of information provided by the borrower;
  Type and frequency of collateral evaluations (appraisals and other estimates of value).

- Loan closing and disbursement.
- Payment processing.
- Escrow administration.
- Collateral administration.
- Loan payoffs.
- Collections and foreclosure, including:

  Delinquency follow-up procedures;
  Foreclosure timing;
  Extensions and other forms of forbearance;
  Acceptance of deeds in lieu of foreclosure.

- Claims processing (*e.g.*, seeking recovery on a defaulted loan covered by a government guaranty or insurance program).
- Servicing and participation agreements.

SUPERVISORY LOAN-TO-VALUE LIMITS

Institutions should establish their own internal loan-to-value limits for real estate loans. These internal limits should not exceed the following supervisory limits:

Loan category	Loan-to-value limit (percent)
Raw land	65
Land development	75
Construction:	
Commercial, multifamily,[2] and other nonresidential	80
1- to 4-family residential	85
Improved property	85
Owner-occupied 1- to 4-family and home equity	[3]

[2] Multifamily construction includes condominiums and cooperatives.

[3] 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.[4] Moreover, within the aggregate limit, total loans for all commercial, agricultural, multifamily or other non-1-to-4 family residential properties should not exceed 30 percent of total capital. An institution will come under increased supervisory scrutiny as the total of such loans approaches these levels.

EXCLUDED TRANSACTIONS

The agencies also recognize that there are a number of lending situations in which other factors significantly outweigh the need to apply the supervisory loan-to-value limits. These include:

• Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.

• Loans backed by the full faith and credit of a state government, provided that the amount of the assurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.

• Loans guaranteed or insured by a state, municipal or local government, or an agency thereof, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit, and provided that the lender has determined that the guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.

• Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.

• Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs), or loans that are renewed, refinanced, or restructured in connection with a workout situation, either with or without the advancement of new funds, where consistent with safe and sound banking practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.

• Loans that facilitate the sale of real estate acquired by the lender in the ordinary course of collecting a debt previously contracted in good faith.

• Loans for which a lien on or interest in real property is taken as additional collateral through an abundance of caution by the lender (e.g., the institution takes a blanket lien on all or substantially all of the assets of the borrower, and the value of the real property is low relative to the aggregate value of all other collateral).

• Loans, such as working capital loans, where the lender does not rely principally on real estate as security and the extension of credit is not used to acquire, develop, or construct permanent improvements on real property.

• Loans for the purpose of financing permanent improvements to real property, but not secured by the property, if such security interest is not required by prudent underwriting practice.

EXCEPTIONS TO THE GENERAL LENDING POLICY

Some provision should be made for the consideration of loan requests from creditworthy borrowers whose credit needs do not fit within the institution's general lending policy. An institution may provide for prudently underwritten exceptions to its lending policies, including loan-to-value limits, on a loan-by-loan basis. However, any exceptions from the supervisory loan-to-value limits should conform to the aggregate limits on such loans discussed above.

The board of directors is responsible for establishing standards for the review and approval of exception loans. Each institution should establish an appropriate internal

[4] For state non-member banks and state savings associations, ''total capital'' refers to that term described in §324.2 of this chapter.

process for the review and approval of loans that do not conform to its own internal policy standards. The approval of any such loan should be supported by a written justification that clearly sets forth all of the relevant credit factors that support the underwriting decision. The justification and approval documents for such loans should be maintained as a part of the permanent loan file. Each institution should monitor compliance with its real estate lending policy and individually report exception loans of a significant size to its board of directors.

SUPERVISORY REVIEW OF REAL ESTATE LENDING POLICIES AND PRACTICES

The real estate lending policies of institutions will be evaluated by examiners during the course of their examinations to determine if the policies are consistent with safe and sound lending practices, these guidelines, and the requirements of the regulation. In evaluating the adequacy of the institution's real estate lending policies and practices, examiners will take into consideration the following factors:

- The nature and scope of the institution's real estate lending activities.
- The size and financial condition of the institution.
- The quality of the institution's management and internal controls.
- The expertise and size of the lending and loan administration staff.
- Market conditions.

Lending policy exception reports will also be reviewed by examiners during the course of their examinations to determine whether the institutions' exceptions are adequately documented and appropriate in light of all of the relevant credit considerations. An excessive volume of exceptions to an institution's real estate lending policy may signal a weakening of its underwriting practices, or may suggest a need to revise the loan policy.

DEFINITIONS

For the purposes of these Guidelines:

Construction loan means an extension of credit for the purpose of erecting or rehabilitating buildings or other structures, including any infrastructure necessary for development.

Extension of credit or *loan* means:

(1) The total amount of any loan, line of credit, or other legally binding lending commitment with respect to real property; and

(2) The total amount, based on the amount of consideration paid, of any loan, line of credit, or other legally binding lending commitment acquired by a lender by purchase, assignment, or otherwise.

Improved property loan means an extension of credit secured by one of the following types of real property:

(1) Farmland, ranchland or timberland committed to ongoing management and agricultural production;

(2) 1- to 4-family residential property that is not owner-occupied;

(3) Residential property containing five or more individual dwelling units;

(4) Completed commercial property; or

(5) Other income-producing property that has been completed and is available for occupancy and use, except income-producing owner-occupied 1- to 4-family residential property.

Land development loan means an extension of credit for the purpose of improving unimproved real property prior to the erection of structures. The improvement of unimproved real property may include the laying or placement of sewers, water pipes, utility cables, streets, and other infrastructure necessary for future development.

Loan origination means the time of inception of the obligation to extend credit (*i.e.*, when the last event or prerequisite, controllable by the lender, occurs causing the lender to become legally bound to fund an extension of credit).

Loan-to-value or *loan-to-value ratio* means the percentage or ratio that is derived at the time of loan origination by dividing an extension of credit by the total value of the property(ies) securing or being improved by the extension of credit plus the amount of any readily marketable collateral and other acceptable collateral that secures the extension of credit. The total amount of all senior liens on or interests in such property(ies) should be included in determining the loan-to-value ratio. When mortgage insurance or collateral is used in the calculation of the loan-to-value ratio, and such credit enhancement is later released or replaced, the loan-to-value ratio should be recalculated.

Other acceptable collateral means any collateral in which the lender has a perfected security interest, that has a quantifiable value, and is accepted by the lender in accordance with safe and sound lending practices. Other acceptable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral. Other acceptable collateral includes, among other items, unconditional irrevocable standby letters of credit for the benefit of the lender.

Owner-occupied, when used in conjunction with the term *1- to 4-family residential property* means that the owner of the underlying real property occupies at least one unit of the real property as a principal residence of the owner.

Readily marketable collateral means insured deposits, financial instruments, and bullion in which the lender has a perfected interest. Financial instruments and bullion must be salable under ordinary circumstances with

reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market. Readily marketable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral.

Value means an opinion or estimate, set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of real property, prepared in accordance with the agency's appraisal regulations and guidance. For loans to purchase an existing property, the term ''value'' means the lesser of the actual acquisition cost or the estimate of value.

1- to 4-family residential property means property containing fewer than five individual dwelling units, including manufactured homes permanently affixed to the underlying property (when deemed to be real property under state law).

[57 FR 62896, 62900, Dec. 31, 1992; 58 FR 4460, Jan. 14, 1993. Redesignated at 75 FR 44692, July 28, 2010; 78 FR 55597, Sept. 10, 2013; 83 FR 17743, Apr. 24, 2018; 84 FR 61804, Nov. 13, 2019; 85 FR 15917, Mar. 20, 2020]

Subpart B [Reserved]

PART 366—MINIMUM STANDARDS OF INTEGRITY AND FITNESS FOR AN FDIC CONTRACTOR

Sec.

AUTHORITY: Section 9 (Tenth) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1819 (Tenth); sections 12(f)(3) and (4) of the FDI Act, 12 U.S.C. 1822(f)(3) and (4); and section 19 of Pub. L. 103–204, 107 Stat. 2369.

SOURCE: 67 FR 69991, Nov. 20, 2002, unless otherwise noted.

§ 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 FDI 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 FDI 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).

[67 FR 69991, Nov. 20, 2002, as amended at 71 FR 20527, Apr. 21, 2006]

§ 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.

(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 confidential information as described in §§ 366.10 through 366.13. You must also provide us with the information we require in § 366.14. Failure to meet these requirements may prevent you from contracting with us.

§ 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.

AUTHORITY: 12 U.S.C. 1822(f) (4) and (5).

SOURCE: 61 FR 68560, Dec. 30, 1996, unless otherwise noted.

§ 367.1 Authority, purpose, scope and application.

(a) *Authority.* This part is adopted pursuant to section 12(f) (4) and (5) of the Federal Deposit Insurance Act, 12 U.S.C. 1822(f) (4) and (5), and the rulemaking authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. Other regulations implementing these statutory directives appear at 12 CFR part 366.

(b) *Purpose.* This part is designed to inform contractors and subcontractors (including their affiliated business entities, key employees and management officials) regarding their rights to notice and an opportunity to be heard on FDIC actions involving suspension and exclusion from contracting and rescission of existing contracts. This part is

in addition to, and not in lieu of, any other statute or regulation that may apply to such contractual activities.

(c) *Scope.* This part applies to:

(1) Contractors, other than attorneys or law firms providing legal services, submitting offers to provide services or entering into contracts to provide services to the FDIC acting in any capacity; and

(2) Subcontractors entering into contracts to perform services under a proposed or existing contract with the FDIC.

(d) *Application.* (1) This part will apply to entities that become contractors, as defined in §367.2(f), on or after December 30, 1996. In addition, this part will apply to contractors as defined in §367.2(f) that are performing contracts on December 30, 1996.

(2) This part will also apply to actions initiated on or after December 30, 1996 regardless of the date of the cause giving rise to the actions.

(3) Contracts entered into by the former Resolution Trust Corporation (RTC) that were transferred to the FDIC will be treated in the same manner as FDIC contracts under this part.

(4) RTC actions taken under the RTC regulations on or before December 31, 1995, will be honored as if taken by the FDIC. A contractor subject to an RTC exclusion or suspension will be precluded thereby from participation in the FDIC's contracting program unless that exclusion or suspension is modified or terminated under the provisions of this part.

§367.2 Definitions.

(a) *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor, or is under common control with the contractor.

(c) *Civil judgment* means a judgment of a civil offense or liability by any court of competent jurisdiction in the United States.

(d) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association, consortium or similar organization.

(e) *Conflict of interest* means a situation in which:

(1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC:

(i) Has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract;

(ii) Is an adverse party to the FDIC, RTC, the former Federal Savings and Loan Insurance Corporation (FSLIC), or their successors in a lawsuit; or

(iii) Has ever been suspended, excluded, or debarred from contracting with a federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or

(2) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

(f) *Contractor* means a person or company which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services. For purposes of this part, contractor also includes:

(1) A contractor's affiliated business entities, key employees, and management officials of the contractor;

(2) Any subcontractor performing services for the FDIC and the management officials and key employees of such subcontractors; and

(3) Any entity or organization seeking to perform services for the FDIC as a minority or woman-owned business (MWOB).

(g) *Contract(s)* means agreement(s) between FDIC and a contractor, including, but not limited to, agreements

identified as ''Task Orders'', for a contractor to provide services to FDIC. Contracts also mean contracts between a contractor and its subcontractor.

(h) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(i) *Conviction* means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, and includes pleas of nolo contendere.

(j) *FDIC* means the Federal Deposit Insurance Corporation acting in its receivership and corporate capacities, and FDIC officials or committees acting under delegated authority.

(k) *Indictment* shall include an information or other filing by a competent authority charging a criminal offense.

(l) *Key employee* means an individual who participates personally and substantially in the negotiation of, performance of, and/or monitoring for compliance under a contract with the FDIC. Such participation is made through, but is not limited to, decision, approval, disapproval, recommendation, or the rendering of advice under the contract.

(m) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership, all partners are deemed to be management officials unless the partnership is governed by a management or executive committee with responsibility for the day-to-day operations. In partnerships with such committees, management official means only those partners who are a member of such a committee.

(n) *Material fact* means one that is necessary to determine the outcome of an issue or case and without which the case could not be supported.

(o) *Offer* means a proposal or other written or oral offer to provide services to FDIC.

(p) *Pattern or practice of defalcation regarding obligations* means two or more instances in which a loan or advance from an insured depository institution:

(1) Is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof, and there remains a legal obligation to pay an amount in excess of $50,000; or

(2) Where there has been a failure to comply with the terms of a loan or advance to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of $50,000 to the insured depository institution.

(q) *Preponderance of the evidence* means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(r) *Subcontractor* means an entity or organization that enters into a contract with an FDIC contractor or another subcontractor to perform services under a proposed or existing contract with the FDIC.

(s) *Substantial loss to federal deposit insurance funds* means:

(1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the 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.

[61 FR 68560, Dec. 30, 1996, as amended at 71 FR 20527, Apr. 21, 2006]

§ 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 antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging, or conspiracy to do the same;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstructing of justice, or conspiracy to do the same;

(4) Commission of any other offense indicating a breach of trust, dishonesty or lack of integrity, or conspiracy to do the same;

(l) The contractor's performance under previous contract(s) with FDIC or RTC has resulted in:

(1) The FDIC or RTC declaring such contract(s) to be in default; or

(2) The termination of such contract(s) for poor performance; or

(3) A violation of the terms of a contract that would have resulted in a default or termination of the contract for poor performance if that violation had been discovered during the course of the contract; or

(m) The contractor has engaged in any conduct:

(1) Indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects its ability to meet standards of present responsibility required of an FDIC contractor; or

(2) So serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimum ethical standards required by 12 CFR part 366.

[61 FR 68560, Dec. 30, 1996, as amended at 71 FR 20528, Apr. 21, 2006]

§ 367.7 Suspensions.

(a) The Ethics Counselor may suspend a contractor for any of the causes in § 367.8 using the procedures established in this section.

(b) Suspension is an action to be imposed when there exists adequate evidence of one or more of the causes set out in § 367.8. This includes, but is not limited to, situations where immediate action is necessary to protect the integrity of the FDIC contracting program and/or the security of FDIC assets during the pendency of legal or investigative proceedings initiated by FDIC, any federal agency or any law enforcement authority.

(c) The duration of any suspension action shall be for a temporary period pending the completion of an investigation and such other legal proceedings as may ensue.

(d) A suspension shall become effective immediately upon issuance of the notice specified in § 367.13(b).

(e) Contractors suspended from FDIC contracting programs are prohibited from entering into any new contracts with the FDIC for the duration of the period of suspension. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Suspended contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors.

§ 367.8 Causes for suspension.

(a) Suspension may be imposed under the procedures set forth in this section upon adequate evidence:

(1) Of suspension by another federal agency;

(2) That a cause for exclusion under § 367.6 may exist;

(3) Of the commission of any other offense indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects the minimum ethical standards required of an FDIC contractor; or

(4) Of any other cause so serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimal ethical standards required by 12 CFR part 366.

(b) Indictment for any offense described in § 367.6 is adequate evidence to suspend a contractor.

(c) In assessing the adequacy of the evidence, FDIC will consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated and what inferences can reasonably be drawn as a result.

§ 367.9 Imputation of causes.

(a) Where there is cause to suspend and/or exclude any affiliated business entity of the contractor, that conduct may be imputed to the contractor if the conduct occurred in connection with the affiliated business entity's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) Where there is cause to suspend and/or exclude any contractor, that conduct may be imputed to any affiliated business entity, key employee, or management official of a contractor who participated in, knew of or had reason to know of the contractor's conduct.

(c) Where there is cause to suspend and/or exclude a key employee or management official of a contractor, that cause may be imputed to the contractor if the conduct occurred in connection with the key employee or management official's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(d) Where there is cause to suspend and/or exclude one contractor participating in a joint venture or similar arrangement, that cause may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(e) Where there is cause to suspend and/or exclude a subcontractor, that cause may be imputed to the contractor for which the subcontractor performed services, if the conduct occurred for or on behalf of the contractor and with the contractor's knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§§ 367.10–367.11 [Reserved]

§ 367.12 Procedures.

(a) FDIC shall process suspension and exclusion actions as informally as practicable, consistent with its policy of providing contractors with adequate information on the grounds that give rise to the proposed action and affording contractors with a reasonable opportunity to respond.

(b) For purposes of determining filing dates for the pleadings required by this part, including responses, notices of appeal, appeals and requests for reconsideration, the provisions relating to the construction of time limits in 12 CFR 308.12 will control.

§ 367.13 Notices.

(a) *Exclusions.* Before excluding a contractor, the FDIC shall send it a written notice of possible cause to exclude. Such notice shall include:

(1) Notification that exclusion for a specified period of time is being considered based on the specified cause(s) in § 367.6 to be relied upon;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicates that there is cause to believe a cause for exclusion exists, described in sufficient detail to put the contractor on notice of the conduct or transaction(s) upon which an exclusion proceeding is based;

(3) Notification that the contractor is not prohibited from contracting with the FDIC unless and until it is either suspended from FDIC contracting or the FDIC Ethics Counselor issues a decision excluding the contractor, *provided however,* in any case where the possible cause for exclusion would also be an impediment to the contractor's eligibility pursuant to 12 CFR part 366, the contractor's eligibility for any contract will be determined under that part; and

(4) Notification of the regulatory provisions governing the exclusion proceeding and the potential effect of a final exclusion decision.

(b) *Suspensions.* Before suspending a contractor, the FDIC shall send it notice, including:

(1) Notice that a suspension is being imposed based on specified causes in § 367.8;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicate that there is adequate evidence to believe a cause for suspension exists, described in sufficient detail to put the contractor on notice of the basis for the suspension, recognizing that the conduct of ongoing investigations and legal proceedings, including criminal proceedings, place limitations on the evidence that can be released;

(3) Notification that the suspension prohibits the contractor from contracting with the FDIC for a temporary period, pending the completion of an investigation or other legal proceedings; and

(4) Notification of the regulatory provisions governing the suspension proceeding.

(c) *Service of notices.* Notices will be sent to the contractor by first class mail, postage prepaid. For purposes of compliance with this section, notice shall be considered to have been received by the contractor if the notice is properly mailed to the last known address of such contractor. Whenever practical, a copy of the notice will also be transmitted to the contractor by facsimile. In the event the notice is not sent by facsimile, a copy will be sent by an overnight delivery service such as Express Mail or a commercial equivalent.

§ 367.14 Responses.

(a) The contractor will have 15 days from the date of the notice within which to respond.

(b) The response shall be in writing and may include: information and argument in opposition to the proposed exclusion and/or suspension, including any additional specific information pertaining to the possible causes for exclusion; and information and argument in mitigation of the proposed period of exclusion.

(c) The response may request a meeting with an FDIC official identified in the notice to permit the contractor to discuss issues of fact or law relating to the suspension and/or proposed exclusion or to otherwise resolve the pending matters.

(1) Any such meetings between a contractor and FDIC shall take such form as the FDIC deems appropriate.

(2) In cases of suspensions, no meeting will be held where a representative of the Department of Justice has advised in writing that the substantial interests of the Government would be prejudiced by such a meeting and the Ethics Counselor determines that a suspension is based on the same facts as pending or contemplated legal proceedings referenced by the representative of the Department of Justice.

(d) Failure to respond to the notice shall be deemed an admission of the existence of the cause(s) for suspension and/or exclusion set forth in the notice and an acceptance of the period of exclusion proposed therein. In such circumstances, the FDIC may proceed to a final decision without further proceedings.

(e) Where a contractor has received more than one notice, the FDIC may consolidate the pending proceedings,

including the scheduling of any meetings, in accordance with this section.

§ 367.15 Additional proceedings as to disputed material facts.

(a) In actions not based upon a conviction or civil judgment, if the Ethics Counselor finds that the contractor's submission raises a genuine dispute over facts material to the proposed suspension and/or exclusion, the contractor shall be afforded an opportunity to appear (with counsel, if desired), submit documentary evidence, present witnesses, and confront any witnesses the FDIC presents.

(b) The Ethics Counselor may refer disputed material facts to another official for analysis and recommendation.

(c) If requested, a transcribed record of any additional proceedings shall be made available at cost to the contractor.

§ 367.16 Ethics Counselor decisions.

(a) Standard of proof:

(1) An exclusion must be based on a finding that the cause(s) for exclusion is established by a preponderance of the evidence in the administrative record of the case; and

(2) A suspension must be based on a finding that the cause(s) for suspension is established by adequate evidence in the administrative record of the case.

(b) The administrative record consists of the portion of any information, reports, documents or other evidence identified and relied upon in the Notice of Possible Cause to Exclude, the Notice of Suspension and/or supplemental notices, if any, together with any material portions of the contractor's response. When additional proceedings are necessary to determine disputed material facts, the Ethics Counselor shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(c) In actions based upon a conviction, judgment, a final enforcement action by a federal financial institution regulatory agency, or in which all facts and circumstances material to the exclusion action have been finally adjudicated in another forum, the Ethics Counselor may exclude a contractor without regard to the procedures set out in §§ 367.13 and 367.14. Any such decisions will be subject to the review and reconsideration provisions of § 367.20.

(d) *Notice of decisions.* Contractors shall be given prompt notice of the Ethics Counselor's decision in the manner described in § 367.13(c). If the Ethics Counselor suspends a contractor or imposes a period of exclusion, the decision shall:

(1) Set forth the cause(s) for suspension and/or exclusion included in the notice that were found by a preponderance of the evidence with reference to the administrative record support for that finding;

(2) Set forth the effect of the exclusion action and the effective dates of that action;

(3) Refer the contractor to its procedural rights of review and reconsideration under § 367.20; and

(4) Inform the contractor that a copy of the exclusion decision shall be placed in the FDIC Public Reading Room.

(e) If the FDIC Ethics Counselor decides that a period of exclusion is not warranted, the Notice of Possible Cause to Exclude may be withdrawn or the proceeding may be otherwise terminated. A decision to terminate an exclusion proceeding may include the imposition of appropriate conditions on the contractor in their future dealings with the FDIC.

§ 367.17 Duration of suspensions and exclusions.

(a) *Suspensions.* (1) Suspensions shall be for a temporary period pending the completion of an investigation or other legal or exclusion proceedings.

(2) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless a representative of the Department of Justice requests its extension in writing. In such cases, the suspension may be extended for an additional six months. In no event may a suspension be imposed for more than 18 months, unless such proceedings have been initiated within that period.

(3) FDIC shall notify the Department of Justice of an impending termination

of a suspension at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

(4) The time limitations for suspension in this section may be waived by the affected contractor.

(b) *Exclusions.* (1) Exclusions shall be for a period commensurate with the seriousness of the cause(s) after due consideration of mitigating evidence presented by the contractor.

(2) If a suspension precedes an exclusion, the suspension period shall be considered in determining the exclusion period.

(3) Exclusion for causes other than the mandatory bars in 12 CFR 366.4(a) generally should not exceed three years, but where circumstances warrant, a longer period of exclusion may be imposed.

(4) The Ethics Counselor may extend an existing exclusion for an additional period if the Ethics Counselor determines that an extension is necessary to protect the integrity of the FDIC contracting program and the public interest. However, an exclusion may not be extended solely on the basis of the facts and circumstances upon which the initial exclusion action was based. The standards and procedures in this part shall be applied in any proceeding to extend an exclusion.

§ 367.18 Abrogation of contracts.

(a) The FDIC may, in its discretion, rescind or terminate any contract in existence at the time a contractor is suspended or excluded.

(b) Any contract not rescinded or terminated shall continue in force in accordance with the terms thereof.

(c) The right to rescind or terminate a contract in existence is cumulative and in addition to any other remedies or rights the FDIC may have under the terms of the contract, at law, or otherwise.

§ 367.19 Exceptions to suspensions and exclusions.

(a) Exceptions to the effects of suspensions and exclusions may be available in unique circumstances, where there are compelling reasons to utilize a particular contractor for a specific task. Requests for such exceptions may be submitted only by the FDIC program office requesting the contract services.

(b) In the case of the modification or extension of an existing contract, the Ethics Counselor may except such a contracting action from the effects of suspension and/or exclusion upon a determination, in writing, that a compelling reason exists for utilization of the contractor in the particular instance. The Ethics Counselor's authority under this section shall not be delegated to any lower official.

(c) In the case of new contracts, the Corporation Ethics Committee may except a particular new contract from the effects of suspension and/or exclusion upon a determination in writing that a compelling reason exists for utilization of the contractor in the particular instance.

§ 367.20 Review and reconsideration of Ethics Counselor decisions.

(a) *Review.* (1) A suspended and/or excluded contractor may appeal the exclusion decision to the Corporation Ethics Committee.

(2) In order to avail itself of the right to appeal, a suspended and/or excluded contractor must file a written notice of intent to appeal within 5 days of the Ethics Counselor's decision.

(3) The appeal shall be filed in writing within 30 days of the decision.

(4) The Corporation Ethics Committee, at its discretion and after determining that it is in the best interests of the FDIC, may stay the effect of the suspension and/or exclusion pending conclusion of its review of the matter.

(b) *Reconsideration.* (1) A suspended and/or excluded contractor may submit a request to the Ethics Counselor to reconsider the suspension and/or exclusion decision, reduce the period of exclusion or terminate the suspension and/or exclusion.

(2) Such requests shall be in writing and supported by documentation that the requested action is justified by:

(i) Reversal of the conviction or civil judgment upon which the suspension and/or exclusion was based;

(ii) Newly discovered material evidence;

(iii) Bona fide change in ownership or management;

(iv) Elimination of other causes for which the suspension and/or exclusion was imposed; or

(v) Other reasons the FDIC Ethics Counselor deems appropriate.

(3) A request for reconsideration based on the reversal of the conviction or civil judgment may be filed at any time.

(4) Requests for reconsideration based on other grounds may only be filed during the period commencing 60 days after the Ethics Counselor's decision imposing the suspension and/or exclusion. Only one such request may be filed in any twelve month period.

(5) The Ethics Counselor's decision on a request for reconsideration is subject to the review procedure set forth in paragraph (a) of this section.

PART 368—GOVERNMENT SECURITIES SALES PRACTICES

Sec.

AUTHORITY: 15 U.S.C. 78o–5.

SOURCE: 62 FR 13287, Mar. 19, 1997, unless otherwise noted.

§ 368.1 Scope.

This part is applicable to state nonmember banks and insured state branches of foreign banks that have filed notice as, or are required to file notice as, government securities brokers or dealers pursuant to section 15C of the Securities Exchange Act (15 U.S.C. 78o–5) and Department of the Treasury rules under section 15C (17 CFR 400.1(d) and part 401).

§ 368.2 Definitions.

(a) *Bank that is a government securities broker or dealer* means a state nonmember bank or an insured state branch of a foreign bank that has filed notice, or is required to file notice, as a government securities broker or dealer pursuant to section 15C of the Securities Exchange Act (15 U.S.C. 78o–5) and Department of the Treasury rules under section 15C (17 CFR 400.1(d) and part 401).

(b) *Customer* does not include a broker or dealer or a government securities broker or dealer.

(c) *Government security* has the same meaning as this term has in section 3(a)(42) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(42)).

(d) *Non-institutional customer* means any customer other than:

(1) A bank, savings association, insurance company, or registered investment company;

(2) An investment adviser registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3); or

(3) Any entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

§ 368.3 Business conduct.

A bank that is a government securities broker or dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business as a government securities broker or dealer.

§ 368.4 Recommendations to customers.

In recommending to a customer the purchase, sale or exchange of a government security, a bank that is a government securities broker or dealer shall have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to the customer's other security holdings and as to the customer's financial situation and needs.

§ 368.5 Customer information.

Prior to the execution of a transaction recommended to a non-institutional customer, a bank that is a government securities broker or dealer shall make reasonable efforts to obtain information concerning:

(a) The customer's financial status;

(b) The customer's tax status;

(c) The customer's investment objectives; and

(d) Such other information used or considered to be reasonable by such

bank in making recommendations to the customer.

§ 368.100 Obligations concerning institutional customers.

(a) As a result of broadened authority provided by the Government Securities Act Amendments of 1993 (15 U.S.C. 78o–3 and 78o–5), the FDIC is adopting sales practice rules for the government securities market, a market with a particularly broad institutional component. Accordingly, the FDIC believes it is appropriate to provide further guidance to banks on their suitability obligations when making recommendations to institutional customers.

(b) The FDIC's suitability rule (§ 368.4) is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct. Banks' responsibilities include having a reasonable basis for recommending a particular security or strategy, as well as having reasonable grounds for believing the recommendation is suitable for the customer to whom it is made. Banks are expected to meet the same high standards of competence, professionalism, and good faith regardless of the financial circumstances of the customer.

(c) In recommending to a customer the purchase, sale, or exchange of any government security, the bank shall have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to the customer's other security holdings and financial situation and needs.

(d) The interpretation in this section concerns only the manner in which a bank determines that a recommendation is suitable for a particular institutional customer. The manner in which a bank fulfills this suitability obligation will vary, depending on the nature of the customer and the specific transaction. Accordingly, the interpretation in this section deals only with guidance regarding how a bank may fulfill customer-specific suitability obligations under § 368.4.[1]

(e) While it is difficult to define in advance the scope of a bank's suitability obligation with respect to a specific institutional customer transaction recommended by a bank, the FDIC has identified certain factors that may be relevant when considering compliance with § 368.4. These factors are not intended to be requirements or the only factors to be considered but are offered merely as guidance in determining the scope of a bank's suitability obligations.

(f) The two most important considerations in determining the scope of a bank's suitability obligations in making recommendations to an institutional customer are the customer's capability to evaluate investment risk independently and the extent to which the customer is exercising independent judgement in evaluating a bank's recommendation. A bank must determine, based on the information available to it, the customer's capability to evaluate investment risk. In some cases, the bank may conclude that the customer is not capable of making independent investment decisions in general. In other cases, the institutional customer may have general capability, but may not be able to understand a particular type of instrument or its risk. This is more likely to arise with relatively new types of instruments, or those with significantly different risk or volatility characteristics than other investments generally made by the institution. If a customer is either generally not capable of evaluating investment risk or lacks sufficient capability to evaluate the particular product, the scope of a bank's customer-specific obligations under § 368.4 would not be diminished by the fact that the bank was dealing with an institutional customer. On the other hand, the fact that a customer initially needed help understanding a potential investment need not necessarily imply that the customer did not ultimately develop an

[1] The interpretation in this section does not address the obligation related to suitability that requires that a bank have '' * * * a 'reasonable basis' to believe that the recommendation could be suitable for at least some customers.'' *In the Matter of the Application of F.J. Kaufman and Company of Virginia and Frederick J. Kaufman, Jr.*, 50 SEC 164 (1989).

understanding and make an independent investment decision.

(g) A bank may conclude that a customer is exercising independent judgement if the customer's investment decision will be based on its own independent assessment of the opportunities and risks presented by a potential investment, market factors and other investment considerations. Where the bank has reasonable grounds for concluding that the institutional customer is making independent investment decisions and is capable of independently evaluating investment risk, then a bank's obligations under §368.4 for a particular customer are fulfilled.[2] Where a customer has delegated decision-making authority to an agent, such as an investment advisor or a bank trust department, the interpretation in this section shall be applied to the agent.

(h) A determination of capability to evaluate investment risk independently will depend on an examination of the customer's capability to make its own investment decisions, including the resources available to the customer to make informed decisions. Relevant considerations could include:

(1) The use of one or more consultants, investment advisers, or bank trust departments;

(2) The general level of experience of the institutional customer in financial markets and specific experience with the type of instruments under consideration;

(3) The customer's ability to understand the economic features of the security involved;

(4) The customer's ability to independently evaluate how market developments would affect the security; and

(5) The complexity of the security or securities involved.

(i) A determination that a customer is making independent investment decisions will depend on the nature of the relationship that exists between the bank and the customer. Relevant considerations could include:

(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.

[2] See footnote 1 in paragraph (d) of this section.

PART 369—PROHIBITION AGAINST USE OF INTERSTATE BRANCHES PRIMARILY FOR DEPOSIT PRODUCTION

Sec.
369.1 Purpose and scope.
369.2 Definitions.
369.3 Loan-to-deposit ratio screen.
369.4 Credit needs determination.
369.5 Sanctions.

AUTHORITY: 12 U.S.C. 1819 (Tenth) and 1835a.

SOURCE: 62 FR 47737, Sept. 10, 1997, unless otherwise noted.

§ 369.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to implement section 109 (12 U.S.C. 1835a) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Interstate Act).

(b) *Scope.* (1) This part applies to any State nonmember bank that has operated a covered interstate branch for a period of at least one year.

(2) This part describes the requirements imposed under 12 U.S.C. 1835a, which requires the appropriate Federal banking agencies (the FDIC, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System) to prescribe uniform rules that prohibit a bank from using any authority to engage in interstate branching pursuant to the Interstate Act, or any amendment made by the Interstate Act to any other provision of law, primarily for the purpose of deposit production.

§ 369.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Bank* means, unless the context indicates otherwise:

(1) A State nonmember bank; and

(2) A foreign bank as that term is defined in 12 U.S.C. 3101(7) and 12 CFR 346.1(a).

(b) *Covered interstate branch* means:

(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 by the Interstate Act or by any amendment made by the Interstate Act to any other provision of law; or

(ii) Could not have been established or acquired outside of the bank's home State but for the establishment or acquisition of a branch described in paragraph (b)(1)(i) of this section; and

(2) Any bank or branch of a bank controlled by an out-of-State bank holding company.

(c) *Home State* means:

(1) With respect to a State bank, the State that chartered the bank;

(2) With respect to a national bank, the State in which the main office of the bank is located;

(3) With respect to a bank holding company, the State in which the total deposits of all banking subsidiaries of such company are the largest on the later of:

(i) July 1, 1966; or

(ii) The date on which the company becomes a bank holding company under the Bank Holding Company Act;

(4) With respect to a foreign bank:

(i) For purposes of determining whether a U.S. branch of a foreign bank is a covered interstate branch, the home State of the foreign bank as determined in accordance with 12 U.S.C. 3103(c) and 12 CFR 347.202(j); and

(ii) For purposes of determining whether a branch of a U.S. bank controlled by a foreign bank is a covered interstate branch, the State in which the total deposits of all banking subsidiaries of such foreign bank are the largest on the later of:

(A) July 1, 1966; or

(B) The date on which the foreign bank becomes a bank holding company under the Bank Holding Company Act.

(d) *Host State* means a State in which a covered interstate branch is established or acquired.

(e) *Host state loan-to-deposit ratio* generally means, with respect to a particular host state, the ratio of total loans in the host state relative to total deposits from the host state for all banks (including institutions covered under the definition of ''bank'' in 12 U.S.C. 1813(a)(1)) that have that state as their home state, as determined and updated periodically by the appropriate Federal banking agencies and made available to the public.

(f) *Out-of-State bank holding company* means, with respect to any State, a bank holding company whose home State is another State.

(g) *State* means state as that term is defined in 12 U.S.C. 1813(a)(3).

(h) *Statewide loan-to-deposit ratio* means, with respect to a bank, the ratio of the bank's loans to its deposits in a state in which the bank has one or more covered interstate branches, as determined by the FDIC.

[62 FR 47737, Sept. 10, 1997, as amended at 67 FR 38848, June 6, 2002]

§ 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.

[62 FR 47737, Sept. 10, 1997, as amended at 67 FR 38848, June 6, 2002]

§ 369.4 Credit needs determination.

(a) *In general.* The FDIC will review the loan portfolio of the bank and determine whether the bank is reasonably helping to meet the credit needs of the communities in the host state that are served by the bank.

(b) *Guidelines.* The FDIC will use the following considerations as guidelines when making the determination pursuant to paragraph (a) of this section:

(1) Whether covered interstate branches were formerly part of a failed or failing depository institution;

(2) Whether covered interstate branches were acquired under circumstances where there was a low loan-to-deposit ratio because of the nature of the acquired institution's business or loan portfolio;

(3) Whether covered interstate branches have a high concentration of commercial or credit card lending, trust services, or other specialized activities, including the extent to which the covered interstate branches accept deposits in the host state;

(4) The Community Reinvestment Act (CRA) ratings received by the bank, if any, under 12 U.S.C. 2901 *et seq.;*

(5) Economic conditions, including the level of loan demand, within the communities served by the covered interstate branches;

(6) The safe and sound operation and condition of the bank; and

(7) The FDIC's Community Reinvestment regulations (12 CFR Part 345) and interpretations of those regulations.

§ 369.5 Sanctions.

(a) *In general.* If the FDIC determines that a bank is not reasonably helping to meet the credit needs of the communities served by the bank in the host state, and that the bank's statewide loan-to-deposit ratio is less than 50 percent of the host state loan-to-deposit ratio, the FDIC:

(1) May order that a bank's covered interstate branch or branches be closed unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank has an acceptable plan under which the bank will reasonably help to meet the credit needs of the communities served by the bank in the host state; and

(2) Will not permit the bank to open a new branch in the host state that would be considered to be a covered interstate branch unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank will reasonably help to meet the credit needs of the community that the new branch will serve.

(b) *Notice prior to closure of a covered interstate branch.* Before exercising the FDIC's authority to order the bank to close a covered interstate branch, the FDIC will issue to the bank a notice of the FDIC's intent to order the closure

and will schedule a hearing within 60 days of issuing the notice.

(c) *Hearing*. The FDIC will conduct a hearing scheduled under paragraph (b) of this section in accordance with the provisions of 12 U.S.C. 1818(h) and 12 CFR part 308.

PART 370—RECORDKEEPING FOR TIMELY DEPOSIT INSURANCE DETERMINATION

Sec.

AUTHORITY: 12 U.S.C. 1817(a)(9), 1819 (Tenth), 1821(f)(1), 1822(c), 1823(c)(4).

SOURCE: 84 FR 37042, July 30, 2019, unless otherwise noted.

§ 370.1 Purpose and scope.

Unless otherwise provided in this part, each ''covered institution'' (defined in § 370.2(c)) is required to implement the information technology system and recordkeeping capabilities needed to calculate the amount of deposit insurance coverage available for each deposit account in the event of its failure. Doing so will improve the FDIC's ability to fulfill its statutory mandates to pay deposit insurance as soon as possible after a covered institution's failure and to resolve a covered institution at the least cost to the Deposit Insurance Fund.

§ 370.2 Definitions.

For purposes of this part:

(a) *Account holder* means the person or entity who has opened a deposit account with a covered institution and with whom the covered institution has a direct legal and contractual relationship with respect to the deposit.

(b) [Reserved]

(c) *Covered institution* means:

(1) An insured depository institution which, based on its Reports of Condition and Income filed with the appropriate federal banking agency, has 2 million or more deposit accounts during the two consecutive quarters preceding the effective date of this part or thereafter; or

(2) Any other insured depository institution that delivers written notice to the FDIC that it will voluntarily comply with the requirements set forth in this part.

(d) *Compliance date* means, except as otherwise provided in § 370.6(b):

(1) April 1, 2020, for any insured depository institution that was a covered institution as of April 1, 2017;

(2) The date that is three years after the date on which an insured depository institution becomes a covered institution; or

(3) The date on which an insured depository institution that elects to be a covered institution under § 370.2(c)(2) files its first certification of compliance and deposit insurance coverage summary report pursuant to § 370.10(a).

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

(f) *Deposit account records* has the same meaning as provided in 12 CFR 330.1(e).

(g) *Ownership rights and capacities* are set forth in 12 CFR part 330.

(h) *Payment instrument* means a check, draft, warrant, money order, traveler's check, electronic instrument, or other instrument, payment of funds, or monetary value (other than currency).

(i) *Standard maximum deposit insurance amount* (or SMDIA) has the same meaning as provided pursuant to section 11(a)(1)(E) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(1)(E)) and 12 CFR 330.1(o).

(j) *Transactional features* with respect to a deposit account means that the account holder or the beneficial owner of deposits can make a transfer from the deposit account to a party other than the account holder, beneficial owner of

deposits, or the covered institution itself, by method that may result in such transfer being reflected in the end-of-day ledger balance for such deposit account on a day that is later than the day that such transfer is initiated, even if initiated prior to the institution's normal cutoff time for such transaction. A deposit account also has transactional features if preauthorized or automatic instructions provide for transfer of deposits in the deposit account to another deposit account at the same institution, if such other deposit account itself has transactional features.

(k) *Unique identifier* means an alphanumeric code associated with an individual or entity that is used consistently and continuously by a covered institution to monitor the covered institution's relationship with that individual or entity.

§ 370.3 Information technology system requirements.

(a) A covered institution must configure its information technology system to be capable of performing the functions set forth in paragraph (b) of this section within 24 hours after the appointment of the FDIC as receiver. To the extent that a covered institution does not maintain its deposit account records in the manner prescribed under § 370.4(a) but instead in the manner prescribed under § 370.4(b), (c) or (d), the covered institution's information technology system must be able to perform the functions set forth in paragraph (b) of this section upon input by the FDIC of additional information collected after failure of the covered institution.

(b) Each covered institution's information technology system must be capable of:

(1) Accurately calculating the deposit insurance coverage for each deposit account in accordance with 12 CFR part 330;

(2) Generating and retaining output records in the data format and layout specified in appendix B to this part;

(3) Restricting access to some or all of the deposits in a deposit account until the FDIC has made its deposit insurance determination for that deposit account using the covered institution's information technology system; and

(4) Debiting from each deposit account the amount that is uninsured as calculated pursuant to paragraph (b)(1) of this section.

§ 370.4 Recordkeeping requirements.

(a) *General recordkeeping requirements.* Except as otherwise provided in paragraphs (b), (c), and (d) of this section, a covered institution must maintain in its deposit account records for each account the information necessary for its information technology system to meet the requirements set forth in § 370.3. The information must include:

(1) The unique identifier of each:

(i) Account holder;

(ii) Beneficial owner of a deposit, if the account holder is not the beneficial owner; and

(iii) Grantor and each beneficiary, if the deposit account is held in connection with an informal revocable trust that is insured pursuant to 12 CFR 330.10 (*e.g.*, payable-on-death accounts, in-trust-for accounts, and *Totten* Trust accounts).

(2) The applicable ownership right and capacity code listed and described in appendix A to this part.

(b) *Alternative recordkeeping requirements.* As permitted under this paragraph, a covered institution may maintain in its deposit account records less information than is required under paragraph (a) of this section.

(1) For each deposit account for which a covered institution's deposit account records disclose the existence of a relationship which might provide a basis for additional deposit insurance in accordance with 12 CFR 330.5 or 330.7 and for which the covered institution does not maintain information that would be needed for its information technology system to meet the requirements set forth in § 370.3, the covered institution must maintain, at a minimum, the following in its deposit account records:

(i) The unique identifier of the account holder; and

(ii) The corresponding ''pending reason'' code listed in data field 2 of the pending file format set forth in appendix B to this part (and need not maintain a ''right and capacity'' code).

(2) For each formal revocable trust account that is insured as described in 12 CFR 330.10 and for each irrevocable trust account that is insured as described in either 12 CFR 330.12 or 12 CFR 330.13, and for which the covered institution does not maintain the information that would be needed for its information technology system to meet the requirements set forth in § 370.3, the covered institution must, at a minimum, maintain in its deposit account records:

(i) The unique identifier of the account holder;

(ii) The unique identifier of a grantor if the deposit account has transactional features (unless the account is insured as described in 12 CFR 330.12, in which case the unique identifier of a grantor need not be maintained for purposes of this part); and

(iii) The corresponding ''right and capacity'' code listed in data field 4 of the pending file format set forth in appendix B to this part if it can be identified, otherwise the corresponding ''pending reason'' code from data field 2 of the pending file format set forth in appendix B.

(c) *Recordkeeping requirements for official items.* A covered institution must maintain in its deposit account records the information needed for its information technology system to meet the requirements set forth in § 370.3 with respect to accounts held in the name of the covered institution from which withdrawals are made to honor a payment instrument issued by the covered institution, such as a certified check, loan disbursement check, interest check, traveler's check, expense check, official check, cashier's check, money order, or similar payment instrument. To the extent that the covered institution does not have such information, it need only maintain in its deposit account records for those accounts the corresponding ''pending reason'' code listed in data field 2 of the pending file format set forth in appendix B to this part (and need not maintain a ''right and capacity'' code).

(d) *Recordkeeping requirements for deposits resulting from credit balances on an account for debt owed to the covered institution.* A covered institution is not required to meet the recordkeeping requirements of paragraph (a) or (b) of this section with respect to deposit liabilities reflected as credit balances on an account for debt owed to the covered institution if its information technology system is capable of:

(1) Immediately upon failure, restricting access to all of the deposits in every borrower's deposit account(s) at the covered institution in accordance with § 370.3(b)(3); and

(2) Producing a file in the format provided in appendix C to this part for:

(i) Credit balances on open-end credit accounts (revolving credit lines) such as credit card accounts and home equity lines of credit within a time frame that will allow the covered institution's information technology system to meet the requirements set forth in § 370.3(b)(1), (2), and (4) within 24 hours after failure; and

(ii) Credit balances on closed-end loan accounts that can be used by the covered institution's information technology system to meet the requirements set forth in § 370.3(b)(1), (2) and (4).

§ 370.5 Actions required for certain deposit accounts with transactional features.

(a) For each deposit account with transactional features for which the covered institution maintains its deposit account records in accordance with § 370.4(b)(1), a covered institution must take steps reasonably calculated to ensure that the account holder will provide to the FDIC the information needed for the covered institution's information technology system to perform the functions set forth in § 370.3(b). At a minimum, ''steps reasonably calculated'' shall include:

(1) A good faith effort to enter into contractual arrangements with the account holder that obligate the account holder to deliver information needed for deposit insurance calculation to the FDIC in a format compatible with the covered institution's information technology system within a timeframe sufficient to allow the covered institution's information technology system to perform the functions set forth in § 370.3(b) within 24 hours after the appointment of the FDIC as receiver in order for the account holder to have

access to deposits on the next business day after failure; and

(2) Regardless of whether the covered institution and the account holder enter into contractual arrangements as set forth in paragraph (a)(1) of this section, the covered institution providing the account holder with:

(i) A written disclosure specifying the information and format requirements of its information technology system and stating that the account holder may not have access to deposits in its deposit account before delivery of information in a format that is compatible with the covered institution's information technology system; and

(ii) An opportunity to validate the capability to deliver the required information in the appropriate format so that a timely calculation of deposit insurance coverage can be made.

(b) A covered institution need not take the steps required pursuant to paragraph (a) of this section with respect to:

(1) Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors;

(2) Accounts maintained by real estate brokers, real estate agents, or title companies in which funds from multiple clients are deposited and held for a short period of time in connection with a real estate transaction;

(3) Accounts established by an attorney or law firm on behalf of clients, commonly known as an *Interest on Lawyers Trust Accounts*, or functionally equivalent accounts;

(4) Accounts held in connection with an employee benefit plan (as defined in 12 CFR 330.14); and

(5) An account maintained by an account holder for the benefit of others, to the extent that the deposits in the account are held for the benefit of:

(i) A formal revocable trust that would be insured as described in 12 CFR 330.10;

(ii) An irrevocable trust that would be insured as described in 12 CFR 330.12; or

(iii) An irrevocable trust that would be insured as described in 12 CFR 330.13.

§ 370.6 Implementation.

(a) *Initial compliance.* A covered institution must satisfy the information technology system and recordkeeping requirements set forth in this part before the compliance date.

(b) *Extension.* (1) A covered institution may submit a request to the FDIC for an extension of its compliance date. The request shall state the amount of additional time needed to meet the requirements of this part, the reason(s) for which such additional time is needed, and the total number and dollar value of accounts for which deposit insurance coverage could not be calculated using the covered institution's information technology system were the covered institution to fail as of the date of the request. The FDIC's grant of a covered institution's request for extension may be conditional or time-limited.

(2) An insured depository institution that became a covered institution on April 1, 2017, may extend its compliance date for up to one year upon written notice to the FDIC prior to April 1, 2020. Such notice shall state the total number of, and dollar amount of deposits in, deposit accounts for which the covered institution's information technology system cannot calculate deposit insurance coverage as of April 1, 2020.

§ 370.7 Accelerated implementation.

(a) On a case-by-case basis, the FDIC may accelerate, upon notice, the implementation time frame for all or part of the requirements of this part for a covered institution that:

(1) Has a composite rating of 3, 4, or 5 under the Uniform Financial Institution's Rating System (*CAMELS* rating), or in the case of an insured branch of a foreign bank, an equivalent rating;

(2) Is undercapitalized, as defined under the prompt corrective action provisions of 12 CFR part 324; or

(3) Is determined by the appropriate federal banking agency or the FDIC in consultation with the appropriate federal banking agency to be experiencing a significant deterioration of capital or significant funding difficulties or liquidity stress, notwithstanding the

composite rating of the covered institution by its appropriate federal banking agency in its most recent report of examination.

(b) In implementing this section, the FDIC must consult with the covered institution's appropriate federal banking agency and consider the complexity of the covered institution's deposit system and operations, extent of the covered institution's asset quality difficulties, volatility of the institution's funding sources, expected near-term changes in the covered institution's capital levels, and other relevant factors appropriate for the FDIC to consider in its role as insurer of the covered institution.

§ 370.8 Relief.

(a) *Exemption.* A covered institution may submit a request in the form of a letter to the FDIC for an exemption from this part if it demonstrates that it does not take deposits from any account holder which, when aggregated, would exceed the SMDIA for any owner of the funds on deposit and will not in the future.

(b) *Exception.* (1) One or more covered institutions may submit a request in the form of a letter to the FDIC for exception from one or more of the requirements set forth in this part if circumstances exist that would make it impracticable or overly burdensome to meet those requirements. The request letter must:

(i) Identify the covered institution(s) requesting the exception;

(ii) Specify the requirement(s) of this part from which exception is sought;

(iii) Describe the deposit accounts the request concerns and state the number of, and dollar amount of deposits in, such deposit accounts for each covered institution requesting the exception;

(iv) Demonstrate the need for exception for each covered institution requesting the exception; and

(v) Explain the impact of the exception on the ability of each covered institution's information technology system to quickly and accurately calculate deposit insurance for the related deposit accounts.

(2) The FDIC shall publish a notice of its response to each exception request in the FEDERAL REGISTER.

(3) By following the procedure set forth in this paragraph, a covered institution may rely upon another covered institution's exception request which the FDIC has previously granted. The covered institution must notify the FDIC that it will invoke relief from certain part 370 requirements by submitting a notification letter to the FDIC demonstrating that the covered institution has substantially similar facts and circumstances as those of the covered institution that has already received the FDIC's approval. The covered institution's notification letter must also include the information required under paragraph (b)(1) of this section and cite the applicable notice published pursuant to paragraph (b)(2) of this section. The covered institution's notification for exception shall be deemed granted subject to the same conditions set forth in the FDIC's published notice unless the FDIC informs the covered institution to the contrary within 120 days after receipt of a complete notification for exception.

(c) *Release from this part.* A covered institution may submit a request in the form of a letter to the FDIC for release from this part if, based on its Reports of Condition and Income filed with the appropriate federal banking agency, it has less than two million deposit accounts during any three consecutive quarters after becoming a covered institution.

(d) *Release from 12 CFR 360.9 requirements.* A covered institution is released from the provisional hold and standard data format requirements of 12 CFR 360.9 upon submitting to the FDIC the compliance certification required under § 370.10(a). A covered institution released from 12 CFR 360.9 under this paragraph (d) shall remain released for so long as it is a covered institution.

(e) *FDIC approval of a request.* The FDIC will consider all requests submitted in writing by a covered institution on a case-by-case basis in light of the objectives of this part, and the FDIC's grant of any request made by a covered institution pursuant to this section may be conditional or time-limited.

§ 370.9 Communication with the FDIC.

(a) *Point of contact.* Not later than ten business days after either the effective date of this part or becoming a covered institution, a covered institution must notify the FDIC of the person(s) responsible for implementing the recordkeeping and information technology system capabilities required by this part.

(b) *Address.* Point-of-contact information, reports and requests made under this part shall be submitted in writing to: Office of the Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429–0002.

§ 370.10 Compliance.

(a) *Certification and report. A* covered institution shall submit to the FDIC a certification of compliance and a deposit insurance coverage summary report on or before its compliance date and annually thereafter.

(1) The certification must:

(i) Confirm that the covered institution has implemented all required capabilities and tested its information technology system during the preceding twelve months;

(ii) Confirm that such testing indicates that the covered institution is in compliance with this part; and

(iii) Be signed by the covered institution's chief executive officer or chief operating officer and made to the best of his or her knowledge and belief after due inquiry.

(2) The deposit insurance coverage summary report must include:

(i) A description of any material change to the covered institution's information technology system or deposit taking operations since the prior annual certification;

(ii) The number of deposit accounts, number of different account holders, and dollar amount of deposits by ownership right and capacity code (as listed and described in Appendix A);

(iii) The total number of fully-insured deposit accounts and the total dollar amount of deposits in all such accounts;

(iv) The total number of deposit accounts with uninsured deposits and the total dollar amount of uninsured amounts in all of those accounts; and

(v) By deposit account type, the total number of, and dollar amount of deposits in, deposit accounts for which the covered institution's information technology system cannot calculate deposit insurance coverage using information currently maintained in the covered institution's deposit account records.

(3) If a covered institution experiences a significant change in its deposit taking operations, the FDIC may require that it submit a certification of compliance and a deposit insurance coverage summary report more frequently than annually.

(b) *FDIC Testing.* (1) The FDIC will conduct periodic tests of a covered institution's compliance with this part. These tests will begin no sooner than the last day of the first calendar quarter following the compliance date and would occur no more frequently than on a three-year cycle thereafter, unless there is a material change to the covered institution's information technology system, deposit-taking operations, or financial condition following the compliance date, in which case the FDIC may conduct such tests at any time thereafter.

(2) A covered institution shall provide the appropriate assistance to the FDIC as the FDIC tests the covered institution's ability to satisfy the requirements set forth in this part.

(c) *Effect of pending requests.* A covered institution that has submitted a request pursuant to § 370.6(b) or § 370.8(a) through (c) will not be considered to be in violation of this part as to the requirements that are the subject of the request while awaiting the FDIC's response to such request.

(d) *Effect of changes to law.* A covered institution will not be considered to be in violation of this part as a result of a change in law that alters the availability or calculation of deposit insurance for such period as specified by the FDIC following the effective date of such change.

(e) *Effect of merger.* An instance of non-compliance occurring as the direct result of a merger transaction shall be deemed not to constitute a violation of this part for a period of 24 months following the effective date of the merger transaction.

APPENDIX A TO PART 370—OWNERSHIP RIGHT AND CAPACITY CODES

A covered institution must use the codes defined below when assigning ownership right and capacity codes.

Code	Illustrative description
SGL	Single Account (12 CFR 330.6): An account owned by one person with no testamentary or ''payable-on-death'' beneficiaries. It includes individual accounts, sole proprietorship accounts, single-name accounts containing community property funds, and accounts of a decedent and accounts held by executors or administrators of a decedent's estate.
JNT	Joint Account (12 CFR 330.9): An account owned by two or more persons with no testamentary or ''payable-on-death'' beneficiaries (other than surviving co-owners) An account does not qualify as a joint account unless: (1) All co-owners are living persons; (2) each co-owner has personally signed a deposit account signature card (except that the signature requirement does not apply to certificates of deposit, to any deposit obligation evidenced by a negotiable instrument, or to any account maintained on behalf of the co-owners by an agent or custodian); and (3) each co-owner possesses withdrawal rights on the same basis.
REV	Revocable Trust Account (12 CFR 330.10): An account owned by one or more persons that evidences an intention that, upon the death of the owner(s), the funds shall belong to one or more beneficiaries. There are two types of revocable trust accounts: (1) Payable-on-Death Account (Informal Revocable Trust Account): An account owned by one or more persons with one or more testamentary or ''payable-on-death'' beneficiaries. (2) Revocable Living Trust Account (Formal Revocable Trust Account): An account in the name of a formal revocable ''living trust'' with one or more grantors and one or more testamentary beneficiaries.
IRR	Irrevocable Trust Account (12 CFR 330.13): An account in the name of an irrevocable trust (unless the trustee is an insured depository institution, in which case the applicable code is DIT).
CRA	Certain Other Retirement Accounts (12 CFR 330.14 (b)–(c)) to the extent that participants under such plan have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plan, including an individual retirement account described in section 408(a) of the Internal Revenue Code (26 U.S.C. 408(a)), an account of a deferred compensation plan described in section 457 of the Internal Revenue Code (26 U.S.C. 457), an account of an individual account plan as defined in section 3(34) of the Employee Retirement Income Security Act (29 U.S.C. 1002), a plan described in section 401(d) of the Internal Revenue Code (26 U.S.C. 401(d)).
EBP	Employee Benefit Plan Account (12 CFR 330.14): An account of an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act (29 U.S.C. 1002), including any plan described in section 401(d) of the Internal Revenue Code (26 U.S.C. 401(d)), but not including any account classified as a Certain Retirement Account.
BUS	Business/Organization Account (12 CFR 330.11): An account of an organization engaged in an 'independent activity' (as defined in § 330.1(g)), but not an account of a sole proprietorship. This category includes: a. Corporation Account: An account owned by a corporation. b. Partnership Account: An account owned by a partnership. c. Unincorporated Association Account: An account owned by an unincorporated association (*i.e.,* an account owned by an association of two or more persons formed for some religious, educational, charitable, social, or other noncommercial purpose).
GOV1–GOV2–GOV3	Government Account (12 CFR 330.15): An account of a governmental entity.
GOV1	All time and savings deposit accounts of the United States and all time and savings deposit accounts of a state, county, municipality, or political subdivision depositing 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)
GOV2	All demand deposit accounts of the United States and all demand deposit accounts of a state, county, municipality, or political subdivision depositing 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)
GOV3	All deposits, regardless of whether they are time, savings or demand deposit accounts of a state, county, municipality or political subdivision depositing funds in an insured depository institution outside of the state comprising the public unit or wherein the public unit is located.
MSA	Mortgage Servicing Account (12 CFR 330.7(d)): An account held by a mortgage servicer, funded by payments by mortgagors of principal and interest.
PBA	Public Bond Accounts (12 CFR 330.15(c)): An account consisting of funds held by an officer, agent or employee of a public unit for the purpose of discharging a debt owed to the holders of notes or bonds issued by the public unit.
DIT	IDI as trustee of irrevocable trust accounts (12 CFR 330.12): ''Trust funds'' (as defined in § 330.1(q)) account held by an insured depository institution as trustee of an irrevocable trust.
ANC	Annuity Contract Accounts (12 CFR 330.8): 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.

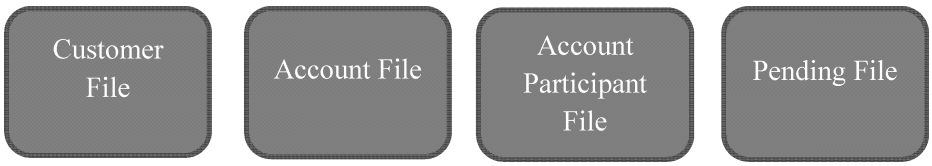
Code	Illustrative description
BIA	Custodian accounts for American Indians (12 CFR 330.7(e)): Funds deposited by the Bureau of Indian Affairs of the United States Department of the Interior (the "BIA") on behalf of American Indians pursuant to 25 U.S.C. 162(a), or by any other disbursing agent of the United States on behalf of American Indians pursuant to similar authority, in an insured depository institution.
DOE	IDI Accounts under Department of Energy Program: Funds deposited by an insured depository institution pursuant to the Bank Deposit Financial Assistance Program of the Department of Energy.

APPENDIX B TO PART 370—OUTPUT FILES STRUCTURE

These output files will include the data necessary for the FDIC to determine deposit insurance coverage in a resolution. A covered institution's information technology system must have the capability to prepare and maintain the files detailed below. These files must be prepared in successive iterations as the FDIC receives additional data from external sources necessary to complete the deposit insurance determinations, and, as it updates pending determinations. The files will be comprised of the following four tables. The unique identifier and government identification are required in all four tables so those tables can be linked where necessary.

A null value, as indicated in the table below, is allowed for fields that are not immediately needed to calculate deposit insurance. To ensure timely calculations for depositor liquidity purposes, the information with null-value designations can be obtained after the initial deposit insurance calculation. As due diligence for recordkeeping progresses throughout the years of ongoing compliance, the FDIC expects that the banks will continue efforts to capture the null-value designations and populate the output file to alleviate the burden at failure. If a null value is allowed in a field, the record should not be placed in the pending file.

These files must be prepared in successive iterations as the covered institution receives additional data from external sources necessary to complete any pending deposit insurance calculations. The unique identifier is required in all four files to link the customer information. All files are pipe delimited. Do not pad leading and trailing spacing or zeros for the data fields.



Customer File. Customer File will be used by the FDIC to identify the customers. One record represents one unique customer.

The data elements will include:

Field name	Description	Format	Null value allowed?
1. CS__Unique__ID	This field is the unique identifier that is the primary key for the depositor data record. It will be generated by the covered institution and there shall not be duplicates.	Variable Character.	No.
2. CS__Govt__ID	This field shall contain the ID number that identifies the entity based on a government issued ID or corporate filling. Populate as follows: —For a United States individual—SSN or TIN	Variable Character.	No.

Field name	Description	Format	Null value allowed?
	—For a foreign national individual—where a SSN or TIN does not exist, a foreign passport or other legal identification number (e.g., Alien Card) —For a Non-Individual—the Tax identification Number (TIN), or other register entity number		
3. CS__Govt__ID__Type	The valid customer identification types are:. —SSN—Social Security Number —TIN—Tax Identification Number —DL—Driver's License, issued by a State or Territory of the United States —ML—Military ID —PPT—Valid Passport —AID—Alien Identification Card —OTH—Other	Character (3)	No.
4. CS__Type	The customer type field indicates the type of entity the customer is at the covered institution. The valid values are:. —IND—Individual —BUS—Business —TRT—Trust —NFP—Non-Profit —GOV—Government —OTH—Other	Character (3)	Yes.
5. CS__First__Name	Customer first name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	No.
6. CS__Middle__Name	Customer middle name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	Yes.
7. CS__Last__Name	Customer last name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	No.
8. CS__Name__Suffix	Customer suffix	Variable Character.	Yes.
9. CS__Entity__Name	The registered name of the entity. Do not use this field if the customer is an individual.	Variable Character.	Yes.
10. CS__Street__Add__Ln1	Street address line 1. The current account statement mailing address of record.	Variable Character.	Yes.
11. CS__Street__Add__Ln2	Street address line 2. If available, the second address line.	Variable Character.	Yes.
12. CS__Street__Add__Ln3	Street address line 3. If available, the third address line.	Variable Character.	Yes.
13. CS__City	The city associated with the mailing address.	Variable Character.	Yes.
14. CS__State	The state for United States addresses or state/province/county for international addresses. —For United States addresses use a two-character state code (official United States Postal Service abbreviations) associated with the mailing address. —For international address follow that country state code.	Variable Character.	Yes.

Field name	Description	Format	Null value allowed?
15. CS__ZIP	The Zip/Postal Code associated with the customer's mailing address. —For United States zip codes, use the United States Postal Service ZIP+4 standard —For international zip codes follow that standard format of that country.	Variable Character.	Yes.
16. CS__Country	The country associated with the mailing address. Provide the country name or the standard International Organization for Standardization (ISO) country code.	Variable Character.	Yes.
17. CS__Telephone	Customer telephone number. The telephone number on record for the customer, including the country code if not within the United States.	Variable Character.	Yes.
18. CS__Email	The email address on record for the customer.	Variable Character.	Yes.
19. CS__Outstanding__Debt__Flag	This field indicates whether the customer has outstanding debt with covered institution. This field may be used by the FDIC to determine offsets. Enter "Y" if customer has outstanding debt with covered institutions, enter "N" otherwise.	Character (1)	Yes.
20. CS__Security__Pledge__Flag	This field shall only be used for Government customers. This field indicates whether the covered institution has pledged securities to the government entity, to cover any shortfall in deposit insurance. Enter "Y" if the government entity has outstanding security pledge with covered institutions, enter "N" otherwise.	Character (1)	No.

Account File. The Account File contains the deposit ownership rights and capacities information, allocated balances, insured amounts, and uninsured amounts. The balances are in U.S. dollars. The Account file is linked to the Customer File by the CS__Unique__ID.

The data elements will include:

Field name	Description	Format	Null value allowed?
1. CS__Unique__ID	This field is the unique identifier that is the primary key for the depositor data record. It will be generated by the covered institution and there cannot be duplicates.	Variable Character.	No.
2. DP__Acct__Identifier	Deposit account identifier. The primary field used to identify a deposit account.	Variable Character.	No.

Field name	Description	Format	Null value allowed?
	The account identifier may be composed of more than one physical data element to uniquely identify a deposit account.		
3. DP__Right__Capacity	Account ownership categories —SGL—Single accounts. —JNT—Joint accounts. —REV—Revocable trust accounts. —IRR—Irrevocable trust accounts. —CRA—Certain retirement accounts. —EBP—Employee benefit plan accounts. —BUS—Business/Organization accounts. —GOV1, GOV2, GOV3—Government accounts (public unit accounts). —MSA—Mortgage servicing accounts for principal and interest payments. —DIT—Accounts held by a depository institution as the trustee of an irrevocable trust. —ANC—Annuity contract accounts. —PBA—Public bond accounts. —BIA—Custodian accounts for American Indians. —DOE—Accounts of an IDI pursuant to the Bank Deposit Financial Assistance Program of the Department of Energy.	Character (4)	No.
4. DP__Prod__Cat	Product category or classification —DDA—Demand Deposit Accounts. —NOW—Negotiable Order of Withdrawal. —MMA—Money Market Deposit Accounts. —SAV—Other savings accounts. —CDS—Time Deposit accounts and Certificate of Deposit accounts, including any accounts with specified maturity dates that may or may not be renewable.	Character (3)	Yes. For credit card accounts with a credit balance that create a deposit liability, use a NULL value for this field.
5. DP__Allocated__Amt	The current balance in the account at the end of business on the effective date of the file, allocated to a specific owner in that insurance category. For JNT accounts, this is a calculated field that represents the allocated amount to each owner in JNT category.	Decimal (14,2)	No.

Field name	Description	Format	Null value allowed?
	For REV accounts, this is a calculated field that represents the allocated amount to each owner-beneficiary in REV category. For other accounts with only one owner, this is the account current balance. This balance shall not be reduced by float or holds. For CDs and time deposits, the balance shall reflect the principal balance plus any interest paid and available for withdrawal not already included in the principal (do not include accrued interest).		
6. DP__Acc__Int	Accrued interest allocated similarly as data field #5 DP__Allocated__Amt. The amount of interest that has been earned but not yet paid to the account as of the date of the file.	Decimal (14,2)	No.
7. DP__Total__PI	Total amount adding #5 DP__Allocated__Amt and #6 DP__Acc__Int.	Decimal (14,2)	No.
8. DP__Hold__Amount	Hold amount on the account The available balance of the account is reduced by the hold amount. It has no effect on current balance (ledger balance).	Decimal (14,2)	No.
9. DP__Insured__Amount	The insured amount of the account	Decimal (14,2)	No.
10. DP__Uninsured__Amount	The uninsured amount of the account.	Decimal (14,2)	No.
11. DP__Prepaid__Account__Flag	This field indicates a prepaid account with covered institution. Enter ''Y'' if account is a prepaid account with covered institutions, enter ''N'' otherwise.	Character (1)	No.
12. DP__PT__Account__Flag	This field indicates a pass-through account with covered institution. Enter ''Y'' if account is a pass-through with covered institutions, enter ''N'' otherwise.	Character (1)	No.
13. DP__PT__Trans__Flag	This field indicates whether the fiduciary account has sub-accounts that have transactional features. Enter ''Y'' if account has transactional features, enter ''N'' otherwise.	Character (1)	No.

Account Participant File. The Account Participant File will be used by the FDIC to identify account participants, to include the official custodian, beneficiary, bond holder, mortgagor, or employee benefit plan participant, for each account and account holder. One record represents one unique account participant. The Account Participant File is linked to the Account File by CS__Unique__ID and DP__Acct__Identifier.

The data elements will include:

Field name	Description	Format	Null value allowed?
1. CS__Unique__ID	This field is the unique identifier that is the primary key for the depositor data record. It will be generated by the covered institution and there shall not be duplicates.	Variable Character.	No.
2. DP__Acct__Identifier	Deposit account identifier. The primary field used to identify a deposit account. The account identifier may be composed of more than one physical data element to uniquely identify a deposit account.	Variable Character.	No.
3. DP__Right__Capacity	Account ownership categories —SGL—Single accounts. —JNT—Joint accounts. —REV—Revocable trust accounts. —IRR—Irrevocable trust accounts. —CRA—Certain retirement accounts. —EBP—Employee benefit plan accounts. —BUS—Business/Organization accounts. —GOV1, GOV2, GOV3—Government accounts (public unit accounts). —MSA—Mortgage servicing accounts for principal and interest payments. —DIT—Accounts held by a depository institution as the trustee of an irrevocable trust. —ANC—Annuity contract accounts. —PBA—Public bond accounts. —BIA—Custodian accounts for American Indians. —DOE—Accounts of an IDI pursuant to the Bank Deposit Financial Assistance Program of the Department of Energy.	Character (4)	No.
4. DP__Prod__Category	Product category or classification —DDA—Demand Deposit Accounts. —NOW—Negotiable Order of Withdrawal. —MMA—Money Market Deposit Accounts. —SAV—Other savings accounts. —CDS—Time Deposit accounts and Certificate of Deposit accounts, including any accounts with specified maturity dates that may or may not be renewable.	Character (3)	Yes.

Field name	Description	Format	Null value allowed?
5. AP__Allocated__Amount	Amount of funds attributable to the account participant as an account holder (*e.g.,* Public account holder of a public bond account) or the amount of funds entitled to the beneficiary for the purpose of insurance determination (*e.g.,* Revocable Trust).	Decimal (14,2)	No.
6. AP__Participant__ID	This field is the unique identifier for the Account Participant. It will be generated by the covered institution and there shall not be duplicates. If the account participant is an existing bank customer, this field is the same as CS__Unique__ID field.	Variable Character.	No.
7. AP__Govt__ID	This field shall contain the ID number that identifies the entity based on a government issued ID or corporate filing. Populate as follows: —For a United States individual—Legal identification number (*e.g.,* SSN, TIN, Driver's License, or Passport Number). —For a foreign national individual—where a SSN or TIN does not exist, a foreign passport or other legal identification number (*e.g.,* Alien Card). —For a Non-Individual—the Tax identification Number (TIN), or other register entity number.	Variable Character.	No.
8. AP__Govt__ID__Type	The valid customer identification types are:. —SSN—Social Security Number. —TIN—Tax Identification Number. —DL—Driver's License, issued by a State or Territory of the United States. —ML—Military ID. —PPT—Valid Passport. —AID—Alien Identification Card. —OTH—Other.	Character (3) ...	No.
9. AP__First__Name	Customer first name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	No.
10. AP__Middle__Name	Customer middle name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	Yes.
11. AP__Last__Name	Customer last name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	No.
12. AP__Entity__Name	The registered name of the entity. Do not use this field if the participant is an individual.	Variable Character.	Yes.

Field name	Description	Format	Null value allowed?
13. AP__Participant__Type	This field is used as the participant type identifier. The field will list the "beneficial owner" type: —OC—Official Custodian. —BEN—Beneficiary. —BHR—Bond Holder. —MOR—Mortgagor. —EPP—Employee Benefit Plan Participant.	Character (3) ...	Yes.

Pending File. The Pending File contains the information needed for the FDIC to contact the owner or agent requesting additional information to complete the deposit insurance calculation. Each record represents a deposit account.

The data elements will include:

Field name	Description	Format	Null value allowed?
1. CS__Unique__ID	This field is the unique identifier that is the primary key for the depositor data record. It will be generated by the covered institution and there cannot be duplicates.	Variable Character.	No.
2. Pending__Reason	Reason code for the account to be included in Pending file. For deposit account records maintained by the bank, use the following codes. —A—agency or custodian. —B—beneficiary. —OI—official item. —RAC—right and capacity code. For alternative recordkeeping requirements, use the following codes. —ARB—depository organization for brokered deposits (Brokered deposit has the same meaning as provided in 12 CFR 337.6(a)(2)). —ARBN—non-depository organization for brokered deposits (Brokered deposit has the same meaning as provided in 12 CFR 337.6(a)(2)). —ARCRA—certain retirement accounts. —AREBP—employee benefit plan accounts. —ARM—mortgage servicing for principal and interest payments. —ARO—other deposits. —ARTR—trust accounts. The FDIC needs these codes to initiate the collection of needed information.	Character (5) ...	No.

Field name	Description	Format	Null value allowed?
3. DP__Acct__Identifier	Deposit account identifier. The primary field used to identify a deposit account The account identifier may be composed of more than one physical data element to uniquely identify a deposit account.	Variable Character.	No.
4. DP__Right__Capacity	Account ownership categories —SGL—Single accounts. —JNT—Joint accounts. —REV—Revocable trust accounts. —IRR—Irrevocable trust accounts. —CRA—Certain retirement accounts. —EBP—Employee benefit plan accounts. —BUS—Business/Organization accounts. —GOV1, GOV2, GOV3—Government accounts (public unit accounts). —MSA—Mortgage servicing accounts for principal and interest payments. —DIT—Accounts held by a depository institution as the trustee of an irrevocable trust. —ANC—Annuity contract accounts. —PBA—Public bond accounts. —BIA—Custodian accounts for American Indians. —DOE—Accounts of an IDI pursuant to the Bank Deposit Financial Assistance Program of the Department of Energy.	Character (4)	Yes.
5. DP__Prod__Category	Product category or classification —DDA—Demand Deposit Accounts. —NOW—Negotiable Order of Withdrawal. —MMA—Money Market Deposit Accounts. —SAV—Other savings accounts. —CDS—Time Deposit accounts and Certificate of Deposit accounts, including any accounts with specified maturity dates that may or may not be renewable.	Character (3)	Yes.
6. DP__Cur__Bal	Current balance—The current balance in the account at the end of business on the effective date of the file.	Decimal (14,2)	No.

Field name	Description	Format	Null value allowed?
	This balance shall not be reduced by float or holds. For CDs and time deposits, the balance shall reflect the principal balance plus any interest paid and available for withdrawal not already included in the principal (do not include accrued interest).		
7. DP__Acc__Int	Accrued interest The amount of interest that has been earned but not yet paid to the account as of the date of the file.	Decimal (14,2)	No.
8. DP__Total__PI	Total of principal and accrued interest.	Decimal (14,2)	No.
9. DP__Hold__Amount	Hold amount on the account The available balance of the account is reduced by the hold amount. It has no impact on current balance (ledger balance).	Decimal (14,2)	No.
10. DP__Prepaid__Account__Flag	This field indicates a prepaid account with covered institution. Enter ''Y'' if account is a prepaid account, enter ''N'' otherwise.	Character (1)	No.
11. CS__Govt__ID	This field shall contain the ID number that identifies the entity based on a government issued ID or corporate filing. Populate as follows: —For a United States individual SSN or TIN. —For a foreign national individual—where a SSN or TIN does not exist, a foreign passport or other legal identification number (e.g., Alien Card). —For a Non-Individual—the Tax identification Number (TIN), or other register entity number.	Variable Character.	No.
12. CS__Govt__ID__Type	The valid customer identification types: —SSN—Social Security Number. —TIN—Tax Identification Number. —DL—Driver's License, issued by a State or Territory of the United States. —ML—Military ID. —PPT—Valid Passport. —AID—Alien Identification Card. —OTH—Other.	Character (3)	No.
13. CS__First__Name	Customer first name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	No.
14. CS__Middle__Name	Customer middle name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	Yes.

Field name	Description	Format	Null value allowed?
15. CS__Last__Name	Customer last name. Use only for the name of individuals and the primary contact for entity.	Variable Character.	No.
16. CS__Name__Suffix	Customer suffix	Variable Character.	Yes.
17. CS__Entity__Name	The registered name of the entity. Do not use this field if the customer is an individual.	Variable Character.	Yes.
18. CS__Street__Add__Ln1	Street address line 1. The current account statement mailing address of record.	Variable Character.	No.
19. CS__Street__Add__Ln2	Street address line 2. If available, the second address line.	Variable Character.	Yes.
20. CS__Street__Add__Ln3	Street address line 3. If available, the third address line.	Variable Character.	Yes.
21. CS__City	The city associated with the mailing address.	Variable Character.	Yes.
22. CS__State	The state for United States addresses or state/province/county for international addresses. —For United States addresses use a two-character state code (official United States Postal Service abbreviations) associated with the mailing address. —For international address follow that country state code.	Variable Character.	Yes.
23. CS__ZIP	The Zip/Postal Code associated with the customer's mailing address. —For United States zip codes, use the United States Postal Service ZIP+4 standard. —For international zip codes follow the standard format of that country.	Variable Character.	Yes.
24. CS__Country	The country associated with the mailing address. Provide the country name or the standard International Organization for Standardization (ISO) country code.	Variable Character.	Yes.
25. CS__Telephone	Customer telephone number. The telephone number on record for the customer, including the country code if not within the United States.	Variable Character.	Yes.
26. CS__Email	The email address on record for the customer.	Variable Character.	Yes.
27. CS__Outstanding__Debt__Flag	This field indicates whether the customer has outstanding debt with covered institution. This field may be used to determine offsets. Enter ''Y'' if customer has outstanding debt with covered institutions, enter ''N'' otherwise.	Character (1)	Yes.

Field name	Description	Format	Null value allowed?
28. CS__Security__Pledge__Flag	This field indicates whether the CI has pledged securities to the government entity, to cover any shortfall in deposit insurance. Enter ''Y'' if the government entity has outstanding security pledge with covered institutions, enter ''N'' otherwise. This field shall only be used for Government customers.	Character (1) ...	No.
29. DP__PT__Account__Flag	This field indicates a pass-through account with covered institution. Enter ''Y'' if account is a pass-through with covered institutions, enter ''N'' otherwise.	Character (1) ...	No.
30. PT__Parent__Customer__ID	This field contains the unique identifier of the parent customer ID who has the fiduciary responsibility at the covered institution.	Variable Character.	No.
31. DP__PT__Trans__Flag	This field indicates whether the fiduciary account has sub-accounts that have transactional features. Enter ''Y'' if account has transactional features, enter ''N'' otherwise.	Character (1) ...	No.

APPENDIX C TO PART 370—CREDIT BALANCE PROCESSING FILE STRUCTURE

A covered institution's IT system should be able to produce a file in the format below that can be used to calculate deposit insurance coverage for deposits resulting from credit balances on accounts for debt owed to the covered institution (''credit balances''). This file format is derived from the ''Broker Submission File Format'' found in the FDIC's ''Deposit Broker's Processing Guide,'' supplemented by the ''Addendum to the Deposit Broker's Processing Guide'' used for Part 370 alternative recordkeeping entity processing. The file format below identifies fields that are not applicable for processing credit balances. These fields should be null while also maintaining the pipe delimiters. Additional information regarding the FDIC's Deposit Broker's Processing Guide for part 370 covered institutions may be found at *https://www.fdic.gov/deposit/deposits/brokers/part-370-appendix.html*

Field name	Description	Null value allowed? (Y/N)
01 Broker Number	Not applicable	Y.
02 Account Number	Account number of account holding pending payments or other items for refunds of credit balances.	N.
03 Customer Account Number.	Assigned customer account number	N.
04 CUSIP	Not applicable	Y.
05 Tax ID	Taxpayer identification number of the account holder	N.
06 Tax ID Code	Code indicates corporate (TIN) or personal tax identification number (SSN).	N.
07 Name	Full name of credit balance owner	N.
08 Name 2	Name 2	Y.
09 Address 1	Address line 1 as it appears on the credit balance owner's statement	N.
10 Address 2	Address line 2 as it appears on the credit balance owner's statement	Y.
11 Address 3	Address line 3 as it appears on the credit balance owner's statement	Y.
12 City	Address city as it appears on the credit balance owner's statement	N.
13 State	State postal abbreviation as it appears on the credit balance owner's statement.	Y.
14 Zip/Postal	The zip/postal code associated with the credit balance owner's address at it appears on the credit balance owner's statement. For United States zip codes, use the United States Postal Service ZIP+4 standard. For international zip codes follow that standard format of that country.	N.
15 Country	Country code as it appears on the credit balance owner's statement	N.

Field name	Description	Null value allowed? (Y/N)
16 Province	Province as it appears on the credit balance owner's statement	Y.
17 IRA Code	Not applicable	Y.
18 Credit Balance	Credit balance of the account as of the institution failure date	N.
19 Sub-broker Indicator	Not applicable	Y.
20 Deposit Account Ownership Category.	Account ownership right and capacity	N.
21 Transactional Flag	Not applicable	Y.
22 Retained Interest	Not applicable	Y.
23 Amount of Overfunding.	Not applicable	Y.
24 Account Participant Full Name.	Not applicable	Y.
25 Account Participant Type.	Not applicable	Y.
26 Amount of Account Participant's Non-contingent Interests.	Not applicable	Y.
27 Amount of Account Participant's Contingent Interests.	Not applicable	Y.
28 Account Participant's Government-Issued ID.	Not applicable	Y.
29 Account Participant's Government-Issued ID Type.	Not applicable	Y.

PART 371—RECORDKEEPING REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS

Sec.

AUTHORITY: 12 U.S.C. 1819(a)(Tenth); 1820(g); 1821(e)(8)(D) and (H); 1831g; 1831i; and 1831s.

SOURCE: 82 FR 35599, July 31, 2017, unless otherwise noted.

§ 371.1 Scope, purpose, and compliance dates.

(a) *Scope.* This part applies to each insured depository institution that qualifies as a ''records entity'' under the definition set forth in § 371.2(r).

(b) *Purpose.* This part establishes recordkeeping requirements with respect to qualified financial contracts for insured depository institutions that are in a troubled condition.

(c) *Compliance dates.* (1) Within 3 business days of becoming a records entity, the records entity shall provide to the FDIC, in writing, the name and contact information for the person at the records entity who is responsible for recordkeeping under this part and, unless not required to maintain files in electronic form pursuant to § 371.4(d), a directory of the electronic files that will be used to maintain the information required to be kept by this part.

(2) Except as provided in § 371.6:

(i) A records entity, other than an accelerated records entity, shall comply with all applicable recordkeeping requirements of this part within 270 days after it becomes a records entity.

(ii) An accelerated records entity shall comply with all applicable recordkeeping requirements of this part within 60 days after it becomes a records entity.

(iii) Notwithstanding paragraphs (c)(2)(i) and (ii) of this section, a records entity that becomes an accelerated records entity after it became a records entity shall comply with all applicable recordkeeping requirements of this part within 60 days after it becomes an accelerated records entity or

its original 270 day compliance period, whichever time period is shorter.

(d) *Extensions of time to comply*. The FDIC may, in its discretion, grant one or more extensions of time for compliance with the recordkeeping requirements of this part.

(1) Except as provided in paragraph (d)(2) of this section, no single extension for a records entity shall be for a period of more than 120 days.

(2) For a records entity that is an accelerated records entity at the time of a request for an extension, no single extension shall be for a period of more than 30 days.

(3) A records entity may request an extension of time by submitting a written request to the FDIC at least 15 days prior to the deadline for its compliance with the recordkeeping requirements of this part. The written request for an extension must contain a statement of the reasons why the records entity cannot comply by the deadline for compliance, a project plan (including timeline) for achieving compliance, and a progress report describing the steps taken to achieve compliance.

§ 371.2 Definitions.

For purposes of this part:

(a) *Accelerated records entity* means a records entity that:

(1) Has a composite rating, as determined by its appropriate Federal banking agency in its most recent report of examination, of 4 or 5 under the Uniform Financial Institution Rating System, or in the case of an insured branch of a foreign bank, an equivalent rating; or

(2) Is determined by the appropriate Federal banking agency or by the FDIC in consultation with the appropriate Federal banking agency to be experiencing a significant deterioration of capital or significant funding difficulties or liquidity stress, notwithstanding the composite rating of the institution by its appropriate Federal banking agency in its most recent report of examination.

(b) *Affiliate* means any entity that controls, is controlled by, or is under common control with another entity.

(c) *Appropriate Federal banking agency* means the agency or agencies designated under 12 U.S.C. 1813(q).

(d) *Business day* means any day other than any Saturday, Sunday or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(e) *Control*. An entity controls another entity if:

(1) The entity directly or indirectly or acting through one or more persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the other entity;

(2) The entity controls in any manner the election of a majority of the directors or trustees of the other entity; or

(3) The Board of Governors of the Federal Reserve System has determined, after notice and opportunity for hearing in accordance with 12 CFR 225.31, that the entity directly or indirectly exercises a controlling influence over the management or policies of the other entity.

(f) *Corporate group* means an entity and all affiliates of that entity.

(g) *Counterparty* means any natural person or entity (or separate non-U.S. branch of any entity) that is a party to a QFC with a records entity or, if the records entity is required or chooses to maintain the records specified in § 371.4(b), a reportable subsidiary of such records entity.

(h) Effective date means October 1, 2017.

(i) *Full scope entity* means a records entity that has total consolidated assets equal to or greater than $50 billion or that is a Part 148 affiliate.

(j) *Insured depository institution* means any bank or savings association, as defined in 12 U.S.C. 1813, the deposits of which are insured by the FDIC.

(k) *Legal entity identifier* or *LEI* for an entity means the global legal entity identifier maintained for such entity by a utility accredited by the Global LEI Foundation or by a utility endorsed by the Regulatory Oversight Committee. As used in this definition:

(1) *Regulatory Oversight Committee* means the Regulatory Oversight Committee (of the Global LEI System), whose charter was set forth by the Finance Ministers and Central Bank Governors of the Group of Twenty and the Financial Stability Board, or any successor thereof; and

(2) *Global LEI Foundation* means the not-for-profit organization organized under Swiss law by the Financial Stability Board in 2014, or any successor thereof.

(l) *Limited scope entity* means a records entity that is not a full scope entity.

(m) *Parent entity* with respect to an entity means an entity that controls that entity.

(n) *Part 148* means 31 CFR part 148.

(o) *Part 148 affiliate* means a records entity that, on financial statements prepared in accordance with U.S. generally accepted accounting principles or other applicable accounting standards, consolidates, or is consolidated by or with (or is required to consolidate or be consolidated by or with), a member of a corporate group one or more members of which are required to maintain QFC records pursuant to Part 148.

(p) *Position* means an individual transaction under a qualified financial contract and includes the rights and obligations of a person or entity as a party to an individual transaction under a qualified financial contract.

(q) *Qualified financial contract* or *QFC* means any qualified financial contract as defined in 12 U.S.C. 1821(e)(8)(D), and any agreement or transaction that the FDIC determines by regulation, resolution, or order to be a QFC, including without limitation, any securities contract, commodity contract, forward contract, repurchase agreement, and swap agreement.

(r) *Records entity* means any insured depository institution that has received written notice from the institution's appropriate Federal banking agency or the FDIC that it is in a troubled condition and written notice from the FDIC that it is subject to the recordkeeping requirements of this part.

(s) *Reportable subsidiary* means any subsidiary of a records entity that is incorporated or organized under U.S. federal law or the laws of any State that is not:

(1) A functionally regulated subsidiary as defined in 12 U.S.C. 1844(c)(5);

(2) A security-based swap dealer as defined in 15 U.S.C. 78c(a)(71); or

(3) A major security-based swap participant as defined in 15 U.S.C. 78c(a)(67).

(t) *State* means any state, commonwealth, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam or the United States Virgin Islands.

(u) *Subsidiary*, with respect to another entity, means an entity that is, or is required to be, consolidated by such other entity on such other entity's financial statements prepared in accordance with U.S. generally accepted accounting principles or other applicable accounting standards.

(v) *Total consolidated assets* means the total consolidated assets of a records entity and its consolidated subsidiaries as reported in the records entity's most recent year-end audited consolidated statement of financial condition filed with the appropriate Federal banking agency.

(w) *Troubled condition* means an insured depository institution that:

(1) Has a composite rating, as determined by its appropriate Federal banking agency in its most recent report of examination, of 3 (only for insured depository institutions with total consolidated assets of $10 billion or greater), 4 or 5 under the Uniform Financial Institution Rating System, or in the case of an insured branch of a foreign bank, an equivalent rating;

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

(3) Is subject to a cease-and-desist order or written agreement issued by the appropriate Federal banking agency, as defined in 12 U.S.C. 1813(q), that requires action to improve the financial condition of the insured depository institution or is subject to a proceeding initiated by the appropriate Federal banking agency which contemplates the issuance of an order that requires action to improve the financial condition of the insured depository institution, unless otherwise informed in writing by the appropriate Federal banking agency;

(4) Is informed in writing by the insured depository institution's appropriate Federal banking agency that it is in troubled condition for purposes of 12 U.S.C. 1831i on the basis of the institution's most recent report of condition or report of examination, or other information available to the institution's appropriate Federal banking agency; or

(5) Is determined by the appropriate Federal banking agency or the FDIC in consultation with the appropriate Federal banking agency to be experiencing a significant deterioration of capital or significant funding difficulties or liquidity stress, notwithstanding the composite rating of the institution by its appropriate Federal banking agency in its most recent report of examination.

§ 371.3 Maintenance of records.

(a) *Form and availability.* (1) Unless it is not required to maintain records in electronic form as provided in § 371.4(d), a records entity shall maintain the records described in § 371.4 in electronic form and shall be capable of producing such records electronically in the format set forth in the appendices of this part.

(2) All such records shall be updated on a daily basis and shall be based upon values and information no less current than previous end-of-day values and information.

(3) Except as provided in § 371.4(d), a records entity shall compile the records described in § 371.4(a) or § 371.4(b) (as applicable) in a manner that permits aggregation and disaggregation of such records by counterparty. If the records are maintained pursuant to § 371.4(b), they must be compiled by the records entity on a consolidated basis for itself and its reportable subsidiaries in a manner that also permits aggregation and disaggregation of such records by the records entity and its reportable subsidiary.

(4) Records maintained pursuant to § 371.4(b) by a records entity that is a Part 148 affiliate shall be compiled consistently, in all respects, with records compiled by its affiliate(s) pursuant to Part 148.

(5) A records entity shall maintain each set of daily records for a period of not less than five business days.

(b) *Change in point of contact.* A records entity shall provide to the FDIC, in writing, any change to the name and contact information for the person at the records entity who is responsible for recordkeeping under this part within 3 business days of any change to such information.

(c) *Access to records.* A records entity shall be capable of providing the records specified in § 371.4 (based on the immediately preceding day's end-of-day values and information) to the FDIC no later than 7 a.m. (Eastern Time) each day. A records entity is required to make such records available to the FDIC following a written request by the FDIC for such records. Any such written request shall specify the date such records are to be made available (and the period of time covered by the request) and shall provide the records entity at least 8 hours to respond to the request. If the request is made less than 8 hours before such 7 a.m. deadline, the deadline shall be automatically extended to the time that is 8 hours following the time of the request.

(d) *Maintenance of records after a records entity is no longer in a troubled condition.* A records entity shall continue to maintain the capacity to produce the records required under this part on a daily basis for a period of one year after the date that the appropriate Federal banking agency or the FDIC notifies the institution, in writing, that it is no longer in a troubled condition as defined in § 371.2(w).

(e) *Maintenance of records after an acquisition of a records entity.* If a records entity ceases to exist as an insured depository institution as a result of a merger or a similar transaction with an insured depository institution that is not in a troubled condition immediately following the transaction, the obligation to maintain records under this part on a daily basis will terminate when the records entity ceases to exist as a separately insured depository institution.

§ 371.4 Content of records.

(a) *Limited scope entities.* Except as provided in § 371.6, a limited scope entity must maintain (at the election of such records entity) either the records described in paragraph (b) of this section or the following records:

(1) The position-level data listed in Table A–1 in Appendix A of this part with respect to each QFC to which it is a party, without duplication.

(2) The counterparty-level data listed in Table A–2 in Appendix A of this part with respect to each QFC to which it is a party, without duplication.

(3) The corporate organization master table in Appendix A of this part for the records entity and its affiliates.

(4) The counterparty master table in Appendix A of this part with respect to each QFC to which it is a party, without duplication.

(5) All documents that govern QFC transactions between the records entity and each counterparty, including, without limitation, master agreements and annexes, schedules, netting agreements, supplements, or other modifications with respect to the agreements, confirmations for each QFC position that has been confirmed and all trade acknowledgments for each QFC position that has not been confirmed, all credit support documents including, but not limited to, credit support annexes, guarantees, keep-well agreements, or net worth maintenance agreements that are relevant to one or more QFCs, and all assignment or novation documents, if applicable, including documents that confirm that all required consents, approvals, or other conditions precedent for such assignment or novation have been obtained or satisfied.

(6) A list of vendors directly supporting the QFC-related activities of the records entity and the vendors' contact information.

(b) *Full scope entities.* Except as provided in § 371.6, a full scope entity must maintain the following records:

(1) The position-level data listed in Table A–1 in Appendix B of this part with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(2) The counterparty-level data listed in Table A–2 in Appendix B of this part with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(3) The legal agreements information listed in Table A–3 in Appendix B of this part with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(4) The collateral detail data listed in Table A–4 in Appendix B of this part with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(5) The corporate organization master table in Appendix B of this part for the records entity and its affiliates.

(6) The counterparty master table in Appendix B of this part with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(7) The booking location master table in Appendix B of this part for each booking location used with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(8) The safekeeping agent master table in Appendix B of this part for each safekeeping agent used with respect to each QFC to which it or any of its reportable subsidiaries is a party, without duplication.

(9) All documents that govern QFC transactions between the records entity (or any of its reportable subsidiaries) and each counterparty, including, without limitation, master agreements and annexes, schedules, netting agreements, supplements, or other modifications with respect to the agreements, confirmations for each QFC position that has been confirmed and all trade acknowledgments for each QFC position that has not been confirmed, all credit support documents including, but not limited to, credit support annexes, guarantees, keep-well agreements, or net worth maintenance agreements that are relevant to one or more QFCs, and all assignment or novation documents, if applicable, including documents that confirm that all required consents, approvals, or other conditions precedent for such assignment or novation have been obtained or satisfied.

(10) A list of vendors directly supporting the QFC-related activities of the records entity and its reportable subsidiaries and the vendors' contact information.

(c) *Change in recordkeeping status.* (1) A records entity that was a limited scope entity maintaining the records specified in paragraphs (a)(1) through (6) of this section and that subsequently becomes a full scope entity must maintain the records specified in paragraph (b) of this section within 270 days of becoming a full scope entity (or 60 days of becoming a full scope entity if it is an accelerated records entity). Until the records entity maintains the records required by paragraph (b) of this section it must continue to maintain the records required by paragraphs (a)(1) through (6) of this section.

(2) A records entity that was a full scope entity maintaining the records specified in paragraph (b) of this section and that subsequently becomes a limited scope entity may continue to maintain the records specified in paragraph (b) of this section or, at its option, may maintain the records specified in paragraphs (a)(1) through (6) of this section, provided however, that such records entity shall continue to maintain the records specified in paragraph (b) of this section until it maintains the records specified in paragraphs (a)(1) through (6) of this section.

(3) A records entity that changes from a limited scope entity to a full scope entity and at the time it becomes a full scope entity is not yet maintaining the records specified in paragraph (a) of this section or paragraph (b) of this section must satisfy the recordkeeping requirements of paragraph (b) of this section within 270 days of first becoming a records entity (or 60 days of first becoming a records entity if it is an accelerated records entity).

(4) A records entity that changes from a full scope entity to a limited scope entity and at the time it becomes a limited scope entity is not yet maintaining the records specified in paragraph (b) of this section must satisfy the recordkeeping requirements of paragraph (a) of this section within 270 days of first becoming a record entity (or 60 days of first becoming a record entity if it is an accelerated records entity).

(d) *Records entities with 50 or fewer QFC positions.* Notwithstanding any other requirement of this part, if a records entity and, if it is a full scope entity, its reportable subsidiaries, have 50 or fewer open QFC positions in total (without duplication) on the date the institution becomes a records entity, the records required by this section are not required to be recorded and maintained in electronic form as would otherwise be required by this section, so long as all required records are capable of being updated on a daily basis. If at any time after it becomes a records entity, the institution and, if it is a full scope entity, its reportable subsidiaries, if applicable, have more than 50 open QFC positions in total (without duplication), it must record and maintain records in electronic form as required by this section within 270 days (or, if it is an accelerated records entity at that time, within 60 days). The records entity must provide to the FDIC, within 3 business days of reaching the 51–QFC threshold, a directory of the electronic files that will be used to maintain the information required to be kept by this section.

§ 371.5 Exemptions.

(a) *Request.* A records entity may request an exemption from one or more of the requirements of § 371.4 by submitting a written request to the Executive Secretary of the FDIC referring to this part. The written request for an exemption must:

(1) Specify the requirement(s) under this part from which the records entity is requesting to be exempt and whether the exemption is sought to apply solely to the records entity or to one or more identified reportable subsidiaries of the records entity or to the records entity and one or more identified reportable subsidiaries;

(2) Specify the reasons why it would be appropriate for the FDIC to grant the exemption;

(3) Specify the reasons why granting the exemption will not impair or impede the FDIC's ability to fulfill its statutory obligations under 12 U.S.C.

1821(e)(8), (9), or (10) or the FDIC's ability to obtain a comprehensive understanding of the QFC exposures of the records entity and its reportable subsidiaries; and

(4) Include such additional information (if any) that the FDIC may require.

(b) *Determination.* Following its evaluation of a request for exemption, the FDIC will determine, in its sole discretion, whether to grant or deny the request.

§ 371.6 Transition for existing records entities.

(a) *Limited scope entities.* Notwithstanding any other provision of this part, an insured depository institution that became a records entity prior to October 1, 2017, and constitutes a limited scope entity on October 1, 2017, shall continue to comply with this part as in effect immediately prior to October 1, 2017, or, if it elects to comply with this part as in effect on and after October 1, 2017, as so in effect, for so long as the entity remains a limited scope entity that has not ceased to be required to maintain the capacity to produce records pursuant to § 371.3(d).

(b) Transition for full scope entities maintaining records on effective date. If an insured depository institution that constitutes a full scope entity on October 1, 2017, became a records entity prior to October 1, 2017, and is maintaining the records required by this part as in effect immediately prior to October 1, 2017, then:

(1) Except as provided in paragraph (b)(2) of this section, such records entity shall comply with the recordkeeping requirements of this part within 270 days after October 1, 2017 (or no later than 60 days after October 1, 2017 if it is an accelerated records entity); and

(2) If—

(i) Such records entity is a Part 148 affiliate and, on October 1, 2017, is not an accelerated records entity; and

(ii) The compliance date for any other member of such record entity's corporate group to comply with Part 148 is set forth in 31 CFR 148.1(d)(1)(i)(B),(C), or (D), as in effect on October 1, 2017, such records entity shall be permitted to delay compliance with the recordkeeping requirements of this part until the first date on which members of any corporate group of which such records entity is a member is required to comply with Part 148 pursuant to 31 CFR 148.1(d)(1)(i)(B),(C), or (D), as in effect on October 1, 2017; provided, that if such records entity becomes an accelerated records entity, it shall comply with the recordkeeping requirements of this part no later than 60 days after it becomes an accelerated records entity; provided, that in the case of each of paragraphs (b)(1) and (2) of this section until such full scope entity maintains the records required by § 371.4, it continues to maintain the records required by this part as in effect immediately prior to October 1, 2017.

(c) *Transition for full scope entities not maintaining records on effective date.* If an insured depository institution that constitutes a full scope entity on October 1, 2017, became a records entity prior to October 1, 2017, but is not maintaining the records required by this part as in effect immediately prior to October 1, 2017, such records entity shall comply with all recordkeeping requirements of this part within 270 days after the date that it first became a records entity (or no later than 60 days after it first became a records entity if it is an accelerated records entity).

§ 371.7 Enforcement actions.

Violating the terms or requirements set forth in this part constitutes a violation of a regulation and subjects the records entity to enforcement actions under Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

APPENDIX A TO PART 371—FILE STRUCTURE FOR QUALIFIED FINANCIAL CONTRACT (QFC) RECORDS FOR LIMITED SCOPE ENTITIES

TABLE A–1—POSITION-LEVEL DATA

	Field	Example	Instructions and data application	Definition	Validation
A1.1	As of date	2015–01–05	Provide data extraction date.	YYYY–MM–DD.	
A1.2	Records entity identifier.	999999999	Provide LEI for records entity if available. Information needed to review position-level data by records entity.	Varchar(50)	Validated against CO.2.
A1.3	Position identifier.	20058953	Provide a position identifier. Use the unique transaction identifier if available. Information needed to readily track and distinguish positions.	Varchar(100).	
A1.4	Counterparty identifier.	888888888	Provide a counterparty identifier. Use LEI if counterparty has one. Information needed to identify counterparty by reference to Counterparty Master Table.	Varchar(50)	Validated against CP.2.
A1.5	Internal booking location identifier.	New York, New York	Provide office where the position is booked. Information needed to determine system on which the trade is booked and settled.	Varchar(50).	
A1.6	Unique booking unit or desk identifier.	xxxxxx	Provide an identifier for unit or desk at which the position is booked. Information needed to help determine purpose of position.	Varchar(50).	
A1.7	Type of QFC ..	Credit, equity, foreign exchange, interest rate (including cross-currency), other commodity, securities repurchase agreement, securities lending, loan repurchase agreement, guarantee or other third party credit enhancement of a QFC.	Provide type of QFC. Use unique product identifier if available. Information needed to determine the nature of the QFC.	Varchar(100).	

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.8	Type of QFC covered by guarantee or other third party credit enhancement.	Credit, equity, foreign exchange, interest rate (including cross-currency), other commodity, securities repurchase agreement, securities lending, or loan repurchase agreement.	If QFC type is guarantee or other third party credit enhancement, provide type of QFC that is covered by such guarantee or other third party credit enhancement. Use unique product identifier if available. If multiple asset classes are covered by the guarantee or credit enhancement, enter the asset classes separated by comma. If all the QFCs of the underlying QFC obligor identifier are covered by the guarantee or other third party credit enhancement, enter "All".	Varchar(200)	Only required if QFC type (A1.7) is a guarantee or other third party credit enhancement.
A1.9	Underlying QFC obligor identifier.	888888888	If QFC type is guarantee or other third party credit enhancement, provide an identifier for the QFC obligor whose obligation is covered by the guarantee or other third party credit enhancement. Use LEI if underlying QFC obligor has one. Complete the counterparty master table with respect to a QFC obligor that is a non-affiliate.	Varchar(50)	Only required if QFC asset type (A1.7) is a guarantee or other third party credit enhancement. Validated against CO.2 if affiliate or CP.2 if non-affiliate.
A1.10 ..	Agreement identifier.	xxxxxxxxx	Provide an identifier for primary governing documentation, e.g. the master agreement or guarantee agreement, as applicable.	Varchar(50).	
A1.11 ..	Netting agreement identifier.	xxxxxxxxx	Provide an identifier for netting agreement. If this agreement is the same as provided in A1.10, use same identifier. Information needed to identify unique netting sets.	Varchar(50).	
A1.12 ..	Netting agreement counterparty identifier.	xxxxxxxxx	Provide a netting agreement counterparty identifier. Use same identifier as provided in A1.4 if counterparty and netting agreement counterparty are the same. Use LEI if netting agreement counterparty has one. Information needed to identify unique netting sets.	Varchar(50)	Validated against CP.2

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.13 ..	Trade date	2014–12–20	Provide trade or other commitment date for the QFC. Information needed to determine when the entity's rights and obligations regarding the position originated.	YYYY–MM–DD.	
A1.14 ..	Termination date.	2014–03–31	Provide date the QFC terminates or is expected to terminate, expire, mature, or when final performance is required. Information needed to determine when the entity's rights and obligations regarding the position are expected to end.	YYYY–MM–DD.	
A1.15 ..	Next call, put, or cancellation date.	2015–01–25	Provide next call, put, or cancellation date.	YYYY–MM–DD.	
A1.16 ..	Next payment date.	2015–01–25	Provide next payment date.	YYYY–MM–DD.	
A1.17 ..	Current market value of the position in U.S. dollars.	995000	In the case of a guarantee or other third party credit enhancements, provide the current mark-to-market expected value of the exposure. Information needed to determine the current size of the obligation/benefit associated with the QFC.	Num (25,5).	
A1.18 ..	Notional or principal amount of the position In U.S. dollars.	1000000	Provide the notional or principal amount, as applicable, in U.S. dollars. In the case of a guarantee or other third party credit enhancements, provide the maximum possible exposure. Information needed to help evaluate the position.	Num (25,5).	
A1.19 ..	Covered by third-party credit enhancement agreement (for the benefit of the records entity)?	Y/N	Indicate whether QFC is covered by a guarantee or other third-party credit enhancement. Information needed to determine credit enhancement.	Char(1)	Should be "Y" or "N"
A1.20 ..	Third-party credit enhancement provider identifier (for the benefit of the records entity).	999999999	If QFC is covered by a guarantee or other third-party credit enhancement, provide an identifier for provider. Use LEI if available. Complete the counterparty master table with respect to a provider that is a non-affiliate.	Varchar(50)	Required if A1.20 is "Y". Validated against CP.2

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.21 ..	Third-party credit enhancement agreement identifier (for the benefit of the records entity).	.....	If QFC is covered by a guarantee or other third-party credit enhancement, provide an identifier for the agreement.	Varchar(50)	Required if A1.20 is ''Y''.
A1.22 ..	Related position of records entity.	3333333	Use this field to link any related positions of the records entity. All positions that are related to one another should have same designation in this field.	Varchar(100).	
A1.23 ..	Reference number for any related loan.	9999999	Provide a unique reference number for any loan held by the records entity or a member of its corporate group related to the position (with multiple entries delimited by commas).	Varchar(500).	
A1.24 ..	Identifier of the lender of the related loan.	999999999	For any loan recorded in A1.23, provide identifier for records entity or member of its corporate group that holds any related loan. Use LEI if entity has one.	Varchar(500).	

TABLE A–2—COUNTERPARTY NETTING SET DATA

	Field	Example	Instructions and data application	Def	Validation
A2.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
A2.2	Records entity identifier.	999999999	Provide the LEI for the records entity if available.	Varchar(50)	Validated against CO.2.
A2.3	Netting agreement counterparty identifier.	888888888	Provide an identifier for the netting agreement counterparty. Use LEI if counterparty has one.	Varchar(50)	Validated against CP.2.
A2.4	Netting agreement identifier.	xxxxxxxxx	Provide an identifier for the netting agreement.	Varchar(50).	
A2.5	Underlying QFC obligor identifier.	888888888	Provide identifier for underlying QFC obligor if netting agreement is associated with a guarantee or other third party credit enhancement. Use LEI if available.	Varchar(50)	Validated against CO.2 or CP.2.
A2.6	Covered by third-party credit enhancement agreement (for the benefit of the records entity)?.	Y/N	Indicate whether the positions subject to the netting set agreement are covered by a third-party credit enhancement agreement.	Char(1)	Should be ''Y'' or ''N''.

TABLE A–2—COUNTERPARTY NETTING SET DATA—Continued

	Field	Example	Instructions and data application	Def	Validation
A2.7	Third-party credit enhancement provider identifier (for the benefit of the records entity).	999999999	Use LEI if available. Information needed to identity third-party credit enhancement provider.	Varchar(50)	Required if A2.6 is "Y". Should be a valid entry in the Counterparty Master Table. Validated against CP.2.
A2.8	Third-party credit enhancement agreement identifier (for the benefit of the records entity).	4444444	.....	Varchar(50)	Required if A2.6 is "Y".
A2.9	Aggregate current market value in U.S. dollars of all positions under this netting agreement.	–1000000	Information needed to help evaluate the positions subject to the netting agreement.	Num (25,5)	Market value of all positions in A1 for the given netting agreement identifier should be equal to this value. A2.9 = A2.10 + A2.11.
A2.10 ..	Current market value in U.S. dollars of all positive positions, as aggregated under this netting agreement.	3000000	Information needed to help evaluate the positions subject to the netting agreement.	Num (25,5)	Market value of all positive positions in A1 for the given netting agreement identifier should be equal to this value. A2.9 = A2.10 + A2.11.
A2.11 ..	Current market value in U.S. dollars of all negative positions, as aggregated under this netting agreement.	–4000000	Information needed to help evaluate the positions subject to the netting agreement.	Num (25,5)	Market value of all negative positions in A1 for the given Netting Agreement Identifier should be equal to this value. A2.9 = A2.10 + A2.11.
A2.12 ..	Current market value in U.S. dollars of all collateral posted by records entity, as aggregated under this netting agreement.	950000	Information needed to determine the extent to which collateral has been provided by records entity.	Num (25,5).	
A2.13 ..	Current market value in U.S. dollars of all collateral posted by counterparty, as aggregated under this netting agreement.	50000	Information needed to determine the extent to which collateral has been provided by counterparty.	Num (25,5).	

TABLE A–2—COUNTERPARTY NETTING SET DATA—Continued

	Field	Example	Instructions and data application	Def	Validation
A2.14 ..	Records entity collateral—net.	950,000	Provide records entity's collateral excess or deficiency with respect to all of its positions, as determined under each applicable agreement, including thresholds and haircuts where applicable.	Num (25,5)	Should be less than or equal to A2.15.
A2.15 ..	Counterparty collateral—net.	950,000	Provide counterparty's collateral excess or deficiency with respect to all of its positions, as determined under each applicable agreement, including thresholds and haircuts where applicable.	Num (25,5)	Should be less than or equal to A2.16.
A2.16 ..	Next margin payment date.	2015–11–05	Provide next margin payment date for position.	YYYY–MM–DD.	
A2.17 ..	Next margin payment amount in U.S. dollars.	150,000	Use positive value if records entity is due a payment and use negative value if records entity has to make the payment.	Num (25,5).	

CORPORATE ORGANIZATION MASTER TABLE *

	Field	Example	Instructions and data application	Def	Validation
CO.1 ...	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
CO.2 ...	Entity identifier	888888888	Provide unique identifier. Use LEI if available. Information needed to identify entity.	Varchar(50)	Should be unique across all record entities.
CO.3 ...	Has LEI been used for entity identifier?	Y/N	Specify whether the entity identifier provided is an LEI..	Char(1)	Should be ''Y'' or ''N''.
CO.4 ...	Legal name of entity.	John Doe & Co.	Provide legal name of entity.	Varchar(200).	
CO.5 ...	Immediate parent entity identifier.	77777777	Use LEI if available. Information needed to complete org structure.	Varchar(50).	
CO.6 ...	Has LEI been used for immediate parent entity identifier?	Y/N	Specify whether the immediate parent entity identifier provided is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CO.7 ...	Legal name of immediate parent entity.	John Doe & Co.	Information needed to complete org structure.	Varchar(200).	
CO.8 ...	Percentage ownership of immediate parent entity in the entity.	100.00	Information needed to complete org structure.	Num (5,2).	
CO.9 ...	Entity type	Subsidiary, foreign branch, foreign division.	Information needed to complete org structure.	Varchar(50).	
CO.10	Domicile	New York, New York	Enter as city, state or city, foreign country.	Varchar(50).	
CO.11	Jurisdiction under which incorporated or organized.	New York	Enter as state or foreign jurisdiction.	Varchar(50).	

*Foreign branches and divisions shall be separately identified to the extent they are identified in an entity's reports to its appropriate Federal banking agency.

COUNTERPARTY MASTER TABLE

	Field	Example	Instructions and data application	Def	Validation
CP.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
CP.2	Counterparty identifier.	888888888	Use LEI if counterparty has one. The counterparty identifier shall be the global legal entity identifier if one has been issued to the entity. If a counterparty transacts with the records entity through one or more separate foreign branches or divisions and any such branch or division does not have its own unique global legal entity identifier, the records entity must include additional identifiers, as appropriate to enable the FDIC to aggregate or disaggregate the data for each counterparty and for each entity with the same ultimate parent entity as the counterparty.	Varchar(50).	
CP.3	Has LEI been used for counterparty identifier?	Y/N	Indicate whether the counterparty identifier is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CP.4	Legal name of counterparty.	John Doe & Co	Information needed to identify and, if necessary, communicate with counterparty.	Varchar(200).	
CP.5	Domicile	New York, New York	Enter as city, state or city, foreign country.	Varchar(50).	
CP.6	Jurisdiction under which incorporated or organized.	New York	Enter as state or foreign jurisdiction.	Varchar(50).	
CP.7	Immediate parent entity identifier.	77777777	Provide an identifier for the parent entity that directly controls the counterparty. Use LEI if immediate parent entity has one.	Varchar(50).	
CP.8	Has LEI been used for immediate parent entity identifier?	Y/N	Indicate whether the immediate parent entity identifier is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CP.9	Legal name of immediate parent entity.	John Doe & Co	Information needed to identify and, if necessary, communicate with counterparty.	Varchar(200).	
CP.10 ..	Ultimate parent entity identifier.	666666666	Provide an identifier for the parent entity that is a member of the corporate group of the counterparty that is not controlled by another entity. Information needed to identify counterparty. Use LEI if ultimate parent entity has one.	Varchar(50).	

COUNTERPARTY MASTER TABLE—Continued

	Field	Example	Instructions and data application	Def	Validation
CP.11 ..	Has LEI been used for ultimate parent entity identifier?	Y/N	Indicate whether the ultimate parent entity identifier is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CP.12 ..	Legal name of ultimate parent entity.	John Doe & Co	Information needed to identify and, if necessary, communicate with counterparty.	Varchar(100).	

DETAILS OF FORMATS

Format	Content in brief	Additional explanation	Examples
YYYY–MM–DD	Date	YYYY = four digit date, MM = 2 digit month, DD = 2 digit date	2015–11–12
Num (25,5)	Up to 25 numerical characters including 5 decimals.	Up to 20 numerical characters before the decimal point and up to 5 numerical characters after the decimal point. The dot character is used to separate decimals.	1352.67 12345678901234567890 12345 0 −20000.25 −0.257
Char(3)	3 alphanumeric characters	The length is fixed at 3 alphanumeric characters.	USD X1X 999
Varchar(25)	Up to 25 alphanumeric characters.	The length is not fixed but limited at up to 25 alphanumeric characters.	asgaGEH3268EFdsagtTRCF543

APPENDIX B TO PART 371—FILE STRUCTURE FOR QUALIFIED FINANCIAL CONTRACT RECORDS FOR FULL SCOPE ENTITIES

Pursuant to §371.4(b), the records entity is required to provide the information required by this appendix B for itself and each of its reportable subsidiaries in a manner that can be disaggregated by legal entity. Accordingly, the reference to ''records entity'' in the tables of appendix B should be read as referring to each of the separate legal entities (*i.e.*, the records entity and each reportable subsidiary).

TABLE A–1—POSITION-LEVEL DATA

	Field	Example	Instructions and data application	Definition	Validation
A1.1	As of date	2015–01–05	Provide data extraction date.	YYYY–MM–DD.	
A1.2	Records entity identifier.	999999999	Provide LEI for records entity. Information needed to review position-level data by records entity.	Varchar(50)	Validated against CO.2.
A1.3	Position identifier.	20058953	Provide a position identifier. Should be used consistently across all records entities. Use the unique transaction identifier if available. Information needed to readily track and distinguish positions.	Varchar(100).	
A1.4	Counterparty identifier.	888888888	Provide a counterparty identifier. Use LEI if counterparty has one. Should be used consistently by all records entities. Information needed to identify counterparty by reference to Counterparty Master Table.	Varchar(50)	Validated against CP.2.

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.5	Internal booking location identifier.	New York, New York	Provide office where the position is booked. Information needed to determine system on which the trade is booked and settled.	Varchar(50)	Combination A1.2 + A1.5 + A1.6 should have a corresponding unique combination BL.2 + BL.3 + BL.4 entry in Booking Location Master Table.
A1.6	Unique booking unit or desk identifier.	xxxxxx	Provide an identifier for unit or desk at which the position is booked. Information needed to help determine purpose of position.	Varchar(50)	Combination A1.2 + A1.5 + A1.6 should have a corresponding unique combination BL.2 + BL.3 + BL.4 entry in Booking Location Master Table.
A1.7	Type of QFC ..	Credit, equity, foreign exchange, interest rate (including cross-currency), other commodity, securities repurchase agreement, securities lending, loan repurchase agreement, guarantee or other third party credit enhancement of a QFC.	Provide type of QFC. Use unique product identifier if available. Information needed to determine the nature of the QFC.	Varchar(100).	
A1.7.1	Type of QFC covered by guarantee or other third party credit enhancement.	Credit, equity, foreign exchange, interest rate (including cross-currency), other commodity, securities repurchase agreement, securities lending, or loan repurchase agreement.	If QFC type is guarantee or other third party credit enhancement, provide type of QFC that is covered by such guarantee or other third party credit enhancement. Use unique product identifier if available. If multiple asset classes are covered by the guarantee or credit enhancement, enter the asset classes separated by comma. If all the QFCs of the underlying QFC obligor identifier are covered by the guarantee or other third party credit enhancement, enter "All.".	Varchar(500)	Only required if QFC type (A1.7) is a guarantee or other third party credit enhancement.
A1.7.2	Underlying QFC obligor identifier.	888888888	If QFC type is guarantee or other third party credit enhancement, provide an identifier for the QFC obligor whose obligation is covered by the guarantee or other third party credit enhancement. Use LEI if underlying QFC obligor has one. Complete the counterparty master table with respect to a QFC obligor that is a non-affiliate.	Varchar(50)	Only required if QFC asset type (A1.7) is a guarantee or other third party credit enhancement. Validated against CO.2 if affiliate or CP.2 if non-affiliate.

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.8	Agreement identifier.	xxxxxxxxx	Provide an identifier for the primary governing documentation, *e.g.,* the master agreement or guarantee agreement, as applicable.	Varchar(50)	Validated against A3.3.
A1.9	Netting agreement identifier.	xxxxxxxxx	Provide an identifier for netting agreement. If this agreement is the same as provided in A1.8, use same identifier. Information needed to identify unique netting sets.	Varchar(50)	Validated against A3.3.
A1.10 ..	Netting agreement counterparty identifier.	xxxxxxxxx	Provide a netting agreement counterparty identifier. Use same identifier as provided in A1.4 if counterparty and netting agreement counterparty are the same. Use LEI if netting agreement counterparty has one. Information needed to identify unique netting sets.	Varchar(50)	Validated against CP.2.
A1.11 ..	Trade date	2014–12–20	Provide trade or other commitment date for the QFC. Information needed to determine when the entity's rights and obligations regarding the position originated.	YYYY–MM–DD.	
A1.12 ..	Termination date.	2014–03–31	Provide date the QFC terminates or is expected to terminate, expire, mature, or when final performance is required. Information needed to determine when the entity's rights and obligations regarding the position are expected to end.	YYYY–MM–DD.	
A1.13 ..	Next call, put, or cancellation date.	2015–01–25	Provide next call, put, or cancellation date.	YYYY–MM–DD.	
A1.14 ..	Next payment date.	2015–01–25	Provide next payment date.	YYYY–MM–DD.	
A1.15 ..	Local Currency Of Position.	USD	Provide currency in which QFC is denominated. Use ISO currency code.	Char(3).	
A1.16 ..	Current market value of the position in local currency.	995000	Provide current market value of the position in local currency. In the case of a guarantee or other third party credit enhancements, provide the current mark-to-market expected value of the exposure. Information needed to determine the current size of the obligation or benefit associated with the QFC.	Num (25,5).	

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.17 ..	Current market value of the position in U.S. dollars.	995000	In the case of a guarantee or other third party credit enhancements, provide the current mark-to-market expected value of the exposure. Information needed to determine the current size of the obligation/benefit associated with the QFC.	Num (25,5).	
A1.18 ..	Asset Classification.	1	Provide fair value asset classification under GAAP, IFRS, or other accounting principles or standards used by records entity. Provide ''1'' for Level 1, ''2'' for Level 2, or ''3'' for Level 3. Information needed to assess fair value of the position.	Char(1).	
A1.19 ..	Notional or principal amount of the position in local currency.	1000000	Provide the notional or principal amount, as applicable, in local currency. In the case of a guarantee or other third party credit enhancement, provide the maximum possible exposure. Information needed to help evaluate the position.	Num (25,5).	
A1.20 ..	Notional or principal amount of the position In U.S. dollars.	1000000	Provide the notional or principal amount, as applicable, in U.S. dollars. In the case of a guarantee or other third party credit enhancements, provide the maximum possible exposure. Information needed to help evaluate the position.	Num (25,5).	
A1.21 ..	Covered by third-party credit enhancement agreement (for the benefit of the records entity)?	Y/N	Indicate whether QFC is covered by a guarantee or other third-party credit enhancement. Information needed to determine credit enhancement.	Char(1).	Should be ''Y'' or ''N''.
A1.21.1	Third-party credit enhancement provider identifier (for the benefit of the records entity).	999999999	If QFC is covered by a guarantee or other third-party credit enhancement, provide an identifier for provider. Use LEI if available. Complete the counterparty master table with respect to a provider that is a non-affiliate.	Varchar(50)	Required if A1.21 is ''Y''. Validated against CP.2.

TABLE A–1—POSITION-LEVEL DATA—Continued

	Field	Example	Instructions and data application	Definition	Validation
A1.21.2	Third-party credit enhancement agreement identifier (for the benefit of the records entity).	4444444	If QFC is covered by a guarantee or other third-party credit enhancement, provide an identifier for the agreement.	Varchar(50)	Required if A1.21 is ''Y.'' Validated against A3.3.
A1.21.3	Covered by third-party credit enhancement agreement (for the benefit of the counterparty)?	Y/N	Indicate whether QFC is covered by a guarantee or other third-party credit enhancement. Information needed to determine credit enhancement.	Char(1)	Should be ''Y'' or ''N''.
A1.21.4	Third-party credit enhancement provider identifier (for the benefit of the counterparty).	999999999	If QFC is covered by a guarantee or other third-party credit enhancement, provide an identifier for provider. Use LEI if available. Complete the counterparty master table with respect to a provider that is a non-affiliate.	Varchar(50)	Required if A1.21.3 is ''Y''. Validated against CO.2 or CP.2.
A1.21.5	Third-party credit enhancement agreement identifier (for the benefit of the counterparty).	4444444	If QFC is covered by a guarantee or other third-party credit enhancement, provide an identifier for agreement.	Varchar(50)	Required if A1.21.3 is ''Y''. Validated against A3.3.
A1.22 ..	Related position of records entity.	3333333	Use this field to link any related positions of the records entity. All positions that are related to one another should have same designation in this field.	Varchar(100).	
A1.23 ..	Reference number for any related loan.	9999999	Provide a unique reference number for any loan held by the records entity or a member of its corporate group related to the position (with multiple entries delimited by commas).	Varchar(500).	
A1.24 ..	Identifier of the lender of the related loan.	999999999	For any loan recorded in A1.23, provide identifier for records entity or member of its corporate group that holds any related loan. Use LEI if entity has one.	Varchar(500).	

TABLE A–2—COUNTERPARTY NETTING SET DATA

	Field	Example	Instructions and data application	Def	Validation
A2.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	

TABLE A–2—COUNTERPARTY NETTING SET DATA—Continued

	Field	Example	Instructions and data application	Def	Validation
A2.2	Records entity identifier.	999999999	Provide the LEI for the records entity.	Varchar(50)	Validated against CO.2.
A2.3	Netting agreement counterparty identifier.	888888888	Provide an identifier for the netting agreement counterparty. Use LEI if counterparty has one.	Varchar(50)	Validated against CP.2.
A2.4	Netting agreement identifier.	xxxxxxxxx	Provide an identifier for the netting agreement.	Varchar(50)	Validated against A3.3.
A2.4.1	Underlying QFC obligor identifier.	888888888	Provide identifier for underlying QFC obligor if netting agreement is associated with a guarantee or other third party credit enhancement. Use LEI if available.	Varchar(50)	Validated against CO.2 or CP.2.
A2.5	Covered by third-party credit enhancement agreement (for the benefit of the records entity)?	Y/N	Indicate whether the positions subject to the netting set agreement are covered by a third-party credit enhancement agreement.	Char(1)	Should be ''Y'' or ''N''.
A2.5.1	Third-party credit enhancement provider identifier (for the benefit of the records entity).	999999999	Use LEI if available. Information needed to identity third-party credit enhancement provider.	Varchar(50)	Required if A2.5 is ''Y''. Validated against CP.2.
A2.5.2	Third-party credit enhancement agreement identifier (for the benefit of the records entity).	4444444	.....	Varchar(50)	Required if A2.5 is ''Y''. Validated against A3.3.
A2.5.3	Covered by third-party credit enhancement agreement (for the benefit of the counterparty)?	Y/N	Information needed to determine credit enhancement.	Char(1)	Should be ''Y'' or ''N''.
A2.5.4	Third-party credit enhancement provider identifier (for the benefit of the counterparty).	999999999	Use LEI if available. Information needed to identity third-party credit enhancement provider.	Varchar(50)	Required if A2.5.3 is ''Y''. Should be a valid entry in the Counterparty Master Table. Validated against CP.2.
A2.5.5	Third-party credit enhancement agreement identifier (for the benefit of the counterparty).	4444444	Information used to determine guarantee or other third-party credit enhancement.	Varchar(50)	Required if A2.5.3 is ''Y''. Validated against A3.3.

TABLE A–2—COUNTERPARTY NETTING SET DATA—Continued

	Field	Example	Instructions and data application	Def	Validation
A2.6	Aggregate current market value in U.S. dollars of all positions under this netting agreement.	–1000000	Information needed to help evaluate the positions subject to the netting agreement.	Num (25,5)	Market value of all positions in A1 for the given netting agreement identifier should be equal to this value. A2.6 = A2.7 + A2.8.
A2.7	Current market value in U.S. dollars of all positive positions, as aggregated under this netting agreement.	3000000	Information needed to help evaluate the positions subject to the netting agreement.	Num (25,5)	Market value of all positive positions in A1 for the given netting agreement identifier should be equal to this value. A2.6 = A2.7 + A2.8.
A2.8	Current market value in U.S. dollars of all negative positions, as aggregated under this netting agreement.	–4000000	Information needed to help evaluate the positions subject to the netting agreement.	Num (25,5)	Market value of all negative positions in A1 for the given Netting Agreement Identifier should be equal to this value. A2.6 = A2.7 + A2.8.
A2.9	Current market value in U.S. dollars of all collateral posted by records entity, as aggregated under this netting agreement.	950000	Information needed to determine the extent to which collateral has been provided by records entity.	Num (25,5)	Market value of all collateral posted by records entity for the given netting agreement Identifier should be equal to sum of all A4.9 for the same netting agreement identifier in A4.
A2.10 ..	Current market value in U.S. dollars of all collateral posted by counterparty, as aggregated under this netting agreement.	50000	Information needed to determine the extent to which collateral has been provided by counterparty.	Num (25,5)	Market value of all collateral posted by counterparty for the given netting agreement identifier should be equal to sum of all A4.9 for the same netting agreement identifier in A4.
A2.11 ..	Current market value in U.S. dollars of all collateral posted by records entity that is subject to re-hypothecation, as aggregated under this netting agreement.	950,000	Information needed to determine the extent to which collateral has been provided by records entity.	Num (25,5).	

TABLE A–2—COUNTERPARTY NETTING SET DATA—Continued

	Field	Example	Instructions and data application	Def	Validation
A2.12 ..	Current market value in U.S. dollars of all collateral posted by counterparty that is subject to re-hypothecation, as aggregated under this netting agreement.	950,000	Information needed to determine the extent to which collateral has been provided by records entity.	Num (25,5).	
A2.13 ..	Records entity collateral—net.	950,000	Provide records entity's collateral excess or deficiency with respect to all of its positions, as determined under each applicable agreement, including thresholds and haircuts where applicable.	Num (25,5)	Should be less than or equal to A2.9.
A2.14 ..	Counterparty collateral—net.	950,000	Provide counterparty's collateral excess or deficiency with respect to all of its positions, as determined under each applicable agreement, including thresholds and haircuts where applicable.	Num (25,5)	Should be less than or equal to A2.10.
A2.15 ..	Next margin payment date.	2015–11–05	Provide next margin payment date for position.	YYYY–MM–DD.	
A2.16 ..	Next margin payment amount in U.S. dollars.	150,000	Use positive value if records entity is due a payment and use negative value if records entity has to make the payment.	Num (25,5).	
A2.17 ..	Safekeeping agent identifier for records entity.	888888888	Provide an identifier for the records entity's safekeeping agent, if any. Use LEI if safekeeping agent has one.	Varchar(50)	Validated against SA.2.
A2.18 ..	Safekeeping agent identifier for counterparty.	888888888	Provide an identifier for the counterparty's safekeeping agent, if any. Use LEI if safekeeping agent has one.	Varchar(50)	Validated against SA.2.

TABLE A–3—LEGAL AGREEMENTS

	Field	Example	Instructions and data application	Def	Validation
A3.1	As of Date	2015–01–05	Data extraction date	YYYY–MM–DD.	
A3.2	Records entity identifier.	999999999	Provide LEI for records entity.	Varchar(50)	Validated against CO.2.
A3.3	Agreement identifier.	xxxxxx	Provide identifier for each master agreement, governing document, netting agreement or third-party credit enhancement agreement.	Varchar(50).	

TABLE A–3—LEGAL AGREEMENTS—Continued

	Field	Example	Instructions and data application	Def	Validation
A3.4	Name of agreement or governing document.	ISDA Master 1992 or Guarantee Agreement or Master Netting Agreement.	Provide name of agreement or governing document.	Varchar(50).	
A3.5	Agreement date.	2010–01–25	Provide the date of the agreement.	YYYY–MM–DD.	
A3.6	Agreement counterparty identifier.	888888888	Use LEI if counterparty has one. Information needed to identify counterparty.	Varchar(50)	Validated against field CP.2.
A3.6.1	Underlying QFC obligor identifier.	888888888	Provide underlying QFC obligor identifier if document identifier is associated with a guarantee or other third party credit enhancement. Use LEI if underlying QFC obligor has one.	Varchar(50)	Validated against CO.2 or CP.2.
A3.7	Agreement governing law.	New York	Provide law governing contract disputes.	Varchar(50).	
A3.8	Cross-default provision?.	Y/N	Specify whether agreement includes default or other termination event provisions that reference an entity not a party to the agreement (''cross-default Entity''). Information needed to determine exposure to affiliates or other entities.	Char(1)	Should be ''Y'' or ''N''.
A3.9	Identity of cross-default entities.	777777777	Provide identity of any cross-default entities referenced in A3.8. Use LEI if entity has one. Information needed to determine exposure to other entities.	Varchar(500)	Required if A3.8 is ''Y''. ID should be a valid entry in Corporate Org Master Table or Counterparty Master Table, if applicable. Multiple entries comma separated.
A3.10 ..	Covered by third-party credit enhancement agreement (for the benefit of the records entity)?.	Y/N	Information needed to determine credit enhancement.	Char(1)	Should be ''Y'' or ''N''.
A3.11 ..	Third-party credit enhancement provider identifier (for the benefit of the records entity).	999999999	Use LEI if available. Information needed to identity Third-Party Credit Enhancement Provider.	Varchar(50)	Required if A3.10 is ''Y''. Should be a valid entry in the Counterparty Master Table. Validated against CP.2.

TABLE A–3—LEGAL AGREEMENTS—Continued

	Field	Example	Instructions and data application	Def	Validation
A3.12 ..	Associated third-party credit enhancement agreement document identifier (for the benefit of the records entity).	33333333	Information needed to determine credit enhancement.	Varchar(50)	Required if A3.10 is ''Y''. Validated against field A3.3.
A3.12.1	Covered by third-party credit enhancement agreement (for the benefit of the counterparty)?.	Y/N	Information needed to determine credit enhancement.	Char(1)	Should be ''Y'' or ''N''.
A3.12.2	Third-party credit enhancement provider identifier (for the benefit of the counterparty).	999999999	Use LEI if available. Information needed to identity Third-Party Credit Enhancement Provider.	Varchar(50)	Required if A3.12.1 is ''Y''. Should be a valid entry in the Counterparty Master. Validated against CP.2.
A3.12.3	Associated third-party credit enhancement agreement document identifier (for the benefit of the counterparty).	33333333	Information needed to determine credit enhancement.	Varchar(50)	Required if A3.12.1 is ''Y''. Validated against field A3.3.
A3.13 ..	Counterparty contact information: name.	John Doe & Co.	Provide contact name for counterparty as provided under notice section of agreement.	Varchar(200).	
A3.14 ..	Counterparty contact information: address.	123 Main St, City, State Zip code.	Provide contact address for counterparty as provided under notice section of agreement.	Varchar(100).	
A3.15 ..	Counterparty contact information: phone.	1–999–999–9999	Provide contact phone number for counterparty as provided under notice section of agreement.	Varchar(50).	
A3.16 ..	Counterparty's contact information: email address.	*Jdoe@JohnDoe.com*	Provide contact email address for counterparty as provided under notice section of agreement.	Varchar(100).	

TABLE A–4—COLLATERAL DETAIL DATA

	Field	Example	Instructions and data application	Def	Validation
A4.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
A4.2	Records entity identifier.	999999999	Provide LEI for records entity.	Varchar(50)	Validated against CO.2.

TABLE A–4—COLLATERAL DETAIL DATA—Continued

	Field	Example	Instructions and data application	Def	Validation
A4.3	Collateral posted/collateral received flag.	P/N	Enter "P" if collateral has been posted by the records entity. Enter "R" for collateral received by Records Entity.	Char(1).	
A4.4	Counterparty identifier.	888888888	Provide identifier for counterparty. Use LEI if counterparty has one.	Varchar(50)	Validated against CP.2.
A4.5	Netting agreement identifier.	xxxxxxxxx	Provide identifier for applicable netting agreement.	Varchar(50)	Validated against field A3.3.
A4.6	Unique collateral item identifier.	CUSIP/ISIN	Provide identifier to reference individual collateral posted.	Varchar(50).	
A4.7	Original face amount of collateral item in local currency.	1500000	Information needed to evaluate collateral sufficiency and marketability.	Num (25,5).	
A4.8	Local currency of collateral item.	USD	Use ISO currency code ..	Char(3).	
A4.9	Market value amount of collateral item in U.S. dollars.	850000	Information needed to evaluate collateral sufficiency and marketability and to permit aggregation across currencies.	Num (25,5)	Market value of all collateral posted by Records Entity or Counterparty A2.9 or A2.10 for the given netting agreement identifier should be equal to sum of all A4.9 for the same netting agreement identifier in A4.
A4.10 ..	Description of collateral item.	U.S. Treasury Strip, maturity 2020/6/30.	Information needed to evaluate collateral sufficiency and marketability.	Varchar(200).	
A4.11 ..	Asset classification.	1	Provide fair value asset classification for the collateral item under GAAP, IFRS, or other accounting principles or standards used by records entity. Provide "1" for Level 1, "2" for Level 2, or "3" for Level 3.	Char(1)	Should be "1" or "2" or "3".
A4.12 ..	Collateral or portfolio segregation status.	Y/N	Specify whether the specific item of collateral or the related collateral portfolio is segregated from assets of the safekeeping agent.	Char(1)	Should be "Y" or "N".
A4.13 ..	Collateral location.	ABC broker-dealer (in safekeeping account of counterparty).	Provide location of collateral posted.	Varchar(200).	
A4.14 ..	Collateral jurisdiction.	New York, New York	Provide jurisdiction of location of collateral posted.	Varchar(50).	
A4.15 ..	Is collateral rehypothecation allowed?.	Y/N	Information needed to evaluate exposure of the records entity to the counterparty or vice-versa for re-hypothecated collateral.	Char(1)	Should be "Y" or "N".

CORPORATE ORGANIZATION MASTER TABLE*

	Field	Example	Instructions and data application	Def	Validation
CO.1 ...	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
CO.2 ...	Entity identifier	888888888	Provide unique identifier. Use LEI if available. Information needed to identify entity.	Varchar(50)	Should be unique across all records entities.
CO.3 ...	Has LEI been used for entity identifier?.	Y/N	Specify whether the entity identifier provided is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CO.4 ...	Legal name of entity.	John Doe & Co	Provide legal name of entity.	Varchar(200).	
CO.5 ...	Immediate parent entity identifier.	77777777	Use LEI if available. Information needed to complete org structure.	Varchar(50).	
CO.6 ...	Has LEI been used for immediate parent entity identifier?	Y/N	Specify whether the immediate parent entity identifier provided is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CO.7 ...	Legal name of immediate parent entity.	John Doe & Co	Information needed to complete org structure.	Varchar(200).	
CO.8 ...	Percentage ownership of immediate parent entity in the entity.	100.00	Information needed to complete org structure.	Num (5,2).	
CO.9 ...	Entity type	Subsidiary, foreign branch, foreign division.	Information needed to complete org structure.	Varchar(50).	
CO.10	Domicile	New York, New York	Enter as city, state or city, foreign country.	Varchar(50).	
CO.11	Jurisdiction under which incorporated or organized.	New York	Enter as state or foreign jurisdiction.	Varchar(50).	

*Foreign branches and divisions shall be separately identified to the extent they are identified in an entity's reports to its appropriate Federal banking agency.

COUNTERPARTY MASTER TABLE

	Field	Example	Instructions and data application	Def	Validation
CP.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	

COUNTERPARTY MASTER TABLE—Continued

	Field	Example	Instructions and data application	Def	Validation
CP.2	Counterparty identifier.	888888888	Use LEI if counterparty has one. Should be used consistently across all records entities within a corporate group. The counterparty identifier shall be the global legal entity identifier if one has been issued to the entity. If a counterparty transacts with the records entity through one or more separate foreign branches or divisions and any such branch or division does not have its own unique global legal entity identifier, the records entity must include additional identifiers, as appropriate to enable the FDIC to aggregate or disaggregate the data for each counterparty and for each entity with the same ultimate parent entity as the counterparty.	Varchar(50).	
CP.3	Has LEI been used for counterparty identifier?.	Y/N	Indicate whether the counterparty identifier is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CP.4	Legal name of counterparty.	John Doe & Co	Information needed to identify and, if necessary, communicate with counterparty.	Varchar(200).	
CP.5	Domicile	New York, New York	Enter as city, state or city, foreign country.	Varchar(50).	
CP.6	Jurisdiction under which incorporated or organized.	New York	Enter as state or foreign jurisdiction.	Varchar(50).	
CP.7	Immediate parent entity identifier.	77777777	Provide an identifier for the parent entity that directly controls the counterparty. Use LEI if immediate parent entity has one.	Varchar(50).	
CP.8	Has LEI been used for immediate parent entity identifier?	Y/N	Indicate whether the immediate parent entity identifier is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CP.9	Legal name of immediate parent entity.	John Doe & Co	Information needed to identify and, if necessary, communicate with counterparty.	Varchar(200).	
CP.10 ..	Ultimate parent entity identifier.	666666666	Provide an identifier for the parent entity that is a member of the corporate group of the counterparty that is not controlled by another entity. Information needed to identify counterparty. Use LEI if ultimate parent entity has one.	Varchar(50).	

COUNTERPARTY MASTER TABLE—Continued

	Field	Example	Instructions and data application	Def	Validation
CP.11 ..	Has LEI been used for ultimate parent entity identifier?.	Y/N	Indicate whether the ultimate parent entity identifier is an LEI.	Char(1)	Should be ''Y'' or ''N''.
CP.12 ..	Legal name of ultimate parent entity.	John Doe & Co.	Information needed to identify and, if necessary, communicate with Counterparty.	Varchar(100).	

BOOKING LOCATION MASTER TABLE

	Field	Example	Instructions and data application	Def	Validation
BL.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
BL.2	Records entity identifier.	999999999	Provide LEI	Varchar(50)	Should be a valid entry in the Corporate Org Master Table.
BL.3	Internal booking location identifier.	New York, New York	Provide office where the position is booked. Information needed to determine the headquarters or branch where the position is booked, including the system on which the trade is booked, as well as the system on which the trade is settled.	Varchar(50).	
BL.4	Unique booking unit or desk identifier.	xxxxxx	Provide unit or desk at which the position is booked. Information needed to help determine purpose of position.	Varchar(50).	
BL.5	Unique booking unit or desk description.	North American trading desk.	Additional information to help determine purpose of position.	Varchar(50).	
BL.6	Booking unit or desk contact—phone.	1–999–999–9999	Information needed to communicate with the booking unit or desk.	Varchar(50).	
BL.7	Booking unit or desk contact—email.	*Desk@Desk.com*	Information needed to communicate with the booking unit or desk.	Varchar(100).	

SAFEKEEPING AGENT MASTER TABLE

	Field	Example	Instructions and data application	Def	Validation
SA.1	As of date	2015–01–05	Data extraction date	YYYY–MM–DD.	
SA.2	Safekeeping agent identifier.	888888888	Provide an identifier for the safekeeping agent. Use LEI if safekeeping agent has one.	Varchar(50).	
SA.3	Legal name of safekeeping agent.	John Doe & Co	Information needed to identify and, if necessary, communicate with the safekeeping agent.	Varchar(200).	
SA.4	Point of contact—name.	John Doe	Information needed to identify and, if necessary, communicate with the safekeeping agent.	Varchar(200).	

SAFEKEEPING AGENT MASTER TABLE—Continued

	Field	Example	Instructions and data application	Def	Validation
SA.5	Point of contact—address.	123 Main St, City, State Zip Code.	Information needed to identify and, if necessary, communicate with the safekeeping agent.	Varchar(100).	
SA.6	Point of contact—phone.	1–999–999–9999	Information needed to identify and, if necessary, communicate with the safekeeping agent.	Varchar(50).	
SA.7	Point of contact—email.	*Jdoe@JohnDoe.com*	Information needed to identify and, if necessary, communicate with the safekeeping agent.	Varchar(100).	

DETAILS OF FORMATS

Format	Content in brief	Additional explanation	Examples
YYYY–MM–DD	Date	YYYY = four digit date, MM = 2 digit month, DD = 2 digit date	2015–11–12
Num (25,5)	Up to 25 numerical characters including 5 decimals.	Up to 20 numerical characters before the decimal point and up to 5 numerical characters after the decimal point. The dot character is used to separate decimals.	1352.67 12345678901234567890.12345 0 −20000.25 −0.257
Char(3)	3 alphanumeric characters	The length is fixed at 3 alphanumeric characters.	USD X1X 999
Varchar(25)	Up to 25 alphanumeric characters.	The length is not fixed but limited at up to 25 alphanumeric characters.	asgaGEH3268EFdsagtTRCF543

PART 373—CREDIT RISK RETENTION

Subpart A—Authority, Purpose, Scope and Definitions

Subpart B—Credit Risk Retention

Subpart C—Transfer of Risk Retention

Subpart D—Exceptions and Exemptions

AUTHORITY: 12 U.S.C. 1811 *et seq.* and 3103 *et seq.*, and 15 U.S.C. 78o–11.

SOURCE: 79 FR 77740, Dec. 24, 2014, unless otherwise noted.

Subpart A—Authority, Purpose, Scope and Definitions

§ 373.1 Purpose and scope.

(a) *Authority*—(1) *In general.* This part is issued by the Federal Deposit Insurance Corporation (FDIC) under section 15G of the Securities Exchange Act of 1934, as amended (Exchange Act) (15 U.S.C. 78o–11), as well as the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*) and the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*).

(2) Nothing in this part shall be read to limit the authority of the FDIC to take action under provisions of law other than 15 U.S.C. 78o–11, including to address unsafe or unsound practices or conditions, or violations of law or regulation under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

(b) *Purpose.* This part requires securitizers to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party in a transaction within the scope of section 15G of the Exchange Act. This part specifies the permissible types, forms, and amounts of credit risk retention, and it establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards or that otherwise qualify for an exemption.

(c) *Scope.* This part applies to any securitizer that is:

(1) A state nonmember bank (as defined in 12 U.S.C. 1813(e)(2));

(2) An insured state branch of a foreign bank (as defined in 12 CFR 347.202);

(3) A state savings association (as defined in 12 U.S.C. 1813(b)(3)); or

(4) Any subsidiary of an entity described in paragraph (c)(1), (2), or (3) of this section.

[79 FR 77740, Dec. 24, 2014]

§ 373.2 Definitions.

For purposes of this part, the following definitions apply:

ABS interest means:

(1) Any type of interest or obligation issued by an issuing entity, whether or not in certificated form, including a security, obligation, beneficial interest or residual interest (other than an uncertificated regular interest in a REMIC that is held by another REMIC, where both REMICs are part of the same structure and a single REMIC in that structure issues ABS interests to investors, or a non-economic residual interest issued by a REMIC), payments on which are primarily dependent on the cash flows of the collateral owned or held by the issuing entity; and

(2) Does not include common or preferred stock, limited liability interests, partnership interests, trust certificates, or similar interests that:

(i) Are issued primarily to evidence ownership of the issuing entity; and

(ii) The payments, if any, on which are not primarily dependent on the cash flows of the collateral held by the issuing entity; and

(3) Does not include the right to receive payments for services provided by the holder of such right, including servicing, trustee services and custodial services.

Affiliate of, or a person *affiliated* with, a specified person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

Appropriate Federal banking agency has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Asset means a self-liquidating financial asset (including but not limited to a loan, lease, mortgage, or receivable).

Asset-backed security has the same meaning as in section 3(a)(79) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(79)).

Collateral means, with respect to any issuance of ABS interests, the assets that provide the cash flow and the servicing assets that support such cash flow for the ABS interests irrespective of the legal structure of issuance, including security interests in assets or other property of the issuing entity, fractional undivided property interests in the assets or other property of the issuing entity, or any other property interest in or rights to cash flow from such assets and related servicing assets. Assets or other property

collateralize an issuance of ABS interests if the assets or property serve as collateral for such issuance.

Commercial real estate loan has the same meaning as in § 373.14.

Commission means the Securities and Exchange Commission.

Control including the terms ''controlling,'' ''controlled by'' and ''under common control with'':

(1) Means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(2) Without limiting the foregoing, a person shall be considered to control another person if the first person:

(i) Owns, controls or holds with power to vote 25 percent or more of any class of voting securities of the other person; or

(ii) Controls in any manner the election of a majority of the directors, trustees or persons performing similar functions of the other person.

Credit risk means:

(1) The risk of loss that could result from the failure of the borrower in the case of a securitized asset, or the issuing entity in the case of an ABS interest in the issuing entity, to make required payments of principal or interest on the asset or ABS interest on a timely basis;

(2) The risk of loss that could result from bankruptcy, insolvency, or a similar proceeding with respect to the borrower or issuing entity, as appropriate; or

(3) The effect that significant changes in the underlying credit quality of the asset or ABS interest may have on the market value of the asset or ABS interest.

Creditor has the same meaning as in 15 U.S.C. 1602(g).

Depositor means:

(1) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity;

(2) The sponsor, in the case of a securitization transaction where there is not an intermediate transfer of the assets from the sponsor to the issuing entity; or

(3) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity in the case of a securitization transaction where the person transferring or selling the securitized assets directly to the issuing entity is itself a trust.

Eligible horizontal residual interest means, with respect to any securitization transaction, an ABS interest in the issuing entity:

(1) That is an interest in a single class or multiple classes in the issuing entity, provided that each interest meets, individually or in the aggregate, all of the requirements of this definition;

(2) With respect to which, on any payment date or allocation date on which the issuing entity has insufficient funds to satisfy its obligation to pay all contractual interest or principal due, any resulting shortfall will reduce amounts payable to the eligible horizontal residual interest prior to any reduction in the amounts payable to any other ABS interest, whether through loss allocation, operation of the priority of payments, or any other governing contractual provision (until the amount of such ABS interest is reduced to zero); and

(3) That, with the exception of any non-economic REMIC residual interest, has the most subordinated claim to payments of both principal and interest by the issuing entity.

Eligible horizontal cash reserve account means an account meeting the requirements of § 373.4(b).

Eligible vertical interest means, with respect to any securitization transaction, a single vertical security or an interest in each class of ABS interests in the issuing entity issued as part of the securitization transaction that constitutes the same proportion of each such class.

Federal banking agencies means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

GAAP means generally accepted accounting principles as used in the United States.

Issuing entity means, with respect to a securitization transaction, the trust or other entity:

(1) That owns or holds the pool of assets to be securitized; and

(2) In whose name the asset-backed securities are issued.

Majority-owned affiliate of a person means an entity (other than the issuing entity) that, directly or indirectly, majority controls, is majority controlled by or is under common majority control with, such person. For purposes of this definition, majority control means ownership of more than 50 percent of the equity of an entity, or ownership of any other controlling financial interest in the entity, as determined under GAAP.

Originator means a person who:

(1) Through an extension of credit or otherwise, creates an asset that collateralizes an asset-backed security; and

(2) Sells the asset directly or indirectly to a securitizer or issuing entity.

REMIC has the same meaning as in 26 U.S.C. 860D.

Residential mortgage means:

(1) A transaction that is a covered transaction as defined in §1026.43(b) of Regulation Z (12 CFR 1026.43(b)(1));

(2) Any transaction that is exempt from the definition of ''covered transaction'' under §1026.43(a) of Regulation Z (12 CFR 1026.43(a)); and

(3) Any other loan secured by a residential structure that contains one to four units, whether or not that structure is attached to real property, including an individual condominium or cooperative unit and, if used as a residence, a mobile home or trailer.

Retaining sponsor means, with respect to a securitization transaction, the sponsor that has retained or caused to be retained an economic interest in the credit risk of the securitized assets pursuant to subpart B of this part.

Securitization transaction means a transaction involving the offer and sale of asset-backed securities by an issuing entity.

Securitized asset means an asset that:

(1) Is transferred, sold, or conveyed to an issuing entity; and

(2) Collateralizes the ABS interests issued by the issuing entity.

Securitizer means, with respect to a securitization transaction, either:

(1) The depositor of the asset-backed securities (if the depositor is not the sponsor); or

(2) The sponsor of the asset-backed securities.

Servicer means any person responsible for the management or collection of the securitized assets or making allocations or distributions to holders of the ABS interests, but does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the ABS interests if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

Servicing assets means rights or other assets designed to assure the servicing or timely distribution of proceeds to ABS interest holders and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the issuing entity's securitized assets. Servicing assets include amounts received by the issuing entity as proceeds of securitized assets, including proceeds of rights or other assets, whether as remittances by obligors or as other recoveries.

Single vertical security means, with respect to any securitization transaction, an ABS interest entitling the sponsor to a specified percentage of the amounts paid on each class of ABS interests in the issuing entity (other than such single vertical security).

Sponsor means a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.

State has the same meaning as in Section 3(a)(16) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(16)).

United States or U.S. means the United States of America, including its territories and possessions, any State of the United States, and the District of Columbia.

Wholly-owned affiliate means a person (other than an issuing entity) that, directly or indirectly, wholly controls, is wholly controlled by, or is wholly under common control with, another person. For purposes of this definition, ''wholly controls'' means ownership of 100 percent of the equity of an entity.

Subpart B—Credit Risk Retention

§ 373.3 Base risk retention requirement.

(a) *Base risk retention requirement.* Except as otherwise provided in this part, the sponsor of a securitization transaction (or majority-owned affiliate of the sponsor) shall retain an economic interest in the credit risk of the securitized assets in accordance with any one of §§ 373.4 through 373.10. Credit risk in securitized assets required to be retained and held by any person for purposes of compliance with this part, whether a sponsor, an originator, an originator-seller, or a third-party purchaser, except as otherwise provided in this part, may be acquired and held by any of such person's majority-owned affiliates (other than an issuing entity).

(b) *Multiple sponsors.* If there is more than one sponsor of a securitization transaction, it shall be the responsibility of each sponsor to ensure that at least one of the sponsors of the securitization transaction (or at least one of their majority-owned or wholly-owned affiliates, as applicable) retains an economic interest in the credit risk of the securitized assets in accordance with any one of §§ 373.4, 373.5, 373.8, 373.9, or 373.10.

§ 373.4 Standard risk retention.

(a) *General requirement.* Except as provided in §§ 373.5 through 373.10, the sponsor of a securitization transaction must retain an eligible vertical interest or eligible horizontal residual interest, or any combination thereof, in accordance with the requirements of this section.

(1) If the sponsor retains only an eligible vertical interest as its required risk retention, the sponsor must retain an eligible vertical interest in a percentage of not less than 5 percent.

(2) If the sponsor retains only an eligible horizontal residual interest as its required risk retention, the amount of the interest must equal at least 5 percent of the fair value of all ABS interests in the issuing entity issued as a part of the securitization transaction, determined using a fair value measurement framework under GAAP.

(3) If the sponsor retains both an eligible vertical interest and an eligible horizontal residual interest as its required risk retention, the percentage of the fair value of the eligible horizontal residual interest and the percentage of the eligible vertical interest must equal at least five.

(4) The percentage of the eligible vertical interest, eligible horizontal residual interest, or combination thereof retained by the sponsor must be determined as of the closing date of the securitization transaction.

(b) *Option to hold base amount in eligible horizontal cash reserve account.* In lieu of retaining all or any part of an eligible horizontal residual interest under paragraph (a) of this section, the sponsor may, at closing of the securitization transaction, cause to be established and funded, in cash, an eligible horizontal cash reserve account in the amount equal to the fair value of such eligible horizontal residual interest or part thereof, provided that the account meets all of the following conditions:

(1) The account is held by the trustee (or person performing similar functions) in the name and for the benefit of the issuing entity;

(2) Amounts in the account are invested only in cash and cash equivalents; and

(3) Until all ABS interests in the issuing entity are paid in full, or the issuing entity is dissolved:

(i) Amounts in the account shall be released only to:

(A) Satisfy payments on ABS interests in the issuing entity on any payment date on which the issuing entity has insufficient funds from any source to satisfy an amount due on any ABS interest; or

(B) Pay critical expenses of the trust unrelated to credit risk on any payment date on which the issuing entity has insufficient funds from any source to pay such expenses and:

(*1*) Such expenses, in the absence of available funds in the eligible horizontal cash reserve account, would be paid prior to any payments to holders of ABS interests; and

(*2*) Such payments are made to parties that are not affiliated with the sponsor; and

(ii) Interest (or other earnings) on investments made in accordance with paragraph (b)(2) of this section may be released once received by the account.

(c) *Disclosures.* A sponsor relying on this section shall provide, or cause to be provided, to potential investors, under the caption ''Credit Risk Retention'', a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction the following disclosures in written form and within the time frames set forth in this paragraph (c):

(1) *Horizontal interest.* With respect to any eligible horizontal residual interest held under paragraph (a) of this section, a sponsor must disclose:

(i) A reasonable period of time prior to the sale of an asset-backed security issued in the same offering of ABS interests,

(A) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that the sponsor expects to retain at the closing of the securitization transaction. If the specific prices, sizes, or rates of interest of each tranche of the securitization are not available, the sponsor must disclose a range of fair values (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that the sponsor expects to retain at the close of the securitization transaction based on a range of bona fide estimates or specified prices, sizes, or rates of interest of each tranche of the securitization. A sponsor disclosing a range of fair values based on a range of bona fide estimates or specified prices, sizes or rates of interest of each tranche of the securitization must also disclose the method by which it determined any range of prices, tranche sizes, or rates of interest.

(B) A description of the material terms of the eligible horizontal residual interest to be retained by the sponsor;

(C) A description of the valuation methodology used to calculate the fair values or range of fair values of all classes of ABS interests, including any portion of the eligible horizontal residual interest retained by the sponsor;

(D) All key inputs and assumptions or a comprehensive description of such key inputs and assumptions that were used in measuring the estimated total fair value or range of fair values of all classes of ABS interests, including the eligible horizontal residual interest to be retained by the sponsor.

(E) To the extent applicable to the valuation methodology used, the disclosure required in paragraph (c)(1)(i)(D) of this section shall include, but should not be limited to, quantitative information about each of the following:

(*1*) Discount rates;

(*2*) Loss given default (recovery);

(*3*) Prepayment rates;

(*4*) Default rates;

(*5*) Lag time between default and recovery; and

(*6*) The basis of forward interest rates used.

(F) The disclosure required in paragraphs (c)(1)(i)(C) and (D) of this section shall include, at a minimum, descriptions of all inputs and assumptions that either could have a material impact on the fair value calculation or would be material to a prospective investor's ability to evaluate the sponsor's fair value calculations. To the extent the disclosure required in this paragraph (c)(1) includes a description of a curve or curves, the description shall include a description of the methodology that was used to derive each curve and a description of any aspects or features of each curve that could materially impact the fair value calculation or the ability of a prospective investor to evaluate the sponsor's fair value calculation. To the extent a sponsor uses information about the securitized assets in its calculation of fair value, such information shall not be as of a date more than 60 days prior to the date of first use with investors; provided that for a subsequent issuance of ABS interests by the same issuing entity with the same sponsor for which

the securitization transaction distributes amounts to investors on a quarterly or less frequent basis, such information shall not be as of a date more than 135 days prior to the date of first use with investors; provided further, that the balance or value (in accordance with the transaction documents) of the securitized assets may be increased or decreased to reflect anticipated additions or removals of assets the sponsor makes or expects to make between the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security and the closing date of the securitization.

(G) A summary description of the reference data set or other historical information used to develop the key inputs and assumptions referenced in paragraph (c)(1)(i)(D) of this section, including loss given default and default rates;

(ii) A reasonable time after the closing of the securitization transaction:

(A) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS are issued, as applicable)) of the eligible horizontal residual interest the sponsor retained at the closing of the securitization transaction, based on actual sale prices and finalized tranche sizes;

(B) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS are issued, as applicable)) of the eligible horizontal residual interest that the sponsor is required to retain under this section; and

(C) To the extent the valuation methodology or any of the key inputs and assumptions that were used in calculating the fair value or range of fair values disclosed prior to sale and required under paragraph (c)(1)(i) of this section materially differs from the methodology or key inputs and assumptions used to calculate the fair value at the time of closing, descriptions of those material differences.

(iii) If the sponsor retains risk through the funding of an eligible horizontal cash reserve account:

(A) The amount to be placed (or that is placed) by the sponsor in the eligible horizontal cash reserve account at closing, and the fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that the sponsor is required to fund through the eligible horizontal cash reserve account in order for such account, together with other retained interests, to satisfy the sponsor's risk retention requirement;

(B) A description of the material terms of the eligible horizontal cash reserve account; and

(C) The disclosures required in paragraphs (c)(1)(i) and (ii) of this section.

(2) *Vertical interest.* With respect to any eligible vertical interest retained under paragraph (a) of this section, the sponsor must disclose:

(i) A reasonable period of time prior to the sale of an asset-backed security issued in the same offering of ABS interests,

(A) The form of the eligible vertical interest;

(B) The percentage that the sponsor is required to retain as a vertical interest under this section; and

(C) A description of the material terms of the vertical interest and the amount that the sponsor expects to retain at the closing of the securitization transaction.

(ii) A reasonable time after the closing of the securitization transaction, the amount of the vertical interest the sponsor retained at closing, if that amount is materially different from the amount disclosed under paragraph (c)(2)(i) of this section.

(d) *Record maintenance.* A sponsor must retain the certifications and disclosures required in paragraphs (a) and (c) of this section in its records and must provide the disclosure upon request to the Commission and its appropriate Federal banking agency, if any, until three years after all ABS interests are no longer outstanding.

§ 373.5 Revolving pool securitizations.

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

Revolving pool securitization means an issuing entity that is established to issue on multiple issuance dates more than one series, class, subclass, or tranche of asset-backed securities that are collateralized by a common pool of securitized assets that will change in composition over time, and that does not monetize excess interest and fees from its securitized assets.

Seller's interest means an ABS interest or ABS interests:

(1) Collateralized by the securitized assets and servicing assets owned or held by the issuing entity, other than the following that are not considered a component of seller's interest:

(i) Servicing assets that have been allocated as collateral only for a specific series in connection with administering the revolving pool securitization, such as a principal accumulation or interest reserve account; and

(ii) Assets that are not eligible under the terms of the securitization transaction to be included when determining whether the revolving pool securitization holds aggregate securitized assets in specified proportions to aggregate outstanding investor ABS interests issued; and

(2) That is *pari passu* with each series of investor ABS interests issued, or partially or fully subordinated to one or more series in identical or varying amounts, with respect to the allocation of all distributions and losses with respect to the securitized assets prior to early amortization of the revolving securitization (as specified in the securitization transaction documents); and

(3) That adjusts for fluctuations in the outstanding principal balance of the securitized assets in the pool.

(b) *General requirement.* A sponsor satisfies the risk retention requirements of § 373.3 with respect to a securitization transaction for which the issuing entity is a revolving pool securitization if the sponsor maintains a seller's interest of not less than 5 percent of the aggregate unpaid principal balance of all outstanding investor ABS interests in the issuing entity.

(c) *Measuring the seller's interest.* In measuring the seller's interest for purposes of meeting the requirements of paragraph (b) of this section:

(1) The unpaid principal balance of the securitized assets for the numerator of the 5 percent ratio shall not include assets of the types excluded from the definition of seller's interest in paragraph (a) of this section;

(2) The aggregate unpaid principal balance of outstanding investor ABS interests in the denominator of the 5 percent ratio may be reduced by the amount of funds held in a segregated principal accumulation account for the repayment of outstanding investor ABS interests, if:

(i) The terms of the securitization transaction documents prevent funds in the principal accumulation account from being applied for any purpose other than the repayment of the unpaid principal of outstanding investor ABS interests; and

(ii) Funds in that account are invested only in the types of assets in which funds held in an eligible horizontal cash reserve account pursuant to § 373.4 are permitted to be invested;

(3) If the terms of the securitization transaction documents set minimum required seller's interest as a proportion of the unpaid principal balance of outstanding investor ABS interests for one or more series issued, rather than as a proportion of the aggregate outstanding investor ABS interests in all outstanding series combined, the percentage of the seller's interest for each such series must, when combined with the percentage of any minimum seller's interest set by reference to the aggregate outstanding investor ABS interests, equal at least 5 percent;

(4) The 5 percent test must be determined and satisfied at the closing of each issuance of ABS interests to investors by the issuing entity, and

(i) At least monthly at a seller's interest measurement date specified under the securitization transaction documents, until no ABS interest in the issuing entity is held by any person not a wholly-owned affiliate of the sponsor; or

(ii) If the revolving pool securitization fails to meet the 5 percent test as of any date described in paragraph (c)(4)(i) of this section, and the securitization transaction documents specify a cure period, the 5 percent test must be determined and satisfied within the earlier of the cure period, or one month after the date described in paragraph (c)(4)(i).

(d) *Measuring outstanding investor ABS interests.* In measuring the amount of outstanding investor ABS interests for purposes of this section, ABS interests held for the life of such ABS interests by the sponsor or its wholly-owned affiliates may be excluded.

(e) *Holding and retention of the seller's interest; legacy trusts.* (1) Notwithstanding §373.12(a), the seller's interest, and any offsetting horizontal retention interest retained pursuant to paragraph (g) of this section, must be retained by the sponsor or by one or more wholly-owned affiliates of the sponsor, including one or more depositors of the revolving pool securitization.

(2) If one revolving pool securitization issues collateral certificates representing a beneficial interest in all or a portion of the securitized assets held by that securitization to another revolving pool securitization, which in turn issues ABS interests for which the collateral certificates are all or a portion of the securitized assets, a sponsor may satisfy the requirements of paragraphs (b) and (c) of this section by retaining the seller's interest for the assets represented by the collateral certificates through either of the revolving pool securitizations, so long as both revolving pool securitizations are retained at the direction of the same sponsor or its wholly-owned affiliates.

(3) If the sponsor retains the seller's interest associated with the collateral certificates at the level of the revolving pool securitization that issues those collateral certificates, the proportion of the seller's interest required by paragraph (b) of this section retained at that level must equal the proportion that the principal balance of the securitized assets represented by the collateral certificates bears to the principal balance of the securitized assets in the revolving pool securitization that issues the ABS interests, as of each measurement date required by paragraph (c) of this section.

(f) *Offset for pool-level excess funding account.* The 5 percent seller's interest required on each measurement date by paragraph (c) of this section may be reduced on a dollar-for-dollar basis by the balance, as of such date, of an excess funding account in the form of a segregated account that:

(1) Is funded in the event of a failure to meet the minimum seller's interest requirements or other requirement to maintain a minimum balance of securitized assets under the securitization transaction documents by distributions otherwise payable to the holder of the seller's interest;

(2) Is invested only in the types of assets in which funds held in a horizontal cash reserve account pursuant to §373.4 are permitted to be invested; and

(3) In the event of an early amortization, makes payments of amounts held in the account to holders of investor ABS interests in the same manner as payments to holders of investor ABS interests of amounts received on securitized assets.

(g) *Combined seller's interests and horizontal interest retention.* The 5 percent seller's interest required on each measurement date by paragraph (c) of this section may be reduced to a percentage lower than 5 percent to the extent that, for all series of investor ABS interests issued after the applicable effective date of this §373.5, the sponsor, or notwithstanding §373.12(a) a wholly-owned affiliate of the sponsor, retains, at a minimum, a corresponding percentage of the fair value of ABS interests issued in each series, in the form of one or more of the horizontal residual interests meeting the requirements of paragraphs (h) or (i).

(h) *Residual ABS interests in excess interest and fees.* The sponsor may take the offset described in paragraph (g) of this section for a residual ABS interest in excess interest and fees, whether certificated or uncertificated, in a single or multiple classes, subclasses, or tranches, that meets, individually or in the aggregate, the requirements of this paragraph (h);

(1) Each series of the revolving pool securitization distinguishes between the series' share of the interest and fee cash flows and the series' share of the principal repayment cash flows from the securitized assets collateralizing the revolving pool securitization, which may according to the terms of the securitization transaction documents, include not only the series' ratable share of such cash flows but also excess cash flows available from other series;

(2) The residual ABS interest's claim to any part of the series' share of the interest and fee cash flows for any interest payment period is subordinated to all accrued and payable interest due on the payment date to more senior ABS interests in the series for that period, and further reduced by the series' share of losses, including defaults on principal of the securitized assets collateralizing the revolving pool securitization (whether incurred in that period or carried over from prior periods) to the extent that such payments would have been included in amounts payable to more senior interests in the series;

(3) The revolving pool securitization continues to revolve, with one or more series, classes, subclasses, or tranches of asset-backed securities that are collateralized by a common pool of assets that change in composition over time; and

(4) For purposes of taking the offset described in paragraph (g) of this section, the sponsor determines the fair value of the residual ABS interest in excess interest and fees, and the fair value of the series of outstanding investor ABS interests to which it is subordinated and supports using the fair value measurement framework under GAAP, as of:

(i) The closing of the securitization transaction issuing the supported ABS interests; and

(ii) The seller's interest measurement dates described in paragraph (c)(4) of this section, except that for these periodic determinations the sponsor must update the fair value of the residual ABS interest in excess interest and fees for the numerator of the percentage ratio, but may at the sponsor's option continue to use the fair values determined in (h)(4)(i) for the outstanding investor ABS interests in the denominator.

(i) *Offsetting eligible horizontal residual interest.* The sponsor may take the offset described in paragraph (g) of this section for ABS interests that would meet the definition of eligible horizontal residual interests in §373.2 but for the sponsor's simultaneous holding of subordinated seller's interests, residual ABS interests in excess interests and fees, or a combination of the two, if:

(1) The sponsor complies with all requirements of paragraphs (b) through (e) of this section for its holdings of subordinated seller's interest, and paragraph (h) for its holdings of residual ABS interests in excess interests and fees, as applicable;

(2) For purposes of taking the offset described in paragraph (g) of this section, the sponsor determines the fair value of the eligible horizontal residual interest as a percentage of the fair value of the outstanding investor ABS interests in the series supported by the eligible horizontal residual interest, determined using the fair value measurement framework under GAAP:

(i) As of the closing of the securitization transaction issuing the supported ABS interests; and

(ii) Without including in the numerator of the percentage ratio any fair value based on:

(A) The subordinated seller's interest or residual ABS interest in excess interest and fees;

(B) the interest payable to the sponsor on the eligible horizontal residual interest, if the sponsor is including the value of residual ABS interest in excess interest and fees pursuant to paragraph (h) of this section in taking the offset in paragraph (g) of this section; and,

(C) the principal payable to the sponsor on the eligible horizontal residual interest, if the sponsor is including the value of the seller's interest pursuant to paragraphs (b) through (f) of this section and distributions on that seller's interest are available to reduce charge-offs that would otherwise be allocated to reduce principal payable to the offset eligible horizontal residual interest.

(j) *Specified dates.* A sponsor using data about the revolving pool securitization's collateral, or ABS interests previously issued, to determine the closing-date percentage of a seller's interest, residual ABS interest in excess interest and fees, or eligible horizontal residual interest pursuant to this § 373.5 may use such data prepared as of specified dates if:

(1) The sponsor describes the specified dates in the disclosures required by paragraph (k) of this section; and

(2) The dates are no more than 60 days prior to the date of first use with investors of disclosures required for the interest by paragraph (k) of this section, or for revolving pool securitizations that make distributions to investors on a quarterly or less frequent basis, no more than 135 days prior to the date of first use with investors of such disclosures.

(k) *Disclosure and record maintenance*—(1) *Disclosure.* A sponsor relying on this section shall provide, or cause to be provided, to potential investors, under the caption ''Credit Risk Retention'' the following disclosure in written form and within the time frames set forth in this paragraph (k):

(i) A reasonable period of time prior to the sale of an asset-backed security, a description of the material terms of the seller's interest, and the percentage of the seller's interest that the sponsor expects to retain at the closing of the securitization transaction, measured in accordance with the requirements of this § 373.5, as a percentage of the aggregate unpaid principal balance of all outstanding investor ABS interests issued, or as a percentage of the aggregate unpaid principal balance of outstanding investor ABS interests for one or more series issued, as required by the terms of the securitization transaction;

(ii) A reasonable time after the closing of the securitization transaction, the amount of seller's interest the sponsor retained at closing, if that amount is materially different from the amount disclosed under paragraph (k)(1)(i) of this section; and

(iii) A description of the material terms of any horizontal residual interests offsetting the seller's interest in accordance with paragraphs (g), (h), and (i) of this section; and

(iv) Disclosure of the fair value of those horizontal residual interests retained by the sponsor for the series being offered to investors and described in the disclosures, as a percentage of the fair value of the outstanding investor ABS interests issued, described in the same manner and within the same timeframes required for disclosure of the fair values of eligible horizontal residual interests specified in § 373.4(c).

(2) *Adjusted data.* Disclosures required by this paragraph (k) to be made a reasonable period of time prior to the sale of an asset-backed security of the amount of seller's interest, residual ABS interest in excess interest and fees, or eligible horizontal residual interest may include adjustments to the amount of securitized assets for additions or removals the sponsor expects to make before the closing date and adjustments to the amount of outstanding investor ABS interests for expected increases and decreases of those interests under the control of the sponsor.

(3) *Record maintenance.* A sponsor must retain the disclosures required in paragraph (k)(1) of this section in its records and must provide the disclosure upon request to the Commission and its appropriate Federal banking agency, if any, until three years after all ABS interests are no longer outstanding.

(l) *Early amortization of all outstanding series.* A sponsor that organizes a revolving pool securitization that relies on this § 373.5 to satisfy the risk retention requirements of § 373.3, does not violate the requirements of this part if its seller's interest falls below the level required by § 373. 5 after the revolving pool securitization commences early amortization, pursuant to the terms of the securitization transaction documents, of all series of outstanding investor ABS interests, if:

(1) The sponsor was in full compliance with the requirements of this section on all measurement dates specified in paragraph (c) of this section prior to the commencement of early amortization;

(2) The terms of the seller's interest continue to make it *pari passu* with or

subordinate in identical or varying amounts to each series of outstanding investor ABS interests issued with respect to the allocation of all distributions and losses with respect to the securitized assets;

(3) The terms of any horizontal interest relied upon by the sponsor pursuant to paragraph (g) to offset the minimum seller's interest amount continue to require the interests to absorb losses in accordance with the terms of paragraph (h) or (i) of this section, as applicable; and

(4) The revolving pool securitization issues no additional ABS interests after early amortization is initiated to any person not a wholly-owned affiliate of the sponsor, either at the time of issuance or during the amortization period.

§ 373.6 Eligible ABCP conduits.

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

100 percent liquidity coverage means an amount equal to the outstanding balance of all ABCP issued by the conduit plus any accrued and unpaid interest without regard to the performance of the ABS interests held by the ABCP conduit and without regard to any credit enhancement.

ABCP means asset-backed commercial paper that has a maturity at the time of issuance not exceeding 397 days, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

ABCP conduit means an issuing entity with respect to ABCP.

Eligible ABCP conduit means an ABCP conduit, *provided that:*

(1) The ABCP conduit is bankruptcy remote or otherwise isolated for insolvency purposes from the sponsor of the ABCP conduit and from any intermediate SPV;

(2) The ABS interests acquired by the ABCP conduit are:

(i) ABS interests collateralized solely by assets originated by an originator-seller and by servicing assets;

(ii) Special units of beneficial interest (or similar ABS interests) in a trust or special purpose vehicle that retains legal title to leased property underlying leases originated by an originator-seller that were transferred to an intermediate SPV in connection with a securitization collateralized solely by such leases and by servicing assets;

(iii) ABS interests in a revolving pool securitization collateralized solely by assets originated by an originator-seller and by servicing assets; or

(iv) ABS interests described in paragraph (2)(i), (ii), or (iii) of this definition that are collateralized, in whole or in part, by assets acquired by an originator-seller in a business combination that qualifies for business combination accounting under GAAP, and, if collateralized in part, the remainder of such assets are assets described in paragraph (2)(i), (ii), or (iii) of this definition; and

(v) Acquired by the ABCP conduit in an initial issuance by or on behalf of an intermediate SPV:

(A) Directly from the intermediate SPV,

(B) From an underwriter of the ABS interests issued by the intermediate SPV, or

(C) From another person who acquired the ABS interests directly from the intermediate SPV;

(3) The ABCP conduit is collateralized solely by ABS interests acquired from intermediate SPVs as described in paragraph (2) of this definition and servicing assets; and

(4) A regulated liquidity provider has entered into a legally binding commitment to provide 100 percent liquidity coverage (in the form of a lending facility, an asset purchase agreement, a repurchase agreement, or other similar arrangement) to all the ABCP issued by the ABCP conduit by lending to, purchasing ABCP issued by, or purchasing assets from, the ABCP conduit in the event that funds are required to repay maturing ABCP issued by the ABCP conduit. With respect to the 100 percent liquidity coverage, in the event that the ABCP conduit is unable for any reason to repay maturing ABCP issued by the issuing entity, the liquidity provider shall be obligated to pay an amount equal to any shortfall, and the total amount that may be due pursuant to the 100 percent liquidity coverage shall be equal to 100 percent of the amount of the ABCP outstanding at any time plus accrued and unpaid

interest (amounts due pursuant to the required liquidity coverage may not be subject to credit performance of the ABS interests held by the ABCP conduit or reduced by the amount of credit support provided to the ABCP conduit and liquidity support that only funds performing loans or receivables or performing ABS interests does not meet the requirements of this section).

Intermediate SPV means a special purpose vehicle that:

(1)(i) Is a direct or indirect wholly-owned affiliate of the originator-seller; or

(ii) Has nominal equity owned by a trust or corporate service provider that specializes in providing independent ownership of special purpose vehicles, and such trust or corporate service provider is not affiliated with any other transaction parties;

(2) Is bankruptcy remote or otherwise isolated for insolvency purposes from the eligible ABCP conduit and from each originator-seller and each majority-owned affiliate in each case that, directly or indirectly, sells or transfers assets to such intermediate SPV;

(3) Acquires assets from the originator-seller that are originated by the originator-seller or acquired by the originator-seller in the acquisition of a business that qualifies for business combination accounting under GAAP or acquires ABS interests issued by another intermediate SPV of the originator-seller that are collateralized solely by such assets; and

(4) Issues ABS interests collateralized solely by such assets, as applicable.

Originator-seller means an entity that originates assets and sells or transfers those assets, directly or through a majority-owned affiliate, to an intermediate SPV, and includes (except for the purposes of identifying the sponsorship and affiliation of an intermediate SPV pursuant to this §373.6) any affiliate of the originator-seller that, directly or indirectly, majority controls, is majority controlled by or is under common majority control with, the originator-seller. For purposes of this definition, majority control means ownership of more than 50 percent of the equity of an entity, or ownership of any other controlling financial interest in the entity, as determined under GAAP.

Regulated liquidity provider means:

(1) A depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(2) A bank holding company (as defined in 12 U.S.C. 1841), or a subsidiary thereof;

(3) 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), or a subsidiary thereof; or

(4) A foreign bank whose home country supervisor (as defined in §211.21 of the Federal Reserve Board's Regulation K (12 CFR 211.21)) has adopted capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof.

(b) *In general.* An ABCP conduit sponsor satisfies the risk retention requirement of §373.3 with respect to the issuance of ABCP by an eligible ABCP conduit in a securitization transaction if, for each ABS interest the ABCP conduit acquires from an intermediate SPV:

(1) An originator-seller of the intermediate SPV retains an economic interest in the credit risk of the assets collateralizing the ABS interest acquired by the eligible ABCP conduit in the amount and manner required under §373.4 or §373.5; and

(2) The ABCP conduit sponsor:

(i) Approves each originator-seller permitted to sell or transfer assets, directly or indirectly, to an intermediate SPV from which an eligible ABCP conduit acquires ABS interests;

(ii) Approves each intermediate SPV from which an eligible ABCP conduit is permitted to acquire ABS interests;

(iii) Establishes criteria governing the ABS interests, and the securitized assets underlying the ABS interests, acquired by the ABCP conduit;

(iv) Administers the ABCP conduit by monitoring the ABS interests acquired by the ABCP conduit and the assets supporting those ABS interests,

arranging for debt placement, compiling monthly reports, and ensuring compliance with the ABCP conduit documents and with the ABCP conduit's credit and investment policy; and

(v) Maintains and adheres to policies and procedures for ensuring that the requirements in this paragraph (b) of this section have been met.

(c) *Originator-seller compliance with risk retention.* The use of the risk retention option provided in this section by an ABCP conduit sponsor does not relieve the originator-seller that sponsors ABS interests acquired by an eligible ABCP conduit from such originator-seller's obligation to comply with its own risk retention obligations under this part.

(d) *Disclosures*—(1) *Periodic disclosures to investors.* An ABCP conduit sponsor relying upon this section shall provide, or cause to be provided, to each purchaser of ABCP, before or contemporaneously with the first sale of ABCP to such purchaser and at least monthly thereafter, to each holder of commercial paper issued by the ABCP conduit, in writing, each of the following items of information, which shall be as of a date not more than 60 days prior to date of first use with investors:

(i) The name and form of organization of the regulated liquidity provider that provides liquidity coverage to the eligible ABCP conduit, including a description of the material terms of such liquidity coverage, and notice of any failure to fund.

(ii) With respect to each ABS interest held by the ABCP conduit:

(A) The asset class or brief description of the underlying securitized assets;

(B) The standard industrial category code (SIC Code) for the originator-seller that will retain (or has retained) pursuant to this section an interest in the securitization transaction; and

(C) A description of the percentage amount of risk retention pursuant to the rule by the originator-seller, and whether it is in the form of an eligible horizontal residual interest, vertical interest, or revolving pool securitization seller's interest, as applicable.

(2) *Disclosures to regulators regarding originator-sellers.* An ABCP conduit sponsor relying upon this section shall provide, or cause to be provided, upon request, to the Commission and its appropriate Federal banking agency, if any, in writing, all of the information required to be provided to investors in paragraph (d)(1) of this section, and the name and form of organization of each originator-seller that will retain (or has retained) pursuant to this section an interest in the securitization transaction.

(e) *Sale or transfer of ABS interests between eligible ABCP conduits.* At any time, an eligible ABCP conduit that acquired an ABS interest in accordance with the requirements set forth in this section may transfer, and another eligible ABCP conduit may acquire, such ABS interest, if the following conditions are satisfied:

(1) The sponsors of both eligible ABCP conduits are in compliance with this section; and

(2) The same regulated liquidity provider has entered into one or more legally binding commitments to provide 100 percent liquidity coverage to all the ABCP issued by both eligible ABCP conduits.

(f) *Duty to comply.* (1) The ABCP conduit sponsor shall be responsible for compliance with this section.

(2) An ABCP conduit sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures that are reasonably designed to monitor compliance by each originator-seller which is satisfying a risk retention obligation in respect of ABS interests acquired by an eligible ABCP conduit with the requirements of paragraph (b)(1) of this section; and

(ii) In the event that the ABCP conduit sponsor determines that an originator-seller no longer complies with the requirements of paragraph (b)(1) of this section, shall:

(A) Promptly notify the holders of the ABCP, and upon request, the Commission and its appropriate Federal banking agency, if any, in writing of:

(*1*) The name and form of organization of any originator-seller that fails to retain risk in accordance with paragraph (b)(1) of this section and the

amount of ABS interests issued by an intermediate SPV of such originator-seller and held by the ABCP conduit;

(*2*) The name and form of organization of any originator-seller that hedges, directly or indirectly through an intermediate SPV, its risk retention in violation of paragraph (b)(1) of this section and the amount of ABS interests issued by an intermediate SPV of such originator-seller and held by the ABCP conduit; and

(*3*) Any remedial actions taken by the ABCP conduit sponsor or other party with respect to such ABS interests; and

(B) Take other appropriate steps pursuant to the requirements of paragraphs (b)(2)(iv) and (v) of this section which may include, as appropriate, curing any breach of the requirements in this section, or removing from the eligible ABCP conduit any ABS interest that does not comply with the requirements in this section.

§ 373.7 Commercial mortgage-backed securities.

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

Special servicer means, with respect to any securitization of commercial real estate loans, any servicer that, upon the occurrence of one or more specified conditions in the servicing agreement, has the right to service one or more assets in the transaction.

(b) *Third-party purchaser.* A sponsor may satisfy some or all of its risk retention requirements under § 373.3 with respect to a securitization transaction if a third party (or any majority-owned affiliate thereof) purchases and holds for its own account an eligible horizontal residual interest in the issuing entity in the same form, amount, and manner as would be held by the sponsor under § 373.4 and all of the following conditions are met:

(1) *Number of third-party purchasers.* At any time, there are no more than two third-party purchasers of an eligible horizontal residual interest. If there are two third-party purchasers, each third-party purchaser's interest must be *pari passu* with the other third-party purchaser's interest.

(2) *Composition of collateral.* The securitization transaction is collateralized solely by commercial real estate loans and servicing assets.

(3) *Source of funds.* (i) Each third-party purchaser pays for the eligible horizontal residual interest in cash at the closing of the securitization transaction.

(ii) No third-party purchaser obtains financing, directly or indirectly, for the purchase of such interest from any other person that is a party to, or an affiliate of a party to, the securitization transaction (including, but not limited to, the sponsor, depositor, or servicer other than a special servicer affiliated with the third-party purchaser), other than a person that is a party to the transaction solely by reason of being an investor.

(4) *Third-party review.* Each third-party purchaser conducts an independent review of the credit risk of each securitized asset prior to the sale of the asset-backed securities in the securitization transaction that includes, at a minimum, a review of the underwriting standards, collateral, and expected cash flows of each commercial real estate loan that is collateral for the asset-backed securities.

(5) *Affiliation and control rights.* (i) Except as provided in paragraph (b)(5)(ii) of this section, no third-party purchaser is affiliated with any party to the securitization transaction (including, but not limited to, the sponsor, depositor, or servicer) other than investors in the securitization transaction.

(ii) Notwithstanding paragraph (b)(5)(i) of this section, a third-party purchaser may be affiliated with:

(A) The special servicer for the securitization transaction; or

(B) One or more originators of the securitized assets, as long as the assets originated by the affiliated originator or originators collectively comprise less than 10 percent of the unpaid principal balance of the securitized assets included in the securitization transaction at the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction.

(6) *Operating Advisor.* The underlying securitization transaction documents shall provide for the following:

(i) The appointment of an operating advisor (the Operating Advisor) that:

(A) Is not affiliated with other parties to the securitization transaction;

(B) Does not directly or indirectly have any financial interest in the securitization transaction other than in fees from its role as Operating Advisor; and

(C) Is required to act in the best interest of, and for the benefit of, investors as a collective whole;

(ii) Standards with respect to the Operating Advisor's experience, expertise and financial strength to fulfill its duties and responsibilities under the applicable transaction documents over the life of the securitization transaction;

(iii) The terms of the Operating Advisor's compensation with respect to the securitization transaction;

(iv) When the eligible horizontal residual interest has been reduced by principal payments, realized losses, and appraisal reduction amounts (which reduction amounts are determined in accordance with the applicable transaction documents) to a principal balance of 25 percent or less of its initial principal balance, the special servicer for the securitized assets must consult with the Operating Advisor in connection with, and prior to, any material decision in connection with its servicing of the securitized assets, including, without limitation:

(A) Any material modification of, or waiver with respect to, any provision of a loan agreement (including a mortgage, deed of trust, or other security agreement);

(B) Foreclosure upon or comparable conversion of the ownership of a property; or

(C) Any acquisition of a property.

(v) The Operating Advisor shall have adequate and timely access to information and reports necessary to fulfill its duties under the transaction documents, including all reports made available to holders of ABS interests and third-party purchasers, and shall be responsible for:

(A) Reviewing the actions of the special servicer;

(B) Reviewing all reports provided by the special servicer to the issuing entity or any holder of ABS interests;

(C) Reviewing for accuracy and consistency with the transaction documents calculations made by the special servicer; and

(D) Issuing a report to investors (including any third-party purchasers) and the issuing entity on a periodic basis concerning:

(*1*) Whether the Operating Advisor believes, in its sole discretion exercised in good faith, that the special servicer is operating in compliance with any standard required of the special servicer in the applicable transaction documents; and

(*2*) Which, if any, standards the Operating Advisor believes, in its sole discretion exercised in good faith, the special servicer has failed to comply.

(vi)(A) The Operating Advisor shall have the authority to recommend that the special servicer be replaced by a successor special servicer if the Operating Advisor determines, in its sole discretion exercised in good faith, that:

(*1*) The special servicer has failed to comply with a standard required of the special servicer in the applicable transaction documents; and

(*2*) Such replacement would be in the best interest of the investors as a collective whole; and

(B) If a recommendation described in paragraph (b)(6)(vi)(A) of this section is made, the special servicer shall be replaced upon the affirmative vote of a majority of the outstanding principal balance of all ABS interests voting on the matter, with a minimum of a quorum of ABS interests voting on the matter. For purposes of such vote, the applicable transaction documents shall specify the quorum and may not specify a quorum of more than the holders of 20 percent of the outstanding principal balance of all ABS interests in the issuing entity, with such quorum including at least three ABS interest holders that are not affiliated with each other.

(7) *Disclosures.* The sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the

Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption ''Credit Risk Retention'':

(i) The name and form of organization of each initial third-party purchaser that acquired an eligible horizontal residual interest at the closing of a securitization transaction;

(ii) A description of each initial third-party purchaser's experience in investing in commercial mortgage-backed securities;

(iii) Any other information regarding each initial third-party purchaser or each initial third-party purchaser's retention of the eligible horizontal residual interest that is material to investors in light of the circumstances of the particular securitization transaction;

(iv) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest that will be retained (or was retained) by each initial third-party purchaser, as well as the amount of the purchase price paid by each initial third-party purchaser for such interest;

(v) The fair value (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) of the eligible horizontal residual interest in the securitization transaction that the sponsor would have retained pursuant to §373.4 if the sponsor had relied on retaining an eligible horizontal residual interest in that section to meet the requirements of §373.3 with respect to the transaction;

(vi) A description of the material terms of the eligible horizontal residual interest retained by each initial third-party purchaser, including the same information as is required to be disclosed by sponsors retaining horizontal interests pursuant to §373.4;

(vii) The material terms of the applicable transaction documents with respect to the Operating Advisor, including without limitation:

(A) The name and form of organization of the Operating Advisor;

(B) A description of any material conflict of interest or material potential conflict of interest between the Operating Advisor and any other party to the transaction;

(C) The standards required by paragraph (b)(6)(ii) of this section and a description of how the Operating Advisor satisfies each of the standards; and

(D) The terms of the Operating Advisor's compensation under paragraph (b)(6)(iii) of this section; and

(viii) The representations and warranties concerning the securitized assets, a schedule of any securitized assets that are determined not to comply with such representations and warranties, and what factors were used to make the determination that such securitized assets should be included in the pool notwithstanding that the securitized assets did not comply with such representations and warranties, such as compensating factors or a determination that the exceptions were not material.

(8) *Hedging, transfer and pledging*—(i) *General rule.* Except as set forth in paragraph (b)(8)(ii) of this section, each third-party purchaser and its affiliates must comply with the hedging and other restrictions in §373.12 as if it were the retaining sponsor with respect to the securitization transaction and had acquired the eligible horizontal residual interest pursuant to §373.4; provided that, the hedging and other restrictions in §373.12 shall not apply on or after the date that each CRE loan (as defined in §373.14) that serves as collateral for outstanding ABS interests has been defeased. For purposes of this section, a loan is deemed to be defeased if:

(A) cash or cash equivalents of the types permitted for an eligible horizontal cash reserve account pursuant to §373.4 whose maturity corresponds to the remaining debt service obligations, have been pledged to the issuing entity as collateral for the loan and are in such amounts and payable at such times as necessary to timely generate cash sufficient to make all remaining

debt service payments due on such loan; and

(B) the issuing entity has an obligation to release its lien on the loan.

(ii) *Exceptions*—(A) *Transfer by initial third-party purchaser or sponsor*. An initial third-party purchaser that acquired an eligible horizontal residual interest at the closing of a securitization transaction in accordance with this section, or a sponsor that acquired an eligible horizontal residual interest at the closing of a securitization transaction in accordance with this section, may, on or after the date that is five years after the date of the closing of the securitization transaction, transfer that interest to a subsequent third-party purchaser that complies with paragraph (b)(8)(ii)(C) of this section. The initial third-party purchaser shall provide the sponsor with complete identifying information for the subsequent third-party purchaser.

(B) *Transfer by subsequent third-party purchaser*. At any time, a subsequent third-party purchaser that acquired an eligible horizontal residual interest pursuant to this section may transfer its interest to a different third-party purchaser that complies with paragraph (b)(8)(ii)(C) of this section. The transferring third-party purchaser shall provide the sponsor with complete identifying information for the acquiring third-party purchaser.

(C) *Requirements applicable to subsequent third-party purchasers*. A subsequent third-party purchaser is subject to all of the requirements of paragraphs (b)(1), (b)(3) through (5), and (b)(8) of this section applicable to third-party purchasers, provided that obligations under paragraphs (b)(1), (b)(3) through (5), and (b)(8) of this section that apply to initial third-party purchasers at or before the time of closing of the securitization transaction shall apply to successor third-party purchasers at or before the time of the transfer of the eligible horizontal residual interest to the successor third-party purchaser.

(c) *Duty to comply*. (1) The retaining sponsor shall be responsible for compliance with this section by itself and for compliance by each initial or subsequent third-party purchaser that acquired an eligible horizontal residual interest in the securitization transaction.

(2) A sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures to monitor each third-party purchaser's compliance with the requirements of paragraphs (b)(1), (b)(3) through (5), and (b)(8) of this section; and

(ii) In the event that the sponsor determines that a third-party purchaser no longer complies with one or more of the requirements of paragraphs (b)(1), (b)(3) through (5), or (b)(8) of this section, shall promptly notify, or cause to be notified, the holders of the ABS interests issued in the securitization transaction of such noncompliance by such third-party purchaser.

§ 373.8 Federal National Mortgage Association and Federal Home Loan Mortgage Corporation ABS.

(a) *In general*. A sponsor satisfies its risk retention requirement under this part if the sponsor fully guarantees the timely payment of principal and interest on all ABS interests issued by the issuing entity in the securitization transaction and is:

(1) The Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617) with capital support from the United States; or

(2) Any limited-life regulated entity succeeding to the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)), provided that the entity is operating with capital support from the United States.

(b) *Certain provisions not applicable*. The provisions of § 373.12(b), (c), and (d) shall not apply to a sponsor described in paragraph (a)(1) or (2) of this section, its affiliates, or the issuing entity

with respect to a securitization transaction for which the sponsor has retained credit risk in accordance with the requirements of this section.

(c) *Disclosure.* A sponsor relying on this section shall provide to investors, in written form under the caption ''Credit Risk Retention'' and, upon request, to the Federal Housing Finance Agency and the Commission, a description of the manner in which it has met the credit risk retention requirements of this part.

§ 373.9 Open market CLOs.

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

CLO means a special purpose entity that:

(i) Issues debt and equity interests, and

(ii) Whose assets consist primarily of loans that are securitized assets and servicing assets.

CLO-eligible loan tranche means a term loan of a syndicated facility that meets the criteria set forth in paragraph (c) of this section.

CLO manager means an entity that manages a CLO, which entity is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (15 U.S.C. 80b-1 *et seq.*), or is an affiliate of such a registered investment adviser and itself is managed by such registered investment adviser.

Commercial borrower means an obligor under a corporate credit obligation (including a loan).

Initial loan syndication transaction means a transaction in which a loan is syndicated to a group of lenders.

Lead arranger means, with respect to a CLO-eligible loan tranche, an institution that:

(i) Is active in the origination, structuring and syndication of commercial loan transactions (as defined in § 373.14) and has played a primary role in the structuring, underwriting and distribution on the primary market of the CLO-eligible loan tranche.

(ii) Has taken an allocation of the funded portion of the syndicated credit facility under the terms of the transaction that includes the CLO-eligible loan tranche of at least 20 percent of the aggregate principal balance at origination, and no other member (or members affiliated with each other) of the syndication group that funded at origination has taken a greater allocation; and

(iii) Is identified in the applicable agreement governing the CLO-eligible loan tranche; represents therein to the holders of the CLO-eligible loan tranche and to any holders of participation interests in such CLO-eligible loan tranche that such lead arranger satisfies the requirements of paragraph (i) of this definition and, at the time of initial funding of the CLO-eligible tranche, will satisfy the requirements of paragraph (ii) of this definition; further represents therein (solely for the purpose of assisting such holders to determine the eligibility of such CLO-eligible loan tranche to be held by an open market CLO) that in the reasonable judgment of such lead arranger, the terms of such CLO-eligible loan tranche are consistent with the requirements of paragraphs (c)(2) and (3) of this section; and covenants therein to such holders that such lead arranger will fulfill the requirements of paragraph (c)(1) of this section.

Open market CLO means a CLO:

(i) Whose assets consist of senior, secured syndicated loans acquired by such CLO directly from the sellers thereof in open market transactions and of servicing assets,

(ii) That is managed by a CLO manager, and

(iii) That holds less than 50 percent of its assets, by aggregate outstanding principal amount, in loans syndicated by lead arrangers that are affiliates of the CLO or the CLO manager or originated by originators that are affiliates of the CLO or the CLO manager.

Open market transaction means:

(i) Either an initial loan syndication transaction or a secondary market transaction in which a seller offers senior, secured syndicated loans to prospective purchasers in the loan market on market terms on an arm's length basis, which prospective purchasers include, but are not limited to, entities that are not affiliated with the seller, or

(ii) A reverse inquiry from a prospective purchaser of a senior, secured syndicated loan through a dealer in the

loan market to purchase a senior, secured syndicated loan to be sourced by the dealer in the loan market.

Secondary market transaction means a purchase of a senior, secured syndicated loan not in connection with an initial loan syndication transaction but in the secondary market.

Senior, secured syndicated loan means a loan made to a commercial borrower that:

(i) Is not subordinate in right of payment to any other obligation for borrowed money of the commercial borrower,

(ii) Is secured by a valid first priority security interest or lien in or on specified collateral securing the commercial borrower's obligations under the loan, and

(iii) The value of the collateral subject to such first priority security interest or lien, together with other attributes of the obligor (including, without limitation, its general financial condition, ability to generate cash flow available for debt service and other demands for that cash flow), is adequate (in the commercially reasonable judgment of the CLO manager exercised at the time of investment) to repay the loan and to repay all other indebtedness of equal seniority secured by such first priority security interest or lien in or on the same collateral, and the CLO manager certifies, on or prior to each date that it acquires a loan constituting part of a new CLO-eligible tranche, that it has policies and procedures to evaluate the likelihood of repayment of loans acquired by the CLO and it has followed such policies and procedures in evaluating each CLO-eligible loan tranche.

(b) *In general.* A sponsor satisfies the risk retention requirements of § 373.3 with respect to an open market CLO transaction if:

(1) The open market CLO does not acquire or hold any assets other than CLO-eligible loan tranches that meet the requirements of paragraph (c) of this section and servicing assets;

(2) The governing documents of such open market CLO require that, at all times, the assets of the open market CLO consist of senior, secured syndicated loans that are CLO-eligible loan tranches and servicing assets;

(3) The open market CLO does not invest in ABS interests or in credit derivatives other than hedging transactions that are servicing assets to hedge risks of the open market CLO;

(4) All purchases of CLO-eligible loan tranches and other assets by the open market CLO issuing entity or through a warehouse facility used to accumulate the loans prior to the issuance of the CLO's ABS interests are made in open market transactions on an arms-length basis;

(5) The CLO manager of the open market CLO is not entitled to receive any management fee or gain on sale at the time the open market CLO issues its ABS interests.

(c) *CLO-eligible loan tranche.* To qualify as a CLO-eligible loan tranche, a term loan of a syndicated credit facility to a commercial borrower must have the following features:

(1) A minimum of 5 percent of the face amount of the CLO-eligible loan tranche is retained by the lead arranger thereof until the earliest of the repayment, maturity, involuntary and unscheduled acceleration, payment default, or bankruptcy default of such CLO-eligible loan tranche, provided that such lead arranger complies with limitations on hedging, transferring and pledging in § 373.12 with respect to the interest retained by the lead arranger.

(2) Lender voting rights within the credit agreement and any intercreditor or other applicable agreements governing such CLO-eligible loan tranche are defined so as to give holders of the CLO-eligible loan tranche consent rights with respect to, at minimum, any material waivers and amendments of such applicable documents, including but not limited to, adverse changes to the calculation or payments of amounts due to the holders of the CLO-eligible tranche, alterations to *pro rata* provisions, changes to voting provisions, and waivers of conditions precedent; and

(3) The pro rata provisions, voting provisions, and similar provisions applicable to the security associated with such CLO-eligible loan tranches under the CLO credit agreement and any intercreditor or other applicable agreements governing such CLO-eligible

loan tranches are not materially less advantageous to the holder(s) of such CLO-eligible tranche than the terms of other tranches of comparable seniority in the broader syndicated credit facility.

(d) *Disclosures.* A sponsor relying on this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction and at least annually with respect to the information required by paragraph (d)(1) of this section and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption ''Credit Risk Retention'':

(1) *Open market CLOs.* A complete list of every asset held by an open market CLO (or before the CLO's closing, in a warehouse facility in anticipation of transfer into the CLO at closing), including the following information:

(i) The full legal name, Standard Industrial Classification (SIC) category code, and legal entity identifier (LEI) issued by a utility endorsed or otherwise governed by the Global LEI Regulatory Oversight Committee or the Global LEI Foundation (if an LEI has been obtained by the obligor) of the obligor of the loan or asset;

(ii) The full name of the specific loan tranche held by the CLO;

(iii) The face amount of the entire loan tranche held by the CLO, and the face amount of the portion thereof held by the CLO;

(iv) The price at which the loan tranche was acquired by the CLO; and

(v) For each loan tranche, the full legal name of the lead arranger subject to the sales and hedging restrictions of § 373.12; and

(2) *CLO manager.* The full legal name and form of organization of the CLO manager.

§ 373.10 Qualified tender option bonds.

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

Municipal security or *municipal securities* shall have the same meaning as the term ''municipal securities'' in Section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)) and any rules promulgated pursuant to such section.

Qualified tender option bond entity means an issuing entity with respect to tender option bonds for which each of the following applies:

(i) Such entity is collateralized solely by servicing assets and by municipal securities that have the same municipal issuer and the same underlying obligor or source of payment (determined without regard to any third-party credit enhancement), and such municipal securities are not subject to substitution.

(ii) Such entity issues no securities other than:

(A) A single class of tender option bonds with a preferred variable return payable out of capital that meets the requirements of paragraph (b) of this section, and

(B) One or more residual equity interests that, in the aggregate, are entitled to all remaining income of the issuing entity.

(C) The types of securities referred to in paragraphs (ii)(A) and (B) of this definition must constitute asset-backed securities.

(iii) The municipal securities held as assets by such entity are issued in compliance with Section 103 of the Internal Revenue Code of 1986, as amended (the ''IRS Code'', 26 U.S.C. 103), such that the interest payments made on those securities are excludable from the gross income of the owners under Section 103 of the IRS Code.

(iv) The terms of all of the securities issued by the entity are structured so that all holders of such securities who are eligible to exclude interest received on such securities will be able to exclude that interest from gross income pursuant to Section 103 of the IRS Code or as ''exempt-interest dividends'' pursuant to Section 852(b)(5) of the IRS Code (26 U.S.C. 852(b)(5)) in the case of regulated investment companies under the Investment Company Act of 1940, as amended.

(v) Such entity has a legally binding commitment from a regulated liquidity provider as defined in § 373.6(a), to provide a 100 percent guarantee or liquidity coverage with respect to all of the

issuing entity's outstanding tender option bonds.

(vi) Such entity qualifies for monthly closing elections pursuant to IRS Revenue Procedure 2003–84, as amended or supplemented from time to time.

Tender option bond means a security which has features which entitle the holders to tender such bonds to the issuing entity for purchase at any time upon no more than 397 days' notice, for a purchase price equal to the approximate amortized cost of the security, plus accrued interest, if any, at the time of tender.

(b) *Risk retention options.* Notwithstanding anything in this section, the sponsor with respect to an issuance of tender option bonds may retain an eligible vertical interest or eligible horizontal residual interest, or any combination thereof, in accordance with the requirements of §373.4. In order to satisfy its risk retention requirements under this section, the sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity may retain:

(1) An eligible vertical interest or an eligible horizontal residual interest, or any combination thereof, in accordance with the requirements of §373.4; or

(2) An interest that meets the requirements set forth in paragraph (c) of this section; or

(3) A municipal security that meets the requirements set forth in paragraph (d) of this section; or

(4) Any combination of interests and securities described in paragraphs (b)(1) through (b)(3) of this section such that the sum of the percentages held in each form equals at least five.

(c) *Tender option termination event.* The sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity may retain an interest that upon issuance meets the requirements of an eligible horizontal residual interest but that upon the occurrence of a ''tender option termination event'' as defined in Section 4.01(5) of IRS Revenue Procedure 2003–84, as amended or supplemented from time to time will meet the requirements of an eligible vertical interest.

(d) *Retention of a municipal security outside of the qualified tender option bond entity.* The sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity may satisfy its risk retention requirements under this Section by holding municipal securities from the same issuance of municipal securities deposited in the qualified tender option bond entity, the face value of which retained municipal securities is equal to 5 percent of the face value of the municipal securities deposited in the qualified tender option bond entity.

(e) *Disclosures.* The sponsor shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption ''Credit Risk Retention'':

(1) The name and form of organization of the qualified tender option bond entity;

(2) A description of the form and subordination features of such retained interest in accordance with the disclosure obligations in §373.4(c);

(3) To the extent any portion of the retained interest is claimed by the sponsor as an eligible horizontal residual interest (including any interest held in compliance with §373.10(c)), the fair value of that interest (expressed as a percentage of the fair value of all of the ABS interests issued in the securitization transaction and as a dollar amount);

(4) To the extent any portion of the retained interest is claimed by the sponsor as an eligible vertical interest (including any interest held in compliance with §373.10(c)), the percentage of ABS interests issued represented by the eligible vertical interest; and

(5) To the extent any portion of the retained interest claimed by the sponsor is a municipal security held outside of the qualified tender option bond entity, the name and form of organization of the qualified tender option bond entity, the identity of the issuer of the municipal securities, the face value of the municipal securities deposited into the qualified tender option bond entity,

and the face value of the municipal securities retained by the sponsor or its majority-owned affiliates and subject to the transfer and hedging prohibition.

(f) *Prohibitions on Hedging and Transfer*. The prohibitions on transfer and hedging set forth in §373.12, apply to any interests or municipal securities retained by the sponsor with respect to an issuance of tender option bonds by a qualified tender option bond entity pursuant to of this section.

Subpart C—Transfer of Risk Retention

§ 373.11 Allocation of risk retention to an originator.

(a) *In general*. A sponsor choosing to retain an eligible vertical interest or an eligible horizontal residual interest (including an eligible horizontal cash reserve account), or combination thereof under §373.4, with respect to a securitization transaction may offset the amount of its risk retention requirements under §373.4 by the amount of the eligible interests, respectively, acquired by an originator of one or more of the securitized assets if:

(1) At the closing of the securitization transaction:

(i) The originator acquires the eligible interest from the sponsor and retains such interest in the same manner and proportion (as between horizontal and vertical interests) as the sponsor under §373.4, as such interest was held prior to the acquisition by the originator;

(ii) The ratio of the percentage of eligible interests acquired and retained by the originator to the percentage of eligible interests otherwise required to be retained by the sponsor pursuant to §373.4, does not exceed the ratio of:

(A) The unpaid principal balance of all the securitized assets originated by the originator; to

(B) The unpaid principal balance of all the securitized assets in the securitization transaction;

(iii) The originator acquires and retains at least 20 percent of the aggregate risk retention amount otherwise required to be retained by the sponsor pursuant to §373.4; and

(iv) The originator purchases the eligible interests from the sponsor at a price that is equal, on a dollar-for-dollar basis, to the amount by which the sponsor's required risk retention is reduced in accordance with this section, by payment to the sponsor in the form of:

(A) Cash; or

(B) A reduction in the price received by the originator from the sponsor or depositor for the assets sold by the originator to the sponsor or depositor for inclusion in the pool of securitized assets.

(2) *Disclosures*. In addition to the disclosures required pursuant to §373.4(c), the sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, in written form under the caption ''Credit Risk Retention'', the name and form of organization of any originator that will acquire and retain (or has acquired and retained) an interest in the transaction pursuant to this section, including a description of the form and amount (expressed as a percentage and dollar amount (or corresponding amount in the foreign currency in which the ABS interests are issued, as applicable)) and nature (*e.g.*, senior or subordinated) of the interest, as well as the method of payment for such interest under paragraph (a)(1)(iv) of this section.

(3) *Hedging, transferring and pledging*. The originator and each of its affiliates complies with the hedging and other restrictions in §373.12 with respect to the interests retained by the originator pursuant to this section as if it were the retaining sponsor and was required to retain the interest under subpart B of this part.

(b) *Duty to comply*. (1) The retaining sponsor shall be responsible for compliance with this section.

(2) A retaining sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures that are reasonably designed to monitor the compliance by

each originator that is allocated a portion of the sponsor's risk retention obligations with the requirements in paragraphs (a)(1) and (3) of this section; and

(ii) In the event the sponsor determines that any such originator no longer complies with any of the requirements in paragraphs (a)(1) and (3) of this section, shall promptly notify, or cause to be notified, the holders of the ABS interests issued in the securitization transaction of such noncompliance by such originator.

§ 373.12 Hedging, transfer and financing prohibitions.

(a) *Transfer.* Except as permitted by § 373.7(b)(8), and subject to § 373.5, a retaining sponsor may not sell or otherwise transfer any interest or assets that the sponsor is required to retain pursuant to subpart B of this part to any person other than an entity that is and remains a majority-owned affiliate of the sponsor and each such majority-owned affiliate shall be subject to the same restrictions.

(b) *Prohibited hedging by sponsor and affiliates.* A retaining sponsor and its affiliates may not purchase or sell a security, or other financial instrument, or enter into an agreement, derivative or other position, with any other person if:

(1) Payments on the security or other financial instrument or under the agreement, derivative, or position are materially related to the credit risk of one or more particular ABS interests that the retaining sponsor (or any of its majority-owned affiliates) is required to retain with respect to a securitization transaction pursuant to subpart B of this part or one or more of the particular securitized assets that collateralize the asset-backed securities issued in the securitization transaction; and

(2) The security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the sponsor (or any of its majority-owned affiliates) to the credit risk of one or more of the particular ABS interests that the retaining sponsor (or any of its majority-owned affiliates) is required to retain with respect to a securitization transaction pursuant to subpart B of this part or one or more of the particular securitized assets that collateralize the asset-backed securities issued in the securitization transaction.

(c) *Prohibited hedging by issuing entity.* The issuing entity in a securitization transaction may not purchase or sell a security or other financial instrument, or enter into an agreement, derivative or position, with any other person if:

(1) Payments on the security or other financial instrument or under the agreement, derivative or position are materially related to the credit risk of one or more particular ABS interests that the retaining sponsor for the transaction (or any of its majority-owned affiliates) is required to retain with respect to the securitization transaction pursuant to subpart B of this part; and

(2) The security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the retaining sponsor (or any of its majority-owned affiliates) to the credit risk of one or more of the particular ABS interests that the sponsor (or any of its majority-owned affiliates) is required to retain pursuant to subpart B of this part.

(d) *Permitted hedging activities.* The following activities shall not be considered prohibited hedging activities under paragraph (b) or (c) of this section:

(1) Hedging the interest rate risk (which does not include the specific interest rate risk, known as spread risk, associated with the ABS interest that is otherwise considered part of the credit risk) or foreign exchange risk arising from one or more of the particular ABS interests required to be retained by the sponsor (or any of its majority-owned affiliates) under subpart B of this part or one or more of the particular securitized assets that underlie the asset-backed securities issued in the securitization transaction; or

(2) Purchasing or selling a security or other financial instrument or entering into an agreement, derivative, or other position with any third party where payments on the security or other financial instrument or under the agreement, derivative, or position are based,

directly or indirectly, on an index of instruments that includes asset-backed securities if:

(i) Any class of ABS interests in the issuing entity that were issued in connection with the securitization transaction and that are included in the index represents no more than 10 percent of the dollar-weighted average (or corresponding weighted average in the currency in which the ABS interests are issued, as applicable) of all instruments included in the index; and

(ii) All classes of ABS interests in all issuing entities that were issued in connection with any securitization transaction in which the sponsor (or any of its majority-owned affiliates) is required to retain an interest pursuant to subpart B of this part and that are included in the index represent, in the aggregate, no more than 20 percent of the dollar-weighted average (or corresponding weighted average in the currency in which the ABS interests are issued, as applicable) of all instruments included in the index.

(e) *Prohibited non-recourse financing.* Neither a retaining sponsor nor any of its affiliates may pledge as collateral for any obligation (including a loan, repurchase agreement, or other financing transaction) any ABS interest that the sponsor is required to retain with respect to a securitization transaction pursuant to subpart B of this part unless such obligation is with full recourse to the sponsor or affiliate, respectively.

(f) *Duration of the hedging and transfer restrictions*—(1) *General rule.* Except as provided in paragraph (f)(2) of this section, the prohibitions on sale and hedging pursuant to paragraphs (a) and (b) of this section shall expire on or after the date that is the latest of:

(i) The date on which the total unpaid principal balance (if applicable) of the securitized assets that collateralize the securitization transaction has been reduced to 33 percent of the total unpaid principal balance of the securitized assets as of the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction;

(ii) The date on which the total unpaid principal obligations under the ABS interests issued in the securitization transaction has been reduced to 33 percent of the total unpaid principal obligations of the ABS interests at closing of the securitization transaction; or

(iii) Two years after the date of the closing of the securitization transaction.

(2) *Securitizations of residential mortgages.* (i) If all of the assets that collateralize a securitization transaction subject to risk retention under this part are residential mortgages, the prohibitions on sale and hedging pursuant to paragraphs (a) and (b) of this section shall expire on or after the date that is the later of:

(A) Five years after the date of the closing of the securitization transaction; or

(B) The date on which the total unpaid principal balance of the residential mortgages that collateralize the securitization transaction has been reduced to 25 percent of the total unpaid principal balance of such residential mortgages at the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction.

(ii) Notwithstanding paragraph (f)(2)(i) of this section, the prohibitions on sale and hedging pursuant to paragraphs (a) and (b) of this section shall expire with respect to the sponsor of a securitization transaction described in paragraph (f)(2)(i) of this section on or after the date that is seven years after the date of the closing of the securitization transaction.

(3) *Conservatorship or receivership of sponsor.* A conservator or receiver of the sponsor (or any other person holding risk retention pursuant to this part) of a securitization transaction is permitted to sell or hedge any economic interest in the securitization transaction if the conservator or receiver has been appointed pursuant to any provision of federal or State law (or regulation promulgated thereunder) that provides for the appointment of the Federal Deposit Insurance Corporation, or an agency or instrumentality

of the United States or of a State as conservator or receiver, including without limitation any of the following authorities:

(i) 12 U.S.C. 1811;

(ii) 12 U.S.C. 1787;

(iii) 12 U.S.C. 4617; or

(iv) 12 U.S.C. 5382.

(4) *Revolving pool securitizations.* The provisions of paragraphs (f)(1) and (2) are not available to sponsors of revolving pool securitizations with respect to the forms of risk retention specified in § 373.5.

Subpart D—Exceptions and Exemptions

§ 373.13 Exemption for qualified residential mortgages.

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

Currently performing means the borrower in the mortgage transaction is not currently thirty (30) days or more past due, in whole or in part, on the mortgage transaction.

Qualified residential mortgage means a ''qualified mortgage'' as defined in section 129C of the Truth in Lending Act (15 U.S.C.1639c) and regulations issued thereunder, as amended from time to time.

(b) *Exemption.* A sponsor shall be exempt from the risk retention requirements in subpart B of this part with respect to any securitization transaction, if:

(1) All of the assets that collateralize the asset-backed securities are qualified residential mortgages or servicing assets;

(2) None of the assets that collateralize the asset-backed securities are asset-backed securities;

(3) As of the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction, each qualified residential mortgage collateralizing the asset-backed securities is currently performing; and

(4)(i) The depositor with respect to the securitization transaction certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages or servicing assets and has concluded that its internal supervisory controls are effective; and

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls must be performed, for each issuance of an asset-backed security in reliance on this section, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (b)(4)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to the Commission and its appropriate Federal banking agency, if any.

(c) *Repurchase of loans subsequently determined to be non-qualified after closing.* A sponsor that has relied on the exemption provided in paragraph (b) of this section with respect to a securitization transaction shall not lose such exemption with respect to such transaction if, after closing of the securitization transaction, it is determined that one or more of the residential mortgage loans collateralizing the asset-backed securities does not meet all of the criteria to be a qualified residential mortgage *provided that:*

(1) The depositor complied with the certification requirement set forth in paragraph (b)(4) of this section;

(2) The sponsor repurchases the loan(s) from the issuing entity at a price at least equal to the remaining aggregate unpaid principal balance and accrued interest on the loan(s) no later than 90 days after the determination that the loans do not satisfy the requirements to be a qualified residential mortgage; and

(3) The sponsor promptly notifies, or causes to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is (or are) required to be repurchased by the sponsor pursuant

to paragraph (c)(2) of this section, including the amount of such repurchased loan(s) and the cause for such repurchase.

§ 373.14 Definitions applicable to qualifying commercial loans, qualifying commercial real estate loans, and qualifying automobile loans.

The following definitions apply for purposes of §§ 373.15 through 373.18:

Appraisal Standards Board means the board of the Appraisal Foundation that develops, interprets, and amends the Uniform Standards of Professional Appraisal Practice (USPAP), establishing generally accepted standards for the appraisal profession.

Automobile loan:

(1) Means any loan to an individual to finance the purchase of, and that is secured by a first lien on, a passenger car or other passenger vehicle, such as a minivan, van, sport-utility vehicle, pickup truck, or similar light truck for personal, family, or household use; and

(2) Does not include any:

(i) Loan to finance fleet sales;

(ii) Personal cash loan secured by a previously purchased automobile;

(iii) Loan to finance the purchase of a commercial vehicle or farm equipment that is not used for personal, family, or household purposes;

(iv) Lease financing;

(v) Loan to finance the purchase of a vehicle with a salvage title; or

(vi) Loan to finance the purchase of a vehicle intended to be used for scrap or parts.

Combined loan-to-value (CLTV) ratio means, at the time of origination, the sum of the principal balance of a first-lien mortgage loan on the property, plus the principal balance of any junior-lien mortgage loan that, to the creditor's knowledge, would exist at the closing of the transaction and that is secured by the same property, divided by:

(1) For acquisition funding, the lesser of the purchase price or the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 373.17(a)(2)(ii); or

(2) For refinancing, the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 373.17(a)(2)(ii).

Commercial loan means a secured or unsecured loan to a company or an individual for business purposes, other than any:

(1) Loan to purchase or refinance a one-to-four family residential property;

(2) Commercial real estate loan.

Commercial real estate (CRE) loan means:

(1) A loan secured by a property with five or more single family units, or by nonfarm nonresidential real property, the primary source (50 percent or more) of repayment for which is expected to be:

(i) The proceeds of the sale, refinancing, or permanent financing of the property; or

(ii) Rental income associated with the property;

(2) Loans secured by improved land if the obligor owns the fee interest in the land and the land is leased to a third party who owns all improvements on the land, and the improvements are nonresidential or residential with five or more single family units; and

(3) Does not include:

(i) A land development and construction loan (including 1- to 4-family residential or commercial construction loans);

(ii) Any other land loan; or

(iii) An unsecured loan to a developer.

Debt service coverage (DSC) ratio means:

(1) For qualifying leased CRE loans, qualifying multi-family loans, and other CRE loans:

(i) The annual NOI less the annual replacement reserve of the CRE property at the time of origination of the CRE loan(s) divided by

(ii) The sum of the borrower's annual payments for principal and interest (calculated at the fully-indexed rate) on any debt obligation.

(2) For commercial loans:

(i) The borrower's EBITDA as of the most recently completed fiscal year divided by

(ii) The sum of the borrower's annual payments for principal and interest on all debt obligations.

Debt to income (DTI) ratio means the borrower's total debt, including the monthly amount due on the automobile loan, divided by the borrower's monthly income.

Earnings before interest, taxes, depreciation, and amortization (EBITDA) means the annual income of a business before expenses for interest, taxes, depreciation and amortization are deducted, as determined in accordance with GAAP.

Environmental risk assessment means a process for determining whether a property is contaminated or exposed to any condition or substance that could result in contamination that has an adverse effect on the market value of the property or the realization of the collateral value.

First lien means a lien or encumbrance on property that has priority over all other liens or encumbrances on the property.

Junior lien means a lien or encumbrance on property that is lower in priority relative to other liens or encumbrances on the property.

Leverage ratio means the borrower's total debt divided by the borrower's EBITDA.

Loan-to-value (LTV) ratio means, at the time of origination, the principal balance of a first-lien mortgage loan on the property divided by:

(1) For acquisition funding, the lesser of the purchase price or the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 373.17(a)(2)(ii); or

(2) For refinancing, the estimated market value of the real property based on an appraisal that meets the requirements set forth in § 373.17(a)(2)(ii).

Model year means the year determined by the manufacturer and reflected on the vehicle's Motor Vehicle Title as part of the vehicle description.

Net operating income (NOI) refers to the income a CRE property generates for the owner after all expenses have been deducted for federal income tax purposes, except for depreciation, debt service expenses, and federal and state income taxes, and excluding any unusual and nonrecurring items of income.

Operating affiliate means an affiliate of a borrower that is a lessor or similar party with respect to the commercial real estate securing the loan.

Payments-in-kind means payments of accrued interest that are not paid in cash when due, and instead are paid by increasing the principal balance of the loan or by providing equity in the borrowing company.

Purchase money security interest means a security interest in property that secures the obligation of the obligor incurred as all or part of the price of the property.

Purchase price means the amount paid by the borrower for the vehicle net of any incentive payments or manufacturer cash rebates.

Qualified tenant means:

(1) A tenant with a lease who has satisfied all obligations with respect to the property in a timely manner; or

(2) A tenant who originally had a lease that subsequently expired and currently is leasing the property on a month-to-month basis, has occupied the property for at least three years prior to the date of origination, and has satisfied all obligations with respect to the property in a timely manner.

Qualifying leased CRE loan means a CRE loan secured by commercial nonfarm real property, other than a multifamily property or a hotel, inn, or similar property:

(1) That is occupied by one or more qualified tenants pursuant to a lease agreement with a term of no less than one (1) month; and

(2) Where no more than 20 percent of the aggregate gross revenue of the property is payable from one or more tenants who:

(i) Are subject to a lease that will terminate within six months following the date of origination; or

(ii) Are not qualified tenants.

Qualifying multi-family loan means a CRE loan secured by any residential property (excluding a hotel, motel, inn, hospital, nursing home, or other similar facility where dwellings are not leased to residents):

(1) That consists of five or more dwelling units (including apartment buildings, condominiums, cooperatives

and other similar structures) primarily for residential use; and

(2) Where at least 75 percent of the NOI is derived from residential rents and tenant amenities (including income from parking garages, health or swim clubs, and dry cleaning), and not from other commercial uses.

Rental income means:

(1) Income derived from a lease or other occupancy agreement between the borrower or an operating affiliate of the borrower and a party which is not an affiliate of the borrower for the use of real property or improvements serving as collateral for the applicable loan; and

(2) Other income derived from hotel, motel, dormitory, nursing home, assisted living, mini-storage warehouse or similar properties that are used primarily by parties that are not affiliates or employees of the borrower or its affiliates.

Replacement reserve means the monthly capital replacement or maintenance amount based on the property type, age, construction and condition of the property that is adequate to maintain the physical condition and NOI of the property.

Salvage title means a form of vehicle title branding, which notes that the vehicle has been severely damaged and/or deemed a total loss and uneconomical to repair by an insurance company that paid a claim on the vehicle.

Total debt, with respect to a borrower, means:

(1) In the case of an automobile loan, the sum of:

(i) All monthly housing payments (rent- or mortgage-related, including property taxes, insurance and home owners association fees); and

(ii) Any of the following that is dependent upon the borrower's income for payment:

(A) Monthly payments on other debt and lease obligations, such as credit card loans or installment loans, including the monthly amount due on the automobile loan;

(B) Estimated monthly amortizing payments for any term debt, debts with other than monthly payments and debts not in repayment (such as deferred student loans, interest-only loans); and

(C) Any required monthly alimony, child support or court-ordered payments; and

(2) In the case of a commercial loan, the outstanding balance of all long-term debt (obligations that have a remaining maturity of more than one year) and the current portion of all debt that matures in one year or less.

Total liabilities ratio means the borrower's total liabilities divided by the sum of the borrower's total liabilities and equity, less the borrower's intangible assets, with each component determined in accordance with GAAP.

Trade-in allowance means the amount a vehicle purchaser is given as a credit at the purchase of a vehicle for the fair exchange of the borrower's existing vehicle to compensate the dealer for some portion of the vehicle purchase price, not to exceed the highest trade-in value of the existing vehicle, as determined by a nationally recognized automobile pricing agency and based on the manufacturer, year, model, features, mileage, and condition of the vehicle, less the payoff balance of any outstanding debt collateralized by the existing vehicle.

Uniform Standards of Professional Appraisal Practice (USPAP) means generally accepted standards for professional appraisal practice issued by the Appraisal Standards Board of the Appraisal Foundation.

§ 373.15 Qualifying commercial loans, commercial real estate loans, and automobile loans.

(a) *General exception for qualifying assets.* Commercial loans, commercial real estate loans, and automobile loans that are securitized through a securitization transaction shall be subject to a 0 percent risk retention requirement under subpart B, provided that the following conditions are met:

(1) The assets meet the underwriting standards set forth in § 373.16 (qualifying commercial loans), 373.17 (qualifying CRE loans), or 373.18 (qualifying automobile loans) of this part, as applicable;

(2) The securitization transaction is collateralized solely by loans of the same asset class and by servicing assets;

(3) The securitization transaction does not permit reinvestment periods; and

(4) The sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of asset-backed securities of the issuing entity, and, upon request, to the Commission, and to its appropriate Federal banking agency, if any, in written form under the caption ''Credit Risk Retention'', a description of the manner in which the sponsor determined the aggregate risk retention requirement for the securitization transaction after including qualifying commercial loans, qualifying CRE loans, or qualifying automobile loans with 0 percent risk retention.

(b) *Risk retention requirement.* For any securitization transaction described in paragraph (a) of this section, the percentage of risk retention required under § 373.3(a) is reduced by the percentage evidenced by the ratio of the unpaid principal balance of the qualifying commercial loans, qualifying CRE loans, or qualifying automobile loans (as applicable) to the total unpaid principal balance of commercial loans, CRE loans, or automobile loans (as applicable) that are included in the pool of assets collateralizing the asset-backed securities issued pursuant to the securitization transaction (the qualifying asset ratio); provided that:

(1) The qualifying asset ratio is measured as of the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction;

(2) If the qualifying asset ratio would exceed 50 percent, the qualifying asset ratio shall be deemed to be 50 percent; and

(3) The disclosure required by paragraph (a)(4) of this section also includes descriptions of the qualifying commercial loans, qualifying CRE loans, and qualifying automobile loans (qualifying assets) and descriptions of the assets that are not qualifying assets, and the material differences between the group of qualifying assets and the group of assets that are not qualifying assets with respect to the composition of each group's loan balances, loan terms, interest rates, borrower credit information, and characteristics of any loan collateral.

(c) *Exception for securitizations of qualifying assets only.* Notwithstanding other provisions of this section, the risk retention requirements of subpart B of this part shall not apply to securitization transactions where the transaction is collateralized solely by servicing assets and either qualifying commercial loans, qualifying CRE loans, or qualifying automobile loans.

(d) *Record maintenance.* A sponsor must retain the disclosures required in paragraphs (a) and (b) of this section and the certifications required in §§ 373.16(a)(8), 373.17(a)(10), and 373.18(a)(8), as applicable, in its records until three years after all ABS interests issued in the securitization are no longer outstanding. The sponsor must provide the disclosures and certifications upon request to the Commission and the sponsor's appropriate Federal banking agency, if any.

§ 373.16 Underwriting standards for qualifying commercial loans.

(a) *Underwriting, product and other standards.* (1) Prior to origination of the commercial loan, the originator:

(i) Verified and documented the financial condition of the borrower:

(A) As of the end of the borrower's two most recently completed fiscal years; and

(B) During the period, if any, since the end of its most recently completed fiscal year;

(ii) Conducted an analysis of the borrower's ability to service its overall debt obligations during the next two years, based on reasonable projections;

(iii) Determined that, based on the previous two years' actual performance, the borrower had:

(A) A total liabilities ratio of 50 percent or less;

(B) A leverage ratio of 3.0 or less; and

(C) A DSC ratio of 1.5 or greater;

(iv) Determined that, based on the two years of projections, which include the new debt obligation, following the closing date of the loan, the borrower will have:

(A) A total liabilities ratio of 50 percent or less;

(B) A leverage ratio of 3.0 or less; and

(C) A DSC ratio of 1.5 or greater.

(2) Prior to, upon or promptly following the inception of the loan, the originator:

(i) If the loan is originated on a secured basis, obtains a perfected security interest (by filing, title notation or otherwise) or, in the case of real property, a recorded lien, on all of the property pledged to collateralize the loan; and

(ii) If the loan documents indicate the purpose of the loan is to finance the purchase of tangible or intangible property, or to refinance such a loan, obtains a first lien on the property.

(3) The loan documentation for the commercial loan includes covenants that:

(i) Require the borrower to provide to the servicer of the commercial loan the borrower's financial statements and supporting schedules on an ongoing basis, but not less frequently than quarterly;

(ii) Prohibit the borrower from retaining or entering into a debt arrangement that permits payments-in-kind;

(iii) Impose limits on:

(A) The creation or existence of any other security interest or lien with respect to any of the borrower's property that serves as collateral for the loan;

(B) The transfer of any of the borrower's assets that serve as collateral for the loan; and

(C) Any change to the name, location or organizational structure of the borrower, or any other party that pledges collateral for the loan;

(iv) Require the borrower and any other party that pledges collateral for the loan to:

(A) Maintain insurance that protects against loss on the collateral for the commercial loan at least up to the amount of the loan, and that names the originator or any subsequent holder of the loan as an additional insured or loss payee;

(B) Pay taxes, charges, fees, and claims, where non-payment might give rise to a lien on any collateral;

(C) Take any action required to perfect or protect the security interest and first lien (as applicable) of the originator or any subsequent holder of the loan in any collateral for the commercial loan or the priority thereof, and to defend any collateral against claims adverse to the lender's interest;

(D) Permit the originator or any subsequent holder of the loan, and the servicer of the loan, to inspect any collateral for the commercial loan and the books and records of the borrower; and

(E) Maintain the physical condition of any collateral for the commercial loan.

(4) Loan payments required under the loan agreement are:

(i) Based on level monthly payments of principal and interest (at the fully indexed rate) that fully amortize the debt over a term that does not exceed five years from the date of origination; and

(ii) To be made no less frequently than quarterly over a term that does not exceed five years.

(5) The primary source of repayment for the loan is revenue from the business operations of the borrower.

(6) The loan was funded within the six (6) months prior to the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction.

(7) At the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction, all payments due on the loan are contractually current.

(8)(i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all qualifying commercial loans that collateralize the asset-backed security and that reduce the sponsor's risk retention requirement under § 373.15 meet all of the requirements set forth in paragraphs (a)(1) through (7) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (a)(8)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date

for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (a)(8)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any.

(b) *Cure or buy-back requirement.* If a sponsor has relied on the exception provided in § 373.15 with respect to a qualifying commercial loan and it is subsequently determined that the loan did not meet all of the requirements set forth in paragraphs (a)(1) through (7) of this section, the sponsor shall not lose the benefit of the exception with respect to the commercial loan if the depositor complied with the certification requirement set forth in paragraph (a)(8) of this section and:

(1) The failure of the loan to meet any of the requirements set forth in paragraphs (a)(1) through (7) of this section is not material; or

(2) No later than 90 days after the determination that the loan does not meet one or more of the requirements of paragraphs (a)(1) through (7) of this section, the sponsor:

(i) Effectuates cure, establishing conformity of the loan to the unmet requirements as of the date of cure; or

(ii) Repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) as of the date of repurchase.

(3) If the sponsor cures or repurchases pursuant to paragraph (b)(2) of this section, the sponsor must promptly notify, or cause to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is required to be cured or repurchased by the sponsor pursuant to paragraph (b)(2) of this section, including the principal amount of such loan(s) and the cause for such cure or repurchase.

§ 373.17 Underwriting standards for qualifying CRE loans.

(a) *Underwriting, product and other standards.* (1) The CRE loan must be secured by the following:

(i) An enforceable first lien, documented and recorded appropriately pursuant to applicable law, on the commercial real estate and improvements;

(ii)(A) An assignment of:

(*1*) Leases and rents and other occupancy agreements related to the commercial real estate or improvements or the operation thereof for which the borrower or an operating affiliate is a lessor or similar party and all payments under such leases and occupancy agreements; and

(*2*) All franchise, license and concession agreements related to the commercial real estate or improvements or the operation thereof for which the borrower or an operating affiliate is a lessor, licensor, concession granter or similar party and all payments under such other agreements, whether the assignments described in this paragraph (a)(1)(ii)(A)(*2*) are absolute or are stated to be made to the extent permitted by the agreements governing the applicable franchise, license or concession agreements;

(B) An assignment of all other payments due to the borrower or due to any operating affiliate in connection with the operation of the property described in paragraph (a)(1)(i) of this section; and

(C) The right to enforce the agreements described in paragraph (a)(1)(ii)(A) of this section and the agreements under which payments under paragraph (a)(1)(ii)(B) of this section are due against, and collect amounts due from, each lessee, occupant or other obligor whose payments were assigned pursuant to paragraphs (a)(1)(ii)(A) or (B) of this section upon a breach by the borrower of any of the terms of, or the occurrence of any other event of default (however denominated) under, the loan documents relating to such CRE loan; and

(iii) A security interest:

(A) In all interests of the borrower and any applicable operating affiliate in all tangible and intangible personal property of any kind, in or used in the

operation of or in connection with, pertaining to, arising from, or constituting, any of the collateral described in paragraphs (a)(1)(i) or (ii) of this section; and

(B) In the form of a perfected security interest if the security interest in such property can be perfected by the filing of a financing statement, fixture filing, or similar document pursuant to the law governing the perfection of such security interest;

(2) Prior to origination of the CRE loan, the originator:

(i) Verified and documented the current financial condition of the borrower and each operating affiliate;

(ii) Obtained a written appraisal of the real property securing the loan that:

(A) Had an effective date not more than six months prior to the origination date of the loan by a competent and appropriately State-certified or State-licensed appraiser;

(B) Conforms to generally accepted appraisal standards as evidenced by the USPAP and the appraisal requirements[1] of the Federal banking agencies; and

(C) Provides an ''as is'' opinion of the market value of the real property, which includes an income approach;[2]

(iii) Qualified the borrower for the CRE loan based on a monthly payment amount derived from level monthly payments consisting of both principal and interest (at the fully-indexed rate) over the term of the loan, not exceeding 25 years, or 30 years for a qualifying multi-family property;

(iv) Conducted an environmental risk assessment to gain environmental information about the property securing the loan and took appropriate steps to mitigate any environmental liability determined to exist based on this assessment;

(v) Conducted an analysis of the borrower's ability to service its overall debt obligations during the next two years, based on reasonable projections (including operating income projections for the property);

(vi)(A) Determined that based on the two years' actual performance immediately preceding the origination of the loan, the borrower would have had:

(*1*) A DSC ratio of 1.5 or greater, if the loan is a qualifying leased CRE loan, net of any income derived from a tenant(s) who is not a qualified tenant(s);

(*2*) A DSC ratio of 1.25 or greater, if the loan is a qualifying multi-family property loan; or

(*3*) A DSC ratio of 1.7 or greater, if the loan is any other type of CRE loan;

(B) If the borrower did not own the property for any part of the last two years prior to origination, the calculation of the DSC ratio, for purposes of paragraph (a)(2)(vi)(A) of this section, shall include the property's operating income for any portion of the two-year period during which the borrower did not own the property;

(vii) Determined that, based on two years of projections, which include the new debt obligation, following the origination date of the loan, the borrower will have:

(A) A DSC ratio of 1.5 or greater, if the loan is a qualifying leased CRE loan, net of any income derived from a tenant(s) who is not a qualified tenant(s);

(B) A DSC ratio of 1.25 or greater, if the loan is a qualifying multi-family property loan; or

(C) A DSC ratio of 1.7 or greater, if the loan is any other type of CRE loan.

(3) The loan documentation for the CRE loan includes covenants that:

(i) Require the borrower to provide the borrower's financial statements and supporting schedules to the servicer on an ongoing basis, but not less frequently than quarterly, including information on existing, maturing and new leasing or rent-roll activity for the property securing the loan, as appropriate; and

(ii) Impose prohibitions on:

(A) The creation or existence of any other security interest with respect to the collateral for the CRE loan described in paragraphs (a)(1)(i) and (a)(1)(ii)(A) of this section, except as provided in paragraph (a)(4) of this section;

(B) The transfer of any collateral for the CRE loan described in paragraph

[1] 12 CFR part 34, subpart C (OCC); 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G (Board); and 12 CFR part 323 (FDIC).

[2] See USPAP, Standard 1.

(a)(1)(i) or (a)(1)(ii)(A) of this section or of any other collateral consisting of fixtures, furniture, furnishings, machinery or equipment other than any such fixture, furniture, furnishings, machinery or equipment that is obsolete or surplus; and

(C) Any change to the name, location or organizational structure of any borrower, operating affiliate or other pledgor unless such borrower, operating affiliate or other pledgor shall have given the holder of the loan at least 30 days advance notice and, pursuant to applicable law governing perfection and priority, the holder of the loan is able to take all steps necessary to continue its perfection and priority during such 30-day period.

(iii) Require each borrower and each operating affiliate to:

(A) Maintain insurance that protects against loss on collateral for the CRE loan described in paragraph (a)(1)(i) of this section for an amount no less than the replacement cost of the property improvements, and names the originator or any subsequent holder of the loan as an additional insured or lender loss payee;

(B) Pay taxes, charges, fees, and claims, where non-payment might give rise to a lien on collateral for the CRE loan described in paragraphs (a)(1)(i) and (ii) of this section;

(C) Take any action required to:

(*1*) Protect the security interest and the enforceability and priority thereof in the collateral described in paragraphs (a)(1)(i) and (a)(1)(ii)(A) of this section and defend such collateral against claims adverse to the originator's or any subsequent holder's interest; and

(*2*) Perfect the security interest of the originator or any subsequent holder of the loan in any other collateral for the CRE loan to the extent that such security interest is required by this section to be perfected;

(D) Permit the originator or any subsequent holder of the loan, and the servicer, to inspect any collateral for the CRE loan and the books and records of the borrower or other party relating to any collateral for the CRE loan;

(E) Maintain the physical condition of collateral for the CRE loan described in paragraph (a)(1)(i) of this section;

(F) Comply with all environmental, zoning, building code, licensing and other laws, regulations, agreements, covenants, use restrictions, and proffers applicable to collateral for the CRE loan described in paragraph (a)(1)(i) of this section;

(G) Comply with leases, franchise agreements, condominium declarations, and other documents and agreements relating to the operation of collateral for the CRE loan described in paragraph (a)(1)(i) of this section, and to not modify any material terms and conditions of such agreements over the term of the loan without the consent of the originator or any subsequent holder of the loan, or the servicer; and

(H) Not materially alter collateral for the CRE loan described in paragraph (a)(1)(i) of this section without the consent of the originator or any subsequent holder of the loan, or the servicer.

(4) The loan documentation for the CRE loan prohibits the borrower and each operating affiliate from obtaining a loan secured by a junior lien on collateral for the CRE loan described in paragraph (a)(1)(i) or (a)(1)(ii)(A) of this section, unless:

(i) The sum of the principal amount of such junior lien loan, plus the principal amount of all other loans secured by collateral described in paragraph (a)(1)(i) or (a)(1)(ii)(A) of this section, does not exceed the applicable CLTV ratio in paragraph (a)(5) of this section, based on the appraisal at origination of such junior lien loan; or

(ii) Such loan is a purchase money obligation that financed the acquisition of machinery or equipment and the borrower or operating affiliate (as applicable) pledges such machinery and equipment as additional collateral for the CRE loan.

(5) At origination, the applicable loan-to-value ratios for the loan are:

(i) LTV less than or equal to 65 percent and CLTV less than or equal to 70 percent; or

(ii) LTV less than or equal to 60 percent and CLTV less than or equal to 65 percent, if an appraisal used to meet

the requirements set forth in paragraph (a)(2)(ii) of this section used a direct capitalization rate, and that rate is less than or equal to the sum of:

(A) The 10-year swap rate, as reported in the Federal Reserve's H.15 Report (or any successor report) as of the date concurrent with the effective date of such appraisal; and

(B) 300 basis points.

(iii) If the appraisal required under paragraph (a)(2)(ii) of this section included a direct capitalization method using an overall capitalization rate, that rate must be disclosed to potential investors in the securitization.

(6) All loan payments required to be made under the loan agreement are:

(i) Based on level monthly payments of principal and interest (at the fully indexed rate) to fully amortize the debt over a term that does not exceed 25 years, or 30 years for a qualifying multifamily loan; and

(ii) To be made no less frequently than monthly over a term of at least ten years.

(7) Under the terms of the loan agreement:

(i) Any maturity of the note occurs no earlier than ten years following the date of origination;

(ii) The borrower is not permitted to defer repayment of principal or payment of interest; and

(iii) The interest rate on the loan is:

(A) A fixed interest rate;

(B) An adjustable interest rate and the borrower, prior to or concurrently with origination of the CRE loan, obtained a derivative that effectively results in a fixed interest rate; or

(C) An adjustable interest rate and the borrower, prior to or concurrently with origination of the CRE loan, obtained a derivative that established a cap on the interest rate for the term of the loan, and the loan meets the underwriting criteria in paragraphs (a)(2)(vi) and (vii) of this section using the maximum interest rate allowable under the interest rate cap.

(8) The originator does not establish an interest reserve at origination to fund all or part of a payment on the loan.

(9) At the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction, all payments due on the loan are contractually current.

(10)(i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all qualifying CRE loans that collateralize the asset-backed security and that reduce the sponsor's risk retention requirement under § 373.15 meet all of the requirements set forth in paragraphs (a)(1) through (9) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (a)(10)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security;

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (a)(10)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any; and

(11) Within two weeks of the closing of the CRE loan by its originator or, if sooner, prior to the transfer of such CRE loan to the issuing entity, the originator shall have obtained a UCC lien search from the jurisdiction of organization of the borrower and each operating affiliate, that does not report, as of the time that the security interest of the originator in the property described in paragraph (a)(1)(iii) of this section was perfected, other higher priority liens of record on any property described in paragraph (a)(1)(iii) of this section, other than purchase money security interests.

(b) *Cure or buy-back requirement.* If a sponsor has relied on the exception provided in § 373.15 with respect to a qualifying CRE loan and it is subsequently determined that the CRE loan did not meet all of the requirements set forth in paragraphs (a)(1) through

(9) and (a)(11) of this section, the sponsor shall not lose the benefit of the exception with respect to the CRE loan if the depositor complied with the certification requirement set forth in paragraph (a)(10) of this section, and:

(1) The failure of the loan to meet any of the requirements set forth in paragraphs (a)(1) through (9) and (a)(11) of this section is not material; or;

(2) No later than 90 days after the determination that the loan does not meet one or more of the requirements of paragraphs (a)(1) through (9) or (a)(11) of this section, the sponsor:

(i) Effectuates cure, restoring conformity of the loan to the unmet requirements as of the date of cure; or

(ii) Repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) as of the date of repurchase.

(3) If the sponsor cures or repurchases pursuant to paragraph (b)(2) of this section, the sponsor must promptly notify, or cause to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is required to be cured or repurchased by the sponsor pursuant to paragraph (b)(2) of this section, including the principal amount of such repurchased loan(s) and the cause for such cure or repurchase.

§ 373.18 Underwriting standards for qualifying automobile loans.

(a) *Underwriting, product and other standards.* (1) Prior to origination of the automobile loan, the originator:

(i) Verified and documented that within 30 days of the date of origination:

(A) The borrower was not currently 30 days or more past due, in whole or in part, on any debt obligation;

(B) Within the previous 24 months, the borrower has not been 60 days or more past due, in whole or in part, on any debt obligation;

(C) Within the previous 36 months, the borrower has not:

(*1*) Been a debtor in a proceeding commenced under Chapter 7 (Liquidation), Chapter 11 (Reorganization), Chapter 12 (Family Farmer or Family Fisherman plan), or Chapter 13 (Individual Debt Adjustment) of the U.S. Bankruptcy Code; or

(*2*) Been the subject of any federal or State judicial judgment for the collection of any unpaid debt;

(D) Within the previous 36 months, no one-to-four family property owned by the borrower has been the subject of any foreclosure, deed in lieu of foreclosure, or short sale; or

(E) Within the previous 36 months, the borrower has not had any personal property repossessed;

(ii) Determined and documented that the borrower has at least 24 months of credit history; and

(iii) Determined and documented that, upon the origination of the loan, the borrower's DTI ratio is less than or equal to 36 percent.

(A) For the purpose of making the determination under paragraph (a)(1)(iii) of this section, the originator must:

(*1*) Verify and document all income of the borrower that the originator includes in the borrower's effective monthly income (using payroll stubs, tax returns, profit and loss statements, or other similar documentation); and

(*2*) On or after the date of the borrower's written application and prior to origination, obtain a credit report regarding the borrower from a consumer reporting agency that compiles and maintain files on consumers on a nationwide basis (within the meaning of 15 U.S.C. 1681a(p)) and verify that all outstanding debts reported in the borrower's credit report are incorporated into the calculation of the borrower's DTI ratio under paragraph (a)(1)(iii) of this section;

(2) An originator will be deemed to have met the requirements of paragraph (a)(1)(i) of this section if:

(i) The originator, no more than 30 days before the closing of the loan, obtains a credit report regarding the borrower from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis (within the meaning of 15 U.S.C. 1681a(p));

(ii) Based on the information in such credit report, the borrower meets all of the requirements of paragraph (a)(1)(i) of this section, and no information in a credit report subsequently obtained by the originator before the closing of the

loan contains contrary information; and

(iii) The originator obtains electronic or hard copies of the credit report.

(3) At closing of the automobile loan, the borrower makes a down payment from the borrower's personal funds and trade-in allowance, if any, that is at least equal to the sum of:

(i) The full cost of the vehicle title, tax, and registration fees;

(ii) Any dealer-imposed fees;

(iii) The full cost of any additional warranties, insurance or other products purchased in connection with the purchase of the vehicle; and

(iv) 10 percent of the vehicle purchase price.

(4) The originator records a first lien securing the loan on the purchased vehicle in accordance with State law.

(5) The terms of the loan agreement provide a maturity date for the loan that does not exceed the lesser of:

(i) Six years from the date of origination; or

(ii) 10 years minus the difference between the current model year and the vehicle's model year.

(6) The terms of the loan agreement:

(i) Specify a fixed rate of interest for the life of the loan;

(ii) Provide for a level monthly payment amount that fully amortizes the amount financed over the loan term;

(iii) Do not permit the borrower to defer repayment of principal or payment of interest; and

(iv) Require the borrower to make the first payment on the automobile loan within 45 days of the loan's contract date.

(7) At the cut-off date or similar date for establishing the composition of the securitized assets collateralizing the asset-backed securities issued pursuant to the securitization transaction, all payments due on the loan are contractually current; and

(8)(i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all qualifying automobile loans that collateralize the asset-backed security and that reduce the sponsor's risk retention requirement under § 373.15 meet all of the requirements set forth in paragraphs (a)(1) through (7) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (a)(8)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (a)(8)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any.

(b) *Cure or buy-back requirement.* If a sponsor has relied on the exception provided in § 373.15 with respect to a qualifying automobile loan and it is subsequently determined that the loan did not meet all of the requirements set forth in paragraphs (a)(1) through (7) of this section, the sponsor shall not lose the benefit of the exception with respect to the automobile loan if the depositor complied with the certification requirement set forth in paragraph (a)(8) of this section, and:

(1) The failure of the loan to meet any of the requirements set forth in paragraphs (a)(1) through (7) of this section is not material; or

(2) No later than ninety (90) days after the determination that the loan does not meet one or more of the requirements of paragraphs (a)(1) through (7) of this section, the sponsor:

(i) Effectuates cure, establishing conformity of the loan to the unmet requirements as of the date of cure; or

(ii) Repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) as of the date of repurchase.

(3) If the sponsor cures or repurchases pursuant to paragraph (b)(2) of this section, the sponsor must promptly notify, or cause to be notified, the holders of the asset-backed securities issued in the securitization transaction

of any loan(s) included in such securitization transaction that is required to be cured or repurchased by the sponsor pursuant to paragraph (b)(2) of this section, including the principal amount of such loan(s) and the cause for such cure or repurchase.

§ 373.19 General exemptions.

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

Community-focused residential mortgage means a residential mortgage exempt from the definition of ''covered transaction'' under §1026.43(a)(3)(iv) and (v) of the CFPB's Regulation Z (12 CFR 1026.43(a)).

First pay class means a class of ABS interests for which all interests in the class are entitled to the same priority of payment and that, at the time of closing of the transaction, is entitled to repayments of principal and payments of interest prior to or pro-rata with all other classes of securities collateralized by the same pool of first-lien residential mortgages, until such class has no principal or notional balance remaining.

Inverse floater means an ABS interest issued as part of a securitization transaction for which interest or other income is payable to the holder based on a rate or formula that varies inversely to a reference rate of interest.

Qualifying three-to-four unit residential mortgage loan means a mortgage loan that is:

(i) Secured by a dwelling (as defined in 12 CFR 1026.2(a)(19)) that is owner occupied and contains three-to-four housing units;

(ii) Is deemed to be for business purposes for purposes of Regulation Z under 12 CFR part 1026, Supplement I, paragraph 3(a)(5)(i); and

(iii) Otherwise meets all of the requirements to qualify as a qualified mortgage under §1026.43(e) and (f) of Regulation Z (12 CFR 1026.43(e) and (f)) as if the loan were a covered transaction under that section.

(b) This part shall not apply to:

(1) *U.S. Government-backed securitizations.* Any securitization transaction that:

(i) Is collateralized solely by residential, multifamily, or health care facility mortgage loan assets that are insured or guaranteed (in whole or in part) as to the payment of principal and interest by the United States or an agency of the United States, and servicing assets; or

(ii) Involves the issuance of asset-backed securities that:

(A) Are insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States; and

(B) Are collateralized solely by residential, multifamily, or health care facility mortgage loan assets or interests in such assets, and servicing assets.

(2) *Certain agricultural loan securitizations.* Any securitization transaction that is collateralized solely by loans or other assets made, insured, guaranteed, or purchased by any institution that is subject to the supervision of the Farm Credit Administration, including the Federal Agricultural Mortgage Corporation, and servicing assets;

(3) *State and municipal securitizations.* Any asset-backed security that is a security issued or guaranteed by any State, or by any political subdivision of a State, or by any public instrumentality of a State that is exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(2) of that Act (15 U.S.C. 77c(a)(2)); and

(4) *Qualified scholarship funding bonds.* Any asset-backed security that meets the definition of a qualified scholarship funding bond, as set forth in section 150(d)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 150(d)(2)).

(5) *Pass-through resecuritizations.* Any securitization transaction that:

(i) Is collateralized solely by servicing assets, and by asset-backed securities:

(A) For which credit risk was retained as required under subpart B of this part; or

(B) That were exempted from the credit risk retention requirements of this part pursuant to subpart D of this part;

(ii) Is structured so that it involves the issuance of only a single class of ABS interests; and

(iii) Provides for the pass-through of all principal and interest payments received on the underlying asset-backed securities (net of expenses of the issuing entity) to the holders of such class.

(6) *First-pay-class securitizations.* Any securitization transaction that:

(i) Is collateralized solely by servicing assets, and by first-pay classes of asset-backed securities collateralized by first-lien residential mortgages on properties located in any state:

(A) For which credit risk was retained as required under subpart B of this part; or

(B) That were exempted from the credit risk retention requirements of this part pursuant to subpart D of this part;

(ii) Does not provide for any ABS interest issued in the securitization transaction to share in realized principal losses other than pro rata with all other ABS interests issued in the securitization transaction based on the current unpaid principal balance of such ABS interests at the time the loss is realized;

(iii) Is structured to reallocate prepayment risk;

(iv) Does not reallocate credit risk (other than as a consequence of reallocation of prepayment risk); and

(v) Does not include any inverse floater or similarly structured ABS interest.

(7) *Seasoned loans.* (i) Any securitization transaction that is collateralized solely by servicing assets, and by seasoned loans that meet the following requirements:

(A) The loans have not been modified since origination; and

(B) None of the loans have been delinquent for 30 days or more.

(ii) For purposes of this paragraph, a *seasoned loan* means:

(A) With respect to asset-backed securities collateralized by residential mortgages, a loan that has been outstanding and performing for the longer of:

(*1*) A period of five years; or

(*2*) Until the outstanding principal balance of the loan has been reduced to 25 percent of the original principal balance.

(*3*) Notwithstanding paragraphs (b)(7)(ii)(A)(*1*) and (*2*) of this section, any residential mortgage loan that has been outstanding and performing for a period of at least seven years shall be deemed a seasoned loan.

(B) With respect to all other classes of asset-backed securities, a loan that has been outstanding and performing for the longer of:

(*1*) A period of at least two years; or

(*2*) Until the outstanding principal balance of the loan has been reduced to 33 percent of the original principal balance.

(8) *Certain public utility securitizations.* (i) Any securitization transaction where the asset-back securities issued in the transaction are secured by the intangible property right to collect charges for the recovery of specified costs and such other assets, if any, of an issuing entity that is wholly owned, directly or indirectly, by an investor owned utility company that is subject to the regulatory authority of a State public utility commission or other appropriate State agency.

(ii) For purposes of this paragraph:

(A) *Specified cost* means any cost identified by a State legislature as appropriate for recovery through securitization pursuant to specified cost recovery legislation; and

(B) *Specified cost recovery legislation* means legislation enacted by a State that:

(*1*) Authorizes the investor owned utility company to apply for, and authorizes the public utility commission or other appropriate State agency to issue, a financing order determining the amount of specified costs the utility will be allowed to recover;

(*2*) Provides that pursuant to a financing order, the utility acquires an intangible property right to charge, collect, and receive amounts necessary to provide for the full recovery of the specified costs determined to be recoverable, and assures that the charges are non-bypassable and will be paid by customers within the utility's historic service territory who receive utility goods or services through the utility's transmission and distribution system, even if those customers elect to purchase these goods or services from a third party; and

(*3*) Guarantees that neither the State nor any of its agencies has the authority to rescind or amend the financing order, to revise the amount of specified costs, or in any way to reduce or impair the value of the intangible property right, except as may be contemplated by periodic adjustments authorized by the specified cost recovery legislation.

(c) *Exemption for securitizations of assets issued, insured or guaranteed by the United States.* This part shall not apply to any securitization transaction if the asset-backed securities issued in the transaction are:

(1) Collateralized solely by obligations issued by the United States or an agency of the United States and servicing assets;

(2) Collateralized solely by assets that are fully insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States (other than those referred to in paragraph (b)(1)(i) of this section) and servicing assets; or

(3) Fully guaranteed as to the timely payment of principal and interest by the United States or any agency of the United States;

(d) *Federal Deposit Insurance Corporation securitizations.* This part shall not apply to any securitization transaction that is sponsored by the Federal Deposit Insurance Corporation acting as conservator or receiver under any provision of the Federal Deposit Insurance Act or of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(e) *Reduced requirement for certain student loan securitizations.* The 5 percent risk retention requirement set forth in § 373.4 shall be modified as follows:

(1) With respect to a securitization transaction that is collateralized solely by student loans made under the Federal Family Education Loan Program (''FFELP loans'') that are guaranteed as to 100 percent of defaulted principal and accrued interest, and servicing assets, the risk retention requirement shall be 0 percent;

(2) With respect to a securitization transaction that is collateralized solely by FFELP loans that are guaranteed as to at least 98 percent but less than 100 percent of defaulted principal and accrued interest, and servicing assets, the risk retention requirement shall be 2 percent; and

(3) With respect to any other securitization transaction that is collateralized solely by FFELP loans, and servicing assets, the risk retention requirement shall be 3 percent.

(f) *Community-focused lending securitizations.* (1) This part shall not apply to any securitization transaction if the asset-backed securities issued in the transaction are collateralized solely by community-focused residential mortgages and servicing assets.

(2) For any securitization transaction that includes both community-focused residential mortgages and residential mortgages that are not exempt from risk retention under this part, the percent of risk retention required under § 373.4(a) is reduced by the ratio of the unpaid principal balance of the community-focused residential mortgages to the total unpaid principal balance of residential mortgages that are included in the pool of assets collateralizing the asset-backed securities issued pursuant to the securitization transaction (the community-focused residential mortgage asset ratio); provided that:

(i) The community-focused residential mortgage asset ratio is measured as of the cut-off date or similar date for establishing the composition of the pool assets collateralizing the asset-backed securities issued pursuant to the securitization transaction; and

(ii) If the community-focused residential mortgage asset ratio would exceed 50 percent, the community-focused residential mortgage asset ratio shall be deemed to be 50 percent.

(g) *Exemptions for securitizations of certain three-to-four unit mortgage loans.* A sponsor shall be exempt from the risk retention requirements in subpart B of this part with respect to any securitization transaction if:

(1)(i) The asset-backed securities issued in the transaction are collateralized solely by qualifying three-to-four unit residential mortgage loans and servicing assets; or

(ii) The asset-backed securities issued in the transaction are collateralized solely by qualifying three-to-four unit residential mortgage loans, qualified residential mortgages

as defined in §373.13, and servicing assets.

(2) The depositor with respect to the securitization provides the certifications set forth in §373.13(b)(4) with respect to the process for ensuring that all assets that collateralize the asset-backed securities issued in the transaction are qualifying three-to-four unit residential mortgage loans, qualified residential mortgages, or servicing assets; and

(3) The sponsor of the securitization complies with the repurchase requirements in §373.13(c) with respect to a loan if, after closing, it is determined that the loan does not meet all of the criteria to be either a qualified residential mortgage or a qualifying three-to-four unit residential mortgage loan, as appropriate.

(h) *Rule of construction.* Securitization transactions involving the issuance of asset-backed securities that are either issued, insured, or guaranteed by, or are collateralized by obligations issued by, or loans that are issued, insured, or guaranteed by, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a Federal home loan bank shall not on that basis qualify for exemption under this part.

§ 373.20 Safe harbor for certain foreign-related transactions.

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

U.S. person means:

(i) Any of the following:

(A) Any natural person resident in the United States;

(B) Any partnership, corporation, limited liability company, or other organization or entity organized or incorporated under the laws of any State or of the United States;

(C) Any estate of which any executor or administrator is a U.S. person (as defined under any other clause of this definition);

(D) Any trust of which any trustee is a U.S. person (as defined under any other clause of this definition);

(E) Any agency or branch of a foreign entity located in the United States;

(F) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person (as defined under any other clause of this definition);

(G) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(H) Any partnership, corporation, limited liability company, or other organization or entity if:

(*1*) Organized or incorporated under the laws of any foreign jurisdiction; and

(*2*) Formed by a U.S. person (as defined under any other clause of this definition) principally for the purpose of investing in securities not registered under the Act; and

(ii) ''U.S. person(s)'' does not include:

(A) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a person not constituting a U.S. person (as defined in paragraph (i) of this section) by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(B) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person (as defined in paragraph (i) of this section) if:

(*1*) An executor or administrator of the estate who is not a U.S. person (as defined in paragraph (i) of this section) has sole or shared investment discretion with respect to the assets of the estate; and

(*2*) The estate is governed by foreign law;

(C) Any trust of which any professional fiduciary acting as trustee is a U.S. person (as defined in paragraph (i) of this section), if a trustee who is not a U.S. person (as defined in paragraph (i) of this section) has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person (as defined in paragraph (i) of this section);

(D) An employee benefit plan established and administered in accordance with the law of a country other than

the United States and customary practices and documentation of such country;

(E) Any agency or branch of a U.S. person (as defined in paragraph (i) of this section) located outside the United States if:

(*1*) The agency or branch operates for valid business reasons; and

(*2*) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located;

(F) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(b) *In general.* This part shall not apply to a securitization transaction if all the following conditions are met:

(1) The securitization transaction is not required to be and is not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*);

(2) No more than 10 percent of the dollar value (or equivalent amount in the currency in which the ABS interests are issued, as applicable) of all classes of ABS interests in the securitization transaction are sold or transferred to U.S. persons or for the account or benefit of U.S. persons;

(3) Neither the sponsor of the securitization transaction nor the issuing entity is:

(i) Chartered, incorporated, or organized under the laws of the United States or any State;

(ii) An unincorporated branch or office (wherever located) of an entity chartered, incorporated, or organized under the laws of the United States or any State; or

(iii) An unincorporated branch or office located in the United States or any State of an entity that is chartered, incorporated, or organized under the laws of a jurisdiction other than the United States or any State; and

(4) If the sponsor or issuing entity is chartered, incorporated, or organized under the laws of a jurisdiction other than the United States or any State, no more than 25 percent (as determined based on unpaid principal balance) of the assets that collateralize the ABS interests sold in the securitization transaction were acquired by the sponsor or issuing entity, directly or indirectly, from:

(i) A majority-owned affiliate of the sponsor or issuing entity that is chartered, incorporated, or organized under the laws of the United States or any State; or

(ii) An unincorporated branch or office of the sponsor or issuing entity that is located in the United States or any State.

(c) *Evasions prohibited.* In view of the objective of these rules and the policies underlying Section 15G of the Exchange Act, the safe harbor described in paragraph (b) of this section is not available with respect to any transaction or series of transactions that, although in technical compliance with paragraphs (a) and (b) of this section, is part of a plan or scheme to evade the requirements of section 15G and this part. In such cases, compliance with section 15G and this part is required.

§ 373.21 Additional exemptions.

(a) *Securitization transactions.* The federal agencies with rulewriting authority under section 15G(b) of the Exchange Act (15 U.S.C. 78o-11(b)) with respect to the type of assets involved may jointly provide a total or partial exemption of any securitization transaction as such agencies determine may be appropriate in the public interest and for the protection of investors.

(b) *Exceptions, exemptions, and adjustments.* The Federal banking agencies and the Commission, in consultation with the Federal Housing Finance Agency and the Department of Housing and Urban Development, may jointly adopt or issue exemptions, exceptions or adjustments to the requirements of this part, including exemptions, exceptions or adjustments for classes of institutions or assets in accordance with section 15G(e) of the Exchange Act (15 U.S.C. 78o-11(e)).

§ 373.22 Periodic review of the QRM definition, exempted three-to-four unit residential mortgage loans, and community-focused residential mortgage exemption

(a) The Federal banking agencies and the Commission, in consultation with the Federal Housing Finance Agency and the Department of Housing and Urban Development, shall commence a review of the definition of qualified residential mortgage in §373.13, a review of the community-focused residential mortgage exemption in §373.19(f), and a review of the exemption for qualifying three-to-four unit residential mortgage loans in §373.19(g):

(1) No later than four years after the effective date of the rule (as it relates to securitizers and originators of asset-backed securities collateralized by residential mortgages), five years following the completion of such initial review, and every five years thereafter; and

(2) At any time, upon the request of any Federal banking agency, the Commission, the Federal Housing Finance Agency or the Department of Housing and Urban Development, specifying the reason for such request, including as a result of any amendment to the definition of qualified mortgage or changes in the residential housing market.

(b) The Federal banking agencies, the Commission, the Federal Housing Finance Agency and the Department of Housing and Urban Development shall publish in the FEDERAL REGISTER notice of the commencement of a review and, in the case of a review commenced under paragraph (a)(2) of this section, the reason an agency is requesting such review. After completion of any review, but no later than six months after the publication of the notice announcing the review, unless extended by the agencies, the agencies shall jointly publish a notice disclosing the determination of their review. If the agencies determine to amend the definition of qualified residential mortgage, the agencies shall complete any required rulemaking within 12 months of publication in the FEDERAL REGISTER of such notice disclosing the determination of their review, unless extended by the agencies.

PART 380—ORDERLY LIQUIDATION AUTHORITY

Subpart A—General and Miscellaneous Provisions

Subpart B—Priorities

Subpart C—Receivership Administrative Claims Process

Subpart D—Orderly Liquidation of Covered Brokers or Dealers

AUTHORITY: 12 U.S.C. 5385(h); 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D); 12 U.S.C. 5381(b); 12 U.S.C. 5390(r); 12 U.S.C. 5390(a)(16)(D).

SOURCE: 76 FR 4215, Jan. 25, 2011, unless otherwise noted.

Subpart A—General and Miscellaneous Provisions

§ 380.1 Definitions.

For purposes of this part, the following terms are defined as follows:

Affiliate. The term ''*affiliate*'' means any company that controls, is controlled by, or is under common control with another company at the time of, or immediately prior to, the appointment of receiver of the covered financial company.

Allowed claim. The term ''allowed claim'' means a claim against the covered financial company or receiver that is allowed by the Corporation as 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.

Board of Governors. The term ''Board of Governors'' means the Board of Governors of the Federal Reserve System.

Bridge financial company. The term ''bridge financial company'' means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered financial company.

Business day. The term ''*business day*'' means any day other than any Saturday, Sunday or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

Claim. The term ''claim'' means any right to payment from either the covered financial company or the Corporation as receiver, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

Compensation. The term ''compensation'' means any direct or indirect financial remuneration received from the covered financial company, including, but not limited to, salary; bonuses; incentives; benefits; severance pay; deferred compensation; golden parachute benefits; benefits derived from an employment contract, or other compensation or benefit arrangement; perquisites; stock option plans; post-employment benefits; profits realized from a sale of securities in the covered financial company; or any cash or noncash payments or benefits granted to or for the benefit of the senior executive or director.

Control. The term ''*control*'', when used in the definitions of ''affiliate'' and ''subsidiary'', has the meaning given to such term under 12 U.S.C. 1841(a)(2)(A) and (B) as such law, or any successor, may be in effect at the date of the appointment of the receiver, together with any regulations promulgated thereunder then in effect.

Corporation. The term ''Corporation'' means the Federal Deposit Insurance Corporation.

Covered financial company. The term ''covered financial company'' means (a) a financial company for which a determination has been made under 12 U.S.C. 5383(b) and (b) does not include an insured depository institution.

Covered subsidiary. The term ''covered subsidiary'' means a subsidiary of a covered financial company other than:

(1) An insured depository institution;

(2) An insurance company; or

(3) A covered broker or dealer.

Creditor. The term ''creditor'' means a person asserting a claim.

Director. The term ''director'' means a member of the board of directors of a company or of a board or committee performing a similar function to a board of directors with authority to vote on matters before the board or committee.

Dodd-Frank Act. The term ''Dodd-Frank Act'' shall mean the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 12 U.S.C. 5301 *et seq*. (2010).

Employee benefit plan. The term ''employee benefit plan'' has the meaning set forth in the Employee Retirement Income Security Act, 29 U.S.C. 1002(3).

Insurance company. The term ''insurance company'' means any entity that is:

(1) Engaged in the business of insurance,

(2) Subject to regulation by a State insurance regulator, and

(3) Covered by a State law that is designed to specifically deal with the rehabilitation, liquidation or insolvency of an insurance company.

Intermediate insurance stock holding company. The term ''*intermediate insurance stock holding company*'' means a corporation organized either at the time of, or at any time after, the organization of the mutual insurance holding company that:

(1) Is a subsidiary of a mutual insurance holding company;

(2) Holds a majority of the issued and outstanding voting stock of the converted mutual insurance company created at the time of formation of the mutual insurance holding company; and

(3) Holds, as its largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter), an insurance company.

Mutual insurance company. The term ''*mutual insurance company*'' means an insurance company organized under the laws of a State that provides for the formation of such an entity as a non-stock mutual corporation in which the surplus and voting rights are vested in the policyholders.

Mutual insurance holding company. The term ''*mutual insurance holding company*'' means a corporation that:

(1) Is lawfully organized under state law authorizing its formation in connection with the reorganization of a mutual insurance company that converts the mutual insurance company to a stock insurance company, and—

(2) Holds either:

(i) A majority of the issued and outstanding voting stock of the intermediate insurance stock holding company, if any, or

(ii) If there is no intermediate insurance stock holding company, a majority of the issued and outstanding voting stock of the converted mutual insurance company.

Senior executive. The term ''senior executive'' means any person who participates or has authority to participate (other than in the capacity of a director) in major policymaking functions of the company, whether or not: The person has an official title; the title designates the officer an assistant; or the person is serving without salary or other compensation. The chairman of the board, the president, every vice president, the secretary, and the treasurer or chief financial officer, general partner and manager of a company are considered senior executives, unless the person is excluded, by resolution of the board of directors, the bylaws, the operating agreement or the partnership agreement of the company, from participation (other than in the capacity of a director) in major policymaking functions of the company, and the person does not actually participate therein.

Subsidiary. The term ''*subsidiary*'' means any company which is controlled by another company at the time of, or immediately prior to, the appointment of receiver of the covered financial company.

[76 FR 41639, July 15, 2011, as amended at 77 FR 25353, Apr. 30, 2012; 77 FR 63214, Oct. 16, 2012]

§ 380.2 [Reserved]

§ 380.3 Treatment of personal service agreements.

(a) For the purposes of this section, the term ''personal service agreement'' means a written agreement between an employee and a covered financial company or a bridge financial company setting forth the terms of employment. This term also includes an agreement

between any group or class of employees and a covered financial company, or a bridge financial company, including, without limitation, a collective bargaining agreement.

(b)(1) If before repudiation or disaffirmance of a personal service agreement, the Corporation as receiver of a covered financial company, or a bridge financial company accepts performance of services rendered under such agreement, then:

(i) The terms and conditions of such agreement shall apply to the performance of such services; and

(ii) Any payments for the services accepted by the Corporation as receiver shall be treated as an administrative expense of the receiver.

(2) If a bridge financial company accepts performance of services rendered under such agreement, then the terms and conditions of such agreement shall apply to the performance of such services.

(c) No party acquiring a covered financial company or any operational unit, subsidiary or assets thereof from the Corporation as receiver or from any bridge financial company shall be bound by a personal service agreement unless the acquiring party expressly assumes the personal service agreement.

(d) The acceptance by the Corporation as receiver for a covered financial company, or by any bridge financial company or the Corporation as receiver for a bridge financial company of services subject to a personal service agreement shall not limit or impair the authority of the receiver to disaffirm or repudiate any personal service agreement in the manner provided for the disaffirmance or repudiation of any agreement under 12 U.S.C. 5390(c).

(e) Paragraph (b) of this section shall not apply to any personal service agreement with any senior executive or director of the covered financial company or covered subsidiary, nor shall it in any way limit or impair the ability of the receiver to recover compensation from any senior executive or director of a covered financial company under 12 U.S.C. 5390 and the regulations promulgated thereunder.

[76 FR 41640, July 15, 2011]

§ 380.4 [Reserved]

§ 380.5 Treatment of covered financial companies that are subsidiaries of insurance companies.

The Corporation as receiver shall distribute the value realized from the liquidation, transfer, sale or other disposition of the direct or indirect subsidiaries of an insurance company, that are not themselves insurance companies, solely in accordance with the order of priorities set forth in 12 U.S.C. 5390(b)(1) and the regulations promulgated thereunder.

[76 FR 41640, July 15, 2011]

§ 380.6 Limitation on liens on assets of covered financial companies that are insurance companies or covered subsidiaries of insurance companies.

(a) In the event that the Corporation makes funds available to a covered financial company that is an insurance company or to any covered subsidiary of an insurance company, or enters into any other transaction with respect to such covered entity under 12 U.S.C. 5384(d), the Corporation will exercise its right to take liens on any or all assets of the covered entities receiving such funds to secure repayment of any such transactions only when the Corporation, in its sole discretion, determines that:

(1) Taking such lien is necessary for the orderly liquidation of the entity; and

(2) Taking such lien will not either unduly impede or delay the liquidation or rehabilitation of such insurance company, or the recovery by its policyholders.

(b) This section shall not be construed to restrict or impair the ability of the Corporation to take a lien on any or all of the assets of any covered financial company or covered subsidiary in order to secure financing provided by the Corporation or the receiver in connection with the sale or transfer of the covered financial company or covered subsidiary or any or all of the assets of such covered entity.

[76 FR 41640, July 15, 2011]

§ 380.7 Recoupment of compensation from senior executives and directors.

(a) *Substantially responsible.* The Corporation, as receiver of a covered financial company, may file an action to recover from any current or former senior executive or director substantially responsible for the failed condition of the covered financial company any compensation received during the 2-year period preceding the date on which the Corporation was appointed as the receiver of the covered financial company, except that, in the case of fraud, no time limit shall apply. A senior executive or director shall be deemed to be substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act if he or she:

(1) Failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances, and

(2) As a result, individually or collectively, caused a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.

(b) *Presumptions.* The following presumptions shall apply for purposes of assessing whether a senior executive or director is substantially responsible for the failed condition of a covered financial company:

(1) It shall be presumed that a senior executive or director is substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act under any of the following circumstances:

(i) The senior executive or director served as the chairman of the board of directors, chief executive officer, president, chief financial officer, or in any other similar role regardless of his or her title if in this role he or she had responsibility for the strategic, policy-making, or company-wide operational decisions of the covered financial company prior to the date that it was placed into receivership under the orderly liquidation authority of the Dodd-Frank Act;

(ii) The senior executive or director is adjudged liable by a court or tribunal of competent jurisdiction for having breached his or her duty of loyalty to the covered financial company;

(iii) The senior executive was removed from the management of the covered financial company under 12 U.S.C. 5386(4); or

(iv) The director was removed from the board of directors of the covered financial company under 12 U.S.C. 5386(5).

(2) The presumption under paragraph (b)(1)(i) of this section may be rebutted by evidence that the senior executive or director conducted his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The presumptions under paragraphs (b)(1)(ii), (b)(1)(iii) and (b)(1)(iv) of this section may be rebutted by evidence that the senior executive or director did not cause a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.

(3) The presumptions do not apply to:

(i) A senior executive hired by the covered financial company during the two years prior to the Corporation's appointment as receiver to assist in preventing further deterioration of the financial condition of the covered financial company; or

(ii) A director who joined the board of directors of the covered financial company during the two years prior to the Corporation's appointment as receiver under an agreement or resolution to assist in preventing further deterioration of the financial condition of the covered financial company.

(4) Notwithstanding that the presumption does not apply under paragraphs (b)(3)(i) and (ii) of this section, the Corporation as receiver still may pursue recoupment of compensation from a senior executive or director in paragraphs (b)(3)(i) or (ii) if they are substantially responsible for the failed condition of the covered financial company.

(c) *Savings Clause.* Nothing in this section shall limit or impair any rights of the Corporation as receiver under other applicable law, including any rights under title II of the Dodd-Frank Act to pursue any other claims or causes of action it may have against senior executives and directors of the covered financial company for losses they cause to the covered financial company in the same or separate actions.

[76 FR 41640, July 15, 2011]

§ 380.8 Predominantly engaged in activities that are financial or incidental thereto.

(a) For purposes of sections 201(a)(11) and 201(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (''Dodd-Frank Act'') and this part, a company is predominantly engaged in activities that the Board of Governors of the Federal Reserve System (''Board of Governors'') has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (''BHC Act'') (12 U.S.C. 1843(k)), if:

(1) At least 85 percent of the total consolidated revenues of such company (determined in accordance with applicable accounting standards) for either of its two most recently completed fiscal years were derived, directly or indirectly, from financial activities, or

(2) Based upon all of the relevant facts and circumstances, the consolidated revenues of the company from financial activities constitute 85 percent or more of the total consolidated revenues of the company.

(b) For purposes of paragraph (a) of this section, the following definitions apply:

(1) The term ''applicable accounting standards'' means the accounting standards utilized by the company in the ordinary course of business in preparing its consolidated financial statements, provided that those standards are:

(i) U.S. generally accepted accounting principles,

(ii) International Financial Reporting Standards, or

(iii) Such other accounting standards that are determined to be appropriate on a case-by-case basis.

(2) The terms ''broker'' and ''dealer'' have the same meanings as in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).

(3) The term ''financial activity'' means:

(i) Lending, exchanging, transferring, investing for others, or safeguarding money or securities.

(ii) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any state.

(iii) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).

(iv) Issuing or selling instruments representing interests in pools of assets permissible for a bank to hold directly.

(v) Underwriting, dealing in, or making a market in securities.

(vi) Engaging in any activity that the Board of Governors has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, which include—

(A) Extending credit and servicing loans. Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.

(B) Activities related to extending credit. Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, including the following activities—

(*1*) Real estate and personal property appraising. Performing appraisals of real estate and tangible and intangible personal property, including securities.

(*2*) Arranging commercial real estate equity financing. Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors.

[1] 12 U.S.C. 5381(a)(11) and (b).

(*3*) Check-guaranty services. Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.

(*4*) Collection agency services. Collecting overdue accounts receivable, either retail or commercial.

(*5*) Credit bureau services. Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.

(*6*) Asset management, servicing, and collection activities. Engaging under contract with a third party in asset management, servicing, and collection[2] of assets of a type that an insured depository institution may originate and own.

(*7*) Acquiring debt in default. Acquiring debt that is in default at the time of acquisition.

(*8*) Real estate settlement servicing. Providing real estate settlement services.[3]

(C) Leasing personal or real property. Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if—

(*1*) The lease is on a nonoperating basis;[4]

(*2*) The initial term of the lease is at least 90 days; and

(*3*) In the case of leases involving real property:

(*i*) At the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

(*ii*) The estimated residual value of property for purposes of paragraph (b)(2)(vi)(C)(*3*)(*i*) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

(D) Operating nonbank depository institutions—(*1*) Industrial banking. Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company that is not a bank for purposes of the BHC Act.

(*2*) Operating savings associations. Owning, controlling, or operating a savings association.

(E) Trust company functions. Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law that is not a bank for purposes of section 2(c) of the BHC Act.

(F) Financial and investment advisory activities. Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing):

(*1*) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(*2*) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

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[2] Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

[3] For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.

[4] The requirement that the lease is on a nonoperating basis means that the company does not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease is on a nonoperating basis means that the company does not, directly or indirectly: (1) Provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts and accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor.

(*3*) Providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions, and conducting financial feasibility studies;[5]

(*4*) Providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments;

(*5*) Providing educational courses, and instructional materials to consumers on individual financial management matters; and

(*6*) Providing tax-planning and tax-preparation services to any person.

(G) Agency transactional services for customer investments—(*1*) Securities brokerage. Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activities and custodial services).

(*2*) Riskless principal transactions. Buying and selling in the secondary market all types of securities on the order of customers as a ''riskless principal'' to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(*3*) Private placement services. Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 (''1933 Act'') and the rules of the Securities and Exchange Commission.

(*4*) Futures commission merchant. Acting as a futures commission merchant (''FCM'') for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract.

(*5*) Other transactional services. Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(2)(vi)(H) of this section, any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange.

(H) Investment transactions as principal—(*1*) Underwriting and dealing in government obligations and money market instruments. Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including banker's acceptances and certificates of deposit.

(*2*) Investing and trading activities. Engaging as principal in:

(*i*) Foreign exchange;

(*ii*) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal), nonfinancial asset, or group of assets, other than a bank-ineligible security,[6] if: a state member bank is authorized to invest in the asset underlying the contract; the contract requires cash settlement; the contract allows for assignment, termination, or offset prior to delivery or expiration, and the company makes every reasonable effort to avoid taking or making delivery of the asset underlying the contract, or receives and instantaneously transfers title to the underlying asset, by operation of contract and without taking or making physical delivery of the asset; or the contract does not allow for assignment, termination, or offset prior to delivery or expiration and is based on an asset for

[5] Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

[6] A bank-ineligible security is any security that a state member bank is not permitted to underwrite or deal in under 12 U.S.C. 24 and 335.

which futures contracts or options on futures contracts have been approved for trading on a U.S. contract market by the Commodity Futures Trading Commission, and the company makes every reasonable effort to avoid taking or making delivery of the asset underlying the contract, or receives and instantaneously transfers title to the underlying asset, by operation of contract and without taking or making physical delivery of the asset.

(*iii*) Forward contracts, options,[7] futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets, if the contract requires cash settlement.

(*3*) Buying and selling bullion, and related activities. Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(I) Management consulting and counseling activities—(*1*) Management consulting. Providing management consulting advice:[8]

(*i*) On any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

(*ii*) On any financial, economic, accounting, or audit matter to any other company.

(*2*) Revenues derived from a company's management consulting activities under this paragraph (b)(3)(vi) will not be considered to be financial if the company:

(*i*) Owns or controls, directly or indirectly, more than 5 percent of the voting securities of the client institution; or

(*ii*) Allows a management official, as defined in 12 CFR 212.2(h), of the company or any of its affiliates to serve as a management official of the client institution, except where such interlocking relationship is permitted pursuant to an exemption permitted by the Board of Governors.

(*3*) Up to 30 percent of a nonbank company's revenues related to management consulting services provided to customers not described in paragraph (b)(3)(vi)(I)(*1*)(*i*) or regarding matters not described in paragraph (b)(3)(vi)(I)(*1*)(*ii*) of this section will be included in the company's financial revenues.

(*4*) Employee benefits consulting services. Providing consulting services to employee benefit, compensation and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(*5*) Career counseling services. Providing career counseling services to:

(*i*) A financial organization[9] and individuals currently employed by, or recently displaced from, a financial organization;

(*ii*) Individuals who are seeking employment at a financial organization; and

[7] This reference does not include acting as a dealer in options based on indices of bank-ineligible securities when the options are traded on securities exchanges. These options are securities for purposes of the federal securities laws and bank-ineligible securities for purposes of section 20 of the Glass-Steagall Act, 12 U.S.C. 337. Similarly, this reference does not include acting as a dealer in any other instrument that is a bank-ineligible security for purposes of section 20. Bank holding companies that deal in these instruments must do so in accordance with the Board of Governor's orders on dealing in bank-ineligible securities.

[8] In performing this activity, companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board of Governors' interpretation of bank management consulting advice (12 CFR 225.131).

[9] Financial organization refers to insured depository institution holding companies and their subsidiaries, other than nonbanking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the BHC Act (12 U.S.C. 1842(c)(8)).

(*iii*) Individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

(J) Support services—(*1*) Courier services. Providing courier services for:

(*i*) Checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and

(*ii*) Audit and accounting media of a banking or financial nature and other business records and documents used in processing such media.[10]

(*2*) Printing and selling MICR-encoded items. Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require Magnetic Ink Character Recognition (MICR) encoding.

(K) Insurance agency and underwriting—(*1*) Credit insurance. Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is:

(*i*) Directly related to an extension of credit by the company or any of its subsidiaries; and

(*ii*) Limited to ensuring the repayment of the outstanding balance due on the extension of credit[11] in the event of the death, disability, or involuntary unemployment of the debtor.

(*2*) Finance company subsidiary. Acting as agent or broker for insurance directly related to an extension of credit by a finance company[12] that is a subsidiary of a company, if:

(*i*) The insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the event of loss or damage to any property used as collateral for the extension of credit; and

(*ii*) The extension of credit is not more than $10,000, or $25,000 if it is to finance the purchase of a residential manufactured home[13] and the credit is secured by the home; and

(*iii*) The applicant commits to notify borrowers in writing that: they are not required to purchase such insurance from the applicant; such insurance does not insure any interest of the borrower in the collateral; and the applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(*3*) Insurance in small towns. Engaging in any insurance agency activity in a place where the company or a subsidiary has a lending office and that:

(*i*) Has a population not exceeding 5,000 (as shown in the preceding decennial census); or

(*ii*) Has inadequate insurance agency facilities, as determined by the Board of Governors, after notice and opportunity for hearing.

(*4*) Insurance-agency activities conducted on May 1, 1982. Engaging in any specific insurance-agency activity[14] if the company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received approval from the Board of Governors to conduct such activity on or before May

[10] See also the Board of Governors' interpretation on courier activities (12 CFR 225.129), which sets forth conditions for company entry into the activity.

[11] Extension of credit includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(2)(vi)(C) of this section.

[12] Finance company includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

[13] These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.

[14] Nothing contained in this provision precludes a subsidiary that is authorized to engage in a specific insurance-agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes.

1, 1982.[15] Revenues derived from a company's specific insurance agency activity under this clause will be considered financial only if the company:

(*i*) Engages in such specific insurance agency activity only at locations: in the state in which the company has its principal place of business (as defined in 12 U.S.C. 1842(d)); in any state or states immediately adjacent to such state; and in any state in which the specific insurance-agency activity was conducted (or was approved to be conducted) by such company or subsidiary thereof or by any other subsidiary of such company on May 1, 1982; and

(*ii*) Provides other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by the company or subsidiary.

(*5*) Supervision of retail insurance agents. Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell:

(*i*) Fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the company or its subsidiaries; and

(*ii*) Group insurance that protects the employees of the company or its subsidiaries.

(*6*) Small companies. Engaging in any insurance-agency activity if the company has total consolidated assets of $50 million or less. Revenues derived from a company's insurance-agency activities under this paragraph will be considered financial only if the company does not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(3)(vi)(K)(*1*) and (*3*) of this section, and does not continue to engage in insurance-agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the company and its subsidiaries exceed $50 million.

(*7*) Insurance-agency activities conducted before 1971. Engaging in any insurance-agency activity performed at any location in the United States directly or indirectly by a company that was engaged in insurance-agency activities prior to January 1, 1971, as a consequence of approval by the Board of Governors prior to January 1, 1971.

(L) Community development activities—(*1*) Financing and investment activities. Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.

(*2*) Advisory activities. Providing advisory and related services for programs designed primarily to promote community welfare.

(M) Money orders, savings bonds, and traveler's checks. The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

(N) Data processing.

(*1*) Providing data processing, data storage and data transmission services, facilities (including data processing, data storage and data transmission hardware, software, documentation, or operating personnel), databases, advice, and access to such services, facilities, or databases by any technological means, if the data to be processed, stored or furnished are financial, banking or economic.

(*2*) Up to 30 percent of a nonbank company's revenues related to providing general purpose hardware in connection with providing data processing products or services described in (b)(2)(vi)(N)(*1*) of this section will be included in the company's financial revenues.

(O) Administrative services. Providing administrative and other services to mutual funds.

[15] For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board of Governors on May 1, 1982, and approved subsequently by the Board of Governors or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition.

(P) Securities exchange. Owning shares of a securities exchange.

(Q) Certification authority. Acting as a certification authority for digital signatures and authenticating the identity of persons conducting financial and nonfinancial transactions.

(R) Employment histories. Providing employment histories to third parties for use in making credit decisions and to depository institutions and their affiliates for use in the ordinary course of business.

(S) Check cashing and wire transmission. Check cashing and wire transmission services.

(T) Services offered in connection with banking services. In connection with offering banking services, providing notary public services, selling postage stamps and postage-paid envelopes, providing vehicle registration services, and selling public transportation tickets and tokens.

(U) Real estate title abstracting.

(vii) Engaging, in the United States, in any activity that a bank holding company may engage in outside of the United States; and the Board has determined, under regulations prescribed or interpretations issued pursuant to section 4(c)(13) of the BHC Act of 1956 (12 U.S.C. 1843(c)(13)) to be usual in connection with the transaction of banking or other financial operations abroad. Those activities include—

(A) Providing management consulting services, including to any person with respect to nonfinancial matters, so long as the management consulting services are advisory and do not allow the company to control the person to which the services are provided.

(B) Operating a travel agency in connection with financial services.

(C) Organizing, sponsoring, and managing a mutual fund.

(D) Commercial banking and other banking activities.

(viii)(A) Acting as a finder in bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate, including providing any or all of the following services through any means—

(*1*) Identifying potential parties, making inquiries as to interest, introducing, and referring potential parties to each other, and arranging contacts between and meetings of interested parties;

(*2*) Conveying between interested parties expressions of interest, bids, offers, orders and confirmations relating to a transaction; and

(*3*) Transmitting information conveying products and services to potential parties in connection with the activities described paragraphs (b)(3)(viii)(A)(*1*) and (*2*) of this section.

(B) The following are examples of finder services when done in accordance with paragraphs (b)(3)(viii)(C)–(D) of this section. These examples are not exclusive.

(*1*) Hosting an electronic marketplace on the company's Internet Web site by providing hypertext or similar links to the Web sites of third party buyers or sellers.

(*2*) Hosting on the company's servers the Internet Web site of—

(*i*) A buyer (or seller) that provides information concerning the buyer (or seller) and the products or services it seeks to buy (or sell) and allows sellers (or buyers) to submit expressions of interest, bids, offers, orders and confirmations relating to such products or services; or

(*ii*) A government or government agency that provides the information concerning the services or benefits made available by government or government agency, assists persons in completing applications to receive such services or benefits from the government or agency, and allows persons to transmit their applications for services or benefits to the government or agency.

(*3*) Operating an Internet Web site that allows multiple buyers and sellers to exchange information concerning the products and services that they are willing to purchase or sell, locate potential counterparties for transactions, aggregate orders for goods or services with those made by other parties, and enter into transactions between themselves.

(*4*) Operating a telephone call center that provides permissible finder services.

(C) To be a finder service for purposes of this section, the company providing

the service must comply with the following limitations.

(*1*) A company providing the service may act only as an intermediary between a buyer and a seller.

(*2*) A company providing the service may not bind any buyer or seller to the terms of a specific transaction or negotiate the terms of a specific transaction on behalf of a buyer or seller, except that the company may—

(*i*) Arrange for buyers to receive preferred terms from sellers so long as the terms are not negotiated as part of any individual transaction, are provided generally to customers or broad categories of customers, and are made available by the seller (and not by the company); and

(*ii*) Establish rules of general applicability governing the use and operation of the finder service, including rules that govern the submission of bids and offers by buyers and sellers that use the finder service and the circumstances under which the finder service will match bids and offers submitted by buyers and sellers, and govern the manner in which buyers and sellers may bind themselves to the terms of a specific transaction.

(*3*) Services provided by a company will not be considered finder services if the company providing the service—

(*i*) Takes title to or acquires or holds an ownership interest in any product or service offered or sold through the finder service;

(*ii*) Provides distribution services for physical products or services offered or sold through the finder service;

(*iii*) Owns or operates any real or personal property that is used for the purpose of manufacturing, storing, transporting, or assembling physical products offered or sold by third parties; or

(*iv*) Owns or operates any real or personal property that serves as a physical location for the physical purchase, sale or distribution of products or services offered or sold by third parties.

(D) Services provided by a company will not be considered finder services if the company providing such services engages in any activity that would require the company to register or obtain a license as a real estate agent or broker under applicable law.

(E) To be a finder service for purposes of this section, a company providing the service must distinguish the products and services offered by the company from those offered by a third party through the finder service.

(ix) Directly, or indirectly acquiring or controlling, whether as principal, on behalf of one or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates, or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity, engaged in any activity not financial in nature as defined in this section if:

(A) Such shares, assets, or ownership interests are acquired and held as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment;

(B) Such shares, assets, or ownership interests are held for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities described in paragraph (b)(3)(ix)(A) of this section; and

(C) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company or entity except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition.

(x) Directly or indirectly acquiring or controlling, whether as principal, on behalf of one or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity engaged in any activity not financial in nature as defined in this section if—

(A) Such shares, assets, or ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident and health, or property and

casualty insurance (other than credit-related insurance) or providing and issuing annuities;

(B) Such shares, assets, or ownership interests represent an investment made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments; and

(C) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

(xi) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.

(xii) Providing any device or other instrumentality for transferring money or other financial assets.

(xiii) Arranging, effecting, or facilitating financial transactions for the account of third parties.

(xiv) Ownership or control of one or more depository institutions.

(4) The term ''recommending agencies'' means:

(i) The Board of Governors and the Securities and Exchange Commission in consultation with the FDIC, for a company;

(A) That is a broker or a dealer; or

(B) Whose largest U.S. subsidiary is a broker or a dealer;

(ii) The Board of Governors and the Director of the Federal Insurance Office in consultation with the FDIC, for a company that is an ''insurance company'', or whose largest U.S. subsidiary is an insurance company, as that term is defined in section 201(a)(13) of the Dodd-Frank Act;[16] and

(iii) The Board of Governors and the FDIC, for any other company.

(5) The term ''total consolidated revenues'' means the total gross revenues of the company and all entities subject to consolidation by the company for a fiscal year.

(c) *Effect of other authority.* Any activity described in paragraph (b)(2) of this section is considered financial in nature or incidental thereto for purposes of this section regardless of whether—

(1) A bank holding company (including a financial holding company or a foreign bank) may be authorized to engage in the activity, or own or control shares of a company engaged in such activity, under any other provisions of the BHC Act or other Federal law including, but not limited to, section 4(a)(2), section 4(c)(5), section 4(c)(6), section 4(c)(7), section 4(c)(9), or section 4(c)(13) of the BHC Act (12 U.S.C. 1843(a)(2), (c)(5), (c)(6), (c)(7), (c)(9), or (c)(13)) and the Board of Governors' implementing regulations; or

(2) Other provisions of Federal or state law or regulations prohibit, restrict, or otherwise place conditions on the conduct of the activity by a bank holding company (including a financial holding company or foreign bank) or bank holding companies generally.

(d) *Rule of construction.* Revenues derived from an investment by the company in an entity whose financial statements are not consolidated with those of the company will be treated as revenues derived from financial activities, unless such treatment is not appropriate based on information that the recommending agencies or the Secretary, have at the time a written recommendation or determination is made under section 203 of the Dodd-Frank Act.

[78 FR 34731, June 10, 2013]

§ 380.9 Treatment of fraudulent and preferential transfers.

(a) *Coverage.* This section shall apply to all receiverships in which the FDIC is appointed as receiver under 12 U.S.C. 5382(a) or 5390(a)(1)(E) of a covered financial company or a covered subsidiary, respectively, as defined in 12 U.S.C. 5381(a)(8) and (9).

(b) *Avoidance standard for transfer of property.* (1) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of property for purposes of 12 U.S.C. 5390(a)(11)(A), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against

[16] 12 U.S.C. 5381(a)(13).

whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee.

(2) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of real property, other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee. For purposes of this section, the term fixture shall be interpreted in accordance with U.S. Federal bankruptcy law.

(3) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of a fixture or property, other than real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee, and the standard of whether the transfer is perfected such that a bona fide purchaser cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee of such property shall not apply to any such transfer under this paragraph (b)(3).

(c) *Grace period for perfection.* In determining when a transfer occurs for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall apply the following standard:

(1) Except as provided in paragraph (c)(2) of this section, a transfer shall be deemed to have been made

(i) At the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in paragraph (c)(1)(ii) of this section;

(ii) At the time such transfer takes effect between the transferor and the transferee, with respect to a transfer of an interest of the transferor in property that creates a security interest in property acquired by the transferor:

(A) To the extent such security interest secures new value that was:

(*1*) Given at or after the signing of a security agreement that contains a description of such property as collateral;

(*2*) Given by or on behalf of the secured party under such agreement;

(*3*) Given to enable the transferor to acquire such property; and

(*4*) In fact used by the transferor to acquire such property; and

(B) That is perfected on or before 30 days after the transferor receives possession of such property;

(iii) At the time such transfer is perfected, if such transfer is perfected after the 30-day period described in paragraph (c)(1)(i) or (ii) of this section, as applicable; or

(iv) Immediately before the appointment of the Corporation as receiver of a covered financial company or a covered subsidiary which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), if such transfer is not perfected at the later of—

(A) The earlier of

(*1*) The date of the filing, if any, of a petition by or against the transferor under title 11 of the United States Code; and

(*2*) The date of the appointment of the Corporation as receiver of such covered financial company or such covered subsidiary; or

(B) Thirty days after such transfer takes effect between the transferor and the transferee.

(2) For the purposes of this paragraph (c), a transfer is not made until the covered financial company or a covered

subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), has acquired rights in the property transferred.

(d) *Limitations.* The provisions of this section do not act to waive, relinquish, limit or otherwise affect any rights or powers of the Corporation in any capacity, whether pursuant to applicable law or any agreement or contract.

[76 FR 41641, July 15, 2011]

§ 380.10 Maximum obligation limitation.

(a) *General rule.* The FDIC shall not, in connection with the orderly liquidation of a covered financial company, issue or incur any obligation, if, after issuing or incurring the obligation, the aggregate amount of such obligations outstanding for each covered financial company would exceed—

(1) An amount that is equal to 10 percent of the total consolidated assets of the covered financial company, based on the most recent financial statement available, during the 30-day period immediately following the date of appointment of the FDIC as receiver (or a shorter time period if the FDIC has calculated the amount described under paragraph (a)(2) of this section); and

(2) The amount that is equal to 90 percent of the fair value of the total consolidated assets of each covered financial company that are available for repayment, after the time period described in paragraph (a)(1) of this section.

(b) *Definitions:* For purposes of paragraph (a) of this section:

(1) The term ''fair value'' means the expected total aggregate value of each asset, or group of assets that are managed within a portfolio, of a covered financial company on a consolidated basis if such asset, or group of assets, was sold or otherwise disposed of in an orderly transaction.

(2) The term ''most recent financial statement available'' means a covered financial company's:

(i) Most recent financial statement filed with the Securities and Exchange Commission or any other regulatory body;

(ii) Most recent financial statement audited by an independent CPA firm; or

(iii) Other available financial statements. The FDIC and the Treasury will jointly determine the most pertinent of the above financial statements, taking into consideration the timeliness and reliability of the statements being considered.

(3) The term ''obligation'' means, with respect to any covered financial company:

(i) Any guarantee issued by the FDIC on behalf of the covered financial company;

(ii) Any amount borrowed pursuant to section 210(n)(5)(A) of the Dodd-Frank Act; and

(iii) Any other obligation with respect to the covered financial company for which the FDIC has a direct or contingent liability to pay any amount.

(4) The term ''total consolidated assets of each covered financial company that are available for repayment'' means the difference between:

(i) The total assets of the covered financial company on a consolidated basis that are available for liquidation during the operation of the receivership; and

(ii) To the extent included in (b)(4)(i) of this section, all assets that are separated from, or made unavailable to, the covered financial company by a statutory or regulatory barrier that prevents the covered financial company from possessing or selling assets and using the proceeds from the sale of such assets.

[77 FR 37557, June 22, 2012]

§ 380.11 Treatment of mutual insurance holding companies.

A mutual insurance holding company shall be treated as an insurance company for the purpose of section 203(e) of the Dodd-Frank Act, 12 U.S.C. 5383(e); provided that—

(a) The company is subject to the insurance laws of the state of its domicile, including, specifically and without limitation, a statutory regime for the rehabilitation or liquidation of insurance companies that are in default or in danger of default;

(b) The company is not subject to bankruptcy proceedings under title 11 of the United States Code;

(c) The largest United States subsidiary of the company (as measured by total assets as of the end of the previous calendar quarter) is an insurance company or an intermediate insurance stock holding company; and

(d) The assets and investments of the company are limited to the securities of an intermediate insurance stock holding company, the securities of the converted mutual insurance company and other assets and securities of the type authorized for holding and investment by an insurance company domiciled in its state of incorporation.

[77 FR 25353, Apr. 30, 2012]

§ 380.12 Enforcement of subsidiary and affiliate contracts by the FDIC as receiver of a covered financial company.

(a) *General.* (1) Contracts of subsidiaries or affiliates of a covered financial company that are linked to or supported by the covered financial company shall remain in full force and effect notwithstanding any specified financial condition clause contained in such contract and no counterparty shall be entitled to terminate, accelerate, liquidate or exercise any other remedy arising solely by reason of such specified financial condition clause. The Corporation as receiver for the covered financial company shall have the power to enforce such contracts according to their terms.

(2) Notwithstanding paragraph (a)(1) of this section, if the obligations under such contract are supported by the covered financial company then such contract shall be enforceable only if—

(i) Any such support together with all related assets and liabilities are transferred to and assumed by a qualified transferee not later than 5 p.m. (eastern time) on the business day following the date of appointment of the Corporation as receiver for the covered financial company; or

(ii) If and to the extent paragraph (a)(2)(i) of this section is not satisfied, the Corporation as receiver otherwise provides adequate protection to the counterparties to such contracts with respect to the covered financial company's support of the obligations or liabilities of the subsidiary or affiliate and provides notice consistent with the requirements of paragraph (d) of this section not later than 5 p.m. (eastern time) on the business day following the date of appointment of the Corporation as receiver.

(3) The Corporation as receiver of a subsidiary of a covered financial company (including a failed insured depository institution that is a subsidiary of a covered financial company) may enforce any contract that is enforceable by the Corporation as receiver for a covered financial company under paragraphs (a)(1) and (2) of this section.

(b) *Definitions.* For purposes of this part, the following terms shall have the meanings set forth below:

(1) A contract is ''*linked*'' to a covered financial company if it contains a specified financial condition clause that specifies the covered financial company.

(2)(i) A ''*specified financial condition clause*'' means any provision of any contract (whether expressly stated in the contract or incorporated by reference to any other contract, agreement or document) that permits a contract counterparty to terminate, accelerate, liquidate or exercise any other remedy under any contract to which the subsidiary or affiliate is a party or to obtain possession or exercise control over any property of the subsidiary or affiliate or affect any contractual rights of the subsidiary or affiliate directly or indirectly based upon or by reason of

(A) A change in the financial condition or the insolvency of a specified company that is a covered financial company;

(B) The appointment of the FDIC as receiver for the specified company or any actions incidental thereto including, without limitation, the filing of a petition seeking judicial action with respect to the appointment of the Corporation as receiver for the specified company or the issuance of recommendations or determinations of systemic risk;

(C) The exercise of rights or powers by the Corporation as receiver for the specified company, including, without

limitation, the appointment of the Securities Investor Protection Corporation (SIPC) as trustee in the case of a specified company that is a covered broker-dealer and the exercise by SIPC of all of its rights and powers as trustee;

(D) The transfer of assets or liabilities to a bridge financial company or other qualified transferee;

(E) Any actions taken by the FDIC as receiver for the specified company to effectuate the liquidation of the specified company;

(F) Any actions taken by or on behalf of the bridge financial company to operate and terminate the bridge financial company including the dissolution, conversion, merger or termination of a bridge financial company or actions incidental or related thereto; or

(G) The transfer of assets or interests in a transferee bridge financial company or its successor in full or partial satisfaction of creditors' claims against the covered financial company.

(ii) Without limiting the general language of paragraphs (b)(1) and (2) of this section, a specified financial condition clause includes a ''walkaway clause'' as defined in 12 U.S.C. 5390(c)(8)(F)(iii) or any regulations promulgated thereunder.

(3) The term ''*support*'' means undertaking any of the following for the purpose of supporting the contractual obligations of a subsidiary or affiliate of a covered financial company for the benefit of a counterparty to a linked contract—

(i) To guarantee, indemnify, undertake to make any loan or advance to or on behalf of the subsidiary or affiliate;

(ii) To undertake to make capital contributions to the subsidiary or affiliate; or

(iii) To be contractually obligated to provide any other financial assistance to the subsidiary or affiliate.

(4) The term ''*related assets and liabilities*'' means—

(i) Any assets of the covered financial company that directly serve as collateral for the covered financial company's support (including a perfected security interest therein or equivalent under applicable law);

(ii) Any rights of offset or setoff or netting arrangements that directly arise out of or directly relate to the covered financial company's support of the obligations or liabilities of its subsidiary or affiliate; and

(iii) Any liabilities of the covered financial company that directly arise out of or directly relate to its support of the obligations or liabilities of the subsidiary or affiliate.

(5) A ''*qualified transferee*'' means any bridge financial company or any third party (other than a third party for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed, or which is otherwise the subject of a bankruptcy or insolvency proceeding).

(6) A ''*successor*'' of a bridge financial company means

(i) A company into which the bridge financial company is converted by way of incorporation under the laws of a State of the United States; or

(ii) The surviving company of a merger or consolidation of the bridge financial company with another company (whether before or after the conversion (if any) of the bridge financial company).

(c) *Adequate protection.* The Corporation as receiver for a covered financial company may provide adequate protection with respect to a covered financial company's support of the obligations and liabilities of a subsidiary or an affiliate pursuant to paragraph (a)(2)(ii) of this section by any of the following means:

(1) Making a cash payment or periodic cash payments to the counterparties of the contract to the extent that the failure to cause the assignment and assumption of the covered financial company's support and related assets and liabilities causes a loss to the counterparties;

(2) Providing to the counterparties a guaranty, issued by the Corporation as receiver for the covered financial company, of the obligations of the subsidiary or affiliate of the covered financial company under the contract; or

(3) Providing relief that will result in the realization by the counterparty of the indubitable equivalent of the covered financial company's support of such obligations or liabilities.

(d) *Notice of transfer of support or provision of adequate protection.* If the Corporation as receiver for a covered financial company transfers any support and related assets and liabilities of the covered financial company in accordance with paragraph (a)(2)(i) of this section or provides adequate protection in accordance with paragraph (a)(2)(ii) of this section, it shall promptly take steps to notify contract counterparties of such transfer or provision of adequate protection. Notice shall be given in a manner reasonably calculated to provide notification in a timely manner, including, but not limited to, notice posted on the Web site of the Corporation, the covered financial company or the subsidiary or affiliate, notice via electronic media, or notice by publication. Neither the failure to provide actual notice to any party nor the lack of actual knowledge on the part of any party shall affect the authority of the Corporation to enforce any contract or exercise any rights or powers under this section.

[77 FR 63214, Oct. 16, 2012]

§ 380.13 Restrictions on sale of assets of a covered financial company by the Federal Deposit Insurance Corporation.

(a) *Purpose and applicability*—(1) *Purpose.* The purpose of this section is to prohibit individuals or entities that profited or engaged in wrongdoing at the expense of a covered financial company or an insured depository institution, or seriously mismanaged a covered financial company or an insured depository institution, from buying assets of a covered financial company from the FDIC.

(2) *Applicability.* (i) The restrictions of this section apply to the sale of assets of a covered financial company by the FDIC as receiver or in its corporate capacity.

(ii) The restrictions in this section apply to the sale of assets of a bridge financial company if:

(A) The sale is not in the ordinary course of business of the bridge financial company, and

(B) The approval or non-objection of the FDIC is required in connection with the sale according to the charter, articles of association, bylaws or other documents or instruments establishing the governance of the bridge financial company and the authorities of its board of directors and executive officers.

(iii) In the case of a sale of securities backed by a pool of assets that may include assets of a covered financial company by a trust or other entity, this section 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.

(iv) The restrictions of this section do not apply to a sale of a security or a group or index of securities, a commodity, or any qualified financial contract that customarily is traded through a financial intermediary, as defined in paragraph (b) of this section, where the seller cannot control selection of the purchaser and the sale is consummated through that customary practice.

(v) The restrictions of this section do not apply to a judicial sale or a trustee's sale of property that secures an obligation to the FDIC where the sale is not conducted or controlled by the FDIC.

(vi) The restrictions of this section do not apply to the sale or transfer of an asset if such sale or transfer resolves or settles, or is part of the resolution or settlement of, one (1) or more claims or obligations that have been, or could have been, asserted by the FDIC against the person with whom the FDIC is settling regardless of the amount of such claims or obligations.

(3) The FDIC retains the authority to establish other policies restricting asset sales. Neither 12 U.S.C. 5390(r) nor this section in any way limits the authority of the FDIC to establish policies prohibiting the sale of assets to prospective purchasers who have injured the respective covered financial company, 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 in any of its capacities. Any such policies may be independent of, in conjunction with, or in addition to the restrictions set forth in this part.

(b) *Definitions.* Many of the terms used in this section are defined in the

Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301, *et seq*. Additionally, for the purposes of this section, the following terms are defined:

(1) *Associated person*. An ''associated person'' of an individual or entity means:

(i) With respect to an individual:

(A) The individual's spouse or dependent child or any member of his or her immediate household;

(B) A partnership of which the individual is or was a general or limited partner or a limited liability company of which the individual is or was a member; or

(C) A corporation of which the individual is or was an officer or director;

(ii) With respect to a partnership, a managing or general partner of the partnership or with respect to a limited liability company, a manager; or

(iii) 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.

(2) *Default*. The term ''default'' means any failure to comply with the terms of an obligation to such an extent that:

(i) A judgment has been rendered in favor of the FDIC or a covered financial company; or

(ii) In the case of a secured obligation, the lien on property securing such obligation has been foreclosed.

(3) *Financial intermediary*. The term ''financial intermediary'' means any broker, dealer, bank, underwriter, exchange, clearing agency registered with the SEC under section 17A of the Securities Exchange Act of 1934, transfer agent (as defined in section 3(a)(25) of the Securities Exchange Act of 1934), central counterparty or any other entity whose role is to facilitate a transaction by, as a riskless intermediary, purchasing a security or qualified financial contract from one counterparty and then selling it to another.

(4) *Obligation*. The term ''obligation'' means any debt or duty to pay money owed to the FDIC or a covered financial company, including any guarantee of any such debt or duty.

(5) *Person*. The term ''person'' means an individual, or an entity with a legally independent existence, including: A trustee; the beneficiary of at least a 25 percent share of the proceeds of a trust; a partnership; a limited liability company; a corporation; an association; or other organization or society.

(6) *Substantial loss*. The term ''substantial loss'' means:

(i) An obligation that is delinquent for ninety (90) or more days and on which there remains an outstanding balance of more than $50,000;

(ii) An unpaid final judgment in excess of $50,000 regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding;

(iii) A deficiency balance following a foreclosure of collateral in excess of $50,000, regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; or

(iv) Any loss in excess of $50,000 evidenced by an IRS Form 1099–C (Information Reporting for Cancellation of Debt).

(c) *Restrictions on the sale of assets*. (1) A person may not acquire any assets of a covered financial company from the FDIC if, prior to the appointment of the FDIC as receiver for the covered financial company, the person or its associated person:

(i) Has participated as an officer or director of a covered financial company or of an affiliate of a covered financial company in a material way in one or more transactions that caused a substantial loss to a covered financial company;

(ii) Has been removed from, or prohibited from participating in the affairs of, a financial company pursuant to any final enforcement action by its primary financial regulatory agency;

(iii) Has demonstrated a pattern or practice of defalcation regarding obligations to a covered financial company;

(iv) Has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 affecting any covered financial company and there has been a default with respect to one or more obligations owed by that person or its associated person; or

(v) Would be prohibited from purchasing the assets of a failed insured depository institution from the FDIC under 12 U.S.C. 1821(p) or its implementing regulation at 12 CFR part 340.

(2) For purposes of paragraph (c)(1) of this section, a person has participated in a ''material way in a transaction that caused a substantial loss to a covered financial company'' if, in connection with a substantial loss to the covered financial company, 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 a primary financial regulatory agency or by any component of the government of the United States or of any state:

(i) To have violated any law, regulation, or order issued by a federal or state regulatory agency, or breached or defaulted on a written agreement with a federal or state regulatory agency, or breached a written agreement with a covered financial company; or

(ii) To have breached a fiduciary duty owed to a covered financial company.

(3) For purposes of paragraph (c)(1) of this section, a person or its associated person has demonstrated a ''pattern or practice of defalcation'' regarding obligations to a covered financial company if the person or associated person has:

(i) 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 company or with reckless disregard for whether such transactions would cause a loss to any such financial company; and

(ii) The transactions, in the aggregate, caused a substantial loss to one or more covered financial companies.

(d) *Restrictions when FDIC provides seller financing.* 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 covered financial company if:

(1) 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

(2) The person or its associated person made any fraudulent misrepresentations in connection with any such obligation(s).

(e) *No obligation to provide seller financing.* 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 section.

(f) *Purchaser eligibility certificate required.* (1) 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 section applies to the purchase. The person must also certify that neither the identity nor form of the person, nor any aspect of the contemplated transaction, has been created or altered with the intent, in whole or in part, to allow an individual or entity who otherwise would be ineligible to purchase assets from the FDIC to benefit directly or indirectly from the proposed transaction. The FDIC may establish the form of the certification and may change the form from time to time.

(2) Notwithstanding paragraph (f)(1) of this section, and unless the Director of the FDIC's Division of Resolutions and Receiverships, or designee, in his or her discretion so requires, a certification need not be provided by:

(i) A state or political subdivision of a state;

(ii) A federal agency or instrumentality such as the Government National Mortgage Association;

(iii) A federally-regulated, government-sponsored enterprise such as Federal National Mortgage Association or Federal Home Loan Mortgage Corporation; or

(iv) A bridge financial company.

[79 FR 20766, Apr. 14, 2014]

§ 380.14 Record retention requirements.

(a) *Scope.* 12 U.S.C. 5390(a)(16)(D) requires that the Corporation establish retention schedules for the maintenance of certain documents and records of a covered financial company for which the Corporation has been appointed receiver and certain documents

and records generated by the Corporation as receiver for a covered financial company in connection with the exercise of its authorities under Title II of the Dodd-Frank Act, 12 U.S.C. 5381 through 5397. This section addresses retention of those two categories of documents and records.

(b) *Definitions.* For the purposes of this section, the following terms shall have the following meanings:

(1) *Documentary material.* The term *documentary material* means any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, or writing regardless of physical form or characteristics and includes any computer or electronically-created data or file.

(2) *Inherited record.* The term *inherited record* means documentary material of a covered financial company, provided that such documentary material existed on the date of the appointment of the Corporation as receiver for such covered financial company and was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business. The determination of whether documentary material was generated or maintained by the covered financial company in the course of, and necessary to, the transaction of its business shall be based on an analysis of the following factors;

(i) Whether such documentary material was generated or maintained in accordance with the covered financial company's own practices and procedures (including the document retention policies of the covered financial company) or pursuant to standards established by the covered financial company's regulators;

(ii) Whether such documentary material is necessary for the Corporation to carry out its obligations as receiver for the covered financial company; and

(iii) Whether there is a present or reasonably foreseeable evidentiary need for such documentary material by the Corporation as receiver for the covered financial company or the public.

(3) *Receivership record.* The term *receivership record* means documentary material generated or maintained by the Corporation in accordance with the policies and procedures of the Corporation (including the document retention policies of the Corporation) that relates to the Corporation's appointment as receiver for a covered financial company or the exercise of its authorities as receiver for the covered financial company under 12 U.S.C. 5381 through 5397.

(c) *Inherited records*—(1) *Retention schedule for inherited records.* The Corporation shall retain any inherited record of a covered financial company that was created fewer than ten years before the date of the appointment of the Corporation as receiver for the covered financial company for a period of no less than six years from the date of such appointment, provided however that an inherited record shall be retained indefinitely so long as it is:

(i) Subject to a litigation hold imposed by the Corporation;

(ii) Subject to a Congressional subpoena or relates to an ongoing investigation by Congress, the United States Government Accountability Office, or the Corporation's Inspector General; or

(iii) An inherited record that the Corporation has determined is necessary for a present or reasonably foreseeable future evidentiary need of the Corporation or the public.

(2) *Examples.* Examples of inherited records include, without limitation: Correspondence; tax forms, accounting forms, and related work papers; internal audits; inventories; board of directors or committee meeting minutes; personnel files and employee benefits information; general ledger and financial reports; financial data; litigation files; loan documents including records relating to intercompany debt; contracts and agreements to which the covered financial company was a party; customer accounts and transactions; qualified financial contracts and related information; and reports or other records of subsidiaries or affiliates of the covered financial company that were provided to the covered financial company.

(3) *Transfer of an inherited record to an acquirer of assets or liabilities of a covered financial company.* If the Corporation transfers an inherited record of a covered financial company to a third party (including a bridge financial company) in connection with the acquisition of

assets or liabilities of the covered financial company by such third party, the record retention requirements of 12 U.S.C. 5390(a)(16)(D) and paragraph (c)(1) of this section shall be satisfied if the third party agrees, in writing, that:

(i) It will maintain the inherited record for at least six years from the date of the appointment of the Corporation as receiver for the covered financial company unless otherwise notified in writing by the Corporation; and

(ii) Prior to destruction of such inherited record it will provide the Corporation with notice and the opportunity to cause the inherited record to be returned to the Corporation.

(d) *Receivership records*—(1) *Retention schedule for receivership records.* (i) A receivership record shall be retained indefinitely to the extent that there is a present or reasonably foreseeable future evidentiary or historical need for such receivership record.

(ii) A receivership record that is subject to a litigation hold imposed by the Corporation, is subject to a Congressional subpoena, or relates to an ongoing investigation by Congress, the United States Government Accountability Office, or the Corporation's Office of Inspector General shall be retained pursuant to the conditions of such hold, subpoena, or investigation.

(iii) In no event shall a receivership record be retained by the Corporation for a period of less than six years following the termination of the receivership to which it relates.

(2) *Not included in receivership records.* Receivership records do not include inherited records.

(3) *Examples.* Examples of receivership records include, without limitation: Correspondence; tax forms, accounting forms and related work papers; inventories; contracts and other information relating to the management and disposition of the assets of the covered financial company; documentary material relating to the appointment of the Corporation as receiver; administrative records and other information relating to administrative proceedings; pleadings and similar documents in civil litigation, criminal restitution, forfeiture litigation, and all other litigation matters in which the Corporation as receiver is a party; the charter and formation documents of a bridge financial company; contracts, other documents, and information relating to the role of the Corporation as receiver in overseeing the operations of the bridge financial company; reports or other records of the bridge financial company and its subsidiaries or affiliates that were provided to the Corporation as receiver; and documentary material relating to the administration, determination, and payment of claims by the Corporation as receiver.

(e) *General provisions.* With respect to any documentary material described in paragraphs (c) and (d) of this section, the following applies:

(1) *Impact on discoverability, admissibility, or release; compliance with court orders.* The Corporation's determination that documentary material must be maintained pursuant to 12 U.S.C. 5390(a)(16)(D) and this section shall not bear on the discoverability or admissibility of such documentary material in any court, tribunal, or other adjudicative proceeding nor on whether such documentary material is subject to release under the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act of 1974, 5 U.S.C. 552a, or any other law. The Corporation shall comply with any applicable court order concerning mandatory retention or destruction of any documentary material subject to this section.

(2) *Exclusions.* Documentary material is not an inherited record nor a receivership record and is not subject to the record retention requirements of section 12 U.S.C. 5390(a)(16)(D) and this section if it is:

(i) A duplicate copy of retained documentary material, reference material, a draft of a document that is superseded by later drafts or revisions, documentary material provided to the Corporation by other parties in concluded litigation for which all appeals have expired, transitory information including routine system messages and system-generated log files, notes and other material of a personal nature, or other documentary material not routinely maintained under the standard record retention policies and procedures of the Corporation;

(ii) Documentary material generated or maintained by a bridge financial company, or by a subsidiary or affiliate of a covered financial company, that was not provided to the covered financial company or to the Corporation as receiver; or

(iii) Non-publicly available confidential supervisory information or operating or condition reports prepared by, on behalf of, or at the requirement of any agency responsible for the regulation or supervision of financial companies or their subsidiaries.

(f) *Policies and procedures.* The Corporation may establish policies and procedures with respect to the retention of inherited records and receivership records that are consistent with this section.

[81 FR 41417, June 27, 2016]

§§ 380.15–380.19 [Reserved]

Subpart B—Priorities

SOURCE: 76 FR 41642, July 15, 2011, unless otherwise noted.

§ 380.20 [Reserved]

§ 380.21 Priorities.

(a) The unsecured amount of allowed claims shall be paid in the following order of priority:

(1) Repayment of debt incurred by or credit obtained by the Corporation as receiver for a covered financial company, provided that the receiver has determined that it is otherwise unable to obtain unsecured credit for the covered financial company from commercial sources.

(2) Administrative expenses of the receiver, as defined in § 380.22, other than those described in paragraph (a)(1) of this section.

(3) Any amounts owed to the United States, as defined in § 380.23 (which is not an obligation described in paragraphs (a)(1) or (2) of this section).

(4) Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual (other than an individual described in paragraph (a)(9) of this section), but only to the extent of $11,725 for each individual (as adjusted for inflation in accordance with paragraph (b) of this section) earned within 180 days before the date of appointment of the receiver.

(5) Contributions owed to employee benefit plans arising from services rendered within 180 days before the date of appointment of the receiver, to the extent of the number of employees covered by each such plan multiplied by $11,725 (as adjusted for inflation in accordance with paragraph (b) of this section); less the sum of (i) the aggregate amount paid to such employees under paragraph (a)(4) of this section, plus (ii) the aggregate amount paid by the Corporation as receiver on behalf of such employees to any other employee benefit plan.

(6) Any amounts due to creditors who have an allowed claim for loss of setoff rights as described in § 380.24.

(7) Any other general or senior liability of the covered financial company (which is not a liability described under paragraphs (a)(8), (9) or (11) of this section).

(8) Any obligation subordinated to general creditors (which is not an obligation described under paragraphs (a)(9) or (11) of this section).

(9) Any wages, salaries, or commissions, including vacation, severance, and sick leave pay earned, that is owed to senior executives and directors of the covered financial company.

(10) Post-insolvency interest in accordance with § 380.25, provided that interest shall be paid on allowed claims in the order of priority of the claims set forth in paragraphs (a)(1) through (9) of this section.

(11) Any amount remaining shall be distributed to shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company arising as a result of their status as shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company, in proportion to their relative equity interests.

(b) All payments under paragraphs (a)(4) and (a)(5) of this section shall be adjusted for inflation in the same manner that claims under 11 U.S.C. 507(a)(1)(4) are adjusted for inflation by the Judicial Conference of the United States pursuant to 11 U.S.C. 104.

(c) All unsecured claims of any category 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 particular category or priority of claims in full, then distributions to creditors in such category or priority shall be made *pro rata*. A subordination agreement is enforceable with respect to the priority of payment of allowed claims within any creditor class or among creditor classes to the extent that such agreement is enforceable under applicable non-insolvency law.

§ 380.22 Administrative expenses of the receiver.

(a) The term ''administrative expenses of the receiver'' includes those actual and necessary pre- and post-failure costs and expenses incurred by the Corporation in connection with its role as receiver in liquidating the covered financial company; together with any obligations that the receiver for the covered financial company determines to be necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company. Administrative expenses of the Corporation as receiver for a covered financial company include:

(1) Contractual rent pursuant to an existing lease or rental agreement accruing from the date of the appointment of the Corporation as receiver until the later of

(i) The date a notice of the dissaffirmance or repudiation of such lease or rental agreement is mailed, or

(ii) The date such disaffirmance or repudiation becomes effective; provided that the lesser of such lease is not in default or breach of the terms of the lease.

(2) Amounts owed pursuant to the terms of a contract for services performed and accepted by the receiver after the date of appointment of the receiver up to the date the receiver repudiates, terminates, cancels or otherwise discontinues such contract or notifies the counterparty that it no longer accepts performance of such services;

(3) Amounts owed under the terms of a contract or agreement executed in writing and entered into by the Corporation as receiver for the covered financial company after the date of appointment, or any contract or agreement entered into by the covered financial company before the date of appointment of the receiver that has been expressly approved in writing by the receiver after the date of appointment; and

(4) Expenses of the Inspector General of the Corporation incurred in carrying out its responsibilities under 12 U.S.C. 5391(d).

(b) Obligations to repay any extension of credit obtained by the Corporation as receiver through enforcement of any contract to extend credit to the covered financial company that was in existence prior to appointment of the receiver pursuant to 12 U.S.C. 5390(c)(13)(D) shall be treated as administrative expenses of the receiver. Other unsecured credit extended to the receivership shall be treated as administrative expenses except with respect to debt incurred by, or credit obtained by, the Corporation as receiver for a covered financial company as described in § 380.21(a)(1).

§ 380.23 Amounts owed to the United States.

(a) The term ''amounts owed to the United States'' as used in § 380.21(a)(3) includes all unsecured amounts owed to the United States, other than expenses included in the definition of administrative expenses of the receiver under § 380.22 that are related to funds provided for the orderly liquidation of a covered financial company, funds provided to avoid or mitigate adverse effects on the financial stability of the United States or unsecured amounts owed to the U.S. Treasury on account of tax liabilities of the covered financial company, without regard for whether such amounts are included as debt or capital on the books and records of the covered financial company. Such amounts shall include obligations incurred before and after the appointment of the Corporation as receiver. Without limitation, ''amounts owed to the United States'' include all

of the following, which all shall have equal priority under § 380.21(a)(3):

(1) Unsecured amounts owed to the Corporation for any extension of credit by the Corporation, including any amounts made available under 12 U.S.C. 5384(d);

(2) Unsecured amounts owed to the U.S. Treasury on account of unsecured tax liabilities of the covered financial company;

(3) Unsecured amounts paid or payable by the Corporation pursuant to its guarantee of any debt issued by the covered financial company under the Temporary Liquidity Guaranty Program, 12 CFR part 370, any widely available debt guarantee program authorized under 12 U.S.C. 5612, or any other debt or obligation of any kind or nature that is guaranteed by the Corporation;

(4) The unsecured amount of any debt owed to a Federal reserve bank including loans made through programs or facilities authorized under the Federal Reserve Act, 12 U.S.C. 221 *et seq.;* and

(5) Any unsecured amount expressly designated in writing in a form acceptable to the Corporation by the appropriate United States department, agency or instrumentality that shall specify the particular debt, obligation or amount to be included as an ''amount owed to the United States'' for the purpose of this rule at the time of such advance, guaranty or other transaction.

(b) Other than those amounts included in paragraph (a) of this section, unsecured amounts owed to a department, agency or instrumentality of the United States that are obligations incurred in the ordinary course of the business of the covered financial company prior to the appointment of the receiver generally will not be in the class of claims designated as ''amounts owed to the United States'' under section 380.21(a)(3), including, but not limited to:

(1) Unsecured amounts owed to government sponsored entities including, without limitation, the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Corporation;

(2) Unsecured amounts owed to Federal Home Loan Banks; and

(3) Unsecured amounts owed as satisfaction of filing, registration or permit fees due to any government department, agency or instrumentality.

(c) The United States may, in its sole discretion, consent to subordinate the repayment of any amount owed to the United States to any other obligation of the covered financial company provided that such consent is provided in writing in a form acceptable to the Corporation by the appropriate department, agency or instrumentality and shall specify the particular debt, obligation or other amount to be subordinated including the amount thereof and shall reference this paragraph (c) or 12 U.S.C. 5390(b)(1); and provided further that unsecured claims of the United States shall, at a minimum, have a higher priority than liabilities of the covered financial company that count as regulatory capital on the books and records of the covered financial company.

§ 380.24 Priority of claims arising out of loss of setoff rights.

(a) Notwithstanding any right of any creditor to offset a mutual debt owed by such creditor to any covered financial company that arose before the date of appointment of the receiver against a claim by such creditor against the covered financial company, the Corporation as receiver may sell or transfer any assets of the covered financial company to a bridge financial company or to a third party free and clear of any such rights of setoff.

(b) If the Corporation as receiver sells or transfers any asset free and clear of the setoff rights of any party, such party shall have a claim against the receiver in the amount of the value of such setoff established as of the date of the sale or transfer of such assets, provided that the setoff rights meet all of the criteria established under 12 U.S.C. 3590(a)(12).

(c) Any allowed claim pursuant to 12 U.S.C. 5390(a)(12) shall be paid prior to any other general or senior liability of the covered financial company described in section 380.21(a)(7). In the event that the setoff amount is less than the amount of the allowed claim, the balance of the allowed claim shall be paid at the otherwise applicable

level of priority for such category of claim under § 380.21.

(d) Nothing in this section shall modify in any way the treatment of qualified financial contracts under title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

§ 380.25 Post-insolvency interest.

(a) *Date of accrual.* Post-insolvency interest shall be paid at the post-insolvency interest rate calculated on the principal amount of an allowed claim from the later of

(i) The date of the appointment of the Corporation as receiver for the covered financial company; or

(ii) In the case of a claim arising or becoming fixed and certain after the date of the appointment of the receiver, the date such claim arises or becomes fixed and certain.

(b) *Interest rate.* Post-insolvency interest rate shall equal, for any calendar quarter, the coupon equivalent yield of the average discount rate set on the three-month U.S. Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar quarter. Post-insolvency interest shall be computed quarterly and shall be computed using a simple interest method of calculation.

(c) *Principal amount.* The principal amount of an allowed claim shall be the full allowed claim amount, including any interest that may have accrued to the extent such interest is included in the allowed claim.

(d) *Post-insolvency interest distributions.* (1) Post-insolvency interest shall only be distributed following satisfaction of the principal amount of all creditor claims set forth in § 380.21(a)(1) through 380.21(a)(9) and prior to any distribution pursuant to § 380.21(a)(11).

(2) Post-insolvency interest distributions shall be made at such time as the Corporation as 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 principal amount of an allowed claim, as reduced from time to time by any interim distributions on account of such claim by the receiver.

§ 380.26 Effect of transfer of assets and obligations to a bridge financial company.

(a) The purchase of any asset or assumption of any asset or liability of a covered financial company by a bridge financial company, through the express agreement of such bridge financial company, constitutes assumption of any contract or agreement giving rise to such asset or liability. Such contracts or agreements, together with any contract the bridge financial company may through its express agreement enter into with any other party, shall become the obligation of the bridge financial company from and after the effective date of the purchase, assumption or agreement, and the bridge financial company shall have the right and obligation to observe, perform and enforce their terms and provisions. In the event that the Corporation shall act as receiver of the bridge financial company any allowed claim arising out of any breach of such contract or agreement by the bridge financial company shall be paid as an administrative expense of the receiver of the bridge financial company.

(b) In the event that the Corporation as receiver of a bridge financial company shall act to dissolve the bridge financial company, it shall wind up the affairs of the bridge financial company in conformity with the laws, rules and regulations relating to the liquidation of covered financial companies, including the laws, rules and regulations governing priorities of claims, subject however to the authority of the Corporation to authorize the bridge financial company to obtain unsecured credit or issue unsecured debt with priority over any or all of the other unsecured obligations of the bridge financial company, provided that unsecured debt is not otherwise generally available to the bridge financial company.

(c) Upon the final dissolution or termination of the bridge financial company whether following a merger or consolidation, a stock sale, a sale of assets, or dissolution and liquidation at the end of the term of existence of such bridge financial company, any proceeds that remain after payment of all administrative expenses of the bridge financial company and all other claims

against such bridge financial company will be distributed to the receiver for the related covered financial company.

§ 380.27 Treatment of similarly situated claimants.

(a) For the purposes of this section, the term ''long-term senior debt'' means senior debt issued by the covered financial company to bondholders or other creditors that has a term of more than 360 days. It does not include partially funded, revolving or other open lines of credit that are necessary to continuing operations essential to the receivership or any bridge financial company, nor to any contracts to extend credit enforced by the receiver under 12 U.S.C. 5390(c)(13)(D).

(b) In applying any provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act permitting the Corporation as receiver to exercise its discretion, upon appropriate determination, to make payments or credit amounts, pursuant to 12 U.S.C. 5390(b)(4), (d)(4), or (h)(5)(E) to or for some creditors but not others similarly situated at the same level of payment priority, the receiver shall not exercise such authority in a manner that would result in the following recovering more than the amount established and due under 12 U.S.C. 5390(b)(1), or other priorities of payment specified by law:

(1) Holders of long-term senior debt who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(E);

(2) Holders of subordinated debt who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(F);

(3) Shareholders, members, general partners, limited partners, or other persons who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390 (b)(1)(H); or

(4) Other holders of claims entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(E) unless the Corporation, through the affirmative vote of a majority the members of the Board of Directors then serving, and in its sole discretion, specifically determines that additional payments or credit amounts to such holders are necessary and meet all of the requirements under 12 U.S.C. 5390(b)(4), (d)(4), or (h)(5)(E), as applicable. The authority of the Board to make the foregoing determination cannot be delegated.

§§ 380.28–380.29 [Reserved]

Subpart C—Receivership Administrative Claims Process

SOURCE: 76 FR 41644, July 15, 2011, unless otherwise noted.

§ 380.30 Receivership administrative claims process.

The Corporation as receiver of a covered financial company shall determine claims against the covered financial company and the receiver of the covered financial company in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2)–(5) and the regulations promulgated by the Corporation.

§ 380.31 Scope.

Nothing in this subpart C shall apply to any liability or obligation of a bridge financial company or its assets or liabilities, or to any extension of credit from a Federal reserve bank or the Corporation to a covered financial company.

§ 380.32 Claims bar date.

Upon its appointment as receiver for a covered financial company, the Corporation as receiver shall establish a claims bar date by which date creditors of the covered financial company shall present their claims, together with proof, to the receiver. The claims bar date shall be not less than 90 days after the date on which the notice to creditors to file claims is first published under § 380.33(a).

§ 380.33 Notice requirements.

(a) *Notice by publication.* Promptly after its appointment as receiver for a covered financial company, the Corporation as receiver shall publish a notice to the creditors of the covered financial company to file their claims with the receiver no later than the claims bar date. The Corporation as receiver shall republish such notice 1 month and 2 months, respectively, after the date the notice is first published. The notice to creditors shall be published in one or more newspapers of

general circulation where the covered financial company has its principal place or places of business. In addition to such publication in a newspaper, the Corporation as receiver may post the notice on the FDIC's Web site at *www.fdic.gov*.

(b) *Notice by mailing.* At the time of the first publication of the notice to creditors, the Corporation as receiver shall mail a notice to present claims no later than the claims bar date to any creditor shown in the books and records of the covered financial company. Such notice shall be sent to the last known address of the creditor appearing in the books and records or appearing in any claim found in the records of the covered financial company.

(c) *Notice by electronic media.* After publishing and mailing notice as required by paragraphs (a) and (b) of this section, the Corporation as receiver may communicate by electronic media with any claimant who expressly agrees to such form of communication.

(d) *Discovered claimants.* Upon discovery of the name and address of a claimant not appearing in the books and records of the covered financial company, the Corporation as receiver shall, not later than 30 days after the discovery of such name and address, mail a notice to such claimant to file a claim no later than the claims bar date. Any claimant not appearing on the books and records that is discovered before the claims bar date shall be required to file a claim before the claims bar date, subject to the exception of §380.35(b)(2). If a claimant not appearing on the books and records is discovered after the claims bar date, the Corporation as receiver shall notify the claimant to file a claim by a date not later than 90 days from the date appearing on the notice that is mailed to such creditor. Any claim filed after such date shall be disallowed, and such disallowance shall be final.

§380.34 Procedures for filing claim.

(a) *In general.* The Corporation as receiver shall provide, in a reasonably practicable manner, instructions for filing a claim, including by the following means:

(1) Providing contact information in the publication notice;

(2) Including in the mailed notice a proof of claim form that has filing instructions; or

(3) Posting filing instructions on the Corporation's public Web site at *www.fdic.gov*.

(b) *When claim is deemed filed.* A claim that is mailed to the receiver in accordance with the instructions established under paragraph (a) of this section shall be deemed to be filed as of the date of postmark. A claim that is sent to the receiver by electronic media or fax in accordance with the instructions established under paragraph (a) shall be deemed to be filed as of the date of transmission by the claimant.

(c) *Class claimants.* If a claimant is a member of a class for purposes of a class action lawsuit, whether or not the class has been certified by a court, each claimant must file its claim with the Corporation as receiver separately.

(d) *Indenture trustee.* A trustee appointed under an indenture or other applicable trust document related to investments or other financial activities may file a claim on behalf of the persons who appointed the trustee.

(e) *Legal effect of filing.* (1) Pursuant to 12 U.S.C. 5390(a)(3)(E)(i), the filing of a claim with the receiver shall constitute a commencement of an action for purposes of any applicable statute of limitations.

(2) *No prejudice to continuation of action.* Pursuant to 12 U.S.C. 5390(a)(3)(E)(ii) and subject to 12 U.S.C. 5390(a)(8), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue, after the receiver's determination of the claim, any action which was filed before the date of appointment of the receiver for the covered financial company.

§380.35 Determination of claims.

(a) *In general.* The Corporation as receiver shall allow any claim received by the receiver on or before the claims bar date if such claim is proved to the satisfaction of the receiver. Except as provided in 12 U.S.C. 5390(a)(3)(D)(iii), the Corporation as receiver may disallow any portion of any claim by a creditor or claim of a security, preference, setoff, or priority which is not

proved to the satisfaction of the receiver.

(b) *Disallowance of claims filed after the claims bar date.* (1) Except as otherwise provided in this section, any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i).

(2) *Certain exceptions.* Paragraph (b)(1) of this section shall not apply with respect to any claim filed by a claimant after the claims bar date and such claim shall be considered by the receiver if:

(i) The claimant did not receive notice of the appointment of the receiver in time to file such claim before the claims bar date, or the claim is based upon an act or omission of the Corporation as receiver that occurs after the claims bar date has passed, and

(ii) The claim is filed in time to permit payment. A claim is ''filed in time to permit payment'' when it is filed before a final distribution is made by the receiver.

§ 380.36 Decision period.

(a) *In general.* Prior to the 180th day after the date on which a claim against a covered financial company or the Corporation as receiver is filed with the receiver, the receiver shall notify the claimant whether it allows or disallows the claim.

(b) *Extension of time.* The 180-day period described in paragraph (a) of this section may be extended by a written agreement between the claimant and the Corporation as receiver executed not later than 180 days after the date on which the claim against the covered financial company or the receiver is filed with the receiver. If an extension is agreed to, the Corporation as receiver shall notify the claimant whether it allows or disallows the claim prior to the end of the extended claims determination period.

§ 380.37 Notification of determination.

(a) *In general.* The Corporation as receiver shall notify the claimant by mail of the decision to allow or disallow the claim. Notice shall be mailed to the address of the claimant as it last appears on the books, records, or both of the covered financial company; in the claim filed by the claimant with the Corporation as receiver; or in documents submitted in the proof of the claim. If the claimant has filed the claim electronically, the receiver may notify the claimant of the determination by electronic means.

(b) *Contents of notice of disallowance.* If the Corporation as receiver disallows a claim, the notice to the claimant shall contain a statement of each reason for the disallowance, and the procedures required to file or continue an action in court.

(c) *Failure to notify deemed to be disallowance.* If the Corporation as receiver does not notify the claimant before the end of the 180-day claims determination period, or before the end of any extended claims determination period, the claim shall be deemed to be disallowed, and the claimant may file or continue an action in court pursuant to 12 U.S.C. 5390(a)(4)(A).

§ 380.38 Procedures for seeking judicial determination of disallowed claim.

(a) *In general.* In order to seek a judicial determination of a claim that has been disallowed, in whole or in part, by the Corporation as receiver, the claimant, pursuant to 12 U.S.C. 5390(a)(4)(A), may either:

(1) File suit on such claim in the district or territorial court of the United States for the district within which the principal place of business of the covered financial company is located; or

(2) Continue an action commenced before the date of appointment of the receiver, in the court in which the action was pending.

(b) *Timing.* Pursuant to 12 U.S.C. 5390(a)(4)(B), a claimant who seeks a judicial determination of a claim disallowed by the Corporation as receiver must file suit on such claim before the end of the 60-day period beginning on the earlier of:

(1) The date of any notice of disallowance of such claim;

(2) The end of the 180-day claims determination period; or

(3) If the claims determination period was extended with respect to such claim under § 380.36(b), the end of such extended claims determination period.

(c) *Statute of limitations.* Pursuant to 12 U.S.C. 5390(a)(4)(C), if any claimant fails to file suit on such claim (or to continue an action on such claim commenced before the date of appointment of the Corporation as receiver) prior to the end of the 60-day period described in 12 U.S.C. 5390(a)(4)(B), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(d) *Jurisdiction.* Pursuant to 12 U.S.C. 5390(a)(9)(D), unless the claimant has first exhausted its administrative remedies by obtaining a determination from the receiver regarding a claim filed with the receiver, no court shall have jurisdiction over:

(1) Any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any covered financial company for which the Corporation has been appointed receiver, including any assets which the Corporation may acquire from itself as such receiver; or

(2) Any claim relating to any act or omission of such covered financial company or the Corporation as receiver.

§ 380.39 Contingent claims.

(a) The Corporation as receiver shall not disallow a claim based on an obligation of the covered financial company solely because the obligation is contingent. To the extent the obligation is contingent, the receiver shall estimate the value of the claim, as such value is measured based upon the likelihood that such contingent obligation would become fixed and the probable magnitude thereof.

(b) If the receiver repudiates a contingent obligation of a covered financial company consisting of a guarantee, letter of credit, loan commitment, or similar credit obligation, the actual direct compensatory damages for repudiation shall be no less than the estimated value of the claim as of the date the Corporation was appointed receiver of the covered financial company, as such value is measured based upon the likelihood that such contingent claim would become fixed and the probable magnitude thereof.

(c) The Corporation as receiver shall estimate the value of a claim under paragraphs (a) or (b) of this section no later than 180 days after the claim is filed, unless such period is extended by a written agreement between the claimant and the receiver.

(d) Except for a contingent claim that becomes absolute and fixed prior to the receiver's determination of the estimated value, such estimated value of a contingent claim shall be recognized as the allowed amount of the claim for purposes of distribution.

(e) The estimated value of a contingent claim shall constitute the receiver's determination of the claim for purposes of § 380.38(d) and 12 U.S.C. 5390(a)(9)(D).

§§ 380.40–380.49 [Reserved]

§ 380.50 Determination of secured claims.

(a) In the case of a claim against a covered financial company that is secured by any property of the covered financial company, the Corporation as receiver shall determine the amount of the claim, whether the claimant's security interest is legally enforceable and perfected, the priority of the claimant's security interest, and the fair market value of the property that is subject to the security interest. The Corporation as receiver may treat the portion of the claim which exceeds an amount equal to the fair market value of such property as an unsecured claim.

(b) The fair market value of any property of a covered financial company that secures a claim shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property and at the time of such proposed disposition or use.

(c) The Corporation as receiver may recover from any property of a covered financial company that secures a claim the reasonable and necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the claimant, including the payment of all ad valorem property taxes with respect to such property.

(d) To the extent that a claim is secured by property of a covered financial company and the value of such property, after any recovery under paragraph (c) of this section, is greater than the amount of such claim, there shall be allowed to the claimant a secured claim for interest on such claim and any reasonable fees, costs, or charges provided for under the agreement or State statute under which the claim arose to the extent of the value of such property.

§ 380.51 Consent to certain actions.

(a) *In general.* Any claimant alleging a legally valid and enforceable or perfected security interest in property of a covered financial company or control of any legally valid and enforceable security entitlement in respect of any asset held by the covered financial company for which the Corporation has been appointed receiver may seek the consent of the receiver for relief from the provisions of 12 U.S.C. 5390(c)(13)(C).

(b) *Contents of request.* A request for consent of the Corporation as receiver for relief from the provisions of 12 U.S.C. 5390(c)(13)(C) shall be in writing and contain the following information:

(1) The amount of the claim, with supporting documentation;

(2) A description of the property that secures the claim, with supporting documentation of the claimant's interest in the property;

(3) The value of the property, as established by an appraisal or other supporting documentation; and

(4) The proposed disposition of the property by the claimant, including the expected date of such disposition.

(c) *Determination by receiver.* The Corporation as receiver shall grant its consent to a request for relief from the provisions of 12 U.S.C. 5390(c)(13)(C) if it determines that the claimant has a legally valid and enforceable or perfected security interest or other lien against the property of a covered financial company and the receiver will not use, sell, or lease the property. If the Corporation as receiver determines that it will use, sell, or lease such property and that adequate protection is necessary and appropriate, the receiver may provide adequate protection instead of granting consent.

(d) *Consent deemed granted.* If the Corporation as receiver has not notified the claimant of the determination whether to grant or withhold consent under this section within 30 days after a request for consent has been submitted, consent shall be deemed to be granted.

(e) *Expiration by operation of law.* Notwithstanding any determination by the Corporation as receiver to withhold consent under this section, the prohibitions described in 12 U.S.C. 5390(c)(13)(C)(i) are no longer applicable 90 days after the appointment of the receiver.

(f) *Limitations.* Any consent granted by the Corporation as receiver under this section shall not act to waive or relinquish any rights granted to the Corporation in any capacity, pursuant to any other applicable law or any agreement or contract, and shall not be construed as waiving, limiting or otherwise affecting the rights or powers of the Corporation as receiver to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the receiver regarding transfers taken in contemplation of the covered financial company's insolvency or with the intent to hinder, delay or defraud the covered financial company or the creditors of such company, or that is a fraudulent transfer under applicable law.

(g) *Exceptions.* (1) This section shall not apply in the case of a contract that is repudiated or disaffirmed by the Corporation as receiver.

(2) This section shall not apply to a director or officer liability insurance contract, a financial institution bond, the rights of parties to certain qualified financial contracts pursuant to 12 U.S.C. 5390(c)(8), the rights of parties to netting contracts pursuant to 12 U.S.C. 4401 *et seq.*, or any extension of credit from any Federal reserve bank or the Corporation to any covered financial company or any security interest in the assets of a covered financial company securing any such extension of credit.

§ 380.52 Adequate protection.

(a) If the Corporation as receiver determines that it will use, sell, or lease or grant a security interest or other lien against property of the covered financial company that is subject to a security interest of a claimant, the receiver shall provide adequate protection by any of the following means:

(1) Making a cash payment or periodic cash payments to the claimant to the extent that the sale, use, or lease of the property or the grant of a security interest or other lien against the property by the Corporation as receiver results in a decrease in the value of such claimant's security interest in the property;

(2) Providing to the claimant an additional or replacement lien to the extent that the sale, use, or lease of the property or the grant of a security interest against the property by the Corporation as receiver results in a decrease in the value of the claimant's security interest in the property; or

(3) Providing any other relief that will result in the realization by the claimant of the indubitable equivalent of the claimant's security interest in the property.

(b) Adequate protection of the claimant's security interest will be presumed if the value of the property is not depreciating or is sufficiently greater than the amount of the claim so that the claimant's security interest is not impaired.

§ 380.53 Repudiation of secured contract.

To the extent that a contract to which a covered financial company is a party is secured by property of the covered financial company, the repudiation of the contract by the Corporation as receiver shall not be construed as permitting the avoidance of any legally enforceable and perfected security interest in the property, and the security interest shall secure any claim for repudiation damages.

Subpart D—Orderly Liquidation of Covered Brokers or Dealers

SOURCE: 85 FR 53665, Aug. 31, 2020, unless otherwise noted.

§ 380.60 Definitions.

For purposes of this subpart D, the following terms are defined as follows:

Appointment date. The term *appointment date* means the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer. This date shall constitute the *filing date* as that term is used in SIPA.

Bridge broker or dealer. The term *bridge broker or dealer* means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered broker or dealer.

Commission. The term *Commission* means the Securities and Exchange Commission.

Covered broker or dealer. The term *covered broker or dealer* means a covered financial company that is a qualified broker or dealer.

Customer. The term *customer* of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78*lll*(2) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

Customer name securities. The term *customer name securities* shall have the same meaning as in 15 U.S.C. 78*lll*(3) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

Customer property. The term *customer property* shall have the same meaning as in 15 U.S.C. 78*lll*(4) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

Net equity. The term *net equity* shall have the same meaning as in 15 U.S.C. 78*lll*(11) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

Qualified broker or dealer. The term *qualified broker or dealer* means a broker or dealer that:

(1) Is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and

(2) Is a member of SIPC.

SIPA. The term *SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–*lll*.

SIPC. The term *SIPC* means the Securities Investor Protection Corporation.

§ 380.61 Appointment of receiver and trustee for covered broker or dealer.

Upon the appointment of the Corporation as receiver for a covered broker or dealer, the Corporation shall appoint SIPC to act as trustee for the covered broker or dealer.

§ 380.62 Notice and application for protective decree for covered broker or dealer.

(a) SIPC and the Corporation, upon consultation with the Commission, shall jointly determine the terms of a notice and application for a protective decree that will be filed promptly with the Federal district court for the district within which the principal place of business of the covered broker or dealer is located; *provided that* if a case or proceeding under SIPA with respect to such covered broker or dealer is then pending, then such notice and application for a protective decree will be filed promptly with the Federal district court in which such case or proceeding under SIPA is pending. If such notice and application for a protective decree is filed on a date other than the appointment date, such filing shall be deemed to have occurred on the appointment date for the purposes of this subpart D.

(b) A notice and application for a protective decree may, among other things, provide for notice:

(1) Of the appointment of the Corporation as receiver and the appointment of SIPC as trustee for the covered broker or dealer; and

(2) That the provisions of Title II of the Dodd-Frank Act and any regulations promulgated thereunder may apply, including without limitation the following:

(i) Any existing case or proceeding with respect to a covered broker or dealer under the Bankruptcy Code or SIPA shall be dismissed effective as of the appointment date and no such case or proceeding may be commenced with respect to a covered broker or dealer at any time while the Corporation is receiver for such covered broker or dealer;

(ii) The revesting of assets in a covered broker or dealer to the extent that they have vested in any entity other than the covered broker or dealer as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer; *provided that* any such revesting shall not apply to assets held by the covered broker or dealer, including customer property, transferred prior to the appointment date pursuant to an order entered by the bankruptcy court presiding over the case or proceeding with respect to the covered broker or dealer;

(iii) The request of the Corporation as receiver for a stay in any judicial action or proceeding (other than actions dismissed in accordance with paragraph (b)(2)(i) of this section) in which the covered broker or dealer is or becomes a party for a period of up to 90 days from the appointment date;

(iv) Except as provided in paragraph (b)(2)(v) of this section with respect to qualified financial contracts, no person may exercise any right or power to terminate, accelerate or declare a default under any contract to which the covered broker or dealer is a party (and no provision in any such contract providing for such default, termination or acceleration shall be enforceable), or to obtain possession of or exercise control over any property of the covered broker or dealer or affect any contractual rights of the covered broker or dealer without the consent of the Corporation as receiver of the covered broker or dealer upon consultation with SIPC during the 90-day period beginning from the appointment date; and

(v) The exercise of rights and the performance of obligations by parties to qualified financial contracts with the covered broker or dealer may be affected, stayed, or delayed pursuant to the provisions of Title II of the Dodd-Frank Act (including 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.

§ 380.63 Bridge broker or dealer.

(a) The Corporation, as receiver for one or more covered brokers or dealers or in anticipation of being appointed receiver for one or more covered broker or dealers, may organize one or more bridge brokers or dealers with respect to a covered broker or dealer.

(b) If the Corporation establishes one or more bridge brokers or dealers with respect to a covered broker or dealer, then, subject to paragraph (d) of this section, the Corporation as receiver for such covered broker or dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge brokers or dealers unless the Corporation determines, after consultation with the Commission and SIPC, that:

(1) The customer accounts, customer name securities, and customer property are likely to be promptly transferred to one or more qualified brokers or dealers such that the use of a bridge broker or dealer would not facilitate such transfer to one or more qualified brokers or dealers; or

(2) The transfer of such customer accounts to a bridge broker or dealer would materially interfere with the ability of the Corporation to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.

(c) The Corporation, as receiver for such covered broker or dealer, also may transfer any other assets and liabilities of the covered broker or dealer (including non-customer accounts and any associated property and any assets and liabilities associated with any trust or custody business) to such bridge brokers or dealers as the Corporation may, in its discretion, determine to be appropriate in accordance with, and subject to the requirements of, 12 U.S.C. 5390(h), including 12 U.S.C. 5390(h)(1) and 5390(h)(5), and any regulations promulgated thereunder.

(d) In connection with customer accounts transferred to the bridge broker or dealer pursuant to paragraph (b) of this section, claims for net equity shall not be transferred but shall remain with the covered broker or dealer. Customer property transferred from the covered broker or dealer, along with advances from SIPC, shall be allocated to customer accounts at the bridge broker or dealer in accordance with § 380.64(a)(3). Such allocations initially may be based upon estimates, and such estimates may be based upon the books and records of the covered broker or dealer or any other information deemed relevant in the discretion of the Corporation as receiver, in consultation with SIPC, as trustee. Such estimates may be adjusted from time to time as additional information becomes available. With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b) or (c) of this section, the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer, and allocated to the account as provided in § 380.64(a)(3), including any customer property and any advances from SIPC. The bridge broker or dealer shall have no obligations with respect to any customer property or other property that is not transferred from the covered broker or dealer to the bridge broker or dealer. The transfer of customer property to such an account shall have no effect on calculation of the amount of the affected account holder's net equity, but the value, as of the appointment date, of the customer property and advances from SIPC so transferred shall be deemed to satisfy any such claim, in whole or in part.

(e) The transfer of assets or liabilities held by a covered broker or dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker or dealer for any non-customer creditor, and assets and liabilities associated with any trust or custody business, to a bridge broker or dealer, shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.

(f) Any succession to or assumption by a bridge broker or dealer of rights, powers, authorities, or privileges of a covered broker or dealer shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any

customer, contract party, governmental authority, or court, and any such bridge broker or dealer shall upon its organization by the Corporation immediately and by operation of law—

(1) Be established and deemed registered with the Commission under the Securities Exchange Act of 1934;

(2) Be deemed to be a member of SIPC; and

(3) Succeed to any and all registrations and memberships of the covered broker or dealer with or in any self-regulatory organizations.

(g) Except as provided in paragraph (f) of this section, the bridge broker or dealer shall be subject to applicable Federal securities laws and all requirements with respect to being a member of a self-regulatory organization and shall operate in accordance with all such laws and requirements and in accordance with its articles of association; provided, however, that the Commission may, in its discretion, exempt the bridge broker or dealer from any such requirements if the Commission deems such exemption to be necessary or appropriate in the public interest or for the protection of investors.

(h) At the end of the term of existence of a bridge broker or dealer, any proceeds that remain after payment of all administrative expenses of such bridge broker or dealer and all other claims against such bridge broker or dealer shall be distributed to the receiver for the related covered broker or dealer.

§ 380.64 Claims of customers and other creditors of a covered broker or dealer.

(a) *Trustee's role.* (1) SIPC, as trustee for a covered broker or dealer, shall determine customer status, claims for net equity, claims for customer name securities, and whether property of the covered broker or dealer qualifies as customer property. SIPC, as trustee for a covered broker or dealer, shall make claims determinations in accordance with SIPA and with paragraph (a)(3) of this section, but such determinations, and any claims related thereto, shall be governed by the procedures set forth in paragraph (b) of this section.

(2) SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff–3. Where appropriate, SIPC shall make such advances by delivering cash or securities to the customer accounts established at the bridge broker or dealer.

(3) Customer property held by a covered broker or dealer shall be allocated as follows:

(i) First, to SIPC in repayment of advances made by SIPC pursuant to 12 U.S.C. 5385(f) and 15 U.S.C. 78fff–3(c)(1), to the extent such advances effected the release of securities which then were apportioned to customer property pursuant to 15 U.S.C. 78fff(d);

(ii) Second, to customers of such covered broker or dealer, or in the case that customer accounts are transferred to a bridge broker or dealer, then to such customer accounts at a bridge broker or dealer, who shall share ratably in such customer property on the basis and to the extent of their respective net equities;

(iii) Third, to SIPC as subrogee for the claims of customers; and

(iv) Fourth, to SIPC in repayment of advances made by SIPC pursuant to 15 U.S.C. 78fff–3(c)(2).

(4) The determinations and advances made by SIPC as trustee for a covered broker or dealer under this subpart D shall be made in a manner consistent with SIPC's customary practices under SIPA. The allocation of customer property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA. Any claims related to determinations made by SIPC as trustee for a covered broker or dealer shall be governed by the procedures set forth in paragraph (b) of this section.

(b) *Receiver's role.* Any claim shall be determined in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2) through (5) and the regulations promulgated by the Corporation thereunder, provided however, that—

(1) *Notice requirements.* The notice of the appointment of the Corporation as receiver for a covered broker or dealer shall also include notice of the appointment of SIPC as trustee. The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's public website in addition to the publication procedures set forth in § 380.33.

(2) *Procedures for filing a claim.* The Corporation as receiver shall consult with SIPC, as trustee, regarding a claim form and filing instructions with respect to claims against the Corporation as receiver for a covered broker or dealer, and such information shall be provided on SIPC's public website in addition to the Corporation's public website. Any such claim form shall contain a provision permitting a claimant to claim status as a customer of the broker or dealer, if applicable.

(3) *Claims bar date.* The Corporation as receiver shall establish a claims bar date in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder by which date creditors of a covered broker or dealer, including all customers of the covered broker or dealer, shall present their claims, together with proof. The claims bar date for a covered broker or dealer shall be the date following the expiration of the six-month period beginning on the date a notice to creditors to file their claims is first published in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder. Any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i) and any regulations promulgated thereunder, except that a claim filed after the claims bar date shall be considered by the receiver as provided by 12 U.S.C. 5390(a)(3)(C)(ii) and any regulations promulgated thereunder. In accordance with section 8(a)(3) of SIPA, 15 U.S.C. 78fff–2(a)(3), any claim for net equity filed more than sixty days after the date the notice to creditors to file claims is first published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it shall be satisfied in cash or securities, or both, as SIPC, as trustee, determines is most economical to the receivership estate.

(c) *Decision period.* The Corporation as receiver of a covered broker or dealer shall notify a claimant whether it allows or disallows the claim, or any portion of a claim or any claim of a security, preference, set-off, or priority, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein) or within the 90-day period set forth in 12 U.S.C. 5390(a)(5)(B) and any regulations promulgated thereunder, whichever is applicable. In accordance with paragraph (a) of this section, the Corporation, as receiver, shall issue the notice required by this paragraph (c), which shall utilize the determination made by SIPC, as trustee, in a manner consistent with SIPC's customary practices in a liquidation under SIPA, with respect to any claim for net equity or customer name securities. The process established herein for the determination, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein), of claims by customers of a covered broker or dealer for customer property or customer name securities shall constitute the exclusive process for the determination of such claims, and any procedure for expedited relief established pursuant to 12 U.S.C. 5390(a)(5) and any regulations promulgated thereunder shall be inapplicable to such claims.

(d) *Judicial review.* The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) of SIPC as trustee made pursuant to § 380.64(a), by the appropriate district or territorial court of the United States in accordance with 12 U.S.C. 5390(a)(4) or (5), whichever is applicable, and any regulations promulgated thereunder.

§ 380.65 Priorities for unsecured claims against a covered broker or dealer.

Allowed claims not satisfied pursuant to § 380.63(d), including allowed claims for net equity to the extent not satisfied after final allocation of customer property in accordance with § 380.64(a)(3), shall be paid in accordance with the order of priority set forth in § 380.21 subject to the following adjustments:

(a) Administrative expenses of SIPC incurred in performing its responsibilities as trustee for a covered broker or dealer shall be included as administrative expenses of the receiver as defined in § 380.22 and shall be paid *pro rata* with such expenses in accordance with § 380.21(c).

(b) Amounts paid by the Corporation to customers or SIPC shall be included as amounts owed to the United States as defined in § 380.23 and shall be paid *pro rata* with such amounts in accordance with § 380.21(c).

(c) Amounts advanced by SIPC for the purpose of satisfying customer claims for net equity shall be paid following the payment of all amounts owed to the United States pursuant to § 380.21(a)(3) but prior to the payment of any other class or priority of claims described in § 380.21(a)(4) through (11).

§ 380.66 Administrative expenses of SIPC.

(a) In carrying out its responsibilities, SIPC, as trustee for a covered broker or dealer, may utilize the services of third parties, including private attorneys, accountants, consultants, advisors, outside experts, and other third party professionals. SIPC shall have an allowed claim for administrative expenses for any amounts paid by SIPC for such services to the extent that such services are available in the private sector, and utilization of such services is practicable, efficient, and cost effective. The term *administrative expenses of SIPC* includes the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts, and other third party professionals, and other expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e).

(b) The term *administrative expenses of SIPC* shall not include advances from SIPC to satisfy customer claims for net equity.

§ 380.67 Qualified Financial Contracts.

The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.

PART 381—RESOLUTION PLANS

Sec.

AUTHORITY: 12 U.S.C. 5365(d).

SOURCE: 84 FR 59228, Nov. 1, 2019, unless otherwise noted.

§ 381.1 Authority and scope.

(a) *Authority*. This part is issued pursuant to section 165(d)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376, 1426–1427), as amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act (Pub. L. 115–174, 132 Stat. 1296) (the *Dodd-Frank Act*), 12 U.S.C. 5365(d)(8), which requires the Board of Governors of the Federal Reserve System (Board) and the Federal Deposit Insurance Corporation (Corporation) to jointly issue rules implementing the provisions of section 165(d) of the Dodd-Frank Act.

(b) *Scope.* This part applies to each covered company and establishes rules and requirements regarding the submission and content of a resolution plan, as well as procedures for review by the Board and Corporation of a resolution plan.

§ 381.2 Definitions.

For purposes of this part:

Bankruptcy Code means Title 11 of the United States Code.

Biennial filer is defined in § 381.4(a)(1).

Category II banking organization means a covered company that is a category II banking organization pursuant to § 252.5 of this title.

Category III banking organization means a covered company that is a category III banking organization pursuant to § 252.5 of this title.

Company means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization, but does not include any organization, the majority of the voting securities of which are owned by the United States.

Control. A company controls another company when the first company, directly or indirectly, owns, or holds with power to vote, 25 percent or more of any class of the second company's outstanding voting securities.

Core business lines means those business lines of the covered company, including associated operations, services, functions and support, that, in the view of the covered company, upon failure would result in a material loss of revenue, profit, or franchise value.

Core elements mean the information required to be included in a full resolution plan pursuant to § 381.5(c), (d)(1)(i), (iii), and (iv), (e)(1)(ii), (e)(2), (3), and (5), (f)(1)(v), and (g) regarding capital, liquidity, and the covered company's plan for executing any recapitalization contemplated in its resolution plan, including updated quantitative financial information and analyses important to the execution of the covered company's resolution strategy.

Council means the Financial Stability Oversight Council established by section 111 of the Dodd-Frank Act (12 U.S.C. 5321).

Covered company—(1) *In general.* A covered company means:

(i) Any nonbank financial company supervised by the Board;

(ii) Any global systemically important BHC;

(iii) Any bank holding company, as that term is defined in section 2 of the Bank Holding Company Act, as amended (12 U.S.C. 1841), and part 225 of this title (the Board's Regulation Y), that has $250 billion or more in total consolidated assets, as determined based on the average of the company's four most recent Consolidated Financial Statements for Holding Companies as reported on the Federal Reserve's Form FR Y–9C; provided that in the case of a company whose total consolidated assets have increased as the result of a merger, acquisition, combination, or similar transaction, the Board and the Corporation may alternatively consider, in their discretion, to the extent and in the manner the Board and the Corporation jointly consider to be appropriate, one or more of the four most recent Consolidated Financial Statements for Holding Companies as reported on the Federal Reserve's Form FR Y–9C or Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y–7Q of the companies that were party to the merger, acquisition, combination or similar transaction;

(iv) Any foreign bank or company that is a bank holding company or is treated as a bank holding company under section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), and that has $250 billion or more in total consolidated assets, as determined annually based on the foreign bank's or company's most recent annual or, as applicable, quarterly based on the average of the foreign bank's or company's four most recent quarterly Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y–7Q; provided that in the case of a company whose total consolidated assets have increased as the result of a merger, acquisition, combination, or similar transaction, the Board and the Corporation may alternatively consider, in their discretion, to the extent and in

the manner the Board and the Corporation jointly consider to be appropriate, one or more of the four most recent Consolidated Financial Statements for Holding Companies as reported on the Federal Reserve's Form FR Y–9C or Capital and Asset Reports for Foreign Banking Organizations as reported on the Federal Reserve's Form FR Y–7Q of the companies that were party to the merger, acquisition, combination or similar transaction; and

(v) Any additional covered company as determined pursuant to § 243.13 of this title.

(2) *Cessation of covered company status for nonbank financial companies supervised by the Board and global systemically important BHCs.* Once a covered company meets the requirements described in paragraph (1)(i) or (ii) of this definition of covered company, the company shall remain a covered company until it no longer meets any of the requirements described in paragraph (1) of this definition of covered company.

(3) *Cessation of covered company status for other covered companies.* Once a company meets the requirements described in paragraph (1)(iii) or (iv) of this definition of covered company, the company shall remain a covered company until—

(i) In the case of a covered company described in paragraph (1)(iii) of this definition of covered company or a covered company described in paragraph (1)(iv) of this definition of covered company that files quarterly Capital and Asset Reports for Foreign Banking Organizations on the Federal Reserve's Form FR Y–7Q, the company has reported total consolidated assets that are below $250 billion for each of four consecutive quarters, as determined based on its total consolidated assets as reported on each of its four most recent Consolidated Financial Statements for Holding Companies on the Federal Reserve's Form FR Y–9C or Capital and Asset Reports for Foreign Banking Organizations on the Federal Reserve's Form FR Y–7Q, as applicable; or

(ii) In the case of a covered company described in paragraph (1)(iv) of this definition of covered company that does not file quarterly Capital and Asset Reports for Foreign Banking Organizations on the Federal Reserve's Form FR Y–7Q, the company has reported total consolidated assets that are below $250 billion for each of two consecutive years, as determined based on its total consolidated assets as reported on each of its two most recent annual Capital and Asset Reports for Foreign Banking Organizations on the Federal Reserve's Form FR Y–7Q, or such earlier time as jointly determined by the Board and the Corporation.

(4) *Multi-tiered holding company.* In a multi-tiered holding company structure, covered company means the top-tier of the multi-tiered holding company unless the Board and the Corporation jointly identify a different holding company to satisfy the requirements that apply to the covered company. In making this determination, the Board and the Corporation shall consider:

(i) The ownership structure of the foreign banking organization, including whether the foreign banking organization is owned or controlled by a foreign government;

(ii) Whether the action would be consistent with the purposes of this part; and

(iii) Any other factors that the Board and the Corporation determine are relevant.

(5) *Asset threshold for bank holding companies and foreign banking organizations.* The Board may, pursuant to a recommendation of the Council, raise any asset threshold specified in paragraph (1)(iii) or (iv) of this definition of covered company.

(6) *Exclusion.* A bridge financial company chartered pursuant to 12 U.S.C. 5390(h) shall not be deemed to be a covered company hereunder.

Critical operations means those operations of the covered company, including associated services, functions and support, the failure or discontinuance of which would pose a threat to the financial stability of the United States.

Deficiency is defined in § 381.8(b).

Depository institution has the same meaning as in section 3(c)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(1)) and includes a state-licensed uninsured branch, agency, or commercial lending subsidiary of a foreign bank.

Foreign banking organization means—

(1) A foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that:

(i) Operates a branch, agency, or commercial lending company subsidiary in the United States;

(ii) Controls a bank in the United States; or

(iii) Controls an Edge corporation acquired after March 5, 1987; and

(2) Any company of which the foreign bank is a subsidiary.

Foreign-based covered company means any covered company that is not incorporated or organized under the laws of the United States.

Full resolution plan means a full resolution plan described in § 381.5.

Functionally regulated subsidiary has the same meaning as in section 5(c)(5) of the Bank Holding Company Act, as amended (12 U.S.C. 1844(c)(5)).

Global systemically important BHC means a covered company that is a global systemically important BHC pursuant to § 252.5 of this title.

Identified critical operations means the critical operations of the covered company identified by the covered company or jointly identified by the Board and the Corporation under § 381.3(b)(2).

Material change means an event, occurrence, change in conditions or circumstances, or other change that results in, or could reasonably be foreseen to have, a material effect on:

(1) The resolvability of the covered company;

(2) The covered company's resolution strategy; or

(3) How the covered company's resolution strategy is implemented. Such changes include, but are not limited to:

(i) The identification of a new critical operation or core business line;

(ii) The identification of a new material entity or the de-identification of a material entity;

(iii) Significant increases or decreases in the business, operations, or funding or interconnections of a material entity; or

(iv) Changes in the primary regulatory authorities of a material entity or the covered company on a consolidated basis.

Material entity means a subsidiary or foreign office of the covered company that is significant to the activities of an identified critical operation or core business line, or is financially or operationally significant to the resolution of the covered company.

Material financial distress with regard to a covered company means that:

(1) The covered company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;

(2) The assets of the covered company are, or are likely to be, less than its obligations to creditors and others; or

(3) The covered company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

Nonbank financial company supervised by the Board means a nonbank financial company or other company that the Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

Rapid and orderly resolution means a reorganization or liquidation of the covered company (or, in the case of a covered company that is incorporated or organized in a jurisdiction other than the United States, the subsidiaries and operations of such foreign company that are domiciled in the United States) under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the covered company would have serious adverse effects on financial stability in the United States.

Reduced resolution plan means a reduced resolution plan described in § 381.7.

Shortcoming is defined in § 381.8(e).

Subsidiary means a company that is controlled by another company, and an indirect subsidiary is a company that is controlled by a subsidiary of a company.

Targeted resolution plan means a targeted resolution plan described in § 381.6.

Triennial full filer is defined in § 381.4(b)(1).

Triennial reduced filer is defined in § 381.4(c)(1).

United States means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 381.3 Critical operations.

(a) *Identification of critical operations by covered companies*—(1) *Process and methodology required.* (i) Each biennial filer and triennial full filer shall establish and implement a process designed to identify each of its critical operations. After July 1, 2022, each triennial reduced filer that has any identified critical operation shall establish and implement a process designed to identify each of its critical operations. The scale of the process must be appropriate to the nature, size, complexity, and scope of the covered company's operations. The covered company must review its process periodically and update it as necessary to ensure its continued effectiveness. The covered company shall describe its process and how it is applied as part of its corporate governance relating to resolution planning under § 381.5(d)(1). The covered company must conduct the process described in this paragraph (a)(1) sufficiently in advance of its next resolution plan submission so that the covered company is prepared to submit the information required under §§ 381.5 through 381.7 for each identified critical operation.

(ii) The process required under paragraph (a)(1)(i) of this section must include a methodology for evaluating the covered company's participation in activities and markets that may be critical to the financial stability of the United States. The methodology must be designed, taking into account the nature, size, complexity, and scope of the covered company's operations, to identify and assess:

(A) The markets and activities in which the covered company participates or has operations;

(B) The significance of those markets and activities with respect to the financial stability of the United States; and

(C) The significance of the covered company as a provider or other participant in those markets and activities.

(2) *Waiver requests.* A covered company that has previously submitted a resolution plan under this part may request a waiver of the requirement to have a process and methodology under paragraph (a)(1) of this section by submitting a waiver request in accordance with this paragraph (a)(2) if the covered company does not have an identified critical operation as of the date it submits the waiver request.

(i) Each waiver request shall be divided into a public section and a confidential section. A covered company shall segregate and separately identify the public section from the confidential section. A covered company shall include in the confidential section of a waiver request its rationale for why a waiver of the requirement would be appropriate, including an explanation of why the process and methodology are not likely to identify any critical operation given its business model, operations, and organizational structure. A covered company shall describe in the public section of a waiver request that it is seeking to waive the requirement.

(ii) Any waiver request must be made in writing no later than 18 months before the date by which the covered company is required to submit its next resolution plan. Notwithstanding the foregoing, with respect to any resolution plan that a covered company is required to submit on or before July 1, 2021, any waiver request must be made in writing no later than 17 months before that date.

(iii) The Board and Corporation may jointly approve or deny a waiver request in their discretion. Unless the Board and the Corporation have jointly approved a waiver request, the waiver request will be deemed denied on the date that is 12 months before the date by which the covered company is required to submit the resolution plan that immediately follows submission of the waiver request.

(iv) An approved waiver request under this paragraph (a)(2) is effective for the resolution plan submission that immediately follows submission of the waiver request and for any resolution plan submitted thereafter until, but

not including, the covered company's next full resolution plan submission.

(3) *Limited exemption.* A foreign-based covered company is exempt from the requirement to have a process and methodology under paragraph (a)(1) of this section in connection with any requirement to submit a resolution plan on or before July 1, 2021 if the foreign-based covered company does not have an identified critical operation as of the date that is 17 months before the date by which the covered company is required to submit the resolution plan.

(b) *Joint identification of critical operations by the Board and the Corporation.* (1) The Board and the Corporation shall, not less frequently than every six years, jointly review the operations of covered companies to determine whether to jointly identify critical operations of any covered company in accordance with paragraph (b)(2) of this section, or to jointly rescind any currently effective joint identification in accordance with paragraph (b)(3) of this section.

(2) If the Board and the Corporation jointly identify a covered company's operation as a critical operation, the Board and the Corporation shall jointly notify the covered company in writing. A covered company is not required to include the information required under §§ 381.5 through 381.7 for the identified critical operation in any resolution plan that the covered company is required to submit within 12 months after the joint notification unless the operation had been identified by the covered company as a critical operation on or before the date the Board and the Corporation jointly notified the covered company.

(3) The Board and the Corporation may jointly rescind a joint identification under paragraph (b)(2) of this section by providing the covered company with joint notice of the rescission. Upon the notification, the covered company is not required to include the information regarding the operation required for identified critical operations under §§ 381.5 through 381.7 in any subsequent resolution plan unless:

(i) The covered company identifies the operation as a critical operation; or

(ii) The Board and the Corporation subsequently provide a joint notification under paragraph (b)(2) of this section to the covered company regarding the operation.

(4) A joint notification provided by the Board and the Corporation to a covered company before [effective date of final rule] that identifies any of its operations as a critical operation and not previously jointly rescinded is deemed to be a joint identification under paragraph (b)(2) of this section.

(c) *Request for reconsideration of jointly identified critical operations.* A covered company may request that the Board and the Corporation reconsider a joint identification under paragraph (b)(2) of this section in accordance with this paragraph (c).

(1) *Written request for reconsideration.* The covered company must submit a written request for reconsideration to the Board and the Corporation that includes a clear and complete statement of all arguments and all relevant, material information that the covered company expects to have considered. If a covered company has previously requested reconsideration regarding the operation, the written request must also describe the material differences between the new request and the most recent prior request.

(2) *Timing.* (i) If a covered company submits a request for reconsideration on or before the date that is 18 months before the date by which it is required to submit its next resolution plan, the Board and the Corporation will complete their reconsideration no later than 12 months before the date by which the covered company is required to submit its next resolution plan. Notwithstanding the foregoing, if the Board and the Corporation jointly find that additional information from the covered company is required to complete their reconsideration, the Board and the Corporation will jointly request in writing the additional information from the covered company. The Board and the Corporation will then complete their reconsideration no later than the later of:

(A) Ninety (90) days after receipt of all additional information from the covered company; and

(B) Twelve (12) months before the date by which the covered company is

required to submit its next resolution plan.

(ii) If a covered company submits a request for reconsideration less than 18 months before the date by which it is required to submit its next resolution plan, the Board and the Corporation may, in their discretion, defer reconsideration of the joint identification until after the submission of that resolution plan, with the result that the covered company must include the identified critical operation in that resolution plan and the Board and the Corporation will complete their reconsideration in accordance with paragraph (c)(2)(i) of this section as though the covered company had submitted the request after the date by which the covered company is required to submit that resolution plan.

(3) *Joint communication following reconsideration.* The Board and the Corporation will communicate jointly the results of their reconsideration in writing to the covered company.

(d) *De-identification by covered company of self-identified critical operations.* A covered company may cease to include in its resolution plans the information required under §§ 381.5 through 381.7 regarding an operation previously identified only by the covered company (and not also jointly by the Board and the Corporation) as a critical operation only in accordance with this paragraph (d).

(1) *Notice of de-identification.* If a covered company ceases to identify an operation as a critical operation, the covered company must notify the Board and the Corporation of its de-identification. The notice must be in writing and include a clear and complete explanation of:

(i) Why the covered company previously identified the operation as a critical operation; and

(ii) Why the covered company no longer identifies the operation as a critical operation.

(2) *Timing.* Notwithstanding a covered company's de-identification, and unless otherwise notified in writing jointly by the Board and the Corporation, a covered company shall include the applicable information required under §§ 381.5 through § 381.7 regarding an operation previously identified by the covered company as a critical operation in any resolution plan the covered company is required to submit during the period ending 12 months after the covered company notifies the Board and the Corporation in accordance with paragraph (d)(1) of this section.

(3) *No effect on joint identifications.* Neither a covered company's de-identification nor notice thereof under paragraph (d)(1) of this section rescinds a joint identification made by the Board and the Corporation under paragraph (b)(2) of this section.

§ 381.4 Resolution plan required.

(a) *Biennial filers*—(1) *Group members.* Biennial filer means:

(i) Any global systemically important BHC; and

(ii) Any nonbank financial company supervised by the Board that has not been jointly designated a triennial full filer by the Board and Corporation under paragraph (a)(2) of this section or that has been jointly re-designated a biennial filer by the Board and the Corporation under paragraph (a)(2) of this section.

(2) *Nonbank financial companies.* The Board and the Corporation may jointly designate a nonbank financial company supervised by the Board as a triennial full filer in their discretion, taking into account facts and circumstances that each of the Board and the Corporation in its discretion determines to be relevant. The Board and the Corporation may in their discretion jointly re-designate as a biennial filer a nonbank financial company that the Board and the Corporation had previously designated as a triennial filer, taking into account facts and circumstances that each of the Board and the Corporation in its discretion determines to be relevant.

(3) *Frequency of submission.* Biennial filers shall each submit a resolution plan to the Board and the Corporation every two years.

(4) *Submission date.* Biennial filers shall submit their resolution plans on or before July 1 of each year in which a resolution plan is due.

(5) *Type of resolution plan required to be submitted.* Biennial filers shall alternate submitting a full resolution plan and a targeted resolution plan.

(6) *New covered companies that are biennial filers.* A company that becomes a covered company and a biennial filer after [effective date of final rule] shall submit a full resolution plan on or before the next date by which the other biennial filers are required to submit resolution plans pursuant to paragraph (a)(4) of this section that occurs no earlier than 12 months after the date as of which the company became a covered company. The company's subsequent resolution plans shall be of the type required to be submitted by the other biennial filers.

(b) *Triennial full filers*—(1) *Group members.* Triennial full filer means:

(i) Any category II banking organization;

(ii) Any category III banking organization; and

(iii) Any nonbank financial company supervised by the Board that is jointly designated a triennial full filer by the Board and Corporation under paragraph (a)(2) of this section.

(2) *Frequency of submission.* Triennial full filers shall each submit a resolution plan to the Board and the Corporation every three years.

(3) *Submission date.* Triennial full filers shall submit their resolution plans on or before July 1 of each year in which a resolution plan is due.

(4) *Type of resolution plan required to be submitted.* Triennial full filers shall alternate submitting a full resolution plan and a targeted resolution plan.

(5) *New covered companies that are triennial full filers.* A company that becomes a covered company and a triennial full filer after [effective date of final rule] shall submit a full resolution plan on or before the next date by which the other triennial full filers are required to submit resolution plans pursuant to paragraph (b)(3) of this section that occurs no earlier than 12 months after the date as of which the company became a covered company. The company's subsequent resolution plans shall be of the type required to be submitted by the other triennial full filers.

(c) *Triennial reduced filers*—(1) *Group members.* Triennial reduced filer means any covered company that is not a global systemically important BHC, nonbank financial company supervised by the Board, category II banking organization, or category III banking organization.

(2) *Frequency of submission.* Triennial reduced filers shall each submit a resolution plan to the Board and the Corporation every three years.

(3) *Submission date.* Triennial reduced filers shall submit their resolution plans on or before July 1 of each year in which a resolution plan is due.

(4) *Type of resolution plan required to be submitted.* Triennial reduced filers shall submit a reduced resolution plan.

(5) *New covered companies that are triennial reduced filers.* A company that becomes a covered company and a triennial reduced filer after December 31, 2019 shall submit a full resolution plan on or before the next date by which the other triennial reduced filers are required to submit resolution plans pursuant to paragraph (c)(3) of this section that occurs no earlier than 12 months after the date as of which the company became a covered company. The company's subsequent resolution plans shall be reduced resolution plans.

(d) *General*—(1) *Changing filing groups.* If a covered company that is a member of a filing group specified in paragraphs (a) through (c) of this section (''original group filer'') becomes a member of a different filing group specified in paragraphs (a) through (c) of this section (''new group filer''), then the covered company shall submit its next resolution plan as follows:

(i) If the next date by which the original group filers are required to submit their next resolution plans is the same date by which the other new group filers are required to submit their next resolution plans and:

(A) That date is less than 12 months after the date as of which the covered company became a new group filer, the covered company shall submit its next resolution plan on or before that date. The resolution plan may be the type of resolution plan that the original group filers are required to submit on or before that date or the type of resolution plan that the other new group filers are

required to submit on or before that date.

(B) That date is 12 months or more after the date as of which the covered company became a new group filer, the covered company shall submit on or before that date the type of resolution plan the other new group filers are required to submit on or before that date.

(ii) If the next date by which the original group filers are required to submit their next resolution plans is different from the date by which the new group filers are required to submit their next resolution plans, the covered company shall submit its next resolution plan on or before the next date by which the other new group filers are required to submit a resolution plan that occurs no earlier than 12 months after the date as of which the covered company became a new group filer. The covered company shall submit the type of resolution plan that the other new group filers are required to submit on or before the date the covered company is required to submit its next resolution plan.

(iii) Notwithstanding paragraph (d)(1)(i) or (ii) of this section, any triennial reduced filer that becomes a biennial filer or a triennial full filer shall submit a full resolution plan on or before the next date by which the other new group filers are required to submit their next resolution plans that occurs no earlier than 12 months after the date as of which the covered company became a new group filer. After submitting a full resolution plan, the covered company shall submit, on or before the next date that the other new group filers are required to submit their next resolution plans, the type of resolution plan the other new group filers are required to submit on or before that date.

(2) *Altering submission dates.* Notwithstanding anything to the contrary in this part, the Board and Corporation may jointly determine that a covered company shall submit its resolution plan on or before a date other than as provided in paragraphs (a) through (c) or paragraph (d)(1) of this section. The Board and the Corporation shall provide a covered company with written notice of a determination under this paragraph (d)(2) no later than 12 months before the date by which the covered company is required to submit the resolution plan.

(3) *Authority to require interim updates.* The Board and the Corporation may jointly require that a covered company submit an update to a resolution plan submitted under this part, within a reasonable amount of time, as jointly determined by the Board and Corporation. The Board and the Corporation shall notify the covered company of its requirement to submit an update under this paragraph (d)(3) in writing, and shall specify the portions or aspects of the resolution plan the covered company shall update.

(4) *Notice of extraordinary events*—(i) *In general.* Each covered company shall provide the Board and the Corporation with a notice no later than 45 days after any material merger, acquisition of assets, or similar transaction or fundamental change to the covered company's resolution strategy. Such notice must describe the event and explain how the event affects the resolvability of the covered company. The covered company shall address any event with respect to which it has provided notice pursuant to this paragraph (d)(4)(i) in the following resolution plan submitted by the covered company.

(ii) *Exception.* A covered company shall not be required to submit a notice under paragraph (d)(4)(i) of this section if the date by which the covered company would be required to submit the notice under paragraph (d)(4)(i) of this section would be within 90 days before the date by which the covered company is required to submit a resolution plan under this section.

(5) *Authority to require a full resolution plan submission.* Notwithstanding anything to the contrary in this part, the Board and Corporation may jointly require a covered company to submit a full resolution plan instead of a targeted resolution plan or a reduced resolution plan that the covered company is otherwise required to submit under this section. The Board and the Corporation shall provide a covered company with written notice of a determination under this paragraph (d)(5) no later than 12 months before the date by which the covered company is required

to submit the full resolution plan. The date on or before which a full resolution plan must be submitted under this paragraph (d)(5) will be the date by which the covered company would otherwise be required to submit its upcoming targeted resolution plan or reduced resolution plan under paragraphs (a) through (c), or (d)(1) or (2) of this section. The requirement to submit a full resolution plan under this paragraph (d)(5) does not alter the type of resolution plan the covered company will subsequently be required to submit under this section.

(6) *Waivers*—(i) *Authority to waive requirements.* The Board and the Corporation may jointly waive one or more of the resolution plan requirements of §381.5, §381.6, or §381.7 for one or more covered companies for any number of resolution plan submissions. A request pursuant to paragraph (d)(6)(ii) of this section is not required for the Board and Corporation to exercise their authority under this paragraph (d)(6)(i).

(ii) *Waiver requests by covered companies.* In connection with the submission of a full resolution plan, a triennial full filer or triennial reduced filer that has previously submitted a resolution plan under this part may request a waiver of one or more of the informational content requirements of §381.5 in accordance with this paragraph (d)(6)(ii).

(A) A requirement to include any of the following information is not eligible for a waiver at the request of a triennial full filer or triennial reduced filer:

(*1*) Information specified in section 165(d)(1)(A) through (C) of the Dodd-Frank Act (12 U.S.C. 5365(d)(1)(A) through (C));

(*2*) Any core element;

(*3*) Information required to be included in the public section of a full resolution plan under §381.11(c)(2);

(*4*) Information about the remediation of any previously identified deficiency or shortcoming unless the Board and the Corporation have jointly determined that the triennial full filer or triennial reduced filer has satisfactorily remedied the deficiency or addressed the shortcoming before its submission of the waiver request; or

(*5*) Information about changes to the triennial full filer or triennial reduced filer's last submitted resolution plan resulting from any:

(*i*) Change in law or regulation;

(*ii*) Guidance or feedback from the Board and the Corporation; or

(*iii*) Any material change experienced by the triennial full filer or triennial reduced filer since it submitted that resolution plan.

(B) Each waiver request shall be divided into a public section and a confidential section. A triennial full filer or triennial reduced filer shall segregate and separately identify the public section from the confidential section.

(*1*) The triennial full filer or triennial reduced filer shall include in the confidential section of a waiver request a clear and complete explanation of why:

(*i*) Each requirement sought to be waived is not a requirement described in paragraph (d)(6)(ii)(A) of this section;

(*ii*) The information sought to be waived would not be relevant to the Board's and Corporation's review of the triennial full filer or triennial reduced filer's next full resolution plan; and

(*iii*) A waiver of each requirement would be appropriate.

(*2*) The triennial full filer or triennial reduced filer shall include in the public section of a waiver request a list of the requirements that it is requesting be waived.

(C) A triennial full filer or triennial reduced filer may not make more than one waiver request for any full resolution plan submission and any waiver request must be made in writing no later than 18 months before the date by which the triennial full filer or triennial reduced filer is required to submit the full resolution plan.

(D) The Board and Corporation may jointly approve or deny a waiver request, in whole or in part, in their discretion. Unless the Board and the Corporation have jointly approved a waiver request, the waiver request will be deemed denied on the date that is 12 months before the date by which the triennial full filer or triennial reduced filer is required to submit the full resolution plan to which the waiver request relates.

(E) An approved waiver request under this paragraph (d)(6)(ii) is effective for only the full resolution plan that immediately follows submission of the waiver request.

(e) *Access to information.* In order to allow evaluation of a resolution plan, each covered company must provide the Board and the Corporation such information and access to personnel of the covered company as the Board and the Corporation jointly determine during the period for reviewing the resolution plan is necessary to assess the credibility of the resolution plan and the ability of the covered company to implement the resolution plan. In order to facilitate review of any waiver request by a covered company under §381.3(a)(2) or paragraph (d)(6)(ii) of this section, or any joint identification of a critical operation of a covered company under §381.3(b), each covered company must provide such information and access to personnel of the covered company as the Board and the Corporation jointly determine is necessary to evaluate the waiver request or whether the operation is a critical operation. The Board and the Corporation will rely to the fullest extent possible on examinations conducted by or on behalf of the appropriate Federal banking agency for the relevant company.

(f) *Board of directors approval of resolution plan.* Before submission of a resolution plan under paragraphs (a) through (c) of this section, the resolution plan of a covered company shall be approved by:

(1) The board of directors of the covered company and noted in the minutes; or

(2) In the case of a foreign-based covered company only, a delegee acting under the express authority of the board of directors of the covered company to approve the resolution plan.

(g) *Resolution plans provided to the Council.* The Board shall make the resolution plans and updates submitted by the covered company pursuant to this section available to the Council upon request.

(h) *Required and prohibited assumptions.* In preparing its resolution plan, a covered company shall:

(1) Take into account that the material financial distress or failure of the covered company may occur under the severely adverse economic conditions provided to the covered company by the Board pursuant to 12 U.S.C. 5365(i)(1)(B);

(2) Not rely on the provision of extraordinary support by the United States or any other government to the covered company or its subsidiaries to prevent the failure of the covered company, including any resolution actions taken outside the United States that would eliminate the need for any of a covered company's U.S. subsidiaries to enter into resolution proceedings; and

(3) With respect to foreign banking organizations, not assume that the covered company takes resolution actions outside of the United States that would eliminate the need for any U.S. subsidiaries to enter into resolution proceedings.

(i) *Point of contact.* Each covered company shall identify a senior management official at the covered company responsible for serving as a point of contact regarding the resolution plan of the covered company.

(j) *Incorporation of previously submitted resolution plan information by reference.* Any resolution plan submitted by a covered company may incorporate by reference information from a resolution plan previously submitted by the covered company to the Board and the Corporation, provided that:

(1) The resolution plan seeking to incorporate information by reference clearly indicates:

(i) The information the covered company is incorporating by reference; and

(ii) Which of the covered company's previously submitted resolution plan(s) originally contained the information the covered company is incorporating by reference and the specific location of the information in the covered company's previously submitted resolution plan; and

(2) The covered company certifies that the information the covered company is incorporating by reference remains accurate in all respects that are material to the covered company's resolution plan.

(k) *Initial resolution plans after effective date.* (1) Notwithstanding anything

to the contrary in paragraphs (a) through (c) or (d)(1) of this section, each company that is a covered company as of December 31, 2019 is required to submit its initial resolution plan after December 31, 2019, as provided in this paragraph (k). The submission date and resolution plan type for each subsequent resolution plan will be determined pursuant to paragraphs (a) through (d) of this section.

(i) *Biennial filers.* Each covered company that is a biennial filer on October 1, 2020 and remains a biennial filer as of July 1, 2021, is required to submit a targeted resolution plan pursuant to paragraph (a)(4) of this section on or before July 1, 2021.

(ii) *Triennial full filers.* Each covered company that is a triennial full filer on October 1, 2020 and remains a triennial full filer as of July 1, 2021 is required to submit a targeted resolution plan pursuant to paragraph (b)(3) of this section on or before July 1, 2021.

(iii) *Triennial reduced filers.* Each covered company that is a triennial reduced filer on October 1, 2020 and remains a triennial reduced filer as of July 1, 2022 is required to submit a reduced resolution plan pursuant to paragraph (c)(3) of this section on or before July 1, 2022.

(2) With respect to any company that is a covered company as of December 31, 2019, and changes filings groups specified in paragraphs (a) through (c) of this section after October 1, 2020 and before the date by which it would be required to submit a resolution plan under paragraph (k)(1) of this section, the requirements for its initial resolution plan after it changes filing groups will be determined pursuant to paragraph (d)(1) of this section.

(3) Notwithstanding anything to the contrary in this paragraph (k), a covered company that has been jointly directed by the Board and the Corporation before December 31, 2019, to submit a resolution plan on or before July 1, 2020 describing changes it has made to its most recent resolution plan submission to address each shortcoming the agencies identified in that resolution plan shall submit a responsive resolution plan on or before July 1, 2020 in addition to any resolution plan that such covered company is otherwise required to submit under this section. The requirement to submit such a resolution plan on or before July 1, 2020 does not alter the timing or type of resolution plan any such covered company is required to submit under this section after July 1, 2020.

§ 381.5 Informational content of a full resolution plan.

(a) *In general*—(1) *Domestic covered companies.* A full resolution plan of a covered company that is organized or incorporated in the United States shall include the information specified in paragraphs (b) through (h) of this section with respect to the subsidiaries and operations that are domiciled in the United States as well as the foreign subsidiaries, offices, and operations of the covered company.

(2) *Foreign-based covered companies.* A full resolution plan of a covered company that is organized or incorporated in a jurisdiction other than the United States (other than a bank holding company) or that is a foreign banking organization shall include:

(i) The information specified in paragraphs (b) through (h) of this section with respect to the subsidiaries, branches and agencies, and identified critical operations and core business lines, as applicable, that are domiciled in the United States or conducted in whole or material part in the United States. With respect to the information specified in paragraph (g) of this section, the resolution plan of a foreign-based covered company shall also identify, describe in detail, and map to legal entity the interconnections and interdependencies among the U.S. subsidiaries, branches, and agencies, and between those entities and:

(A) The identified critical operations and core business lines of the foreign-based covered company; and

(B) Any foreign-based affiliate; and

(ii) A detailed explanation of how resolution planning for the subsidiaries, branches and agencies, and identified critical operations and core business lines of the foreign-based covered company that are domiciled in the United States or conducted in whole or material part in the United States is

integrated into the foreign-based covered company's overall resolution or other contingency planning process.

(b) *Executive summary.* Each full resolution plan of a covered company shall include an executive summary describing:

(1) The key elements of the covered company's strategic plan for rapid and orderly resolution in the event of material financial distress at or failure of the covered company;

(2) A description of each material change experienced by the covered company since the filing of the covered company's previously submitted resolution plan (or affirmation that no such material change has occurred);

(3) Changes to the covered company's previously submitted resolution plan resulting from any:

(i) Change in law or regulation;

(ii) Guidance or feedback from the Board and the Corporation; or

(iii) Material change described pursuant to paragraph (b)(2) of this section; and

(4) Any actions taken by the covered company since filing of the previous resolution plan to improve the effectiveness of the covered company's resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to effective and timely execution of the resolution plan.

(c) *Strategic analysis.* Each full resolution plan shall include a strategic analysis describing the covered company's plan for rapid and orderly resolution in the event of material financial distress or failure of the covered company. Such analysis shall:

(1) Include detailed descriptions of the:

(i) Key assumptions and supporting analysis underlying the covered company's resolution plan, including any assumptions made concerning the economic or financial conditions that would be present at the time the covered company sought to implement such plan;

(ii) Range of specific actions to be taken by the covered company to facilitate a rapid and orderly resolution of the covered company, its material entities, and its identified critical operations and core business lines in the event of material financial distress or failure of the covered company;

(iii) Funding, liquidity and capital needs of, and resources available to, the covered company and its material entities, which shall be mapped to its identified critical operations and core business lines, in the ordinary course of business and in the event of material financial distress at or failure of the covered company;

(iv) Covered company's strategy for maintaining operations of, and funding for, the covered company and its material entities, which shall be mapped to its identified critical operations and core business lines;

(v) Covered company's strategy in the event of a failure or discontinuation of a material entity, core business line or identified critical operation, and the actions that will be taken by the covered company to prevent or mitigate any adverse effects of such failure or discontinuation on the financial stability of the United States; provided, however, if any such material entity is subject to an insolvency regime other than the Bankruptcy Code, a covered company may exclude that entity from its strategic analysis unless that entity either has $50 billion or more in total assets or conducts an identified critical operation; and

(vi) Covered company's strategy for ensuring that any insured depository institution subsidiary of the covered company will be adequately protected from risks arising from the activities of any nonbank subsidiaries of the covered company (other than those that are subsidiaries of an insured depository institution);

(2) Identify the time period(s) the covered company expects would be needed for the covered company to successfully execute each material aspect and step of the covered company's plan;

(3) Identify and describe any potential material weaknesses or impediments to effective and timely execution of the covered company's plan;

(4) Discuss the actions and steps the covered company has taken or proposes to take to remediate or otherwise mitigate the weaknesses or impediments

identified by the covered company, including a timeline for the remedial or other mitigatory action; and

(5) Provide a detailed description of the processes the covered company employs for:

(i) Determining the current market values and marketability of the core business lines, identified critical operations, and material asset holdings of the covered company;

(ii) Assessing the feasibility of the covered company's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations, or other similar actions contemplated in the covered company's resolution plan; and

(iii) Assessing the impact of any sales, divestitures, restructurings, recapitalizations, or other similar actions on the value, funding, and operations of the covered company, its material entities, identified critical operations and core business lines.

(d) *Corporate governance relating to resolution planning.* Each full resolution plan shall:

(1) Include a detailed description of:

(i) How resolution planning is integrated into the corporate governance structure and processes of the covered company;

(ii) The covered company's policies, procedures, and internal controls governing preparation and approval of the covered company's resolution plan;

(iii) The identity and position of the senior management official(s) of the covered company that is primarily responsible for overseeing the development, maintenance, implementation, and filing of the covered company's resolution plan and for the covered company's compliance with this part; and

(iv) The nature, extent, and frequency of reporting to senior executive officers and the board of directors of the covered company regarding the development, maintenance, and implementation of the covered company's resolution plan;

(2) Describe the nature, extent, and results of any contingency planning or similar exercise conducted by the covered company since the date of the covered company's most recently filed resolution plan to assess the viability of or improve the resolution plan of the covered company; and

(3) Identify and describe the relevant risk measures used by the covered company to report credit risk exposures both internally to its senior management and board of directors, as well as any relevant risk measures reported externally to investors or to the covered company's appropriate Federal regulator.

(e) *Organizational structure and related information.* Each full resolution plan shall:

(1) Provide a detailed description of the covered company's organizational structure, including:

(i) A hierarchical list of all material entities within the covered company's organization (including legal entities that directly or indirectly hold such material entities) that:

(A) Identifies the direct holder and the percentage of voting and nonvoting equity of each legal entity and foreign office listed; and

(B) The location, jurisdiction of incorporation, licensing, and key management associated with each material legal entity and foreign office identified;

(ii) A mapping of the covered company's identified critical operations and core business lines, including material asset holdings and liabilities related to such identified critical operations and core business lines, to material entities;

(2) Provide an unconsolidated balance sheet for the covered company and a consolidating schedule for all material entities that are subject to consolidation by the covered company;

(3) Include a description of the material components of the liabilities of the covered company, its material entities, identified critical operations and core business lines that, at a minimum, separately identifies types and amounts of the short-term and long-term liabilities, the secured and unsecured liabilities, and subordinated liabilities;

(4) Identify and describe the processes used by the covered company to:

(i) Determine to whom the covered company has pledged collateral;

(ii) Identify the person or entity that holds such collateral; and

(iii) Identify the jurisdiction in which the collateral is located, and, if different, the jurisdiction in which the security interest in the collateral is enforceable against the covered company;

(5) Describe any material off-balance sheet exposures (including guarantees and contractual obligations) of the covered company and its material entities, including a mapping to its identified critical operations and core business lines;

(6) Describe the practices of the covered company, its material entities and its core business lines related to the booking of trading and derivatives activities;

(7) Identify material hedges of the covered company, its material entities, and its core business lines related to trading and derivative activities, including a mapping to legal entity;

(8) Describe the hedging strategies of the covered company;

(9) Describe the process undertaken by the covered company to establish exposure limits;

(10) Identify the major counterparties of the covered company and describe the interconnections, interdependencies and relationships with such major counterparties;

(11) Analyze whether the failure of each major counterparty would likely have an adverse impact on or result in the material financial distress or failure of the covered company; and

(12) Identify each trading, payment, clearing, or settlement system of which the covered company, directly or indirectly, is a member and on which the covered company conducts a material number or value amount of trades or transactions. Map membership in each such system to the covered company's material entities, identified critical operations and core business lines.

(f) *Management information systems.* (1) Each full resolution plan shall include:

(i) A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, accounting, and financial and regulatory reporting, used by the covered company and its material entities. The description of each system or application provided shall identify the legal owner or licensor, the use or function of the system or application, service level agreements related thereto, any software and system licenses, and any intellectual property associated therewith;

(ii) A mapping of the key management information systems and applications to the material entities, identified critical operations and core business lines of the covered company that use or rely on such systems and applications;

(iii) An identification of the scope, content, and frequency of the key internal reports that senior management of the covered company, its material entities, identified critical operations and core business lines use to monitor the financial health, risks, and operation of the covered company, its material entities, identified critical operations and core business lines;

(iv) A description of the process for the appropriate supervisory or regulatory agencies to access the management information systems and applications identified in paragraph (f) of this section; and

(v) A description and analysis of:

(A) The capabilities of the covered company's management information systems to collect, maintain, and report, in a timely manner to management of the covered company, and to the Board, the information and data underlying the resolution plan; and

(B) Any gaps or weaknesses in such capabilities, and a description of the actions the covered company intends to take to promptly address such gaps, or weaknesses, and the time frame for implementing such actions.

(2) The Board will use its examination authority to review the demonstrated capabilities of each covered company to satisfy the requirements of paragraph (f)(1)(v) of this section. The Board will share with the Corporation information regarding the capabilities of the covered company to collect, maintain, and report in a timely manner information and data underlying the resolution plan.

(g) *Interconnections and interdependencies.* To the extent not provided elsewhere in this part, each full resolution plan shall identify and map to the material entities the interconnections and

interdependencies among the covered company and its material entities, and among the identified critical operations and core business lines of the covered company that, if disrupted, would materially affect the funding or operations of the covered company, its material entities, or its identified critical operations or core business lines. Such interconnections and interdependencies may include:

(1) Common or shared personnel, facilities, or systems (including information technology platforms, management information systems, risk management systems, and accounting and recordkeeping systems);

(2) Capital, funding, or liquidity arrangements;

(3) Existing or contingent credit exposures;

(4) Cross-guarantee arrangements, cross-collateral arrangements, cross-default provisions, and cross-affiliate netting agreements;

(5) Risk transfers; and

(6) Service level agreements.

(h) *Supervisory and regulatory information.* Each full resolution plan shall:

(1) Identify any:

(i) Federal, state, or foreign agency or authority (other than a Federal banking agency) with supervisory authority or responsibility for ensuring the safety and soundness of the covered company, its material entities, identified critical operations and core business lines; and

(ii) Other Federal, state, or foreign agency or authority (other than a Federal banking agency) with significant supervisory or regulatory authority over the covered company, and its material entities and identified critical operations and core business lines.

(2) Identify any foreign agency or authority responsible for resolving a foreign-based material entity and identified critical operations or core business lines of the covered company; and

(3) Include contact information for each agency identified in paragraphs (h)(1) and (2) of this section.

§ 381.6 Informational content of a targeted resolution plan.

(a) *In general.* A targeted resolution plan is a subset of a full resolution plan and shall include core elements of a full resolution plan and information concerning key areas of focus as set forth in this section.

(b) *Targeted resolution plan content.* Each targeted resolution plan of a covered company shall include:

(1) The core elements;

(2) Such targeted information as the Board and Corporation may jointly identify pursuant to paragraph (c) of this section;

(3) A description of each material change experienced by the covered company since the filing of the covered company's previously submitted resolution plan (or affirmation that no such material change has occurred); and

(4) A description of changes to the covered company's previously submitted resolution plan resulting from any;

(i) Change in law or regulation;

(ii) Guidance or feedback from the Board and the Corporation; or

(iii) Material change described pursuant to paragraph (b)(3) of this section.

(c) *Targeted information requests.* No less than 12 months before the date by which a covered company is required to submit a targeted resolution plan, the Board and Corporation may jointly identify in writing resolution-related key areas of focus, questions, and issues that must also be addressed in the covered company's targeted resolution plan.

(d) *Deemed incorporation by reference.* If a covered company does not include in its targeted resolution plan a description of changes to any information set forth in section 165(d)(1)(A), (B), or (C) of the Dodd-Frank Act (12 U.S.C. 5365(d)(1)(A), (B), or (C)) since its previously submitted resolution plan, such information from its previously submitted resolution plan are incorporated by reference into its targeted resolution plan.

§ 381.7 Informational content of a reduced resolution plan.

(a) *Reduced resolution plan content.* Each reduced resolution plan of a covered company shall include:

(1) A description of each material change experienced by the covered company since the filing of the covered

company's previously submitted resolution plan (or affirmation that no such material change has occurred); and

(2) A description of changes to the strategic analysis that was presented in the covered company's previously submitted resolution plan resulting from any:

(i) Change in law or regulation;

(ii) Guidance or feedback from the Board and the Corporation; or

(iii) Material change described pursuant to paragraph (a)(1) of this section.

(b) *Deemed incorporation by reference.* If a covered company does not include in its reduced resolution plan a description of changes to any information set forth in section 165(d)(1)(A), (B), or (C) of the Dodd-Frank Act (12 U.S.C. 5365(d)(1)(A), (B), or (C)) since its previously submitted resolution plan, such information from its previously submitted resolution plan are incorporated by reference into its reduced resolution plan.

§ 381.8 Review of resolution plans; resubmission of deficient resolution plans.

(a) *Review of resolution plans.* The Board and Corporation will seek to coordinate their activities concerning the review of resolution plans, including planning for, reviewing, and assessing the resolution plans, as well as such activities that occur during the periods between resolution plan submissions.

(b) *Joint determination regarding deficient resolution plans.* If the Board and Corporation jointly determine that the resolution plan of a covered company submitted under § 381.4 is not credible or would not facilitate an orderly resolution of the covered company under the Bankruptcy Code, the Board and Corporation shall jointly notify the covered company in writing of such determination. Any joint notice provided under this paragraph (b) shall be provided pursuant to paragraph (f) of this section and shall identify the deficiencies identified by the Board and Corporation in the resolution plan. A deficiency is an aspect of a covered company's resolution plan that the Board and Corporation jointly determine presents a weakness that individually or in conjunction with other aspects could undermine the feasibility of the covered company's resolution plan.

(c) *Resubmission of a resolution plan.* Within 90 days of receiving a notice of deficiencies issued pursuant to paragraph (b) of this section, or such shorter or longer period as the Board and Corporation may jointly determine, a covered company shall submit a revised resolution plan to the Board and Corporation that addresses the deficiencies jointly identified by the Board and Corporation, and that discusses in detail:

(1) The revisions made by the covered company to address the deficiencies jointly identified by the Board and the Corporation;

(2) Any changes to the covered company's business operations and corporate structure that the covered company proposes to undertake to facilitate implementation of the revised resolution plan (including a timeline for the execution of such planned changes); and

(3) Why the covered company believes that the revised resolution plan is credible and would result in an orderly resolution of the covered company under the Bankruptcy Code.

(d) *Extensions of time.* Upon their own initiative or a written request by a covered company, the Board and Corporation may jointly extend any time period under this section. Each extension request shall be supported by a written statement of the covered company describing the basis and justification for the request.

(e) *Joint determination regarding shortcomings in resolution plans.* The Board and Corporation may also jointly identify one or more shortcomings in a covered company's resolution plan. A shortcoming is a weakness or gap that raises questions about the feasibility of a covered company's resolution plan, but does not rise to the level of a deficiency for both the Board and Corporation. If a shortcoming is not satisfactorily explained or addressed before or in the submission of the covered company's next resolution plan, it may be found to be a deficiency in the covered company's next resolution plan. The

Board and the Corporation may identify an aspect of a covered company's resolution plan as a deficiency even if such aspect was not identified as a shortcoming in an earlier resolution plan submission.

(f) *Feedback.* Following their review of a resolution plan, the Board and the Corporation will jointly send a notification to each covered company that identifies any deficiencies or shortcomings in the covered company's resolution plan (or confirms that no deficiencies or shortcomings were identified) and provides any feedback on the resolution plan. The Board and the Corporation will jointly send the notification no later than 12 months after the later of the date on which the covered company submitted the resolution plan and the date by which the covered company was required to submit the resolution plan, unless the Board and the Corporation jointly determine in their discretion that extenuating circumstances exist that require delay.

§ 381.9 Failure to cure deficiencies on resubmission of a resolution plan.

(a) *In general.* The Board and Corporation may jointly determine that a covered company or any subsidiary of a covered company shall be subject to more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the covered company or the subsidiary if:

(1) The covered company fails to submit a revised resolution plan under § 381.8(c) within the required time period; or

(2) The Board and the Corporation jointly determine that a revised resolution plan submitted under § 381.8(c) does not adequately remedy the deficiencies jointly identified by the Board and the Corporation under § 381.8(b).

(b) *Duration of requirements or restrictions.* Any requirements or restrictions imposed on a covered company or a subsidiary thereof pursuant to paragraph (a) of this section shall cease to apply to the covered company or subsidiary, respectively, on the date that the Board and the Corporation jointly determine the covered company has submitted a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation under § 381.8(b).

(c) *Divestiture.* The Board and Corporation, in consultation with the Council, may jointly, by order, direct the covered company to divest such assets or operations as are jointly identified by the Board and Corporation if:

(1) The Board and Corporation have jointly determined that the covered company or a subsidiary thereof shall be subject to requirements or restrictions pursuant to paragraph (a) of this section; and

(2) The covered company has failed, within the 2-year period beginning on the date on which the determination to impose such requirements or restrictions under paragraph (a) of this section was made, to submit a revised resolution plan that adequately remedies the deficiencies jointly identified by the Board and the Corporation under § 381.8(b); and

(3) The Board and Corporation jointly determine that the divestiture of such assets or operations is necessary to facilitate an orderly resolution of the covered company under the Bankruptcy Code in the event the company was to fail.

§ 381.10 Consultation.

Before issuing any notice of deficiencies under § 381.8(b), determining to impose requirements or restrictions under § 381.9(a), or issuing a divestiture order pursuant to § 381.9(c) with respect to a covered company that is likely to have a significant impact on a functionally regulated subsidiary or a depository institution subsidiary of the covered company, the Board—

(a) Shall consult with each Council member that primarily supervises any such subsidiary; and

(b) May consult with any other Federal, state, or foreign supervisor as the Board considers appropriate.

§ 381.11 No limiting effect or private right of action; confidentiality of resolution plans.

(a) *No limiting effect on bankruptcy or other resolution proceedings.* A resolution plan submitted pursuant to this part shall not have any binding effect on:

(1) A court or trustee in a proceeding commenced under the Bankruptcy Code;

(2) A receiver appointed under title II of the Dodd-Frank Act (12 U.S.C. 5381 *et seq.*);

(3) A bridge financial company chartered pursuant to 12 U.S.C. 5390(h); or

(4) Any other authority that is authorized or required to resolve a covered company (including any subsidiary or affiliate thereof) under any other provision of Federal, state, or foreign law.

(b) *No private right of action.* Nothing in this part creates or is intended to create a private right of action based on a resolution plan prepared or submitted under this part or based on any action taken by the Board or the Corporation with respect to any resolution plan submitted under this part.

(c) *Form of resolution plans*—(1) *Generally.* Each full, targeted, and reduced resolution plan of a covered company shall be divided into a public section and a confidential section. Each covered company shall segregate and separately identify the public section from the confidential section.

(2) *Public section of full and targeted resolution plans.* The public section of a full or targeted resolution plan shall consist of an executive summary of the resolution plan that describes the business of the covered company and includes, to the extent material to an understanding of the covered company:

(i) The names of material entities;

(ii) A description of core business lines;

(iii) Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources;

(iv) A description of derivative activities and hedging activities;

(v) A list of memberships in material payment, clearing and settlement systems;

(vi) A description of foreign operations;

(vii) The identities of material supervisory authorities;

(viii) The identities of the principal officers;

(ix) A description of the corporate governance structure and processes related to resolution planning;

(x) A description of material management information systems; and

(xi) A description, at a high level, of the covered company's resolution strategy, covering such items as the range of potential purchasers of the covered company, its material entities, and its core business lines.

(3) *Public section of reduced resolution plans.* The public section of a reduced resolution plan shall consist of an executive summary of the resolution plan that describes the business of the covered company and includes, to the extent material to an understanding of the covered company:

(i) The names of material entities;

(ii) A description of core business lines;

(iii) The identities of the principal officers; and

(iv) A description, at a high level, of the covered company's resolution strategy, referencing the applicable resolution regimes for its material entities.

(d) *Confidential treatment of resolution plans.* (1) The confidentiality of resolution plans and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)), 12 CFR part 261 (the Board's Rules Regarding Availability of Information), and 12 CFR part 309 (the Corporation's Disclosure of Information rules).

(2) Any covered company submitting a resolution plan or related materials pursuant to this part that desires confidential treatment of the information under 5 U.S.C. 552(b)(4), 12 CFR part 261 (the Board's Rules Regarding Availability of Information), and 12 CFR part 309 (the Corporation's Disclosure of Information rules) may file a request for confidential treatment in accordance with those rules.

(3) To the extent permitted by law, information comprising the Confidential Section of a resolution plan will be treated as confidential.

(4) To the extent permitted by law, the submission of any nonpublic data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise

subject. Privileges that apply to resolution plans and related materials are protected pursuant to section 18(x) of the Federal Deposit Insurance Act (12 U.S.C. 1828(x)).

§ 381.12 Enforcement.

The Board and Corporation may jointly enforce an order jointly issued by the Board and Corporation under § 381.9(a) or (c). The Board, in consultation with the Corporation, may take any action to address any violation of this part by a covered company under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

PART 382—RESTRICTIONS ON QUALIFIED FINANCIAL CONTRACTS

Sec.
382.1 Definitions.
382.2 Applicability.
382.3 U.S. Special resolution regimes.
382.4 Insolvency proceedings.
382.5 Approval of enhanced creditor protection conditions.
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382.7 Exclusion of certain QFCs.

AUTHORITY: 12 U.S.C. 1816, 1818, 1819, 1820(g) 1828, 1828(m), 1831n, 1831o,1831p–l, 1831(u), 1831w.

SOURCE: 82 FR 50262, Oct. 30, 2017, unless otherwise noted.

§ 382.1 Definitions.

Affiliate has the same meaning as in section 12 U.S.C. 1813(w).

Central counterparty (CCP) has the same meaning as in § 324.2 of this chapter.

Chapter 11 proceeding means a proceeding under Chapter 11 of Title 11, United States Code (11 U.S.C. 1101–74).

Consolidated affiliate means an affiliate of another company that:

(1) Either consolidates the other company, or is consolidated by the other company, on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) Is, along with the other company, consolidated with a third company on a financial statement prepared in accordance with principles or standards referenced in paragraph (1) of this definition; or

(3) For a company that is not subject to principles or standards referenced in paragraph (1), if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied.

Control has the same meaning as in section 3(w) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)).

Covered bank means a covered bank as defined by the Office of the Comptroller of the Currency in 12 CFR part 47.

Covered entity means a covered entity as defined by the Federal Reserve Board in 12 CFR 252.82.

Covered QFC means a QFC as defined in § 382.2 of this part.

Credit enhancement means a QFC of the type set forth in sections 210(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI)) or a credit enhancement that the Federal Deposit Insurance Corporation determines is a QFC pursuant to section 210(c)(8)(D)(i) of Title II of the act (12 U.S.C. 5390(c)(8)(D)(i)).

Default right means:

(1) With respect to a QFC, any

(i) Right of a party, whether contractual or otherwise (including, without limitation, rights incorporated by reference to any other contract, agreement, or document, and rights afforded by statute, civil code, regulation, and common law), to liquidate, terminate, cancel, rescind, or accelerate such agreement or transactions thereunder, set off or net amounts owing in respect thereto (except rights related to same-day payment netting), exercise remedies in respect of collateral or other credit support or property related thereto (including the purchase and sale of property), demand payment or delivery thereunder or in respect thereof (other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure), suspend, delay, or defer payment or performance thereunder, or modify the obligations of a

party thereunder, or any similar rights; and

(ii) Right or contractual provision that alters the amount of collateral or margin that must be provided with respect to an exposure thereunder, including by altering any initial amount, threshold amount, variation margin, minimum transfer amount, the margin value of collateral, or any similar amount, that entitles a party to demand the return of any collateral or margin transferred by it to the other party or a custodian or that modifies a transferee's right to reuse collateral or margin (if such right previously existed), or any similar rights, in each case, other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure;

(2) With respect to § 382.4, does not include any right under a contract that allows a party to terminate the contract on demand or at its option at a specified time, or from time to time, without the need to show cause.

FDI Act proceeding means a proceeding in which the Federal Deposit Insurance Corporation is appointed as conservator or receiver under section 11 of the Federal Deposit Insurance Act (12 U.S.C. 1821).

FDI Act stay period means, in connection with an FDI Act proceeding, the period of time during which a party to a QFC with a party that is subject to an FDI Act proceeding may not exercise any right that the party that is not subject to an FDI Act proceeding has to terminate, liquidate, or net such QFC, in accordance with section 11(e) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)) and any implementing regulations.

Financial counterparty means a person that is:

(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company as defined in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)); a U.S. intermediate holding company that is established or designated for purposes of compliance with 12 CFR 252.153; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(ii) A depository institution as defined, in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841 (c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is State-licensed or registered as;

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary Federal regulator;

(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended, 12 U.S.C. 2001 *et seq.* that is regulated by the Farm Credit Administration;

(vi) Any entity registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1

et seq.), or an entity that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(vii) A securities holding company within the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(45); an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(viii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(ix) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in section 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(x) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(xi) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator; or

(xii) An entity that would be a financial counterparty described in paragraphs (1)(i) through (xi) of this definition, if the entity were organized under the laws of the United States or any State thereof.

(2) The term ''financial counterparty'' does not include any counterparty that is:

(i) A sovereign entity;

(ii) A multilateral development bank; or

(iii) The Bank for International Settlements.

Financial market utility (FMU) means any person, regardless of the jurisdiction in which the person is located or organized, that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person, but does not include:

(1) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; or

(2) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed

by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a FMU or a participant therein in connection with the furnishing by the FMU of services to its participants or the use of services of the FMU by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the FMU.

Investment advisory contract means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person.

Master agreement means a QFC of the type set forth in sections 210(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V)) or a master agreement that the Federal Deposit Insurance Corporation determines is a QFC pursuant to section 210(c)(8)(D)(i) of Title II of the act (12 U.S.C. 5390(c)(8)(D)(i)).

Person has the same meaning as in 12 CFR 225.2.

Qualified financial contract (QFC) has the same meaning as in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

Retail customer or counterparty has the same meaning as in § 329.3 of this chapter.

Small financial institution means a company that:

(1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(2) Has total assets of $10,000,000,000 or less on the last day of the company's most recent fiscal year.

State means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

Subsidiary of a covered FSI means any subsidiary of a covered FSI as defined in 12 U.S.C. 1813(w).

U.S. agency has the same meaning as the term ''agency'' in 12 U.S.C. 3101.

U.S. branch has the same meaning as the term ''branch'' in 12 U.S.C. 3101.

U.S. special resolution regimes means the Federal Deposit Insurance Act (12 U.S.C. 1811–1835a) and regulations promulgated thereunder and Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381–5394) and regulations promulgated thereunder.

[82 FR 50261, 50267, Oct. 30, 2017; 82 FR 61443, Dec. 28, 2017]

§ 382.2 Applicability.

(a) *General requirement.* A covered FSI must ensure that each covered QFC conforms to the requirements of §§ 382.3 and 382.4 of this part.

(b) *Covered FSI.* For purposes of this part a covered FSI means

(1) Any State savings association or State non-member bank (as defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of:

(i) A global systemically important bank holding company that has been designated pursuant to § 252.82(a)(1) of the Federal Reserve Board's Regulation YY (12 CFR 252.82); or

(ii) A global systemically important foreign banking organization that has been designated pursuant to subpart I of 12 CFR part 252 (FRB Regulation YY), and

(2) Any subsidiary of a covered FSI other than:

(i) A subsidiary that is owned in satisfaction of debt previously contracted in good faith;

(ii) A portfolio concern that is a small business investment company, as defined in section 103(3) of the Small

Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a Small Business Investment Company, which notice or license has not been revoked; or

(iii) A subsidiary designed to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- to moderate-income communities or families (such as providing housing, services, or jobs).

(c) *Covered QFCs.* For purposes of this part, a covered QFC is:

(1) With respect to a covered FSI that is a covered FSI on January 1, 2018, an in-scope QFC that the covered FSI:

(i) Enters, executes, or otherwise becomes a party to on or after January 1, 2019; or

(ii) Entered, executed, or otherwise became a party to before January 1, 2019, if the covered FSI or any affiliate that is a covered entity, covered bank, or covered FSI also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of the same person on or after January 1, 2019.

(2) With respect to a covered FSI that becomes a covered FSI after January 1, 2018, an in-scope QFC that the covered FSI:

(i) Enters, executes, or otherwise becomes a party to on or after the later of the date the covered FSI first becomes a covered FSI and January 1, 2019; or

(ii) Entered, executed, or otherwise became a party to before the date identified in paragraph (c)(2)(i) of this section with respect to the covered FSI, if the covered FSI or any affiliate that is a covered entity, covered bank or covered FSI also enters, executes, or otherwise becomes a party to a QFC with the same person or consolidated affiliate of the same person on or after the date identified in paragraph (c)(2)(i) of this section with respect to the covered FSI.

(d) *In-scope QFCs.* An in-scope QFC is a QFC that explicitly:

(1) Restricts the transfer of a QFC (or any interest or obligation in or under, or any property securing, the QFC) from a covered FSI; or

(2) Provides one or more default rights with respect to a QFC that may be exercised against a covered FSI.

(e) *Rules of construction.* For purposes of this part,

(1) A covered FSI does not become a party to a QFC solely by acting as agent with respect to the QFC; and

(2) The exercise of a default right with respect to a covered QFC includes the automatic or deemed exercise of the default right pursuant to the terms of the QFC or other arrangement.

(f) *Initial applicability of requirements for covered QFCs.* (1) With respect to each of its covered QFCs, a covered FSI that is a covered FSI on January 1, 2018 must conform the covered QFC to the requirements of this part by:

(i) January 1, 2019, if each party to the covered QFC is a covered entity, covered bank, or covered FSI.

(ii) July 1, 2019, if each party to the covered QFC (other than the covered FSI) is a financial counterparty that is not a covered entity, covered bank or covered FSI; or

(iii) January 1, 2020, if a party to the covered QFC (other than the covered FSI) is not described in paragraph (f)(1)(i) or (ii) of this section or if, notwithstanding paragraph (f)(1)(ii), a party to the covered QFC (other than the covered FSI) is a small financial institution.

(2) With respect to each of its covered QFCs, a covered FSI that is not a covered FSI on January 1, 2018 must conform the covered QFC to the requirements of this part by:

(i) The first day of the calendar quarter immediately following 1 year after the date the covered FSI first becomes a covered FSI if each party to the covered QFC is a covered entity, covered bank, or covered FSI;

(ii) The first day of the calendar quarter immediately following 18 months from the date the covered FSI first becomes a covered FSI if each party to the covered QFC (other than the covered FSI) is a financial counterparty that is not a covered entity, covered bank or covered FSI; or

(iii) The first day of the calendar quarter immediately following 2 years

from the date the covered FSI first becomes a covered FSI if a party to the covered QFC (other than the covered FSI) is not described in paragraph (f)(2)(i) or (ii) of this section or if, notwithstanding paragraph (f)(2)(ii), a party to the covered QFC (other than the covered FSI) is a small financial institution.

(g) *Rights of receiver unaffected.* Nothing in this part shall in any manner limit or modify the rights and powers of the FDIC as receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Act, including, without limitation, the rights of the receiver to enforce provisions of the Federal Deposit Insurance Act or Title II of the Dodd-Frank Act that limit the enforceability of certain contractual provisions.

[82 FR 50261, Oct. 30, 2017; 82 FR 61443, Dec. 28, 2017]

§ 382.3 U.S. special resolution regimes.

(a) *Covered QFCs not required to be conformed.* (1) Notwithstanding § 382.2 of this part, a covered FSI is not required to conform a covered QFC to the requirements of this section if:

(i) The covered QFC designates, in the manner described in paragraph (a)(2) of this section, the U.S. special resolution regimes as part of the law governing the QFC; and

(ii) Each party to the covered QFC, other than the covered FSI, is

(A) An individual that is domiciled in the United States, including any State;

(B) A company that is incorporated in or organized under the laws of the United States or any State;

(C) A company the principal place of business of which is located in the United States, including any State; or

(D) A U.S. branch or U.S. agency.

(2) A covered QFC designates the U.S. special resolution regimes as part of the law governing the QFC if the covered QFC:

(i) Explicitly provides that the covered QFC is governed by the laws of the United States or a State of the United States; and

(ii) Does not explicitly provide that one or both of the U.S. special resolution regimes, or a broader set of laws that includes a U.S. special resolution regime, is excluded from the laws governing the covered QFC.

(b) *Provisions required.* A covered QFC must explicitly provide that:

(1) In the event the covered FSI becomes subject to a proceeding under a U.S. special resolution regime, the transfer of the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) from the covered FSI will be effective to the same extent as the transfer would be effective under the U.S. special resolution regime if the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) were governed by the laws of the United States or a State of the United States; and

(2) In the event the covered FSI or an affiliate of the covered FSI becomes subject to a proceeding under a U.S. special resolution regime, default rights with respect to the covered QFC that may be exercised against the covered FSI are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. special resolution regime if the covered QFC were governed by the laws of the United States or a State of the United States.

(c) *Relevance of creditor protection provisions.* The requirements of this section apply notwithstanding § 382.4(d), (f), and (h) of this part.

§ 382.4 Insolvency proceedings.

This section does not apply to proceedings under Title II of the Dodd-Frank Act.

(a) *Covered QFCs not required to be conformed.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform a covered QFC to the requirements of this section if the covered QFC:

(1) Does not explicitly provide any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding; and

(2) Does not explicitly prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing

the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding or would prohibit such a transfer only if the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(b) *General prohibitions.* (1) A covered QFC may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.

(2) A covered QFC may not prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding unless the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(c) *Definitions relevant to the general prohibitions*—(1) *Direct party.* Direct party means a covered entity, covered bank, or covered FSI that is a party to the direct QFC.

(2) *Direct QFC.* Direct QFC means a QFC that is not a credit enhancement, *provided that*, for a QFC that is a master agreement that includes an affiliate credit enhancement as a supplement to the master agreement, the direct QFC does not include the affiliate credit enhancement.

(3) *Affiliate credit enhancement.* Affiliate credit enhancement means a credit enhancement that is provided by an affiliate of a party to the direct QFC that the credit enhancement supports.

(d) *General creditor protections.* Notwithstanding paragraph (b) of this section, a covered direct QFC and covered affiliate credit enhancement that supports the covered direct QFC may permit the exercise of a default right with respect to the covered QFC that arises as a result of

(1) The direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(2) The direct party not satisfying a payment or delivery obligation pursuant to the covered QFC or another contract between the same parties that gives rise to a default right in the covered QFC; or

(3) The covered affiliate support provider or transferee not satisfying a payment or delivery obligation pursuant to a covered affiliate credit enhancement that supports the covered direct QFC.

(e) *Definitions relevant to the general creditor protections*—(1) *Covered direct QFC.* Covered direct QFC means a direct QFC to which a covered entity, covered bank, or covered FSI is a party.

(2) *Covered affiliate credit enhancement.* Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered entity, covered bank, or covered FSI is the obligor of the credit enhancement.

(3) *Covered affiliate support provider.* Covered affiliate support provider means, with respect to a covered affiliate credit enhancement, the affiliate of the direct party that is obligated under the covered affiliate credit enhancement and is not a transferee.

(4) *Supported party.* Supported party means, with respect to a covered affiliate credit enhancement and the direct QFC that the covered affiliate credit enhancement supports, a party that is a beneficiary of the covered affiliate support provider's obligation(s) under the covered affiliate credit enhancement.

(f) *Additional creditor protections for supported QFCs.* Notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding if:

(1) The covered affiliate support provider that remains obligated under the covered affiliate credit enhancement becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding other than a Chapter 11 proceeding;

(2) Subject to paragraph (h) of this section, the transferee, if any, becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(3) The covered affiliate support provider does not remain, and a transferee does not become, obligated to the same, or substantially similar, extent as the covered affiliate support provider was obligated immediately prior to entering the receivership, insolvency, liquidation, resolution, or similar proceeding with respect to:

(i) The covered affiliate credit enhancement;

(ii) All other covered affiliate credit enhancements provided by the covered affiliate support provider in support of other covered direct QFCs between the direct party and the supported party under the covered affiliate credit enhancement referenced in paragraph (f)(3)(i) of this section; and

(iii) All covered affiliate credit enhancements provided by the covered affiliate support provider in support of covered direct QFCs between the direct party and affiliates of the supported party referenced in paragraph (f)(3)(ii) of this section; or

(4) In the case of a transfer of the covered affiliate credit enhancement to a transferee,

(i) All of the ownership interests of the direct party directly or indirectly held by the covered affiliate support provider are not transferred to the transferee; or

(ii) Reasonable assurance has not been provided that all or substantially all of the assets of the covered affiliate support provider (or net proceeds therefrom), excluding any assets reserved for the payment of costs and expenses of administration in the receivership, insolvency, liquidation, resolution, or similar proceeding, will be transferred or sold to the transferee in a timely manner.

(g) *Definitions relevant to the additional creditor protections for supported QFCs*—(1) *Stay period.* Stay period means, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, the period of time beginning on the commencement of the proceeding and ending at the later of 5 p.m. (EST) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding.

(2) *Business day.* Business day means a day on which commercial banks in the jurisdiction the proceeding is commenced are open for general business (including dealings in foreign exchange and foreign currency deposits).

(3) *Transferee.* Transferee means a person to whom a covered affiliate credit enhancement is transferred upon the covered affiliate support provider entering a receivership, insolvency, liquidation, resolution, or similar proceeding or thereafter as part of the resolution, restructuring, or reorganization involving the covered affiliate support provider.

(h) *Creditor protections related to FDI Act proceedings.* Notwithstanding paragraphs (d) and (f) of this section, which are inapplicable to FDI Act proceedings, and notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right that is related, directly or indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings only in the following circumstances:

(1) After the FDI Act stay period, if the covered affiliate credit enhancement is not transferred pursuant to 12 U.S.C. 1821(e)(9)–(10) and any regulations promulgated thereunder; or

(2) During the FDI Act stay period, if the default right may only be exercised so as to permit the supported party under the covered affiliate credit enhancement to suspend performance with respect to the supported party's obligations under the covered direct QFC to the same extent as the supported party would be entitled to do if the covered direct QFC were with the covered affiliate support provider and

were treated in the same manner as the covered affiliate credit enhancement.

(i) *Prohibited terminations.* A covered QFC must require, after an affiliate of the direct party has become subject to a receivership, insolvency, liquidation, resolution, or similar proceeding,

(1) The party seeking to exercise a default right to bear the burden of proof that the exercise is permitted under the covered QFC; and

(2) Clear and convincing evidence or a similar or higher burden of proof to exercise a default right.

§ 382.5 Approval of enhanced creditor protection conditions.

(a) *Protocol compliance.* (1) Unless the FDIC determines otherwise based on the specific facts and circumstances, a covered QFC is deemed to comply with this part if it is amended by the universal protocol or the U.S. protocol.

(2) A covered QFC will be deemed to be amended by the universal protocol for purposes of paragraph (a)(1) of this section notwithstanding the covered QFC being amended by one or more Country Annexes, as the term is defined in the universal protocol.

(3) For purposes of paragraphs (a)(1) and (2) of this section:

(i) The universal protocol means the ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and Other Agreements Annex, published by the International Swaps and Derivatives Association, Inc., as of May 3, 2016, and minor or technical amendments thereto;

(ii) The U.S. protocol means a protocol that is the same as the universal protocol other than as provided in paragraphs (a)(3)(ii)(A) through (F) of this section.

(A) The provisions of Section 1 of the attachment to the universal protocol may be limited in their application to covered entities, covered banks, and covered FSIs and may be limited with respect to resolutions under the Identified Regimes, as those regimes are identified by the universal protocol;

(B) The provisions of Section 2 of the attachment to the universal protocol may be limited in their application to covered entities, covered banks, and covered FSIs;

(C) The provisions of Section 4(b)(i)(A) of the attachment to the universal protocol must not apply with respect to U.S. special resolution regimes;

(D) The provisions of Section 4(b) of the attachment to the universal protocol may only be effective to the extent that the covered QFCs affected by an adherent's election thereunder would continue to meet the requirements of this part;

(E) The provisions of Section 2(k) of the attachment to the universal protocol must not apply; and

(F) The U.S. protocol may include minor and technical differences from the universal protocol and differences necessary to conform the U.S. protocol to the differences described in paragraphs (a)(3)(ii)(A) through (E) of this section.

(iii) Amended by the universal protocol or the U.S. protocol, with respect to covered QFCs between adherents to the protocol, includes amendments through incorporation of the terms of the protocol (by reference or otherwise) into the covered QFC; and

(iv) The attachment to the universal protocol means the attachment that the universal protocol identifies as ''ATTACHMENT to the ISDA 2015 UNIVERSAL RESOLUTION STAY PROTOCOL.''

(b) *Proposal of enhanced creditor protection conditions.* (1) A covered FSI may request that the FDIC approve as compliant with the requirements of §§ 382.3 and 382.4 proposed provisions of one or more forms of covered QFCs, or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions.

(2) Enhanced creditor protection conditions means a set of limited exemptions to the requirements of § 382.4(b) of this part that is different than that of § 382.4(d), (f), and (h).

(3) A covered FSI making a request under paragraph (b)(1) of this section must provide

(i) An analysis of the proposal that addresses each consideration in paragraph (d) of this section;

(ii) A written legal opinion verifying that proposed provisions or amendments would be valid and enforceable

under applicable law of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and

(iii) Any other relevant information that the FDIC requests.

(c) *FDIC approval.* The FDIC may approve, subject to any conditions or commitments the FDIC may set, a proposal by a covered FSI under paragraph (b) of this section if the proposal, as compared to a covered QFC that contains only the limited exemptions in § 382.4(d), (f), and (h) or that is amended as provided under paragraph (a) of this section, would promote the safety and soundness of covered FSIs by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered FSI to at least the same extent.

(d) *Considerations.* In reviewing a proposal under this section, the FDIC may consider all facts and circumstances related to the proposal, including:

(1) Whether, and the extent to which, the proposal would reduce the resiliency of such covered FSIs during distress or increase the impact on U.S. financial stability were one or more of the covered FSIs to fail;

(2) Whether, and the extent to which, the proposal would materially decrease the ability of a covered FSI, or an affiliate of a covered FSI, to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(3) Whether, and the extent to which, the set of conditions or the mechanism in which they are applied facilitates, on an industry-wide basis, contractual modifications to remove impediments to resolution and increase market certainty, transparency, and equitable treatment with respect to the default rights of non-defaulting parties to a covered QFC;

(4) Whether, and the extent to which, the proposal applies to existing and future transactions;

(5) Whether, and the extent to which, the proposal would apply to multiple forms of QFCs or multiple covered FSIs;

(6) Whether the proposal would permit a party to a covered QFC that is within the scope of the proposal to adhere to the proposal with respect to only one or a subset of covered FSIs;

(7) With respect to a supported party, the degree of assurance the proposal provides to the supported party that the material payment and delivery obligations of the covered affiliate credit enhancement and the covered direct QFC it supports will continue to be performed after the covered affiliate support provider enters a receivership, insolvency, liquidation, resolution, or similar proceeding;

(8) The presence, nature, and extent of any provisions that require a covered affiliate support provider or transferee to meet conditions other than material payment or delivery obligations to its creditors;

(9) The extent to which the supported party's overall credit risk to the direct party may increase if the enhanced creditor protection conditions are not met and the likelihood that the supported party's credit risk to the direct party would decrease or remain the same if the enhanced creditor protection conditions are met; and

(10) Whether the proposal provides the counterparty with additional default rights or other rights.

§ 382.6 [Reserved]

§ 382.7 Exclusion of certain QFCs.

(a) *Exclusion of QFCs with FMUs.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform to the requirements of this part a covered QFC to which:

(1) A CCP is party; or

(2) Each party (other than the covered FSI) is an FMU.

(b) *Exclusion of certain covered entity and covered bank QFCs.* If a covered QFC is also a covered QFC under part 252 or part 47 of this title that an affiliate of the covered FSI is also required to conform pursuant to part 252 or part 47 and the covered FSI is:

(1) The affiliate credit enhancement provider with respect to the covered QFC, then the covered FSI is required to conform the credit enhancement to the requirements of this part but is not

required to conform the direct QFC to the requirements of this part; or

(2) The direct party to which the covered entity or covered bank is the affiliate credit enhancement provider, then the covered FSI is required to conform the direct QFC to the requirements of this part but is not required to conform the credit enhancement to the requirements of this part.

(c) *Exclusion of certain contracts.* Notwithstanding §382.2 of this part, a covered FSI is not required to conform the following types of contracts or agreements to the requirements of this part:

(1) An investment advisory contract that:

(i) Is with a retail customer or counterparty;

(ii) Does not explicitly restrict the transfer of the contract (or any QFC entered into pursuant thereto or governed thereby, or any interest or obligation in or under, or any property securing, any such QFC or the contract) from the covered FSI except as necessary to comply with section 205(a)(2) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5(a)(2)); and

(iii) Does not explicitly provide a default right with respect to the contract or any QFC entered pursuant thereto or governed thereby.

(2) A warrant that:

(i) Evidences a right to subscribe to or otherwise acquire a security of the covered FSI or an affiliate of the covered FSI; and

(ii) Was issued prior to January 1, 2018.

(d) *Exemption by order.* The FDIC may exempt by order one or more covered FSI(s) from conforming one or more contracts or types of contracts to one or more of the requirements of this part after considering:

(1) The potential impact of the exemption on the ability of the covered FSI(s), or affiliates of the covered FSI(s), to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(2) The burden the exemption would relieve; and

(3) Any other factor the FDIC deems relevant.

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

Subparts A–E [Reserved]

Subpart F—Application Processing Procedures

Sec.

Subpart G—Nondiscrimination Requirements

Subparts H–N [Reserved]

Subpart O—Subordinate Organizations

Subpart P [Reserved]

Subpart Q—Definitions for Regulations Affecting All State Savings Associations

Subparts R–V [Reserved]

Subpart W—Securities Offerings

Subpart X [Reserved]

Subpart Y—Prompt Corrective Action

Subpart Z [Reserved]

AUTHORITY: 12 U.S.C. 1819.

Subpart F also issued under 5 U.S.C. 552; 559; 12 U.S.C. 2901 *et seq*.

Subpart G also issued under 12 U.S.C. 2810 *et seq.*, 2901 *et seq.;* 15 U.S.C. 1691; 42 U.S.C. 1981, 1982, 3601–3619.

Subpart O also issued under 12 U.S.C. 1828.

Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.

Subpart W also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78l; 78m; 78n; 78p; 78w.

Subpart Y also issued under 12 U.S.C. 1831o.

SOURCE: 76 FR 47655, Aug. 5, 2011, unless otherwise noted.

Subparts A—E [Reserved]

Subpart F—Application Processing Procedures

§ 390.100 What does this subpart do?

(a) This subpart explains the FDIC's procedures for processing applications, notices, or filings (applications) under parts 390 and 391 for State savings associations. Except as provided in paragraph (b) of this section, §§ 390.103 through 390.110 and §§ 390.126 through 390.135 apply whenever an FDIC regulation requires any person (you) to file an application with the FDIC. Sections 390.111 through 390.125, however, only apply when a FDIC regulation incorporates the procedures in those sections or where otherwise required by the FDIC.

(b) This subpart does not apply to any of the following:

(1) An application related to a transaction under section 13(c) or (k) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(c) or (k).

(2) A request for reconsideration, modification, or appeal of a final FDIC action.

(3) A request related to litigation, an enforcement proceeding, a supervisory directive or supervisory agreement. Such requests include a request seeking approval under, modification of, or termination of an order issued under subparts C or D, a supervisory agreement, a supervisory directive, a consent merger agreement or a document negotiated in settlement of an enforcement matter or other litigation, unless an applicable FDIC regulation specifically requires an application under this subpart.

(4) An application filed under a FDIC regulation that prescribes other application processing procedures and time frames for the approval of applications.

(c) If a FDIC regulation for a specific type of application prescribes some application processing procedures, or time frames, the FDIC will apply this subpart to the extent necessary to process the application. For example, if a FDIC regulation for a specific type of application does not identify time periods for the processing of an application, the time periods in this subpart apply.

§ 390.101 Do the same procedures apply to all applications under this subpart?

The FDIC processes applications for State savings associations under this subpart using two procedures, expedited treatment and standard treatment. To determine which treatment applies, you may use the following chart:

If . . .	Then the FDIC will process your application under . . .
(a) The applicable regulation does not specifically state that expedited treatment is available	Standard treatment.
(b) You are not a State savings association	Standard treatment.
(c) Your composite rating is 3, 4, or 5. The composite rating is the composite numeric rating that the FDIC or the other federal banking regulator assigned to you under the Uniform Financial Institutions Rating System or under a comparable rating system. The composite rating refers to the rating assigned and provided to you, in writing, as a result of the most recent examination.	Standard treatment.

If . . .	Then the FDIC will process your application under . . .
(d) Your Community Reinvestment Act (CRA) rating is Needs to Improve or Substantial Noncompliance. The CRA rating is the Community Reinvestment Act performance rating that the FDIC or the other federal banking regulator assigned and provided to you, in writing, as a result of the most recent compliance examination. *See,* for example, 12 CFR 195.28.	Standard treatment.
(e) Your compliance rating is 3, 4, or 5. The compliance rating is the numeric rating that the FDIC or the other federal banking regulator assigned to you under the FDIC compliance rating system, or a comparable rating system used by the other federal banking regulator. The compliance rating refers to the rating assigned and provided to you, in writing, as a result of the most recent compliance examination.	Standard treatment.
(f) You fail any one of your capital requirements under 12 CFR part 324	Standard treatment.
(g) The FDIC has notified you that you are an association in troubled condition	Standard treatment.
(h) Neither the FDIC nor any other federal banking regulator has assigned you a composite rating, a CRA rating or a compliance rating.	Standard treatment.
(i) You do not meet any of the criteria listed in paragraphs (a) through (h) of this section	Expedited treatment.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

§ 390.102 How does the FDIC compute time periods under this subpart?

In computing time periods under this subpart, the FDIC does not include the day of the act or event that commences the time period. When the last day of a time period is a Saturday, Sunday, or Federal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

§ 390.103 Must I meet with the FDIC before I file my application?

(a) *Chart.* To determine whether you must attend a pre-filing meeting before you file an application, please consult the following chart:

If you file . . .	Then . . .
An application to acquire control of a State savings association.	The FDIC may require you to meet with the FDIC before filing your application and may require you to submit a draft business plan or other relevant information before this meeting.

(b) *Contacting the appropriate FDIC region.* (1) You must contact the appropriate FDIC region a reasonable time before you file an application described in paragraph (a) of this section. Unless paragraph (a) already requires a pre-filing meeting or a draft business plan, the appropriate FDIC region will determine whether it will require a pre-filing meeting, and whether you must submit a business plan or other relevant information before the meeting. The appropriate FDIC region will also establish a schedule for any meeting and the submission of any information.

(2) All other applicants are encouraged to contact the appropriate FDIC region to determine whether a pre-filing meeting or the submission of a draft business plan or other relevant information would expedite the application review process.

§ 390.104 What information must I include in my draft business plan?

If you are required to submit a draft business plan under § 309.103, your plan must:

(a) Clearly and completely describe the State savings association's projected operations and activities;

(b) Describe the risks associated with the transaction and the impact of this transaction on any existing activities and operations of the State savings association, including financial projections for a minimum of three years;

(c) Identify the majority of the proposed board of directors and the key senior executive officers (as defined in § 390.361) of the State savings association and demonstrate that these individuals have the expertise to prudently manage the activities and operations described in the savings association's draft business plan; and

(d) Demonstrate how applicable requirements regarding serving the credit and lending needs in the market areas served by the State savings association will be met.

§ 390.105 What type of application must I file?

(a) *Expedited treatment.* If you are eligible for expedited treatment under § 390.101, you may file your application in the form of a notice that includes all information required by the applicable substantive regulation. If the FDIC has designated a form for your notice, you must file that form. Your notice is an application for the purposes of all statutory and regulatory references to ''applications.''

(b) *Standard treatment.* If you are subject to standard treatment under § 390.101, you must file your application following all applicable substantive regulations and guidelines governing the filing of applications. If the FDIC has a designated form for your application, you must file that form.

(c) *Waiver requests.* If you want the FDIC to waive a requirement that you provide certain information with the notice or application, you must include a written waiver request:

(1) Describing the requirement to be waived and

(2) Explaining why the information is not needed to enable the FDIC to evaluate your notice or application under applicable standards.

§ 390.106 What information must I provide with my application?

(a) *Required information.* You may obtain information about required certifications, other regulations and guidelines affecting particular notices and applications, appropriate forms, and instructions from the appropriate FDIC region.

(b) *Captions and exhibits.* You must caption the original application and required copies with the type of filing, and must include all exhibits and other pertinent documents with the original application and all required copies. You are not required to include original signatures on copies if you include a copy of the signed signature page or the copy otherwise indicates that the original was signed.

§ 390.107 May I keep portions of my application confidential?

(a) *Confidentiality.* The FDIC makes submissions under this subpart available to the public, but may keep portions of your application confidential based on the rules in this section.

(b) *Confidentiality request.* (1) You may request the FDIC to keep portions of your application confidential. You must submit your request in writing with your application and must explain in detail how your request is consistent with the standards under the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter. For example, you should explain how you will be substantially harmed by public disclosure of the information. You must separately bind and mark the portions of the application you consider confidential and the portions you consider nonconfidential.

(2) The FDIC will not treat as confidential the portion of your application describing how you plan to meet your Community Reinvestment Act (CRA) objectives. The FDIC will make information in your CRA plan, including any information incorporated by reference from other parts of your application, available to the public upon request.

(c) *FDIC determination on confidentiality.* The FDIC will determine whether information that you designate as confidential may be withheld from the public under the Freedom of Information Act (5 U.S.C. 552) and part 309 of this chapter. The FDIC will advise you before it makes information you designate as confidential available to the public.

§ 390.108 Where do I file my application?

(a) *Appropriate FDIC region.* (1) You must file the original application and the number of copies indicated on the applicable form with the appropriate FDIC region. The appropriate FDIC region addresses are listed in paragraph (a)(2) of this section. If the form does not indicate the number of copies you must file or if FDIC has not prescribed a form for your application, you must file the original application and two copies.

(2) The addresses of appropriate FDIC region and the states covered by each office are:

Region	Office address	States served
New York	350 Fifth Avenue, Suite 1200, New York, NY 10118.	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands.
Atlanta	10 Tenth Street, NE., Suite 800, Atlanta, GA 30309–3906.	Alabama, Florida, Georgia, North Carolina, South Carolina, Virginia, West Virginia.
Chicago	300 South Riverside Plaza, Suite 1700, Chicago, Illinois 60606.	Illinois, Indiana, Kentucky, Ohio, Michigan, Wisconsin.
Kansas	1100 Walnut St., Suite 2100, Kansas City, MO 64106.	Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
Dallas	1601 Bryan Street, Dallas, TX 75201	Arkansas, Colorado, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, Texas.
San Francisco	25 Jessie Street at Ecker Square, Suite 2300, San Francisco, CA 94105–2780.	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Utah, Washington, Wyoming.

(b) *Additional filings with FDIC headquarters.* (1) In addition to filing in the appropriate FDIC region, if your application involves a significant issue of law or policy or if an applicable regulation or form directs you to file with FDIC Headquarters, you must also file copies of your application with the Risk Management and Applications Section at FDIC headquarters, 550 17th Street, NW., Washington, DC 20429. You must file the number of copies indicated on the applicable form. If the form does not indicate the number of copies you must file or if FDIC has not prescribed a form for your application, you must file three copies.

(2)(i) You may request a list of applications involving significant issues of law or policy by contacting appropriate FDIC region.

(ii) The FDIC reserves the right to identify significant issues of law or policy in a particular application. The FDIC will advise you, in writing, if it makes this determination.

§ 390.109 What is the filing date of my application?

(a) Your application's filing date is the date that you complete all of the following requirements.

(1) You attend a pre-filing meeting and submit a draft business plan or relevant information, if the FDIC requires you to do so under § 390.103.

(2) You file your application and all required copies with the FDIC, as described under § 390.108.

(i) If you are required to file with an appropriate FDIC region and with the FDIC headquarters, you have not filed with the FDIC until you file with both offices.

(ii) You have not filed with the appropriate FDIC region or the FDIC headquarters until you file the application and the required number of copies with that office.

(iii) If you file after the close of business established by appropriate FDIC region or the FDIC headquarters, you have filed with that office on the next business day.

(3) [Reserved]

(b) The FDIC may notify you that it has adjusted your application filing date if you fail to meet any applicable publication requirements.

(c) If, after you properly file your application with the appropriate FDIC region, the FDIC determines that a significant issue of law or policy exists under § 390.108(b)(2)(ii), the filing date of your application is the day you filed with the appropriate FDIC region. The 30-day review period under § 390.126 or § 390.127 will restart in its entirety when the appropriate FDIC region forwards the appropriate number of copies of your application to the FDIC headquarters.

§ 390.110 How do I amend or supplement my application?

To amend or supplement your application, you must file the amendment

or supplemental information at the appropriate FDIC region along with the number of copies required under § 390.108. Your amendment or supplemental information also must meet the caption and exhibit requirements at § 390.106(b).

§ 390.111 Who must publish a public notice of an application?

Sections 390.111 through 390.115 apply whenever a FDIC regulation requires an applicant (''you'') to follow the public notice procedures in this subpart.

§ 390.112 What information must I include in my public notice?

Your public notice must include the following:

(a) Your name and address.

(b) The type of application.

(c) The name of the depository institution(s) that is the subject matter of the application.

(d) A statement indicating that the public may submit comments to the appropriate FDIC region.

(e) The address of the appropriate FDIC region where the public may submit comments.

(f) The date that the comment period closes.

(g) A statement indicating that the nonconfidential portions of the application are on file in the appropriate FDIC region, and are available for public inspection during regular business hours.

(h) Any other information that the FDIC requires you to publish. You may find the format for various publication notices in the appendix to the FDIC application processing handbook.

§ 390.113 When must I publish the public notice?

You must publish a public notice of the application no earlier than seven days before and no later than the date of filing of the application.

§ 390.114 Where must I publish the public notice?

You must publish the notice in a newspaper having a general circulation in the communities indicated in the following chart:

If you file . . .	You must publish in the following communities . . .
(a) Bank Merger Act application under 390.332(a), or an application for a mutual to stock conversion under 12 CFR part 192.	The community in which your home office is located.
(b) A change of control notice under part 391, subpart E.	The community in which the home office of the State savings association whose stock is to be acquired is located and, if applicable, the community in which the home office of the acquiror's largest subsidiary State savings association is located.

§ 390.115 What language must I use in my publication?

(a) *English.* You must publish the notice in a newspaper printed in the English language.

(b) *Other than English.* If the FDIC determines that the primary language of a significant number of adult residents of the community is a language other than English, the FDIC may require that you simultaneously publish additional notice(s) in the community in the appropriate language(s).

§ 390.116 Comment procedures.

Sections 390.116 though 390.120 contain the procedures governing the submission of public comments on certain types of applications or notices (''applications'') pending before the FDIC. It applies whenever a regulation incorporates the procedures in §§ 390.116 through 390.120, or where otherwise required by the FDIC.

§ 390.117 Who may submit a written comment?

Any person may submit a written comment supporting or opposing an application.

§ 390.118 What information should a comment include?

(a) A comment should recite relevant facts, including any demographic, economic, or financial data, supporting the commenter's position. A comment opposing an application should also:

(1) Address at least one of the reasons why the FDIC may deny the application under the relevant statute or regulation;

(2) Recite any relevant facts and supporting data addressing these reasons; and

(3) Address how the approval of the application could harm the commenter or any community.

(b) A commenter must include any request for a meeting under § 390.122 in its comment. The commenter must describe the nature of the issues or facts to be discussed and the reasons why written submissions are insufficient to adequately address these facts or issues.

§ 390.119 Where are comments filed?

A commenter must file with the appropriate FDIC region (See table at § 390.108(a)(2)). The commenter must simultaneously send a copy of the comment to the applicant.

§ 390.120 How long is the comment period?

(a) *General.* Except as provided in paragraph (b) of this section, a commenter must file a written comment with the FDIC within 30 calendar days after the date of publication of the initial public notice.

(b) *Late-filed comments.* The FDIC may consider late-filed comments if the FDIC determines that the comment will assist in the disposition of the application.

§ 390.121 Meeting procedures.

Sections 390.121 through 390.125 contain meeting procedures. They apply whenever a regulation incorporates the procedures in §§ 390.121 through 390.125, or when otherwise required by the FDIC.

§ 390.122 When will the FDIC conduct a meeting on an application?

(a) The FDIC will grant a meeting request or conduct a meeting on its own initiative, if it finds that written submissions are insufficient to address facts or issues raised in an application, or otherwise determines that a meeting will benefit the decision-making process. The FDIC may limit the issues considered at the meeting to issues that the FDIC decides are relevant or material.

(b) The FDIC will inform the applicant and all commenters requesting a meeting of its decision to grant or deny a meeting request, or of its decision to conduct a meeting on its own initiative.

(c) If the FDIC decides to conduct a meeting, the FDIC will invite the applicant and any commenters requesting a meeting and raising an issue that FDIC intends to consider at the meeting. The FDIC may also invite other interested persons to attend. The FDIC will inform the participants of the date, time, location, issues to be considered, and format for the meeting a reasonable time before the meeting.

§ 390.123 What procedures govern the conduct of the meeting?

(a) The FDIC may conduct meetings in any format including, but not limited to, a telephone conference, a face-to-face meeting, or a more formal meeting.

(b) The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*) and the FDIC Rules of Practice and Procedure in Adjudicatory Proceedings (subpart C) do not apply to meetings under this section.

§ 390.124 Will FDIC approve or disapprove an application at a meeting?

The FDIC will not approve or deny an application at a meeting under §§ 390.121 through 390.125.

§ 390.125 Will a meeting affect application processing time frames?

If the FDIC decides to conduct a meeting, it may suspend applicable application processing time frames, including the time frames for deeming an application complete and the applicable approval time frames in §§ 390.126 through 390.135. If the FDIC suspends applicable application processing time frames, the time period will resume when the FDIC determines that a record has been developed that sufficiently supports a determination on the issues considered at the meeting.

§ 390.126 If I file a notice under expedited treatment, when may I engage in the proposed activities?

If you are eligible for expedited treatment and you have appropriately filed your notice with the FDIC, you may engage in the proposed activities upon the expiration of 30 days after the filing date of your notice, unless the FDIC takes one of the following actions before the expiration of that time period:

(a) The FDIC notifies you in writing that you must file additional information supplementing your notice. If you are required to file additional information, you may engage in the proposed activities upon the expiration of 30 calendar days after the date you file the additional information, unless the FDIC takes one of the actions described in paragraphs (b) through (d) of this section before the expiration of that time period;

(b) The FDIC notifies you in writing that your notice is subject to standard treatment under §§ 390.126 through 390.135. The FDIC will subject your notice to standard treatment if it raises a supervisory concern, raises a significant issue of law or policy, or requires significant additional information;

(c) The FDIC notifies you in writing that it is suspending the applicable time frames under § 390.125; or

(d) The FDIC notifies you that it disapproves your notice.

§ 390.127 What will the FDIC do after I file my application?

(a) *FDIC action.* Within 30 calendar days after the filing date of your application, the FDIC will take one of the following actions:

If the FDIC . . .	Then . . .
(1) Notifies you, in writing, that your application is complete * * *.	The applicable review period will begin on the date that the FDIC deems your application complete.
(2) Notifies you, in writing, that you must submit addition information to complete your application * * *.	You must submit the required additional information under § 390.128.
(3) Notifies you, in writing, that your application is materially deficient * * *.	The FDIC will not process your application.
(4) Takes no action * * *	Your application is deemed complete. The applicable review period will begin on the day the 30-day time period expires.

(b) *Waiver requests.* If your application includes a request for waiver of an information requirement under § 390.105(b), and the FDIC has not notified you that you must submit additional information under paragraph (a)(2) of this section, your request for waiver is granted.

§ 390.128 If the FDIC requests additional information to complete my application, how will it process my application?

(a) You may use the following chart to determine the procedure that applies to your submission of additional information under § 390.127(a)(1):

If, within 30 calendar days after the date of FDIC's request for additional information . . .	Then, FDIC may . . .	And . . .
(1) You file a response to all information requests * * *.	(i) Notify you in writing within 15 days after the filing date of your response that your application is complete * * * applicable to all response that your application is complete * * *.	The applicable review period will begin on the date that the FDIC deems your application complete.
	(ii) Notify you in writing within 15 calendar days after the filing date of your response that you must submit additional information regarding matters derived from or prompted by information already furnished or any additional information necessary to resolve the issues presented in your application * * *.	You must respond to the additional information request within the time period required by the FDIC. The FDIC will review your response under the procedures described in this section.
	(iii) Notify you in writing within 15 calendar days after the filing date of your response that your application is materially deficient * * *.	The FDIC will not process your application.

If, within 30 calendar days after the date of FDIC's request for additional information . . .	Then, FDIC may . . .	And . . .
	(iv) Take no action within 15 calendar days after the filing date of your response * * *.	Your application is deemed complete. The applicable review period will begin on the day that the 15-day time period expires.
(2) You request an extension of time to file additional information * * *.	(i) Grant an extension, in writing, specifying the number of days for the extension * * *.	You must fully respond within the extended time period specified by the FDIC. The FDIC will review your response under the procedures described under this section.
	(ii) Notify you in writing that your extension request is disapproved * * *.	The FDIC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation.
(3) You fail to respond completely * * *.	(i) Notify you in writing that your application is deemed withdrawn * * *.	The FDIC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation.
	(ii) Notify you, in writing, that your response is incomplete and extend the response period, specifying the number of days for the respond extension * * *.	You must fully respond within the extended time period specified by the FDIC. The FDIC will review your response under the procedures described under this section.

(b) The FDIC may extend the 15-day period referenced in paragraph (a)(1) of this section by up to 15 calendar days, if the FDIC requires the additional time to review your response. The FDIC will notify you that it has extended the period before the end of the initial 15-day period and will briefly explain why the extension is necessary.

(c) If your response filed under paragraph (a)(1) of this section includes a request for a waiver of an informational requirement, your request for a waiver is granted if the FDIC fails to act on it within 15 calendar days after the filing of your response, unless the FDIC extends the review period under paragraph (b) of this section. If the FDIC extends the review period under paragraph (b), your request is granted if the FDIC fails to act on it by the end of the extended review period.

§ 390.129 Will the FDIC conduct an eligibility examination?

(a) *Eligibility examination.* The FDIC may notify you at any time before it deems your application complete that it will conduct an eligibility examination. If the FDIC decides to conduct an eligibility examination, it will not deem your application complete until it concludes the examination.

(b) *Additional information.* The FDIC may, as a result of the eligibility examination, notify you that you must submit additional information to complete your application. If so, you must respond to the additional information request within the time period required by the FDIC. The FDIC will review your response under the procedures described in § 390.128.

§ 390.130 What may the FDIC require me to do after my application is deemed complete?

After your application is deemed complete, but before the end of the applicable review period,

(a) The FDIC may require you to provide additional information if the information is necessary to resolve or clarify the issues presented by your application.

(b) The FDIC may determine that a major issue of law or a change in circumstances arose after you filed your application, and that the issue or changed circumstances will substantially effect your application. If the FDIC identifies such an issue or changed circumstances, it may:

(1) Notify you, in writing, that your application is now incomplete and require you to submit additional information to complete the application under the procedures described at § 390.128; and

(2) Require you to publish a new public notice of your application under § 390.131.

§ 390.131 Will the FDIC require me to publish a new public notice?

(a) If your application was subject to a publication requirement, the FDIC

may require you to publish a new public notice of your application if:

(1) You submitted a revision to the application, you submitted new or additional information, or a major issue of law or a change in circumstances arose after the filing of your application; and

(2) The FDIC determines that additional comment on these matters is appropriate because of the significance of the new information or circumstances.

(b) The FDIC will notify you in writing if you must publish a new public notice of your revised application.

(c) If you are required to publish a new public notice of your revised application, you must notify the FDIC after you publish the new public notice.

§ 390.132 May the FDIC suspend processing of my application?

(a) *Suspension.* The FDIC may, at any time, indefinitely suspend processing of your application if:

(1) The FDIC, another governmental entity, or a self-regulatory trade or professional organization initiates an investigation, examination, or administrative proceeding that is relevant to the FDIC's evaluation of your application;

(2) You request the suspension or there are other extraordinary circumstances that have a significant impact on the processing of your application.

(b) *Notice.* The FDIC will promptly notify you, in writing, if it suspends your application.

§ 390.133 How long is the FDIC review period?

(a) *General.* The applicable FDIC review period is 60 calendar days after the date that your application is deemed complete, unless an applicable FDIC regulation specifies a different review period.

(b) *Multiple applications.* If you submit more than one application in connection with a proposed action or if two or more applicants submit related applications, the applicable review period for all applications is the review period for the application with the longest review period, subject to statutory review periods.

(c) *Extensions.* (1) The FDIC may extend the review period for up to 30 calendar days beyond the period described in paragraph (a) or (b) of this section. The FDIC must notify you in writing of the extension and the duration of the extension. The FDIC must issue the written extension before the end of the review period.

(2) The FDIC may also extend the review period as needed until it acts on the application, if the application presents a significant issue of law or policy that requires additional time to resolve. The FDIC must notify you in writing of the extension and the general reasons for the extension. The FDIC must issue the written extension before the end of the review period, including any extension of that period under paragraph (c)(1) of this section.

§ 390.134 How will I know if my application has been approved?

(a) *FDIC approval or denial.* (1) The FDIC will approve or deny your application before the expiration of the applicable review period, including any extensions of the review period.

(2) The FDIC will promptly notify you in writing of its decision to approve or deny your application.

(b) *No FDIC action.* If the FDIC fails to act under paragraph (a)(1) of this section, your application is approved.

§ 390.135 What will happen if the FDIC does not approve or disapprove my application within two calendar years after the filing date?

(a) *Withdrawal.* If the FDIC has not approved or denied your pending application within two calendar years after the filing date under § 390.109, the FDIC will notify you, in writing, that your application is deemed withdrawn unless the FDIC determines that you are actively pursuing a final FDIC determination on your application. You are not actively pursuing a final FDIC determination if you have failed to timely take an action required under this part, including filing required additional information, or the FDIC has suspended processing of your application under § 390.132 based on circumstances that are, in whole or in part, within your control and you have

failed to take reasonable steps to resolve these circumstances.

(b) [Reserved]

Subpart G—Nondiscrimination Requirements

§ 390.140 Definitions.

As used in this subpart—

Application. For purposes of this part, an application for a loan or other service is as defined in Regulation C, 12 CFR 203.2(b).

Dwelling. The term ''dwelling'' means a residential structure (whether or not it is attached to real property) located in a state of the United States of America, the District of Colombia, or the Commonwealth of Puerto Rico. The term includes an individual condominium unit, cooperative unit, or mobile or manufactured home.

State savings association. The term ''State savings association'' means any State savings association as defined in 12 U.S.C. 1813(b).

§ 390.141 Supplementary guidelines.

The FDIC's policy statement found at 12 CFR 390.150 supplements this subpart and should be read together with this subpart. Refer also to the HUD Fair Housing regulations at 24 CFR parts 100 *et seq.*, Federal Reserve Regulation B at 12 CFR part 202, and Federal Reserve Regulation C at 12 CFR part 203.

§ 390.142 Nondiscrimination in lending and other services.

(a) No State savings association may deny a loan or other service, or discriminate in the purchase of loans or securities or discriminate in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of such loan or other service on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract) or national origin of:

(1) An applicant or joint applicant;

(2) Any person associated with an applicant or joint applicant regarding such loan or other service, or with the purposes of such loan or other service;

(3) The present or prospective owners, lessees, tenants, or occupants of the dwelling(s) for which such loan or other service is to be made or given;

(4) The present or prospective owners, lessees, tenants, or occupants of other dwellings in the vicinity of the dwelling(s) for which such loan or other service is to be made or given.

(b) A State savings association shall consider without prejudice the combined income of joint applicants for a loan or other service.

(c) No State savings association may discriminate against an applicant for a loan or other service on any prohibited basis (as defined in 12 CFR 202.2(z) and 24 CFR part 100).

§ 390.143 Nondiscriminatory appraisal and underwriting.

(a) *Appraisal*. No State savings association may use or rely upon an appraisal of a dwelling which the State savings association knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory per se or in effect under the Fair Housing Act of 1968 or the Equal Credit Opportunity Act.

(b) *Underwriting*. Each State savings association shall have clearly written, non-discriminatory loan underwriting standards, available to the public upon request, at each of its offices. Each association shall, at least annually, review its standards, and business practices implementing them, to ensure equal opportunity in lending.

§ 390.144 Nondiscrimination in applications.

(a) No State savings association may discourage, or refuse to allow, receive, or consider, any application, request, or inquiry regarding a loan or other service, or discriminate in imposing conditions upon, or in processing, any such application, request, or inquiry on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), national origin, or

other characteristics prohibited from consideration in § 390.142(c), of the prospective borrower or other person, who:

(1) Makes application for any such loan or other service;

(2) Requests forms or papers to be used to make application for any such loan or other service; or

(3) Inquires about the availability of such loan or other service.

(b) A State savings association shall inform each inquirer of his or her right to file a written loan application, and to receive a copy of the association's underwriting standards.

§ 390.145 Nondiscriminatory advertising.

No State savings association may directly or indirectly engage in any form of advertising that implies or suggests a policy of discrimination or exclusion in violation of title VIII of the Civil Rights Acts of 1968, the Equal Credit Opportunity Act, or this subpart. Advertisements for any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall include a facsimile of the following logotype and legend:

§ 390.146 Equal Housing Lender Poster.

(a) Each State savings association shall post and maintain one or more Equal Housing Lender Posters, the text of which is prescribed in paragraph (b) of this section, in the lobby of each of its offices in a prominent place or places readily apparent to all persons seeking loans. The poster shall be at least 11 by 14 inches in size, and the text shall be easily legible. It is recommended that savings associations post a Spanish language version of the poster in offices serving areas with a substantial Spanish-speaking population.

(b) The text of the Equal Housing Lender Poster shall be as follows:

We Do Business In Accordance With Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

[ ] Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or

[ ] Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD:

SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410.

For processing under the Federal Fair Housing Act

AND TO:

Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106

For processing under FDIC Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

[ ] On the basis of race, color, national origin, religion, sex, marital status, or age;

[ ] Because income is from public assistance; or

[ ] Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Federal Deposit Insurance Corporation, Consumer Response Center, 1100 Walnut St, Box #11, Kansas City, MO 64106

§ 390.147 Loan application register.

State savings associations and other lenders required to file Home Mortgage Disclosure Act Loan Application Registers with the FDIC in accordance with 12 CFR part 203 must enter the reason for denial, using the codes provided in 12 CFR part 203, with respect to all loan denials.

§ 390.148 Nondiscrimination in employment.

(a) No State savings association shall, because of an individual's race, color, religion, sex, or national origin:

(1) Fail or refuse to hire such individual;

(2) Discharge such individual;

(3) Otherwise discriminate against such individual with respect to such individual's compensation, promotion, or the terms, conditions, or privileges of such individual's employment; or

(4) Discriminate in admission to, or employment in, any program of apprenticeship, training, or retraining, including on-the-job training.

(b) No State savings association shall limit, segregate, or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of such individual's race, color, religion, sex, or national origin.

(c) No State savings association shall discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State, or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing of such practice by any lawfully constituted authority.

(d) No State savings association shall print or publish or cause to be printed or published any notice or advertisement relating to employment by such savings association indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin.

(e) This regulation shall not apply in any case in which the Federal Equal Employment Opportunities law is made inapplicable by the provisions of section 2000e–1 or sections 2000e–2 (e) through (j) of title 42, United States Code.

(f) Any violation of the following laws or regulations by a State savings association shall be deemed to be a violation of this subpart:

(1) The Equal Employment Opportunity Act, as amended, 42 U.S.C. 2000e–2000h–2, and Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR part 1600;

(2) The Age Discrimination in Employment Act, 29 U.S.C. 621–633, and EEOC and Department of Labor regulations;

(3) Department of the Treasury regulations at 31 CFR part 12 and Office of Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60;

(4) The Veterans Employment and Readjustment Act of 1972, 38 U.S.C. 2011–2012, and the Vietnam Era Veterans Readjustment Adjustment Assistance Act of 1974, 38 U.S.C. 2021–2026;

(5) The Rehabilitation Act of 1973, 29 U.S.C. 701 *et al.;* and

(6) The Immigration and Nationality Act, 8 U.S.C. 1324b, and INS regulations at 8 CFR part 274a.

§ 390.149 Complaints.

Complaints regarding discrimination in lending by a State savings association shall be referred to the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Washington, DC 20410 for processing under the Fair Housing Act, and to the Director, Division of Depositor and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20249 for processing under FDIC regulations. Complaints regarding discrimination in employment by a State savings association should be referred to the Equal Employment Opportunity Commission, Washington, DC 20506 and a copy, for information only, sent to the Director, Division of Depositor and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20249.

§ 390.150 Guidelines relating to nondiscrimination in lending.

(a) *General.* Fair housing and equal opportunity in home financing is a policy of the United States established by Federal statutes and Presidential orders and proclamations. In furtherance of the Federal civil rights laws and the economical home financing purposes of the statutes administered by the FDIC, the FDIC has adopted, in this subpart, nondiscrimination regulations that, among other things, prohibit arbitrary refusals to consider loan applications on the basis of the age or location of a dwelling, and prohibit discrimination based on race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), or national origin in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of housing related loans. Such discrimination is also prohibited in the purchase of loans and securities. This section provides supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies. Each State savings association should reexamine its underwriting standards at least annually in order to ensure equal opportunity.

(b) *Loan underwriting standards.* The basic purpose of the FDIC's nondiscrimination regulations is to require that every applicant be given an equal opportunity to obtain a loan. Each loan applicant's creditworthiness should be evaluated on an individual basis without reference to presumed characteristics of a group. The use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.

(c) *Discriminatory practices*—(1) *Discrimination on the basis of sex or marital status.* The Civil Rights Act of 1968 and the National Housing Act prohibit discrimination in lending on the basis of sex. The Equal Credit Opportunity Act, in addition to this prohibition, forbids discrimination on the basis of marital status. Refusing to lend to, requiring higher standards of creditworthiness of, or imposing different requirements on, members of one sex or individuals of one marital status, is discrimination based on sex or marital status. Loan underwriting decisions must be based on an applicant's credit history and present and reasonably foreseeable economic prospects, rather than on the basis of assumptions regarding comparative differences in creditworthiness between married and unmarried individuals, or between men and women.

(2) *Discrimination on the basis of language.* Requiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin.

(3) *Income of husbands and wives.* A practice of discounting all or part of either spouse's income where spouses

apply jointly is a violation of section 527 of the National Housing Act. As with other income, when spouses apply jointly for a loan, the determination as to whether a spouse's income qualifies for credit purposes should depend upon a reasonable evaluation of his or her past, present, and reasonably foreseeable economic circumstances. Information relating to child-bearing intentions of a couple or an individual may not be requested.

(4) *Supplementary income.* Lending standards which consider as effective only the non-overtime income of the primary wage-earner may result in discrimination because they do not take account of variations in employment patterns among individuals and families. The FDIC favors loan underwriting which reasonably evaluates the credit worthiness of each applicant based on a realistic appraisal of his or her own past, present, and foreseeable economic circumstances. The determination as to whether primary income or additional income qualifies as effective for credit purposes should depend upon whether such income may reasonably be expected to continue through the early period of the mortgage risk. Automatically discounting other income from bonuses, overtime, or part-time employment, will cause some applicants to be denied financing without a realistic analysis of their credit worthiness. Since statistics show that minority group members and low- and moderate-income families rely more often on such supplemental income, the practice may be racially discriminatory in effect, as well as artificially restrictive of opportunities for home financing.

(5) *Applicant's prior history.* Loan decisions should be based upon a realistic evaluation of all pertinent factors respecting an individual's creditworthiness, without giving undue weight to any one factor. The State savings association should, among other things, take into consideration that:

(i) In some instances, past credit difficulties may have resulted from discriminatory practices;

(ii) A policy favoring applicants who previously owned homes may perpetuate prior discrimination;

(iii) A current, stable earnings record may be the most reliable indicator of credit-worthiness, and entitled to more weight than factors such as educational level attained;

(iv) Job or residential changes may indicate upward mobility; and

(v) Preferring applicants who have done business with the lender can perpetuate previous discriminatory policies.

(6) *Income level or racial composition of area.* Refusing to lend or lending on less favorable terms in particular areas because of their racial composition is unlawful. Refusing to lend, or offering less favorable terms (such as interest rate, downpayment, or maturity) to applicants because of the income level in an area can discriminate against minority group persons.

(7) *Age and location factors.* Sections 390.142–390.144 prohibit loan denials based upon the age or location of a dwelling. These restrictions are intended to prohibit use of unfounded or unsubstantiated assumptions regarding the effect upon loan risk of the age of a dwelling or the physical or economic characteristics of an area. Loan decisions should be based on the present market value of the property offered as security (including consideration of specific improvements to be made by the borrower) and the likelihood that the property will retain an adequate value over the term of the loan. Specific factors which may negatively affect its short-range future value (up to 3–5 years) should be clearly documented. Factors which in some cases may cause the market value of a property to decline are recent zoning changes or a significant number of abandoned homes in the immediate vicinity of the property. However, not all zoning changes will cause a decline in property values, and proximity to abandoned buildings may not affect the market value of a property because of rehabilitation programs or affirmative lending programs, or because the cause of abandonment is unrelated to high risk. Proper underwriting considerations include the condition and utility of the improvements, and various physical factors such as street conditions, amenities such as parks and recreation areas, availability of public utilities

and municipal services, and exposure to flooding and land faults. However, arbitrary decisions based on age or location are prohibited, since many older, soundly constructed homes provide housing opportunities which may be precluded by an arbitrary lending policy.

(8) *Fair Housing Act (title VIII, Civil Rights Act of 1968, as amended).* State savings associations, must comply with all regulations promulgated by the Department of Housing and Urban Development to implement the Fair Housing Act, found at 24 CFR part 100 *et seq.*, except that they shall use the Equal Housing Lender logo and poster prescribed by FDIC regulations at §§ 390.145 and 390.146 rather than the Equal Housing Opportunity logo and poster required by 24 CFR parts 109 and 110.

(d) *Marketing practices.* State savings associations should review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. Discrimination in lending is not limited to loan decisions and underwriting standards; a State savings association does not meet its obligations to the community or implement its equal lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to segments of the community. A review of marketing practices could begin with an examination of an association's loan portfolio and applications to ascertain whether, in view of the demographic characteristics and credit demands of the community in which the institution is located, it is adequately serving the community on a nondiscriminatory basis. The FDIC will systematically review marketing practices where evidence of discrimination in lending is discovered.

Subparts H–N [Reserved]

Subpart O—Subordinate Organizations

§ 390.250 What does this subpart cover?

(a) The FDIC is issuing this subpart O pursuant to its general rulemaking and supervisory authority under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, and its specific authority under section 18(m) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(m). This subpart applies to subordinate organizations of State savings associations. The FDIC may, at any time, limit a State savings association's investment in any of these entities, or may limit or refuse to permit any activities of any of these entities for supervisory, legal, or safety and soundness reasons.

(b) Notices under this subpart are applications for purposes of statutory and regulatory references to ''applications.'' Any conditions that the FDIC imposes in approving any application are enforceable as a condition imposed in writing by the FDIC in connection with the granting of a request by a State savings association within the meaning of 12 U.S.C. 1818(b) or 1818(i).

§ 390.251 Definitions.

For purposes of this subpart:

Control has the same meaning as in part 391, subpart E.

GAAP-consolidated subsidiary means an entity in which a State savings association has a direct or indirect ownership interest and whose assets are consolidated with those of the savings association for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, these are entities in which a State savings association has a majority ownership interest.

Lower-tier entity includes any company in which a subsidiary has a direct or indirect ownership interest.

Ownership interest means any equity interest in a business organization, including stock, limited or general partnership interests, or shares in a limited liability company.

Subordinate organization means any corporation, partnership, business trust, association, joint venture, pool, syndicate, or other similar business organization in which a State savings association has a direct or indirect ownership interest, unless that ownership interest qualifies as a pass-through investment and is so designated by the investing State savings association.

Subsidiary means any subordinate organization directly or indirectly controlled by a State savings association.

§ 390.252 How must separate corporate identities be maintained?

(a) Each State savings association and subordinate organization thereof must be operated in a manner that demonstrates to the public that each maintains a separate corporate existence. Each must operate so that:

(1) Their respective business transactions, accounts, and records are not intermingled;

(2) Each observes the formalities of their separate corporate procedures;

(3) Each is adequately financed as a separate unit in light of normal obligations reasonably foreseeable in a business of its size and character;

(4) Each is held out to the public as a separate enterprise; and

(5) Unless the parent State savings association has guaranteed a loan to the subordinate organization, all borrowings by the subordinate organization indicate that the parent is not liable.

(b) The FDIC regulations that apply both to State savings associations and subordinate organizations shall not be construed as requiring a State savings association and its subordinate organizations to operate as a single entity.

§ 390.253 What notices are required to establish or acquire a new subsidiary or engage in new activities through an existing subsidiary?

When required by section 18(m) of the Federal Deposit Insurance Act, a State savings association (''you'') must file a notice (''Notice'') with the FDIC before establishing or acquiring a subsidiary or engaging in new activities in a subsidiary. The Notice must contain all of the information the required under 12 CFR 362.15. If the FDIC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the FDIC's prior written approval before establishing or acquiring the subsidiary or engaging in new activities in the subsidiary.

§ 390.254 How may a subsidiary of a State savings association issue securities?

(a) A subsidiary may issue, either directly or through a third party intermediary, any securities that its parent State savings association (''you'') may issue. The subsidiary must not state or imply that the securities it issues are covered by federal deposit insurance. A subsidiary may not issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that you are insolvent or have been placed into receivership.

(b) You must file a notice with the FDIC in accordance with § 390.253 at least 30 days before your first issuance of any securities through an existing subsidiary or in conjunction with establishing or acquiring a new subsidiary. If the FDIC notifies you within 30 days that the notice presents supervisory concerns or raises significant issues of law or policy, you must receive the FDIC's prior written approval before issuing securities through your subsidiary.

(c) For as long as any securities are outstanding, you must maintain all records generated through each securities issuance in the ordinary course of business, including a copy of any prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the FDIC. Such records must include, but are not limited to:

(1) The amount of your assets or liabilities (including any guarantees you make with respect to the securities issuance) that have been transferred or made available to the subsidiary; the percentage that such amount represents of the current book value of your assets on an unconsolidated basis; and the current book value of all such assets of the subsidiary;

(2) The terms of any guarantee(s) issued by you or any third party;

(3) A description of the securities the subsidiary issued;

(4) The net proceeds from the issuance of securities (or the pro rata portion of the net proceeds from securities issued through a jointly owned subsidiary); the gross proceeds of the securities issuance; and the market

value of assets collateralizing the securities issuance (any assets of the subsidiary, including any guarantees of its securities issuance you have made);

(5) The interest or dividend rates and yields, or the range thereof, and the frequency of payments on the subsidiary's securities;

(6) The minimum denomination of the subsidiary's securities; and

(7) Where the subsidiary marketed or intends to market the securities.

§ 390.255 How may a State savings association exercise its salvage power in connection with a service corporation or lower-tier entities?

(a) In accordance with this section, a State savings association (''you'') may exercise your salvage power to make a contribution or a loan (including a guarantee of a loan made by any other person) to a lower-tier entity (''salvage investment'') that exceeds the maximum amount otherwise permitted under law or regulation. You must notify the FDIC at least 30 days before making such a salvage investment. This notice must demonstrate that:

(1) The salvage investment protects your interest in the lower-tier entity;

(2) The salvage investment is consistent with safety and soundness; and

(3) You considered alternatives to the salvage investment and determined that such alternatives would not adequately satisfy paragraphs (a)(1) and (2) of this section.

(b) If the FDIC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the FDIC's prior written approval before making a salvage investment.

(c) If your lower-tier entity is a GAAP-consolidated subsidiary, your salvage investment under this section will be considered an investment in a subsidiary for purposes of subpart Z.

Subpart P [Reserved]

Subpart Q—Definitions for Regulations Affecting All State Savings Associations

§ 390.280 When do the definitions in this subpart apply?

The definitions in this subpart apply throughout parts 390 and 391, unless another definition is specifically provided.

§ 390.281 Account.

The term *account* means any savings account, demand account, certificate account, tax and loan account, note account, United States Treasury general account or United States Treasury time deposit-open account, whether in the form of a deposit or a share, held by an accountholder in a State savings association.

§ 390.282 Accountholder.

The term *accountholder* means the holder of an account or accounts in a State savings association insured by the Deposit Insurance Fund. The term does not include the holder of any subordinated debt security or any mortgage-backed bond issued by the State savings association.

§ 390.283 Affiliate.

The term *affiliate* of a State savings association, unless otherwise defined, means any corporation, business trust, association, or other similar organization:

(a) Of which a State savings association, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(b) Of which control is held, directly or indirectly through stock ownership or in any other manner, by the shareholders of a State savings association who own or control either a majority of the shares of such State savings association or more than 50 per centum of the number of shares voted for the

election of directors of such State savings association at the preceding election, or by trustees for the benefit of the shareholders of any such State savings association; or

(c) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one State savings association.

§ 390.284 Affiliated person.

The term *affiliated person* of a State savings association means the following:

(a) A director, officer, or controlling person of such association;

(b) A spouse of a director, officer, or controlling person of such association;

(c) A member of the immediate family of a director, officer, or controlling person of such association, who has the same home as such person or who is a director or officer of any subsidiary of such association or of any holding company affiliate of such association;

(d) Any corporation or organization (other than the State savings association or a corporation or organization through which the State savings association operates) of which a director, officer or the controlling person of such association:

(1) Is chief executive officer, chief financial officer, or a person performing similar functions;

(2) Is a general partner;

(3) Is a limited partner who, directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns an interest of 10 percent or more in the partnership (based on the value of his or her contribution) or who, directly or indirectly with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, owns an interest of 25 percent or more in the partnership; or

(4) Directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns or controls 10 percent or more of any class of equity securities or owns or controls, with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, 25 percent or more of any class of equity securities; and

(5) Any trust or other estate in which a director, officer, or controlling person of such association or the spouse of such person has a substantial beneficial interest or as to which such person or his or her spouse serves as trustee or in a similar fiduciary capacity.

§ 390.285 Audit period.

The *audit period* of a State savings association means the twelve month period (or other period in the case of a change in audit period) covered by the annual audit conducted to satisfy § 390.350.

§ 390.286 Certificate account.

The term *certificate account* means a savings account evidenced by a certificate that must be held for a fixed or minimum term.

§ 390.287 Consumer credit.

The term *consumer credit* means credit extended to a natural person for personal, family, or household purposes, including loans secured by liens on real estate and chattel liens secured by mobile homes and leases of personal property to consumers that may be considered the functional equivalent of loans on personal security: *Provided,* the State savings association relies substantially upon other factors, such as the general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan. Appropriate evidence to demonstrate justification for such reliance should be retained in a State savings association's files. Among the types of credit included within this term are consumer loans; educational loans; unsecured loans for real property alteration, repair or improvement, or for the equipping of real property; loans in the nature of overdraft protection; and credit extended in connection with credit cards.

§ 390.288 Controlling person.

The term *controlling person* of a State savings association means any person or entity which, either directly or indirectly, or acting in concert with one or more other persons or entities, owns, controls, or holds with power to vote, or holds proxies representing, ten percent or more of the voting shares or rights of such State savings association; or controls in any manner the election or appointment of a majority of the directors of such State savings association. However, a director of a State savings association will not be deemed to be a controlling person of such State savings association based upon his or her voting, or acting in concert with other directors in voting, proxies:

(a) Obtained in connection with an annual solicitation of proxies, or

(b) Obtained from savings account holders and borrowers if such proxies are voted as directed by a majority vote of the entire board of directors of such association, or of a committee of such directors if such committee's composition and authority are controlled by a majority vote of the entire board and if its authority is revocable by such a majority.

§ 390.289 Corporation.

The terms *Corporation* and *FDIC* mean the Federal Deposit Insurance Corporation.

§ 390.290 Demand accounts.

The term *demand accounts* means non-interest-bearing demand deposits that are subject to check or to withdrawal or transfer on negotiable or transferable order to the State savings association and that are permitted to be issued by statute, regulation, or otherwise and are payable on demand.

§ 390.291 Director.

The term *director* means any director, trustee, or other person performing similar functions with respect to any organization whether incorporated or unincorporated. Such term does not include an advisory director, honorary director, director emeritus, or similar person, unless the person is otherwise performing functions similar to those of a director.

§ 390.292 Financial institution.

The term *financial institution* has the same meaning as the term *depository institution* set forth in 12 U.S.C. 1813(c)(1).

§ 390.293 Immediate family.

The term *immediate family* of any natural person means the following (whether by the full or half blood or by adoption):

(a) Such person's spouse, father, mother, children, brothers, sisters, and grandchildren;

(b) The father, mother, brothers, and sisters of such person's spouse; and

(c) The spouse of a child, brother, or sister of such person.

§ 390.294 Land loan.

The term *land loan* means a loan:

(a) Secured by real estate upon which all facilities and improvements have been completely installed, as required by local regulations and practices, so that it is entirely prepared for the erection of structures;

(b) To finance the purchase of land and the accomplishment of all improvements required to convert it to developed building lots; or

(c) Secured by land upon which there is no structure.

§ 390.295 Low-rent housing.

The term *low-rent housing* means real estate which is, or which is being constructed, remodeled, rehabilitated, modernized, or renovated to be, the subject of an annual contributions contract for low-rent housing under the provisions of the United States Housing Act of 1937, as amended.

§ 390.296 Money Market Deposit Accounts.

(a) *Money Market Deposit Accounts* (*MMDAs*) offered by State savings associations in accordance with applicable state law are savings accounts on which interest may be paid if issued subject to the following limitations:

(1) The State savings association shall reserve the right to require at

least seven days' notice prior to withdrawal or transfer of any funds in the account; and

(2)(i) The depositor is authorized by the State savings association to make no more than six transfers per calendar month or statement cycle (or similar period) of at least four weeks by means of preauthorized, automatic, telephonic, or data transmission agreement, order, or instruction to another account of the depositor at the same State savings association to the State savings association itself, or to a third party.

(ii) State savings associations may permit holders of MMDAs to make unlimited transfers for the purpose of repaying loans (except overdraft loans on the depositor's demand account) and associated expenses at the same State savings association (as originator or servicer), to make unlimited transfers of funds from this account to another account of the same depositor at the same State savings association or to make unlimited payments directly to the depositor from the account when such transfers or payments are made by mail, messenger, automated teller machine, or in person, or when such payments are made by telephone (via check mailed to the depositor).

(3) In order to ensure that no more than the number of transfers specified in paragraph (a)(2)(i) of this section are made, a State savings association must either:

(i) Prevent transfers of funds in excess of the limitations; or

(ii) Adopt procedures to monitor those transfers on an after-the-fact basis and contact customers who exceed the limits on more than an occasional basis. For customers who continue to violate those limits after being contacted by the depository State savings association the depository State savings association must either place funds in another account that the depositor is eligible to maintain or take away the account's transfer and draft capacities.

(iii) Insured State savings associations at their option, may use on a consistent basis either the date on a check or the date it is paid in determining whether the transfer limitations within the specified interval are exceeded.

(b) State savings associations may offer MMDAs to any depositor not inconsistent with applicable state law.

§ 390.297 Negotiable Order of Withdrawal Accounts.

(a) *Negotiable Order of Withdrawal (NOW)* accounts are savings accounts authorized by 12 U.S.C. 1832 on which the State savings association reserves the right to require at least seven days' notice prior to withdrawal or transfer of any funds in the account.

(b) For purposes of 12 U.S.C. 1832:

(1) An organization shall be deemed ''operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and * * * not * * * for profit'' if it is described in sections 501(c)(3) through (13), 501(c)(19), or 528 of the Internal Revenue Code; and

(2) The funds of a sole proprietorship or unincorporated business owned by a husband and wife shall be deemed beneficially owned by ''one or more individuals.''

§ 390.298 Nonresidential construction loan.

The term *nonresidential construction loan* means a loan for construction of other than one or more dwelling units.

§ 390.299 Nonwithdrawable account.

The term *nonwithdrawable account* means an account which by the terms of the contract of the accountholder with the State savings association or by provisions of state law cannot be paid to the accountholder until all liabilities, including other classes of share liability of the State savings association have been fully liquidated and paid upon the winding up of the State savings association is referred to as a *nonwithdrawable account*.

§ 390.300 Note account.

The term *note account* means a note, subject to the right of immediate call, evidencing funds held by depositories electing the note option under applicable United States Treasury Department regulations. Note accounts are not savings accounts or savings deposits.

§ 390.301 [Reserved]

§ 390.302 Officer.

The term *Officer* means the president, any vice-president (but not an assistant vice-president, second vice-president, or other vice president having authority similar to an assistant or second vice-president), the secretary, the treasurer, the comptroller, and any other person performing similar functions with respect to any organization whether incorporated or unincorporated. The term *officer* also includes the chairman of the board of directors if the chairman is authorized by the charter or by-laws of the organization to participate in its operating management or if the chairman in fact participates in such management.

§ 390.303 Parent company; subsidiary.

The term *parent company* means any company which directly or indirectly controls any other company or companies. The term *subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes a subsidiary owned in whole or in part by a State savings association, or a subsidiary of that subsidiary.

§ 390.304 Political subdivision.

The term *political subdivision* includes any subdivision of a public unit, any principal department of such public unit:

(a) The creation of which subdivision or department has been expressly authorized by state statute,

(b) To which some functions of government have been delegated by state statute, and

(c) To which funds have been allocated by statute or ordinance for its exclusive use and control. It also 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. Excluded from the term are subordinate or nonautonomous divisions, agencies or boards within principal departments.

§ 390.305 Principal office.

The term *principal office* means the home office of a State savings association established as such in conformity with the laws under which the State savings association is organized.

§ 390.306 Public unit.

The term *public unit* means the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, the Virgin Islands, any county, any municipality or any political subdivision thereof.

§ 390.307 Savings account.

The term *savings account* means any withdrawable account, except a demand account as defined in § 390.290, a tax and loan account, a note account, a United States Treasury general account, or a United States Treasury time deposit-open account.

§ 390.308 State savings association.

The term *State savings association* means a State savings association as defined in section 3 of the Federal Deposit Insurance Act, the deposits of which are insured by the Corporation. It includes a building and loan, savings and loan, or homestead association, or a cooperative bank (other than a cooperative bank which is a State bank as defined in section 3(a)(2) of the Federal Deposit Insurance Act) organized and operating according to the laws of the State in which it is chartered or organized, or a corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act) that the Board of Directors of the Federal Deposit Insurance Corporation determine to be operating substantially in the same manner as a State savings association.

§ 390.309 Security.

The term *security* means any nonwithdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or, in general, any interest or instrument commonly known as a *security,* or any certificate of interest or participation in, temporary or interim

certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing, except that a *security* shall not include an account or deposit insured by the Federal Deposit Insurance Corporation.

§ 390.310 Service corporation.

The term *service corporation* means any corporation, the majority of the capital stock of which is owned by one or more savings associations and which engages, directly or indirectly, in any activities similar to activities which may be engaged in by a service corporation in which a Federal savings association may invest.

§ 390.311 State.

The term *State* means a State, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands of the United States.

§ 390.312 Subordinated debt security.

The term *subordinated debt security* means any unsecured note, debenture, or other debt security issued by a State savings association and subordinated on liquidation to all claims having the same priority as account holders or any higher priority.

§ 390.313 Tax and loan account.

The term *tax and loan account* means an account, the balance of which is subject to the right of immediate withdrawal, established for receipt of payments of Federal taxes and certain United States obligations. Such accounts are not savings accounts or savings deposits.

§ 390.314 United States Treasury General Account.

The term *United States Treasury General Account* means an account maintained in the name of the United States Treasury the balance of which is subject to the right of immediate withdrawal, except in the case of the closure of the member, and in which a zero balance may be maintained. Such accounts are not savings accounts or savings deposits.

§ 390.315 United States Treasury Time Deposit Open Account.

The term *United States Treasury Time Deposit Open Account* means a non-interest-bearing account maintained in the name of the United States Treasury which may not be withdrawn prior to the expiration of 30 days' written notice from the United States Treasury, or such other period of notice as the Treasury may require. Such accounts are not savings accounts or savings deposits.

§ 390.316 With recourse.

(a) The term *with recourse* means, in connection with the sale of a loan or a participation interest in a loan, an agreement or arrangement under which the purchaser is to be entitled to receive from the seller a sum of money or thing of value, whether tangible or intangible (including any substitution), upon default in payment of any loan involved or any part thereof or to withhold or to have withheld from the seller a sum of money or anything of value by way of security against default. The recourse liability resulting from a sale with recourse shall be the total book value of any loan sold with recourse less:

(1) The amount of any insurance or guarantee against loss in the event of default provided by a third party,

(2) The amount of any loss to be borne by the purchaser in the event of default, and

(3) The amount of any loss resulting from a recourse obligation entered on the books and records of the State savings association.

(b) The term *with recourse* does not include loans or interests therein where the agreement of sale provides for the State savings association directly or indirectly

(1) To hold or retain a subordinate interest in a specified percentage of the loans or interests; or

(2) To guarantee against loss up to a specified percentage of the loans or interests, which specified percentage shall not exceed ten percent of the outstanding balance of the loans or interests at the time of sale: *Provided*, that the State savings association designates adequate reserves for the subordinate interest or guarantee.

(c) This definition does not apply for purposes of determining the capital adequacy requirements under part 324 of this chapter.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17743, Apr. 24, 2018]

Subparts R–V [Reserved]

Subpart W—Securities Offerings

§ 390.410 Definitions.

(a) For purposes of this subpart, the following definitions apply:

(1) *Accredited investor* means the same as in Commission Rule 501(a) (17 CFR 230.501(a)) under the Securities Act, and includes any State savings association.

(2) *Commission* means the Securities and Exchange Commission.

(3) *Dividend or interest reinvestment plan* means a plan which is offered solely to existing security holders of the State savings association which allows such persons to reinvest dividends or interest paid to them on securities issued by the State savings association, and which also may allow additional cash amounts to be contributed by the participants in the plan, provided that the securities to be issued are newly issued, or are purchased for the account of plan participants, at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined in accordance with a pricing formula specified in the plan and based upon average or current market prices at the time of purchase.

(4) *Employee benefit plan* means any purchase, savings, option, rights, bonus, ownership, appreciation, profit sharing, thrift, incentive, pension or similar plan solely for officers, directors or employees.

(5) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj).

(6) *Filing date* means the date on which a document is actually received during business hours, 9 a.m. to 5 p.m. Eastern Standard Time, by the FDIC, 550 17th Street, NW., Washington, DC 20429. However if the last date on which a document can be accepted falls on a Saturday, Sunday, or holiday, such document may be filed on the next business day.

(7) *Issuer* means a State savings association which issues or proposes to issue any security.

(8) *Offer; Sale* or *sell*. For purposes of this subpart, the term *offer*, *offer to sell*, or *offer for sale* shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. However, these terms shall not include preliminary negotiations or agreements between an issuer and any underwriter or among underwriters who are or are to be in privity of contract with the issuer. *Sale* and *sell* includes every contract to sell or otherwise dispose of a security or interest in a security for value. Every offer or sale of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.

(9) *Person* means the same as in 12 CFR 192.25, and includes a State savings association.

(10) *Purchase* and *buy* mean the same as in 12 CFR 192.25.

(11) *State savings association* means the same as in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)), and includes a state-chartered savings association in organization which is granted conditional approval of insurance of accounts by the Federal Deposit Insurance Corporation. In addition, for purposes of § 390.411, *State savings association* includes any underwriter participating in the distribution of securities of a State savings association.

(12) *Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a–77aa).

(13) *Security* means any nonwithdrawable account, note, stock,

treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization or subscription, transferable share, investment contract, voting trust certificate or, in general, any interest or instrument commonly known as a *security,* or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing, except that a *security* shall not include an account insured, in whole or in part, by the Federal Deposit Insurance Corporation.

(14) *Underwriter* means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission and such term shall also not include any person who has continually held the securities being transferred for a period of two (2) consecutive years provided that the securities sold in any one (1) transaction shall be less than ten percent (10%) of the issued and outstanding securities of the same class. The following shall apply for the purpose of determining the period securities have been held:

(i) *Stock dividends, splits and recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

(ii) *Conversions.* If the securities sold were acquired from the issuer for consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion.

(iii) *Contingent issuance of securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.

(iv) *Pledged securities.* Securities which are *bona fide* pledged by any person other than the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of securities.* Securities acquired from any person, other than the issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts.* Securities acquired from the settler of a trust by the trust or acquired from the trust by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the settler.

(vii) *Estates.* Securities held by the estate of a deceased person or acquired from such an estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

(viii) *Exchange transactions.* A person receiving securities in a transaction involving an exchange of the securities of

one issuer for securities of another issuer shall be deemed to have acquired the securities received when such person acquired the securities exchanged.

(b) A term not defined in this subpart but defined elsewhere in this part, when used in subpart, shall have the meanings given elsewhere in this part, unless the context otherwise requires.

(c) When used in the rules, regulations, or forms of the Commission referred to in this subpart, the term *Commission* shall be deemed to refer to the FDIC, the term *registrant* shall be deemed to refer to an issuer defined in this subpart, and the term *registration statement* or *prospectus* shall be deemed to refer to an offering circular filed under this subpart, unless the context otherwise requires.

§ 390.411 Offering circular requirement.

(a) *General*. No State savings association shall offer or sell, directly or indirectly, any security issued by it unless:

(1) The offer or sale is accompanied or preceded by an offering circular which includes the information required by this subpart and which has been filed and declared effective pursuant to this subpart; or

(2) An exemption is available under this subpart.

(b) *Communications not deemed an offer*. The following communications shall not be deemed an offer under this subpart:

(1) Prior to filing an offering circular, any notice of a proposed offering which satisfies the requirements of Commission Rule 135 (17 CFR 230.135) under the Securities Act;

(2) Subsequent to filing an offering circular, any notice circular, advertisement, letter, or other communication published or transmitted to any person which satisfies the requirements of Commission Rule 134 (17 CFR 230.134) under the Securities Act; and

(3) Oral offers of securities covered by an offering circular made after filing the offering circular with the FDIC.

(c) *Preliminary offering circular*. Notwithstanding paragraph (a) of this section, a preliminary offering circular may be used for an offer of any security prior to the effective date of the offering circular if:

(1) The preliminary offering circular has been filed pursuant to this subpart;

(2) The preliminary offering circular includes the information required by this subpart, except for the omission of information relating to offering price, discounts or commissions, amount of proceeds, conversion rates, call prices, or other matters dependent on the offering price; and

(3) The offering circular declared effective by the FDIC is furnished to the purchaser prior to, or simultaneously with, the sale of any such security.

§ 390.412 Exemptions.

The offering circular requirement of § 390.411 shall not apply to an issuer's offer or sale of securities:

(a) [Reserved]

(b) Exempt from registration under either section 3(a) or section 4 of the Securities Act, but only by reason of an exemption other than section 3(a)(5) (for regulated State savings associations), and section 3(a)(11) (for intrastate offerings) of the Securities Act;

(c) In a conversion from the mutual to the stock form of organization pursuant to12 CFR part 192, except for a supervisory conversion undertaken pursuant to subpart C of 12 CFR part 192;

(d) In a non-public offering which satisfies the requirements of § 390.413;

(e) That are debt securities issued in denominations of $100,000 or more, which are fully collateralized by cash, any security issued, or guaranteed as to principal and interest, by the United States, the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Government National Mortgage Association or by interests in mortgage notes secured by real property;

(f) Distributed exclusively abroad to foreign nationals: *Provided*, That—

(1) The offering is made subject to safeguards reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States; and

(2) Such safeguards include, without limitation, measures that would be sufficient to ensure that registration of the securities would not be required if the securities were not exempt under the Securities Act; or

(g) To its officers, directors or employees pursuant to an employee benefit plan or a dividend or interest reinvestment plan, and provided that any such plan has been approved by the majority of shareholders present in person or by proxy at an annual or special meeting of the shareholders of the State savings association.

§ 390.413 Non-public offering.

Offers and sales of securities by an issuer that satisfy the conditions of paragraph (a) or (b) of this section and the requirements of paragraphs (c) and (d) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Securities Act and §§ 390.412(b) and 390.412(d). However, an issuer shall not be deemed to be not in compliance with the provisions of this subpart solely by reason of making an untimely filing of the notice required to be filed by paragraph (c) of this section so long as the notice is actually filed and all other conditions and requirements of this subpart are satisfied.

(a) *Regulation D.* The offer and sale of all securities in the transaction satisfies the Commission's Regulation D (17 CFR 230.501–230.506), except for the notice requirements of Commission Rule 503 (17 CFR 230.503) and the limitations on resale in Commission Rule 502(d) (17 CFR 230.502(d)).

(b) *Sales to 35 persons.* The offer and sale of all securities in the transaction satisfies each of the following conditions:

(1) Sales of the security are not made to more than 35 persons during the offering period, as determined under the integration provisions of Commission Rule 502(a) (17 CFR 230.502(a)). The number of purchasers referred to above is exclusive of any accredited investor, officer, director or affiliate of the issuer. For purposes of paragraph (b) of this section, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person and a partnership, corporation or other organization which was not specifically formed for the purpose of purchasing the security offered in reliance upon this exemption, is counted as one person.

(2) All purchasers either have a preexisting personal or business relationship with the issuer or any of its officers, directors or controlling persons, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could reasonably be assumed to have the capacity to protect their own interests in connection with the transaction.

(3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

(4) The offer and sale of the security is not accomplished by the publication of any advertisement.

(c) *Filing of notice of sales.* Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to this subpart, the issuer, shall file with the FDIC a report describing the results of the sale of securities as required by § 390.421(b).

(d) *Limitation on resale.* The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of § 390.410(a)(14), which reasonable care shall include, but not be limited to, the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for the purchaser or for other persons;

(2) Written disclosure to each purchaser prior to the sale that the securities are not offered by an offering circular filed with, and declared effective by, the FDIC pursuant to § 390.411, but instead are being sold in reliance upon the exemption from the offering circular requirement provided for by this subpart; and

(3) Placement of a legend on the certificate, or other document evidencing

the securities, indicating that the securities have not been offered by an offering circular filed with, and declared effective by, the FDIC and that due care should be taken to ensure that the seller of the securities is not an underwriter within the meaning of §390.410(a)(14).

§390.414 Filing and signature requirements.

(a) *Procedures.* An offering circular, amendment, notice, report, or other document required by this subpart shall, unless otherwise indicated, be filed in accordance with the requirements of 12 CFR 192.115(a), 192.150(a)(6), 192.155, 192.180(b), and Form AC, General Instruction B, of this subpart.

(b) *Number of copies.* (1) Unless otherwise required, any filing under this subpart shall include nine copies of the document to be filed with the FDIC, as follows:

(i) Seven copies, which shall include one manually signed copy with exhibits, three conformed copies with exhibits, and three conformed copies without exhibits, to the FDIC, ATTN: Accounting and Securities Disclosure Section, 550 17th Street NW, Washington, DC 20429; and

(ii) Two copies, which shall include one manually signed copy with exhibits and one conformed copy, without exhibits, to the appropriate regional director.

(2) Within five days after the effective date of an offering circular or the commencement of a public offering after the effective date, whichever occurs later, nine copies of the offering circular used shall be filed with the FDIC as follows: Seven copies to the FDIC, 550 17th Street NW., ATTN: Accounting and Securities Disclosure Section, Washington, DC, and two copies to the appropriate Regional Director.

(3) After the effective date of an offering circular, an offering circular which varies from the form previously filed shall not be used, unless it includes only non-material supplemental or additional information and until 10 copies have been filed with the FDIC in the manner required.

(c) *Signature.* (1) Any offering circular, amendment, or consent filed with the FDIC pursuant to this subpart shall include an attached manually signed signature page which authorizes the filing and has been signed by:

(i) The issuer, by its duly authorized representative;

(ii) The issuer's principal executive officer;

(iii) The issuer's principal financial officer;

(iv) The issuer's principal accounting officer; and

(v) At least a majority of the issuer's directors.

(2) Any other document filed pursuant to this subpart shall be signed by a person authorized to do so.

(3) At least *one copy* of every document filed pursuant to this subpart shall be manually signed, and every copy of a document filed shall:

(i) Have the name of each person who signs typed or printed beneath the signature;

(ii) State the capacity or capacities in which the signature is provided;

(iii) Provide the name of each director of the issuer, if a majority of directors is required to sign the document; and

(iv) With regard to any copies not manually signed, bear typed or printed signatures.

§390.415 Effective date.

(a) Except as provided for in paragraph (d) of this section, an offering circular filed by a State savings association shall be deemed to be automatically declared effective by the FDIC on the twentieth day after filing or on such earlier date as the FDIC may determine for good cause shown.

(b) If any amendment is filed prior to the effective date, the offering circular shall be deemed to have been filed when such amendment was filed.

(c) The period until automatic effectiveness under this subpart shall be stated at the bottom of the facing page of the Form OC or any amendment.

(d) The effectiveness will be delayed if a duly authorized amendment, telegram confirmed in writing, or letter states that the effective date is delayed until a further amendment is filed specifically stating that the offering circular will become effective in accordance with this subpart.

(e) An amendment filed after the effective date of the offering circular shall become effective on such date as the FDIC may determine.

(f) If it appears to the FDIC at any time that the offering circular includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, then the FDIC may pursue any remedy it is authorized to pursue under section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818), including, but not limited to, institution of cease-and-desist proceedings.

§ 390.416 Form, content, and accounting.

(a) *Form and content.* Any offering circular or amendment filed pursuant to this subpart shall:

(1) Be filed under cover of Form OC, which is under 12 CFR part 192;

(2) Comply with the requirements of Items 3 and 4 of Form OC and the requirements of all items of the form for registration (17 CFR part 239) that the issuer would be eligible to use were it required to register the securities under the Securities Act;

(3) Comply with all item requirements of the Form S–1 (17 CFR part 239) for registration under the Securities Act, if the association issuing the securities is not in compliance with the FDIC's regulatory capital requirements during the time the offering is made;

(4) Where a form specifies that the information required by an item in the Commission's Regulation S–K (17 CFR part 229) should be furnished, include such information and all of the information required by Item 7 of Form PS, which is under 12 CFR part 192;

(5) Include after the facing page of the Form OC a cross-reference sheet listing each item requirement of the form for registration under the Securities Act and indicate for each item the applicable heading or subheading in the offering circular under which the required information is disclosed;

(6) Include in part II of the Form OC the applicable undertakings required by the form for registration under the Securities Act;

(7) If the issuer has not previously been required to file reports pursuant to section 13(a) of the Exchange Act or § 390.427, include in part II of Form OC the following undertaking: ''The issuer hereby undertakes, in connection with any distribution of the offering circular, to have a preliminary or effective offering circular including the information required by this subpart distributed to all persons expected to be mailed confirmations of sale not less than 48 hours prior to the time such confirmations are expected to be mailed;''

(8) In offerings involving the issuance of options, warrants, subscription rights or conversion rights within the meaning of § 390.410(a)(8), include in part II of Form OC an undertaking to provide a copy of the issuer's most recent audited financial statements to persons exercising such options, warrants or rights promptly upon receiving written notification of the exercise thereof;

(9) Include as supplemental information and not as part of the Form OC and only with respect to *de novo* offerings, a copy of the application for insurance of accounts as submitted to the Federal Deposit Insurance Corporation for state-chartered savings associations; and

(10) In addition to the information expressly required to be included by this subpart, 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.

(b) *Accounting requirements.* To be declared effective an offering circular or amendment shall satisfy the accounting requirements in subpart T.

§ 390.417 Use of the offering circular.

(a) An offering circular or amendment declared effective by the FDIC shall not be used more than nine months after the effective date, unless the information contained therein is as of a date not more than 16 months prior to such use.

(b) An offering circular filed under §390.414(b)(3) shall not extend the period for which an effective offering circular or amendment may be used under paragraph (c) of this section.

(c) If any event arises, or change in fact occurs, after the effective date and such event or change in fact, individually or in the aggregate, results in the offering circular containing any untrue statement of material fact, or omitting to state a material fact necessary in order to make statements made in the offering circular not misleading under the circumstances, then no offering circular, which has been declared effective under this subpart, shall be used until an amendment reflecting such event or change in fact has been filed with, and declared effective by, the FDIC.

§390.418 Escrow requirement.

(a) Any funds received in an offering which is offered and sold on a best efforts all-or-none condition or with a minimum-maximum amount to be sold shall be held in an escrow or similar separate account until such time as all of the securities are sold with respect to a best efforts all-or-none offering or the stated minimum amount of securities are sold in a minimum-maximum offering.

(b) If the amount of securities required to be sold under escrow conditions in paragraph (a) of this section are not sold within the time period for the offering as disclosed in the offering circular, all funds in the escrow account shall be promptly refunded unless the FDIC otherwise approves an extension of the offering period upon a showing of good cause and provided that the extension is consistent with the public interest and the protection of investors.

§390.419 Unsafe or unsound practices.

(a) No person shall directly or indirectly,

(1) Employ any device, scheme or artifice to defraud,

(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, or

(3) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security of a State savings association.

(b) Violations of this subpart shall constitute an unsafe or unsound practice within the meaning of section 8 of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818.

(c) Nothing in this subpart shall be construed as a limitation on the applicability of section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) or Rule 10b–5 promulgated thereunder (17 CFR 240.10b–5).

§390.420 Withdrawal or abandonment.

(a) Any offering circular, amendment, or exhibit may be withdrawn prior to the effective date. A withdrawal shall be signed and state the grounds upon which it is made. Any document withdrawn will not be removed from the files of the FDIC, but will be marked ''Withdrawn upon the request of the issuer on (date).''

(b) When an offering circular or amendment has been on file with the FDIC for a period of nine months and has not become effective, the FDIC may, in its discretion, determine whether the filing has been abandoned, after notifying the issuer that the filing is out of date and must either be amended to comply with the applicable requirements of this subpart or be withdrawn within 30 days after the date of such notice. When a filing is abandoned, the filing will not be removed from the files of the FDIC, but will be marked ''Declared abandoned by the FDIC on (date).''

§390.421 Securities sale report.

(a) Within 30 days after the first sale of the securities, every six months after such 30 day period and not later than 30 days after the later of the last sale of securities in an offering pursuant to §390.411 or the application of the proceeds therefrom, the issuer shall file with the FDIC a report describing the results of the sale of the securities and the application of the proceeds, which shall include all of the information required by Form G–12 set forth at

§ 390.429 and shall also include the following:

(1) The name, address, and docket number of the issuer;

(2) The title, number, aggregate and per-unit offering price of the securities sold;

(3) The aggregate and per-unit dollar amounts of actual itemized expenses, discounts or commissions, and other fees;

(4) The aggregate and per-unit dollar amounts of the net proceeds raised, and the use of proceeds therefrom; and

(5) The number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities after the issuance of the securities or termination of the offer.

(b) Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to § 390.413, the issuer shall file with the FDIC a report describing the results of the sale of securities, which shall include all of the information required by Form G–12 set forth at § 390.429, and shall also include the following:

(1) All of the information required by paragraph (a) of this section; and

(2) A detailed statement of the factual and legal grounds for the exemption claimed.

§ 390.422 Public disclosure and confidential treatment.

(a) Any offering circular, amendment, exhibit, notice, or report filed pursuant to this subpart will be publicly available. Any other related documents will be treated in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), and parts 309 and 310 of this chapter.

(b) Any requests for confidential treatment of information in a document required to be filed under this subpart shall be made as required under Commission Rule 24b–2 (17 CFR 240.24b–2) under the Exchange Act.

§ 390.423 Waiver.

(a) The FDIC may waive any requirement of this subpart, or any required information:

(1) Determined to be unnecessary by the FDIC;

(2) In connection with a transaction approved by the FDIC for supervisory reasons, or

(3) Where a provision of this subpart conflicts with a requirement of applicable state law.

(b) Any condition, stipulation or provision binding any person acquiring a security issued by a State savings association which seeks to waive compliance with any provision of this subpart shall be void, unless approved by the FDIC.

§ 390.424 Requests for interpretive advice or waiver.

Any requests to the FDIC for interpretive advice or a waiver with respect to any provision of this subpart shall satisfy the following requirements:

(a) A copy of the request, including any attachments, shall be filed with the FDIC;

(b) The provisions of this subpart to which the request relates, the participants in the proposed transaction, and the reasons for the request, shall be specifically identified or described; and

(c) The request shall include a legal opinion as to each legal issue raised and an accounting opinion as to each accounting issue raised.

§ 390.425 Delayed or continuous offering and sale of securities.

Any offer or sale of securities under § 390.411 may be made on a continuous or delayed basis in the future, if:

(a) The securities would satisfy all of the eligibility requirements of the Commission's Rule 415, 17 CFR 230.415; and

(b) The association issuing the securities is in compliance with the FDIC's regulatory capital requirements during the time the offering is made.

§ 390.426 Sales of securities at an office of a State savings association.

Sales of securities of a State savings association or its affiliates at an office of a State savings association may

only be made in accordance with the provisions of § 390.340.

§ 390.427 Current and periodic reports.

(a) Each State savings association which files an offering circular which becomes effective pursuant to this subpart, after such effective date, shall file with the FDIC periodic and current reports on Forms 8–K, 10–Q and 10–K as may be required by section 13 of the Exchange Act (15 U.S.C. 78m) as if the securities sold by such offering circular were securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). The duty to file periodic and current reports under this subpart shall be automatically suspended if and so long as any issue of securities of the State savings association is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). The duty to file under this subpart shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such offering circular became effective, if, at the beginning of such fiscal year, the securities of each class to which the offering circular relates are held of record by less than three hundred persons and upon the filing of a Form 15.

(b) For purposes of registering securities under section 12(b) or 12(g) of the Exchange Act, an issuer subject to the reporting requirements of paragraph (a) of this section may use the Commission's registration statement on Form 10 or Form 8–A or 8–B as applicable.

§ 390.428 Approval of the security.

Any securities of a State savings association which are not exempt under this subpart and are offered or sold pursuant to an offering circular which becomes effective under this subpart, are deemed to be approved as to form and terms for purposes of this subpart.

§ 390.429 Form for securities sale report.

FDIC, 550 17th Street, NW.,
Washington, DC 20429

[Form G–12]

Securities Sale Report Pursuant to § 390.12

FDIC No. _____
Issuer's Name: _____
Address: _____

If in organization, state the date of FDIC certification of insurance of accounts: ____

State the title, number, aggregate and per-unit offering price of the securities sold: _____

State the aggregate and per-unit dollar amounts of actual itemized offering expenses, discounts, commissions, and other fees: _____

State the aggregate and per-unit dollar amounts of the net proceeds raised: _____

Describe the use of proceeds. If unknown, provide reasonable estimates of the dollar amount allocated to each purpose for which the proceeds will be used: _____

State the number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities at the close or termination of the offering: _____

For a non-public offering, also state the factual and legal grounds for the exemption claimed (attach additional pages if necessary): _____

For a non-public offering, all offering materials used should be listed: _____

Person to Contact: _____
Telephone No.: _____

This issuer has duly caused this securities sale report to be signed on its behalf by the undersigned person.

Date of securities sale report _____
Issuer: _____
Signature: _____
Name: _____
Title: _____

Instruction: Print the name and title of the signing representative under his or her signature. Ten copies of the securities sale report should be filed, including one copy manually signed, as required under 12 CFR 390.414.

Attention

Intentional misstatements or omissions of fact constitute violations of Federal law (See 18 U.S.C. 1001 and § 390.355(b)).

§ 390.430 Filing of copies of offering circulars in certain exempt offerings.

A copy of the offering circular, or similar document, if any, used in connection with an offering exempt from the offering circular requirement of § 390.411 by reason of § 390.412(e) or § 390.413 shall be mailed to the FDIC within 30 days after the first sale of such securities. Such copy of the offering circular, or similar document, is solely for the information of the FDIC and shall not be deemed to be ''filed'' with the FDIC pursuant to § 390.411. The mailing to the FDIC of such offering circular, or similar document, shall not be a pre-condition of the applicable exemption from the offering circular requirements of § 390.411.

Subpart X [Reserved]

Subpart Y—Prompt Corrective Action

§§ 390.450–390.455 [Reserved]

§ 390.456 Directives to take prompt corrective action.

(a) *Notice of intent to issue a directive*—(1) *In general.* The FDIC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized State savings association or, where appropriate, any company that controls the State savings association, prior written notice of the FDIC's intention to issue a directive requiring such State savings association or company 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 State savings association 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 State savings association or any company that controls a State savings association 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 State savings association or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the FDIC. Such an appeal must be received by the FDIC within 14 calendar days of the issuance of the directive, unless the FDIC permits a longer period. The FDIC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the FDIC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the State savings association'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 State savings association or company subject to the directive may file with the FDIC a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A State savings association or company 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 State savings association 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 State savings association or company 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 State savings association or company; or

(3) Seek additional information or clarification of the response from the State savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a State savings association or company 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 State savings association or company that is subject to a directive under this subpart, upon a change in circumstances, request in writing that the FDIC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the FDIC, the directive shall continue in place while such request is pending before the FDIC.

§ 390.457 Procedures for reclassifying a State savings association 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 § 324.403(d) of this chapter, the FDIC may reclassify a well capitalized State savings association 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 State savings association is in unsafe or unsound condition; or

(*2*) The FDIC deems the State savings association 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 § 324.403(d) of this chapter, the FDIC shall issue and serve on the State savings association a written notice of the FDIC's intention to reclassify the State savings association.

(2) *Contents of notice.* A notice of intention to reclassify a State savings association based on unsafe or unsound condition shall include:

(i) A statement of the State savings association's capital measures and capital levels and the category to which the State savings association would be reclassified;

(ii) The reasons for reclassification of the State savings association;

(iii) The date by which the State savings association 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 State savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A State savings association 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 State savings association is not in 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 State savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a State savings association to file, within the specified time period, a written response with the FDIC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the FDIC or its designee under this section. If the State savings association desires to present oral testimony or witnesses at the hearing, the State savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the FDIC allows further time at the request of the State savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(7) *Hearing procedures.* (i) The State savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The State savings association may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor subpart C apply to an informal hearing under this section unless the FDIC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the State savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the FDIC will decide whether to reclassify the State savings association and notify the State savings association of the FDIC's decision.

(b) *Request for rescission of reclassification.* Any State savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the FDIC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the FDIC, the State savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the FDIC.

[76 FR 47655, Aug. 5, 2011, as amended at 83 FR 17744, Apr. 24, 2018]

§ 390.458 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the FDIC issues and serves a directive on a State savings association pursuant to § 390.456 requiring the State savings association to dismiss any director or senior executive officer under section 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 should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the FDIC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the 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 State savings association to dismiss from office any director or senior executive officer, the FDIC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the FDIC, before a presiding officer(s) designated by the FDIC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the FDIC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor subpart C 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 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 State savings association would materially strengthen the State savings association's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the State savings association'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 State savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the FDIC concerning the Respondent's request for reinstatement with the State savings association.

(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 has been 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.

§ 390.459 Enforcement of directives.

(a) *Judicial remedies.* Whenever a State savings association or company that controls a State savings association 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.

(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 State savings association or company that controls a State savings association 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 State savings association to implement a capital restoration plan required under section 38, or this subpart, or the failure of a company having control of a State savings association to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the State savings association or company to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the FDIC may seek enforcement of the provisions of section 38 or this subpart through any other judicial or administrative proceeding authorized by law.

Subpart Z [Reserved]

PARTS 391–399 [RESERVED]

CHAPTER IV—EXPORT-IMPORT BANK OF THE UNITED STATES

PART 400—EMPLOYEE FINANCIAL DISCLOSURE AND ETHICAL CONDUCT STANDARDS REGULATIONS

AUTHORITY: 5 U.S.C. 7301.

SOURCE: 60 FR 17628, Apr. 7, 1995, unless otherwise noted.

§ 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.

PART 403—CLASSIFICATION, DECLASSIFICATION, AND SAFEGUARDING OF NATIONAL SECURITY INFORMATION

Sec.

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 SecurityInformation,'' signed by the President on March 11, 1983 (hereafter referred to as *NSDD 84*).

SOURCE: 50 FR 27215, July 2, 1985, unless otherwise noted.

§ 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:

(i) Information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the

information, the source of the information, or both, are to be held in confidence; or

(ii) Information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

(4) *National security* means the national defense or foreign relations of the United States.

(5) *Confidential source* means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.

(6) *Original classification* means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required.

§ 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.* (1) 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.* (1) 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

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:

Classification	Classifier
CONFIDENTIAL.	President and Chairman. First Vice President and Vice Chairman. General Counsel. Senior Vice Presidents. Security Officer.

(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

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 proscribed 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.* (1) 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.

(2) New material that derives its classification under prior orders shall be treated as follows:

(i) If the source material bears a classification date or event 20 years or less from the date or origin, that date or event shall be carried forward on the new material.

(ii) If the source material bears no declassification date or event or is marked for declassification beyond 20 years, the new material shall be marked with a date for review for declassification at 20 years from the date of original classification of the source material.

(iii) If the source material is foreign government information bearing no date or event for declassification or is marked for declassification beyond 30 years, the new material shall be marked for review for declassification at 30 years from the date of original classification of the source materials.

(iv) A copy of the source document or documents should be maintained with the file copy of the new document or documents which have been derivatively classified.

§ 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.

(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.

(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.

(e) *Transferred Information.* Classified information transferred from one agency to another in conjunction with a transfer of functions, and not merely for storage purposes, shall be considered under the control of the receiving agency for purposes of downgrading and declassification, subject to consultation with any other agency that has an interest in the subject matter of the information. Prior to forwarding classified information to an approved storage facility of the Bank, to a Federal records center, or to the National Archives for permanent preservation, the information shall be reviewed for downgrading or declassification.

§ 403.6 Systematic review for declassification.

Classified information determined by the Archivist of the United States to be of sufficient value to warrant permanent retention will be subject to systematic declassification review by the Archivist in accordance with guidelines provided by the Bank, as originator of the information. These guidelines shall be developed by the Security Officer who is designated by the Bank to assist the Archivist in the review process. The guidelines shall be reviewed every five years or as requested by the Archivist of the United States.

§ 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

Privacy Act of 1974, in accordance with the provisions of those acts. (*See*, 12 CFR part 404 and 12 CFR part 405, respectively.) In any case, however, exemptions under the Freedom of Information Act or other exemptions under applicable law may be invoked by the Bank to deny material on grounds other than classification.

(i) The Bank shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under the Order.

§ 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 authorize 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 maintain current access records.

(g) *Storage.* Classified information shall be stored only in facilities or under conditions adequate to prevent unauthorized persons from gaining access to it and in accordance with the Directive as well as General Services Administration standards and specifications. Reference may be made to 32 CFR 2001.41, 2001.43 for preliminary guidance regarding these standards and specifications.

(h) *Coversheets.* Department of State (DSC) 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

originating agency, and all SECRET and all CONFIDENTIAL documents which are marked with special dissemination and reproduction limitations.

§ 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

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act.

Sec.

Subpart B—Protection of Privacy and Access to Records Under the Privacy Act of 1974

Subpart C—Demands for Testimony of Current and Former Ex-Im Bank Personnel and for Production of Ex-Im Bank Records

Subparts D–E [Reserved]

AUTHORITY: 5 U.S.C. 552 and 552a.

Section 404.7 also issued under E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

Section 404.21 also issued under 5 U.S.C. 552a note.

Subpart C also issued under 5 U.S.C. 301, 12 U.S.C. 635.

SOURCE: 64 FR 14374, Mar. 25, 1999, unless otherwise noted.

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act.

§ 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.

Person—An individual, partnership, corporation, association or organization other than a federal government agency.

Record—All papers, memoranda or other documentary material, or copies thereof, regardless of physical form or characteristics, created or received by Ex-Im Bank and preserved as evidence of the activities of Ex-Im Bank. ''Record'' does not include publications which are available to the public through the FEDERAL REGISTER, sale or free distribution.

Redaction—The process of removing non-disclosable material from a record so that the remainder may be released.

Representative of the news media—A person actively gathering information on behalf of an entity organized and operated to publish or broadcast news to the public. Freelance journalists shall qualify as representatives of the news media when they can demonstrate that a request is reasonably likely to lead to publication.

Request—Any record request made to Ex-Im Bank under the FOIA.

Requester—Any person making a request.

Review—The process of examining a record to determine whether any portion is required to be withheld. It includes redaction, duplication, and any other preparation for release. Review does not include time spent resolving general legal and policy issues regarding the application of exemptions.

Search—The process of identifying and collecting records pursuant to a request.

Trade secrets—All forms and types of financial, business, scientific, technical, economic or engineering information, including, but not limited to, patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes.

Unusual circumstances—The need to search for and collect requested records from facilities that are separate from Ex-Im Bank headquarters; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or the need for consultation with another agency a person that has a substantial interest in the determination of the request.

Working days—All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

§ 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.

(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. Such notice shall be 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 and Privacy 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

printouts, or for other methods of duplication. When duplication charges are expected to exceed $50.00, Ex-Im Bank shall seek the requester's consent to be responsible for the estimated charges unless a requester has already expressed a willingness to pay duplication fees in excess of $50.00. Ex-Im Bank shall also offer the requester the opportunity to alter the request in order to reduce duplication costs.

(f) *Fees for searches that produce no records.* Fees shall be payable as provided in this section even though searches and review do not generate any disclosable records.

(g) *Aggregating requests.* A requester, or a group of requesters acting in concert, shall not file multiple requests, seeking portions of a record or similar or related records, in order to avoid payment of fees. Ex-Im Bank shall aggregate any such requests and charge as if the requests were a single request.

(h) *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.

(i) *Minimum fee.* Ex-Im Bank shall waive a final fee of $5.00 or less.

(j) *Advance payment.* Whenever Ex-Im Bank estimates that the fees are likely to exceed $250.00, Ex-Im Bank shall notify the requester of the likely cost and shall require an advance payment of an amount up to the full estimated charges.

(k) *Failure to pay fee.* 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 a requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request. The administrative time limits for the new request—set forth in § 404.5—shall begin to run only after Ex-Im Bank has received the payments described in this section.

§ 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(i).

Subpart B—Access to Records Under the Privacy Act of 1974

§ 404.12 General provisions.

(a) *Purpose.* This subpart establishes policies, procedures, requirements, and responsibilities for administration of the Privacy Act of 1974, 5 U.S.C. 552a, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) *Relationship to the Freedom of Information Act.* The Privacy Act applies to records contained in a systems of records, as defined in § 404.13. If an individual submits a request for access to records and cites the Privacy Act, but the records sought are not contained in a Privacy Act system of records, then the request shall be processed only under subpart A of this part, Procedures for Disclosure of Records Under the Freedom of Information Act. All requests properly processed under this subpart B shall also be processed under subpart A of this part.

(c) *Appellate authority.* The Ex-Im Bank Assistant General Counsel for Administration is the appellate authority for all Privacy Act requests.

(d) *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.

(e) *Ex-Im Bank address.* The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

§ 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.

Requester—An individual who makes a request under the Privacy Act.

Review—The process of examining a record to determine whether any portion is required to be withheld.

Search—The process of identifying and collecting records pursuant to a request.

System of records—A group of any records under the control of an agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual.

Working days—All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

§ 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 be 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 trade 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 request 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 a social security or passport number 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

Ex-Im Bank employee for purposes of this subpart. Ex-Im Bank shall supply any such contractor with a copy of the regulations in this subpart upon entering into a contract with Ex-Im Bank.

§ 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 Exemptions: EIB–35—Office of Inspector General Investigative Records.

(a) *Criminal Law Enforcement*—(1) *Exemption.* Under the authority granted by 5 U.S.C. 552a(j)(2), Ex-Im Bank hereby exempts the system of records entitled ''EIB–35—Office of Inspector General Investigative Records'' from the provisions of 5 U.S.C. 552a(c)(3), (c)(4), (d)(1) through (4), (e)(1) through (3), (e)(4)(G) and (H), (e)(5), (e)(8), (f), and (g) because the system contains information pertaining to the enforcement of criminal laws. ''EIB–35—Office of Inspector General Investigative Records'' is maintained by the Ex-Im Bank Office of Inspector General (''OIG'' or ''Ex-Im Bank OIG.'')

(2) *Reasons for exemption.* The reasons for asserting this exemption are:

(i) Disclosure to the individual named in the record pursuant to 5 U.S.C. 552a(c)(3), (c)(4), or (d)(1) through (4) could seriously impede or compromise the investigation by alerting the target(s), subjecting a potential witness or witnesses to intimidation or improper influence, and leading to destruction of evidence. Disclosure could enable suspects to take action to prevent detection of criminal activities, conceal evidence, or escape prosecution.

(ii) Application of 5 U.S.C. 552a(e)(1) is impractical because the relevance of specific information might be established only after considerable analysis and as the investigation progresses. Effective law enforcement requires the OIG to keep information that may not be relevant to a specific OIG investigation, but which may provide leads for appropriate law enforcement and to establish patterns of activity that might relate to the jurisdiction of the OIG and/or other agencies.

(iii) Application of 5 U.S.C. 552a(e)(2) would be counterproductive to the performance of a criminal investigation because it would alert the individual to the existence of an investigation. In any investigation, it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful litigation or prosecution.

(iv) Application of 5 U.S.C. 552a(e)(3) could discourage the free flow of information in a criminal law enforcement inquiry.

(v) The requirements of 5 U.S.C. 552a(e)(4)(G) and (H) and (f) would be counterproductive to the performance of a criminal investigation. To notify an individual at the individual's request of the existence of records in an investigative file pertaining to such individual, or to grant access to an investigative file could interfere with investigative and enforcement proceedings, deprive co-defendants of a right to a fair trial or other impartial adjudication, constitute an unwarranted invasion of personal privacy of others, disclose the identity or confidential sources, reveal confidential information supplied by these sources and disclose investigative techniques and procedures. Nevertheless, Ex-Im Bank OIG has published notice of its notification, access, and contest procedures because access may be appropriate in some cases.

(vi) Although the OIG endeavors to maintain accurate records, application of 5 U.S.C. 552a(e)(5) is impractical because maintaining only those records that are accurate, relevant, timely, and complete and that assure fairness

in determination is contrary to established investigative techniques. Information that may initially appear inaccurate, irrelevant, untimely, or incomplete may, when collated and analyzed with other available information, become more pertinent as an investigation progresses.

(vii) Application of 5 U.S.C. 552a(e)(8) could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(viii) The provisions of subsection (g) do not apply to this system if an exemption otherwise applies.

(b) *Other Law Enforcement*—(1) *Exemption*. Under the authority granted by 5 U.S.C. 552a(k)(2), Ex-Im Bank hereby exempts the system of records entitled ''EIB–35—Office of Inspector General Investigative Records'' from the provisions of 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G) and (H), and (f) for the same reasons as stated in paragraph (a)(2) of this section, that is, because the system contains investigatory material compiled for law enforcement purposes other than material within the scope of subsection 552a(j)(2).

(2) *Reasons for exemption*. The reasons for asserting this exemption are because the disclosure and other requirements of the Privacy Act could substantially compromise the efficacy and integrity of OIG operations. Disclosure could invade the privacy of other individuals and disclose their identity when they were expressly promised confidentiality. Disclosure could interfere with the integrity of information which would otherwise be subject to privileges (see, e.g., 5 U.S.C. 552(b)(5)), and which could interfere with other important law enforcement concerns (see, e.g., 5 U.S.C. 552(b)(7)).

(c) *Federal Civilian or Contract Employment*—(1) *Exemption*. Under the authority granted by 5 U.S.C. 552a(k)(5), Ex-Im Bank hereby exempts the system of records entitled ''EIB–35—Office of Inspector General Investigative Records'' from the provisions of 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G) and (H), and (f) because the system contains investigatory material compiled for the purpose of determining eligibility or qualifications for federal civilian or contract employment.

(2) *Reasons for exemption*. The reasons for asserting this exemption are the same as described in paragraph (a)(2) of this section.

[77 FR 41886, July 17, 2012, as amended at 77 FR 42949, July 23, 2012]

§ 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.

Records—all documentary materials that Ex-Im Bank creates or receives in connection with the transaction of official business, including any materials classified as ''Federal records'' under 44 U.S.C. 3301 and its implementing regulations.

Testimony—written or oral statements, including, but not limited to, depositions, answers to interrogatories, affidavits, declarations, and any other statements made in a legal proceeding, including any expert or opinion testimony.

§ 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 EXIMBANK MEETINGS

Sec.

AUTHORITY: Sec. (g) Government in the Sunshine Act, 5 U.S.C. 552b(g); secs. (b) through (f), 5 U.S.C. 552b.

SOURCE: 42 FR 12417, Mar. 4, 1977, unless otherwise noted.

§ 407.1 Purpose, scope and definitions.

(a) Consistent with the principles that: (1) The public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government, and (2) the rights of individuals and the ability of the Export-Import Bank of the United States to carry out its statutory responsibilities should be protected, this part is promulgated pursuant to the directive of section (g) of the Government in the Sunshine Act, 5 U.S.C. 552b(g), and specifically implements sections (b) through (f) of said Act, 5 U.S.C. 552b (b) through (f).

(b) The term *meeting* means any meeting of the Board of Directors of Eximbank at which a quorum is present and where deliberations determine or result in the joint conduct or disposition of official Eximbank business.

(c) The term *regularly scheduled meeting* means meetings of the Board of Directors or the Executive Committee which are held at 9:30 a.m. on Thursday of each week.

(d) The term *General Counsel* means the General Counsel and his or her designees.

[42 FR 12417, Mar. 4, 1977, as amended at 47 FR 12136, Mar. 22, 1982; 49 FR 41237, Oct. 22, 1984; 72 FR 66043, Nov. 27, 2007]

§ 407.2 Closing meetings.

(a) Except where Eximbank finds that the public interest requires otherwise, a meeting, or any portion thereof, may be closed to the public, where the Board of Directors determines that such meetings, or any portion thereof, or information pertaining to such meeting, or any portion thereof, 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 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 funished 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 agency 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.

[42 FR 12417, Mar. 4, 1977, as amended at 47 FR 12136, Mar. 22, 1982; 49 FR 9560, Mar. 14, 1984; 49 FR 41237, Oct. 22, 1984; 50 FR 8606, Mar. 4, 1985; 72 FR 66043, Nov. 27, 2007]

§ 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 the 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.

[42 FR 12417, Mar. 4, 1977, as amended at 72 FR 66043, Nov. 27, 2007]

§ 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 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

Sec.

Subpart B—Eximbank Implementing Procedures

AUTHORITY: National Environmental Policy Act of 1969; 42 U.S.C. 4321 *et seq.*

SOURCE: 44 FR 50811, Aug. 30, 1979, unless otherwise noted.

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.

Eximbank actions	Start of NEPA process	Completion of NEPA process	Key officials or offices required to consider environmental documents
Issuance of Preliminary Commitment (P.C.).	When application is received.	When the Board of Directors meets to consider application. The Board may notify applicant that environmental effects will be considered when final commitment is requested and request information on environmental matters.	Under §408.4(b)(1)(i) and (ii), General Counsel to determine whether requested Eximbank financing is a major action and Engineer to determine whether proposed Transaction may significantly affect the quality of the human environment in the United States, its territories or possessions.
Issuance of Final Commitment.	When application is received.	When the Board of Directors meets to consider application.	(If no P.C. has been issued, key offices will make determinations mentioned above.) Engineer to collect, prepare or arrange for preparation of all environmental documents.

§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:

Actions normally requiring EIS's	Actions normally requiring assessments but not necessarily EIS's	Actions normally not requiring assessments or EIS's
None	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.	Applications for Eximbank financing in the form of insurance or guarantees.

(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

Sec.

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 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:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcholism.

(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; or

(iii) 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.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4575, 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§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 qualfied 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 permissibly 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

such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is nor required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4575, 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§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 such 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.

§§ 410.161–410.169 [Reserved]

§ 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.

(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.

[51 FR 4575, 4579, Feb. 5, 1986, as amended at 51 FR 7543, Mar. 5, 1986]

§§410.171–410.999 [Reserved]

PART 411—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

AUTHORITY: Sec. 319, Pub. L. 101–121 (31 U.S.C. 1352); 5 U.S.C. 552a.

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 ageement 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:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed 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.

§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) 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

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 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.

(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:

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

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse 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:** ☐ Prime ☐ Subawardee Tier _____, *if known*: **Congressional District,** *if known*:	5. **If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:** **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** *(if individual, last name, first name, MI)*:	**b. Individuals Performing Services** *(including address if different from No. 10a) (last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. **Amount of Payment** *(check all that apply)*: $ _____ ☐ actual ☐ planned	13. **Type of Payment** *(check all that apply)*: ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. **Form of Payment** *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	

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:**

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. **Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier 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 $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____
Federal Use Only:	**Authorized for Local Reproduction Standard Form - LLL**

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 subaward 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 1 (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 Federal 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). Enter Last Name, First Name, and Middle Initial (MI).
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) of 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 were 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 this collection of information is estimated to average 30 mintues 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 (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 412—ACCEPTANCE OF PAYMENT FROM A NON-FEDERAL SOURCE FOR TRAVEL EXPENSES

AUTHORITY: 5 U.S.C. 5701–5709; 12 U.S.C. 635(2)(a)(1).

SOURCE: 59 FR 31136, June 17, 1994, unless otherwise noted.

§ 412.1 Authority.

This part is issued under the authority of 5 U.S.C. 553, 5 U.S.C. 5701–5709 and 12 U.S.C. 635(2)(a)(1).

§ 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 who, 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

travel in accordance with this part is subject to the maximum per diem or actual subsistence expense rates and transportation class of service limitations prescribed in 41 CFR chapter 301.

§ 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.

PART 414—CONFERENCE AND OTHER FEES

AUTHORITY: 12 U.S.C. 635(a)(1), 5 U.S.C. 553.

SOURCE: 72 FR 66043, Nov. 27, 2007, unless otherwise noted.

§ 414.1 Collection of conference and other fees.

Ex-Im Bank may impose and collect reasonable fees to cover the costs of conferences and seminars sponsored by, and publications provided by Ex-Im Bank. Amounts received under the preceding sentence shall be credited to the fund which initially paid for such activities and shall be offset against the expenses of Ex-Im Bank for such activities.

PARTS 415–499 [RESERVED]

CHAPTER V [RESERVED]

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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