353 of this chapter or other similar authority for the purpose of performing duty not limited to 30 days or less in a uniformed service, if ordered to active duty under 10 U.S.C. 673b or 10 U.S.C. 688, or under 10 U.S.C. 672(d) in support of Operation Desert Shield.

[FR Doc. 90-22681 Filed 9-24-90; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 300 and 319

[Docket No. 90-152]

Hot Water Dip Treatments for Mangoes

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are adopting as a final rule a proposal we made to amend the Plant Protection and Quarantine regulations concerning the importation of treated mangoes. This rule will allow the importation of all varieties of mangoes from all of South America, Central Ameria, and the West Indies that have been treated with an approved hot water dip treatment. The rule also slightly modifies the current hot water dip treatment for mangoes from the West Indies islands of Aruba, Bonaire, Curacao, Margarita, Tortuga, and Trinidad and Tobago. This change will allow importation into the United States of mangoes from these areas without the risk of introducing plant pests associated with them.

EFFECTIVE DATE: October 25, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Fons, Senior Operations Officer, Port Operations, PPQ, APHIS, USDA, room 635, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8295.

SUPPLEMENTARY INFORMATION:

Background

Chapter III of title 7, Code of Federal Regulations (regulations), contains the regulations of Plant Protection and Quarantine (PPQ) of the Animal and Plant Health Inspection Service, United States Department of Agriculture (USDA). Section 300.1 of the regulations incorporates by reference the Plant Protection and Quarantine Treatment Manual (PPQ Treatment Manual). The PPQ Treatment Manual contains procedures and schedules for treating various regulated articles.

In a proposed rule published in the **Federal Register** on June 21, 1990 (55 FR 25313-25315, Docket 90-001), we proposed to amend the regulations in 7 CFR parts 300 and 319 by changing the treatment requirements for mangoes imported from various areas. The most significant provision of that document was a proposal to allow importation of mangoes from Panama and South America after they are treated with a hot water dip treatment similar to a treatment authorized for mangoes imported from other areas. This change would provide the first approved treatment for mangoes from Panama and South America since 1987, when as a result of action taken by the Environmental Protection Agency, ethylene dibromide (EDB) fumigation was disallowed as a treatment for mangoes moved into the United States.

The proposed rule was based on research by the Agricultural Research Service, USDA [1], that has shown that a hot water dip treatment is effective against *Anastrepha* species of fruit flies and the Mediterranean fruit fly in various varieties of mangoes. Specifically, research has shown a hot water dip treatment to be effective for mangoes of the varieties found in all of South America and Panama. The same research has shown that for a hot water dip treatment to be effective for mangoes of the varieties found in the West Indies islands of Aruba, Bonaire, Curacao, Margarita, Tortuga, and Trinidad and Tobago, the size, time and temperature requirements formerly listed in the treatment schedule for these mangoes should be adjusted slightly.

Comments on the proposed rule were required to be received on or before July 23, 1990. We received four comments prior to this closing date. Two comments from importers of mangoes supported the proposed rule. One comment from the California Department of Food and Agriculture (CDFA) opposed the proposed rule, and one comment from the Agricultural Export Promotion Project of the Regional Office of Central America and Panama of the United States Agency for International Development (ROCAP/USAID) requested a technical change to a time and temperature requirement in the treatment schedule. These latter two comments are discussed below.

The CDFA comment stated that the potential for artificial spread of serious fruit fly pests via improperly treated host fruits is of critical concern to CDFA. CDFA requested that each lot of mangoes imported in accordance with the regulations, in addition to undergoing the hot water dip treatment, be required to be inspected and sampled prior to treatment, and that any lot found to be infested be rejected for importation into the United States. CDFA requested that at least 300 fruits from each lot be cut open and inspected under close supervision of USDA or the appropriate agency in the origin country as part of this pretreatment inspection.

No change was made in response to this comment. The scientific data cited in support of the proposed rule showed that the proposed hot water dip treatments (HWDT) were efficacious against *Anastrepha* species and *Ceratitis capitata* for mangoes of the varieties we are allowing to be imported. We are approving these treatments because they effectively kill all life stages of these pests. We do not see any valid reason why shipments of mangoes that are treated with an effective treatment should also be required by the regulations to be subjected to extensive inspection. However, work plans developed for mango processing do require visual inspection of the fruit before treatment, and any mango shipments that are found infested during that inspection are not eligible for treatment and importation into the United States.

CDFA also requested that a protocol be developed and submitted for their approval, describing what steps will be taken to assure that hot water dip treatment facilities are properly constructed and tested, what monitoring or supervision is to be performed of the ongoing treatment operations, and what corrective action and penalties will be levied in the event that protocol failures or violations occur.

No change was made in response to this comment. Procedures for the design and operation of treatment facilities are already contained in the Plant Protection and Quarantine Treatment Manual, which is incorporated by reference in the regulations. If a treatment facility fails to follow required procedures, the mangoes it treats would not meet regulatory requirements for importation into the United States, and would therefore be prohibited importation. Persons violating the regulations could also be subjected to civil or criminal penalties in accordance with various Federal statutes.

[1] This research is available upon written request from the Administrator, c/o Port Operations, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, United States Department of Agriculture, room 635, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

The ROCAP/USAID comment requested a shorter hot water dip time for elongated and flattened varieties of mangoes from Mexico and Central America north of and including Costa Rica. The comment noted that the proposed rule called for all mangoes from these areas to be treated as follows: 75 minutes for mangoes up to 500 grams; 90 minutes for mangoes up to 700 grams. The comment then noted that for mangoes from Panama and South America, there are two treatment schedules: a shorter dip time for elongated, flattened varieties that heat quickly, and a longer dip time for more round varieties of mangoes. The commenter suggested that since some elongated, flattened varieties of mango, such as the Zill mango, exist in Mexico and Central America, these varieties should be subjected to the same dip time as similar varieties from Panama and South America.

We agree with this comment, and are changing the treatment schedule accordingly. As revised, the treatment schedule will require the same treatment for elongated, flattened types of mangoes from Mexico and Central America north of and including Coasta Rica that is required for similarly shaped mangoes from Panama and South America. The required treatment for these mangoes is 65 minutes for mangoes weighing up to 375 grams, and 75 minutes for mangoes weighing up to 570 grams.

Therefore, based on the rationale set forth in the proposed rule and in this document, we are revising the PPQ Treatment Manual, which is incorporated by reference in the regulations at 7 CFR 300.1, and the fruit and vegetable import regulations, which are contained in "Subpart—Fruits and Vegetables" in 7 CFR 319.56. The PPQ Treatment Manual, as revised, shows the following treatment schedules for mangoes:

Hot Water Dip Treatment for Mangoes

All mangoes must be at a temperature of 21.1 °C or higher before treatment begins. The mangoes must be submerged 4 inches below the surface of water that is heated to 46.1 °C. The water temperature must be kept at 46.1 °C, except that it may fall as low as 45.4 °C for no more than 10 minutes in any treatment lasting 65 to 75 minutes, and for no more than 15 minutes in any treatment lasting 90 minutes. The water temperature must not be allowed to fall below 45.4 °C at any time during the treatment.

Type of Mango	Submersion time
"Francis" and similarly shaped mangoes (elongate, flattened types, including the "Carrot" variety) from Puerto Rico, the U.S. Virgin Islands, and the West Indies, excluding the islands of Aruba, Bonaire, Curacao, Margarita, Tortuga, and Trinidad and Tobago.	(maximum weight 570 g each) 75 minutes. (maximum weight 400 g each) 65 minutes.
Other varieties of mangoes from Central America north of and including Costa Rica, Mexico, Puerto Rico, the U.S. Virgin Islands, and the West Indies, excluding the islands of Aruba, Bonaire, Curacao, Margarita, Tortuga, and Trinidad and Tobago.	(maximum weight 700 g each) 90 minutes. (maximum weight 500 g each) 75 minutes.
"Francis" and similarly shaped mangoes (elongate, flattened types) from Central America north of and including Costa Rica, Mexico, Panama, South America, and the islands of Aruba, Bonaire, Curacao, Margarita, Tortuga, and Trinidad and Tobago.	(maximum weight 570 g each) 75 minutes. (maximum weight 375 g each) 65 minutes.
Other varieties of mangoes (Tommy Atkins, Kent, Keitt, Haden and similarly shaped) from Panama, South America, and the islands of Aruba, Bonaire, Curacao, Margarita, Tortuga, and Trinidad and Tobago.	(maximum weight 650 g each) 90 minutes. (maximum weight 425 g each) 75 minutes.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In the proposed rule we summarized the Initial Regulatory Flexibility Analysis we prepared in accordance with 5 U.S.C. 603, evaluating the potential impact of the proposed rule on small entities. Two importers commenting on the proposed rule noted that failure to adopt the proposed rule or delay in implementing its provisions could have adverse economic impact on growers, shippers, and importers involved in importing mangoes into the United States.

This rule allows hot water dip treatments for specified varieties and sizes of mangoes from certain areas where *Anastrepha* species of fruit flies and the Mediterranean fruit fly exist. These treatments will be included in the Plant Protection and Quarantine Treatment Manual, which is incorporated by reference in the regulations at 7 CFR 300.1.

In accordance with the Federal Plant Pest Act and the Plant Quarantine Act, the Secretary of Agriculture is authorized to promulgate regulations concerning the importation or interstate movement of fruits and other plant products to prevent the spread of injurious plant pests.

This rule affects domestic mango producers. Mangoes are a minor agricultural crop in the United States, which has few areas with suitable growing conditions for the fruit. In the continental United States, mango production is limited to about 2,300 acres on approximately 270 farms in Florida, all small entities. Most of these small entities do not produce mangoes as their major crop. Production of mangoes in Florida between 1985 and 1988 ranged from 30,250,000 pounds in 1987 to 19,250,000 pounds in 1988.

By comparison, imports of mangoes into the United States during that same time period ranged from 66,073,940 pounds in 1985 to 43,171,269 pounds in 1988, consistently accounting for more than two-thirds of the mangoes marketed in the continental United States. This rule will have a beneficial economic effect on importers of mangoes, by increasing the number of sources from which mangoes may be imported. Based on available information, most mangoes are imported by a small number of importers which are not small entities.

Mangoes imported into the United States come primarily from Mexico (85 to 95 percent during 1985–1988), with Haiti providing most of the others. In 1987, the last year that mangoes treated with ethylene dibromide could be imported into the United States from the countries that will be affected by this rule, countries other than Mexico and Haiti provided only about 2.2 percent of those mangoes. In 1985 and 1986, they provided between 1 and 2 percent. We anticipate that a resumption of mango imports from these countries will not result in a significant increase in the amount of mangoes imported into the United States, and therefore will not result in a significant economic impact on a substantial number of small entities.

This rule will not result in any significant increase in reporting, recordkeeping, or compliance requirements.

As an alternative to this rule, we considered retaining the former treatment schedule in the PPQ Treatment Manual. This alternative was rejected because given the existence of additional effective treatments for mangoes, there is no pest risk basis for not allowing use of these treatments.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

List of Subjects

7 CFR Part 300

Incorporation by reference, Plant diseases, Plant pests.

7 CFR Part 319

Agricultural commodities, Imports, Incorporation by reference, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation.

Accordingly, title 7, chapter III, of the Code of Federal Regulations is amended as follows:

PART 300—INCORPORATION BY REFERENCE

1. The authority citation for part 300 continues to read as follows:

Authority: 7 U.S.C. 150ee, 161.

2. In § 300.1, paragraph (a) is revised to read as follows:

§ 300.1 Materials incorporated by reference.

(a) The Plant Protection and Quarantine Treatment Manual, which was reprinted May 1985, and includes all revisions through October 1990, has been approved for incorporation by reference in 7 CFR chapter III by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

* * * * *

PART 319—FOREIGN QUARANTINE NOTICES

3. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151–167; 7 CFR 2.17, 2.51, and 371.2(c), unless otherwise noted.

4. In subpart—Fruits and Vegetables, a new § 319.56–2i is added to read as follows:

§ 319.56–2i Administrative instructions prescribing treatments for mangoes from Central America, Mexico, South America, and the West Indies.

(a) *Authorized treatments.* (1) Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56–2 as a condition for the importation into the United States of mangoes from Central America, South America, and the West Indies. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, "Materials incorporated by reference."

(2) Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56–2 as a condition for the importation into the United States of mangoes from Mexico. Manila mangoes from Mexico may also be imported into the United States in accordance with § 319.56–2f of this subpart. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter "Materials incorporated by reference."

(b) *Department not responsible for damage.* The treatments for mangoes prescribed in § 319.56–2f of this subpart and in the Plant Protection and Quarantine Treatment Manual are judged from experimental tests to be safe. However, the Department assumes no responsibility for any damage sustained through or in the course of such treatment.

Done in Washington, DC, this 19th day of September 1990.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 90–22582 Filed 9–24–90; 8:45 am]

BILLING CODE 3410–34–M

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9 CFR Part 77

[Docket No. 90–173]

Tuberculosis in Cattle and Bison; State Designation

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule.

SUMMARY: We are amending the regulations concerning the interstate movement of cattle and bison because of tuberculosis raising the designation of Idaho from a modified accredited State to an accredited-free State. We have determined that Idaho meets the criteria for designation as an accredited-free State.

DATES: Interim rule effective September 25, 1990. Consideration will be given only to comment received on or before November 24, 1990.

ADDRESSES: To help ensure that your comments are considered, send an original and three copies of written comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 90–173. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Mitchell A. Essey, Senior Staff Veterinarian, Cattle Diseases and Surveillance Staff, VS, APHIS, USDA, Room 729, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–8715.

SUPPLEMENTARY INFORMATION:

Background

The "Tuberculosis" regulations contained in 9 CFR part 77 (referred to below as the regulations) regulate the interstate movement of cattle and bison because of tuberculosis. Bovine tuberculosis is the contagious, infectious, and communicable disease caused by *Mycobacterium bovis*. The requirements of the regulations concerning the interstate movement of cattle and bison not known to be affected with, or exposed to, tuberculosis are based on whether the cattle and bison are moved from jurisdictions designated as accredited-free States, modified accredited States, or nonmodified accredited States.

The criteria for determining the status of States (the term State is defined to mean any State, territory, the District of Columbia, or Puerto Rico) are contained in a document captioned "Uniform Methods and Rules—Bovine Tuberculosis Eradication," 1985 edition, which has been made part of the regulations via incorporation by reference. The status of States is based on the rate of tuberculosis infection present and the effectiveness of a tuberculosis eradication program.

Before publication of this interim rule, Idaho was designated in § 77.1 of the regulations as a modified accredited State. However, Idaho now meets the requirements for designation as an accredited-free State. Therefore, we are amending the regulations by removing Idaho from the list of modified accredited States in § 77.1 and adding it to the list of accredited-free States in that section.

Immediate Action

James W. Glosser, Administrator of the Animal and Plant Health Inspection Service, has determined that there is good cause for publishing this interim rule without prior opportunity for public comment. It is necessary to change the regulations so that they accurately reflect the current tuberculosis status of Idaho as an accredited-free State. This will provide prospective cattle and bison buyers with accurate and up-to-date information, which may affect the marketability of cattle and bison since some prospective buyers prefer to buy cattle and bison from accredited-free State.

Since prior notice and other public procedures with respect to this interim rule are impracticable and contrary to the public interest under these conditions, there is good cause under 5 U.S.C. 553 to make it effective upon publication in the **Federal Register**. We will consider comments that are received within 60 days of publication of this interim rule in the **Federal Register**. After the comment period closes, we will publish another document in the **Federal Register**, including a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

Cattle and bison moved interstate are moved for slaughter, for use as breeding stock, or for feeding. Changing the status of Idaho may affect the marketability of cattle and bison from the State, since some prospective cattle and bison buyers perfer to buy cattle and bison from accredited-free States. This may result in some beneficial economic impact on some small entities. However, based on our experience in similar designations of other States, the impact should not be significant.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*)

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Transportation, Tuberculosis.

Accordingly, we are amending 9 CFR part 77 as follows:

PART 77—TUBERCULOSIS

1. The authority citation for part 77 continues to read as follows:

Authority: 21 U.S.C. 111, 114, 114a, 115–117, 120, 121, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

§ 77.1 [Amended]

2. Section 77.1, paragraph (2) of the definition for "Modified accredited state" is amended by removing "Idaho,".

3. Section 77.1, paragraph (2) of the definition for "Accredited-free state" is amended by adding "Idaho," immediately before "Illinois,".

Done in Washington, DC, this 19th day of September 1990.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 90–22685 Filed 9–24–90; 8:45 am]

BILLING CODE 3410-34-M

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 337

RIN 3064–AB00

Unsafe and Unsound Banking Practices

AGENCY: Federal Deposit Insurance Corporation ("FDIC").

ACTION: Final rule.

SUMMARY: This regulation implements statutory provisions prohibiting undercapitalized insured depository institutions (banks and savings associations) from accepting, renewing or rolling over brokered deposits except on specific application to and waiver of the prohibition by the FDIC. The regulation provides guidance and further detail on when an institution is considered undercapitalized, when certain deposits are considered "brokered," and the circumstances under which a waiver from the prohibition may be granted. It replaces an interim rule that has been in effect since December 12, 1989, and which is scheduled to "sunset" or terminate on November 9, 1990. The final rule remains essentially unchanged from the interim provisions, except that the final rule expressly applies to insured branches of foreign banks and provides further clarification of the term "normal market area" used in defining the prohibition on paying significantly higher rates of interest on deposits without a waiver from the FDIC.

EFFECTIVE DATE: The final rule is effective October 25, 1990. The interim rule published at 54 FR 51012 (Dec. 12, 1989), and amended at 55 FR 23186 (June 7, 1990) and at 55 FR 28884 (July 16, 1990), terminates on that date and is replaced by the final rule.

FOR FURTHER INFORMATION CONTACT: William G. Hrindac, Examination Specialist, Division of Supervision, (202) 898–6892, or Adrienne George, Attorney, Legal Division, (202) 898–3859, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in § 337.6(d) of the final rule has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 3064–0099. The information will be collected from undercapitalized insured depository institutions applying for a waiver from the prohibition on the acceptance or renewal of brokered deposits contained in section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f).

The estimated annual reporting burden for the collection of information in this final rule is summarized as follows:

Number of Respondents	370
Number of Responses Per Respondent	1
Total Annual Responses	370
Hours Per Response	6
Total Annual Burden Hours	2,220

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Assistant Executive Secretary (Administration), Room F–400, Federal Deposit Insurance Corporation, Washington, DC 20429, and to the Office of Management and Budget, Paperwork Reduction Project (3064–0099), Washington, DC 20503.

Regulatory Flexibility Act

The FDIC's Board of Directors hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities because it largely tracks and clarifies strictures previously established by statute and affords a means by which undercapitalized insured depository institutions may avoid the application of those strictures by applying to the FDIC for a waiver. Moreover, it is anticipated that relatively few small entities will be impacted by the regulation since most insured depository institutions are adequately capitalized or, if undercapitalized, do not utilize brokered deposits. Finally, an entire grouping of undercapitalized institutions, namely, those in FDIC or Resolution Trust Corporation ("RTC") receivership or conservatorship, have effectively been excluded from the application of the regulation. Consequently, the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603 and 604) are not applicable.

Discussion

Section 224 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") added a new section 29 to the Federal Deposit Insurance Act ("FDIA"). This new section prohibits the acceptance, renewal or rollover of brokered deposits by any "troubled"—*i.e.*, undercapitalized—insured depository institution (bank or thrift) after December 7, 1989, except on specific application to and waiver of the prohibition by the FDIC. On December 5, 1989, the FDIC adopted an interim rule, new § 337.6 of FDIC regulations, which provides guidance and further detail on when an institution is considered undercapitalized, when certain deposits are considered "brokered" for purposes of the prohibition, and the circumstances under which a waiver from the prohibition may be granted. The FDIC solicited comment on this interim rule with a view towards possible revision or modification at a later date. The interim rule adopted by the FDIC on December 5, 1989, was scheduled to terminate six months from its December 12, 1989 publication in the **Federal Register**, *i.e.*, on June 12, 1990. The FDIC, however, determined that it required more time to consider the issues. The FDIC, therefore, extended the effectiveness of the interim rule through amendments adopted on May 22, 1990, and on July 10, 1990. As extended, the interim rule is scheduled to terminate on November 9, 1990, unless sooner terminated, amended, or replaced by the FDIC.

The public comment period has expired and, based on a review and analysis of the comments received as well as the FDIC's experience to date with the interim rule, the FDIC believes the provisions of the interim rule should remain essentially unchanged except for the explicit extension of the rule to insured branches of foreign banks and some further clarification of a term used to define the prohibition on paying significantly higher rates of interest on deposits without a waiver from the FDIC. The comments received and the FDIC's responses are summarized below.

Insured Branches of Foreign Banks

Although the interim rule adopted the generic language of the statute in referring to "undercapitalized insured depository institutions" without explicitly mentioning insured branches of foreign banks, it is clear that the same policy considerations apply to insured branches as well. Consequently, the final rule is explicitly extended to insured branches of foreign banks.

Effect of Capital Plans

The final rule continues the position taken in the interim rule on the relationship between the new capital requirements established by FIRREA for savings associations and the prohibition on the acceptance of brokered deposits by undercapitalized institutions. More specifically, the FDIC continues to believe that any savings institutions whose capital plans have been approved by the Office of Thrift Supervision ("OTS") are not thereby exempted from the prohibition against brokered deposits. Nor is the existence of an approved capital plan grounds for an automatic grant of a waiver from the prohibition against brokered deposits. Of the three commenters that dealt with the capital plan issue, one agreed with the FDIC's position, while two argued that an institution which has submitted a capital plan acceptable to the OTS should be treated as being in compliance with its capital requirements, and therefore, not subject to the brokered deposits rule. The FDIC, however, believes that a capital plan is not capital and therefore, the mere existence of a capital plan and any decision to grant a waiver are separate issues. As a result, an undercapitalized savings association may not accept or renew brokered deposits without a waiver from the FDIC so long as it remains undercapitalized, whether or not it has a capital plan approved by the OTS. The same principle applies to any plan or forbearance approved by a banking regulator for an insured bank.

For purposes of applying for a waiver, an undercapitalized insured savings association may submit to the FDIC, in addition to the information otherwise required by this final rule, the same documentation regarding its capital plans that it submits to the OTS. The FDIC, however, will make its own judgment as to the sufficiency of any plan and its prospects for success in the context of deciding a particular waiver application. In this process, the FDIC will give due deference to the views and recommendation of the OTS or any other regulators that may be involved when insured banks apply for a waiver.

Significantly Higher Rates of Interest

The final rule continues the anomalous definition of brokered deposits contained in FIRREA. In addition to deposits obtained from or through the mediation of third-party brokers, the definition of deposit broker in FIRREA includes any insured depository institution that solicits deposits by offering rates of interest that are "significantly" higher than the prevailing rates of interest offered by other depository institutions with the same type of charter in its normal market area. In this regard, FIRREA makes no distinction between deposits obtained locally or out-of-territory through the operation of a so-called "money desk."

The final rule also adopts the determination set forth in the interim rule that more than 50 basis points is deemed "significant" for this purpose, and thus establishes what is believed to be a reasonable compromise between the need to permit even undercapitalized institutions to compete on a reasonable basis in their normal market and the need to prevent such institutions from bidding excessively for an increasing share of local deposits or paying excessive rates to fund themselves through the operation of a "money desk" soliciting deposits throughout the country.

One commenter suggested that 50 basis points may be "significant" now but insignificant at some future time in different interest rate environments. This commenter suggested the need for flexibility and possibly varying the interest rate margins deemed significant from time to time or for different types of deposits or in different regions of the country.

The FDIC believes these suggested approaches are more elaborate and burdensome than necessary for the purpose at hand since they would necessarily involve extensive tracking and compilation of interest rate data on an ongoing basis with respect to interest rates on different types of accounts in different areas by both banks and thrifts with frequent updates and notices to the affected bank and thrift industries. The FDIC believes a simple, clear, across-the-board rule is the much better alternative, particularly when exceeding the 50-basis-points difference merely results in the need to apply for a waiver in which context appropriate consideration of all relevant circumstances may be taken into account.

A number of commenters pointed out that banks and thrifts compete head-to-head for deposits in most markets and consequently, there is no basis for distinguishing between institutions based on their charter.

Whatever may be the merit of this argument, the distinction is drawn explicitly in the statute and the FDIC is without authority to alter that basic statutory scheme. Consequently, the final rule continues to distinguish between banks and thrifts when comparing interest rates offered in their normal market areas.

Prevailing Rates and Normal Market Area

One commenter suggested the need to clarify the concept of "prevailing rates" of interest, and two commenters suggested the need to clarify the concept of "normal market area." The FDIC believes the concept of the "prevailing rate" for a particular deposit is sufficiently clear without further elaboration. The final rule does clarify the concept of "normal market area" in a footnote to the relevant definition. Essentially, the "normal market" is the particular area in which a given deposit is being sought or solicited and may vary by office or groups of offices or from one type of deposit to another. The media used and their coverage bear importantly on how the normal market for a deposit is defined.

Definition of "Undercapitalized" Institution

One bank commented that the definition of "undercapitalized" was too strict since it includes many institutions that are not truly "troubled." This commenter suggested that a bank's CAMEL rating should be considered as well.

Regardless of the merits of this suggestion, FIRREA explicitly defines "troubled" in terms of institutions that fail to meet the minimum capital requirements applicable to them. In light of this statutory mandate, the final rule makes no change in the basic statutory definition of "troubled institution."

Other Comments

A savings association recommended that the definition of brokered deposit be revised to cover only deposits on which a commission is paid directly to the broker by the insured depository institution. Without this change, it is argued that an institution may be deemed to have accepted a brokered deposit even though it did not solicit the services of a deposit broker, did not pay a commission to the deposit broker, and did not know the depositor utilized the services or assistance of a deposit broker.

The specific recommended change is rejected since deposit transactions can be readily structured to avoid direct payment of a commission. Moreover, it is irrelevant who solicited the services of a deposit broker.

One commenter noted the differing definitions and approaches in the OTS regulation dealing with brokered deposits (12 CFR 563.4) and urged the FDIC to work with the OTS to make the provisions of the FDIC rule controlling, given the mandate granted the FDIC by FIRREA with respect to all undercapitalized depository institutions.

The OTS rule prohibits a savings association with insufficient regulatory capital from accepting more than five percent of its total deposits from brokers without a waiver from its principal supervisory agent. While there is considerable overlap between this OTS rule and the FDIC rule, the two are not inconsistent and savings associations can comply with both as each may be applicable in the circumstances. The FDIC rule, which implements the statutory prohibition imposed by FIRREA, is broader, uniform for all depository institutions and more stringent while at the same time providing a measure of flexibility on a case-by-case basis through the waiver application process which includes appropriate consultation with the OTS.

One deposit broker seemingly objected to any regulation of brokered deposits. However, this is not an option for the FDIC at this point since the statute (section 29 of the FDI Act) is already in place and would operate of its own force and effect even without a FDIC regulation to provide further guidance.

Another deposit broker emphasized that price is the critical consideration in the acceptance of brokered deposits and suggested the regulation should not preclude the use of "economical" deposits, even if they are brokered.

The FDIC agrees that price is an important consideration and for that reason, both the interim rule and the final rule indicate a waiver may be granted for brokered deposits that serve to reduce an institution's overall cost of funding. On the other hand, the FDIC does not believe that undercapitalized institutions should be permitted to grow through the use of brokered deposits, however "economical" those deposits might be. Margining deposit growth with adequate capital is and always has been a principal supervisory concern and will remain so regardless of the price of deposits. This is why both the interim and final rules preclude even growth resulting from the direct solicitation of deposits by paying excessive or significantly higher rates than other institutions with the same type of charter.

One commenter suggested that waivers be granted narrowly for brokered deposits of specified maturities with a view towards assuring their repayment in accordance with their original terms.

While repayment according to terms is always an appropriate public policy consideration, it is not the only one. Broader aspects of an institution's overall condition must be taken into account as well. While the FDIC in practice may well grant waivers narrowly to encourage reduced volumes of brokered deposits and short-term maturities, the FDIC believes it unwise to constrain its flexibility by attempting to prescribe waiver limitations by regulation. Consequently, the final rule contains no such limitations and continues to leave terms and conditions of a waiver to be decided on a case-by-case basis.

One commenter suggested that the RTC move aggressively to downsize or shrink savings associations in conservatorship or receivership in order to minimize destructive competition with solvent institutions.

While downsizing may well be an appropriate strategy for a variety of reasons, the FDIC sees no need to address this broad policy issue in the context of promulgating a final regulation on brokered deposits. Consequently, the final rule is silent on how savings associations in RTC conservatorship or receivership should be managed.

Two commenters suggested that by establishing the more than 50 basis points standard, the FDIC was regulating market interest rates without the necessary authority. Still another suggested that the FDIC should not define as brokered those deposits solicited by offering excessive rates. This commenter pointed out that the FDIC had cease-and-desist authority to remedy the payment of excessive interest rates.

The FDIC, of course, is not limiting or controlling the interest rates that insured depository institutions generally, or even undercapitalized institutions, may pay on their deposits. On the contrary, the FDIC is merely providing further and more precise guidance on what is considered "significant" for purposes of the statutory definition of brokered deposits which includes deposits which an insured depository institution is soliciting "by offering rates of interest (with respect to such deposits) which are significantly higher than the prevailing rates of interest on deposits offered by other insured depository institutions having the same type of charter in such depository institution's normal market." 12 U.S.C. 1831f(f)(3). The FDIC has ample authority to provide such elaboration and further clarification.

Several commenters objected specifically to the exclusion of savings associations in RTC receivership or conservatorship from the prohibition on the acceptance of brokered deposits, particularly that portion of the definition designed to prevent the payment of excessive rates on deposits by undercapitalized institutions. These commenters contend that such institutions have contributed substantially to higher rates in many areas by paying "inflated rates" to attract funds which has resulted in many sound institutions having to pay higher rates to remain competitive.

It must be remembered, however, that the FDIC is the exclusive manager of the RTC and each institution under an RTC conservatorship or receivership is carefully monitored by an RTC managing agent. That managing agent is doing essentially what the FDIC does in granting a waiver—*i.e.* the agent is setting parameters for the institution's acceptance or renewal of brokered deposits to ensure that brokered deposits are both necessary and that any possible negative effect on the institution will be minimal. An institution in RTC conservatorship or receivership generally uses brokered deposits only when needed to meet essential liquidity needs and avoid unnecessary losses. Looking at the broader competitive issue, however, it is true that these institutions may from time to time (certainly less often than in the past) bid up the cost of deposits in certain local markets. This arguably unfair competition from institutions effectively under government control can be justified only as a temporary expedient in an effort to save taxpayer dollars (from which all benefit) by enabling such institutions to maintain necessary liquidity while preserving their franchise value until they can be sold or liquidated in an orderly fashion. Consequently, for purposes of the final regulation, the FDIC believes no change is warranted and savings associations in RTC conservatorship or receivership will continue to be excluded from the scope of application of the final rule.

Section 29(d) of the FDIA, as added by section 224 of FIRREA, authorizes the FDIC to grant an exception from the prohibition on the acceptance of brokered deposits for institutions in FDIC or RTC conservatorship or receivership if the FDIC determines that the acceptance of brokered deposits by such institutions "(1) is not an unsafe or unsound practice, and (2) either (A) is necessary to enable the institution to meet the demands of its depositors or pay its obligations in the ordinary course of business; or (B) is consistent with the conservator's fiduciary duty to minimize the losses of the institution." The FDIC Board of Directors is able to make these findings with respect to all insured depository institutions under FDIC or RTC conservatorship or receivership because such institutions are essentially under FDIC or RTC control and management and therefore pose no risk to the deposit insurance funds beyond the FDIC's control, and because the FDIC, in its own capacity and as exclusive manager for the RTC, intends to direct the brokered deposit activities of the various institutions under FDIC or RTC conservatorship or receivership to ensure that such deposits are used only as necessary to meet essential liquidity needs and minimize losses to the institutions. Accordingly, the FDIC Board has made the requisite findings and has determined to exclude from coverage under the brokered deposits prohibition any insured depository institution for which the FDIC or the RTC has been appointed conservator or receiver. As a result, no such institution need apply to the FDIC for a waiver from the prohibition.

FIRREA amends the Federal Deposit Insurance Act to provide authority to the FDIC to waive the prohibition against brokered deposits if the FDIC finds that acceptance of such deposits does not constitute an unsafe or unsound practice with respect to the affected institution. The FDIC has long recognized the importance of involving other affected agencies, where appropriate, in the exercise of its decision-making authority. For example, the FDIC's Division of Supervision currently has outstanding instructions that the "institution's principal federal and any state regulator, as appropriate, should be consulted by telephone or letter for their comments and any recommendations they may wish to make" in these circumstances. Memorandum to Regional Directors, entitled "Brokered Deposits in Undercapitalized Insured Depository Institutions", dated December 21, 1989, from Paul G. Fritts, Director, Division of Supervision, Federal Deposit Insurance Corporation.

In exercising its FIRREA authority to waive the prohibition against brokered funds, the Corporation will provide prior notice to the appropriate Federal and state regulatory agency in connection with action proposed to be taken pursuant to this regulation and will consult with such agency with respect to the appropriateness of any such action and any terms or conditions that would apply in connection with the granting of a waiver. The FDIC may waive the prior notice and/or consultation requirements when it determines that the circumstances of a particular case require the FDIC to do so.

Accordingly, notice is hereby given that the FDIC Board of Directors has adopted the following final rule on the acceptance, renewal or rollover of brokered deposits by undercapitalized insured depository institutions. The final rule becomes effective October 25, 1990. The interim rule published at 54 FR 51012 (Dec. 12, 1989), and amended at 55 FR 23186 (June 7, 1990) and at 55 FR 28884 (July 16, 1990), terminates on that date and is replaced by the final rule.

List of Subjects in 12 CFR Part 337

Banks, Banking, Reporting and recordkeeping requirements, Savings associations, Securities.

For the reasons set forth in the preamble, the FDIC hereby amends part 337 of title 12 of the Code of Federal Regulations by revising § 337.6 to read as set forth below.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

1. The authority citation for part 337 continues to read as follows:

Authority: 12 U.S.C. 1816, 1818(a), 1818(b), 1819, 1828(j)(2), 1821(f), 1831f.

2. Section 337.6 is revised to read as follows:

§ 337.6 Brokered deposits in undercapitalized insured depository institutions.

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

(1) *Brokered deposit.* The term "brokered deposit" means any deposit, as that term is defined in section 3(*l*) of the Federal Deposit Insurance Act (18 U.S.C. 1813(*l*)), that is obtained:

(i) From or through the mediation or assistance of a deposit broker; or,

(ii) By offering a rate of interest (with respect to such deposit) that is significantly higher than the prevailing rate of interest on a deposit with similar terms and conditions, including maturity, offered or paid by other insured depository institutions having the same type of charter (bank or thrift) in the institution's normal market area.[11] For this purpose, a rate of interest is deemed "significantly higher" if it is more than 50 basis points higher than the prevailing rate offered or paid at the time for a deposit of comparable amount, maturity and other terms by other insured depository institutions with the same type of charter (bank or thrift) in the institution's market area. A rate of interest on a deposit with an odd maturity is "significantly higher" if it is more than 50 basis points higher than the rate interpolated between the prevailing rates offered or paid by other depository institutions with the same charter on deposits of the next longer and shorter maturities offered in the market. For purposes of comparing interest rates offered on deposits by other insured depository institutions, an insured branch of a foreign bank is deemed to have a bank charter.

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

(A) Any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions, or the business of placing deposits with insured depository institutions for the purpose of selling interests in those deposits to third parties; and,

(B) An agent or trustee who establishes a deposit account to facilitate a business arrangement with an insured depository institution to use the proceeds of the account to fund a prearranged loan.

(ii) The term "deposit broker" does not include:

(A) An insured depository institution, with respect to funds placed with that depository institution;

(B) An employee of an insured depository institution, with respect to funds placed with the employing depository institution;

(C) A trust department of an insured depository institution, if the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(D) The trustee of a pension or other employee benefit plan, with respect to funds of the plan;

(E) A person acting as a plan administrator or an investment advisor in connection with a pension plan or other employee benefit plan provided that person is performing managerial functions with respect to the plan;

(F) The trustee of a testamentary account;

(G) The trustee of an irrevocable trust (other than one described in paragraph (a)(2)(i)(B) of this section), as long as the trust in question has not been established for the primary purpose of placing funds with insured depository institutions;

(H) A trustee or custodian of a pension or profit-sharing plan qualified under section 401(d) or 403(a) of the Internal Revenue Code of 1986; or

(I) An agent or nominee whose primary purpose is not the placement of funds with depository institutions.

(3) *Employee.* The term "employee" means any employee:

(i) Who is employed exclusively by the insured depository institution;

(ii) Whose compensation is primarily in the form of a salary;

(iii) Who does not share such employee's compensation with a deposit broker; and

(iv) Whose office space or place of business is used exclusively for the benefit of the insured depository institution which employs such individual.

(4) *Insured depository institution.* The term "insured depository institution" means any bank, savings association or branch of a foreign bank insured under the provisions of the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(5) *Undercapitalized insured depository institution.* (i) The term "undercapitalized insured depository institution" means any insured depository institution that fails to meet the minimum capital requirements applicable to it at the time and includes any insured depository institution which:

(A) After giving effect to any charge-offs or other capital reductions directed by its principal federal or state regulator, fails to meet any applicable capital standard (*e.g.*, tangible, core, primary, total, risk-based, or leverage) established by law or regulation promulgated by its principal federal or state regulator, as applicable; or

(B) Has been directed by a formal administrative order or advised in

[11] The "normal market area" is the area in which an institution is advertising and soliciting a particular type of deposit and may vary from office to office or for different types of deposits. For example, the market for passbook deposits will normally be local in character but may vary from office to office or groups of offices located in different geographic markets. By the same token, an institution may solicit large denomination certificates in a national market at one rate and offer the same certificate at a different rate in local areas in which it has a physical presence. In each case, the rates offered for the particular deposit must be compared to the rates offered by other institutions with the same type of charter, without regard to size, in the particular geographic market in which that deposit is being solicited, whether the market is national, regional or local in character. The media used to advertise and solicit a particular type of deposit and the normal coverage of those media are important considerations in defining the market for that deposit.

writing by its principal federal or state regulator as part of the supervisory process to achieve a specific higher level of capital (*e.g.*, to margin additional risk inherent in its activities or assets, balance sheet structure, or off-balance sheet liabilities) and has not yet met that higher capital level.

(ii) The term "undercapitalized insured depository institution" includes an insured branch of a foreign bank that fails to maintain either:

(A) The pledge of assets required under § 346.19 of the Federal Deposit Insurance Corporation's rules and regulations (12 CFR 346.19) or;

(B) The required volume of eligible assets prescribed by § 346.20 of the Federal Deposit Insurance Corporation's regulations (12 CFR 346.20).

(iii) The determination of whether an insured depository institution or insured branch is an "undercapitalized depository institution," as defined in paragraphs (a)(5) (i) and (ii) of this section, shall be made without regard to whether it has been granted any forbearance or other relief from any statutory, regulatory, or other capital requirements by any federal or state regulator, whether the institution or branch has submitted to any such regulator a plan to meet applicable capital requirements or standards over time, or whether any such plan has been approved by a federal or state regulator.

(b) *Prohibition.* No undercapitalized insured depository institution may accept, renew or rollover any brokered deposit unless it has applied for and been granted a waiver of this prohibition by the Federal Deposit Insurance Corporation in accordance with the provisions of this section.

(c) *Waiver.* The Federal Deposit Insurance Corporation may, on a case-by-case basis and upon application by an undercapitalized insured depository institution, waive the prohibition on the acceptance, renewal or rollover of brokered deposits upon a finding that such acceptance, renewal or rollover does not constitute an unsafe or unsound practice with respect to such institution. The Federal Deposit Insurance Corporation may conclude that it is not unsafe or unsound and may grant a waiver when the acceptance, renewal or rollover of brokered deposits is necessary to maintain the institution's short-term liquidity or to facilitate a restructuring of its liabilities to reduce costs without materially lengthening maturities and with no significant increase in total assets. A waiver will not be granted to permit an institution to grow appreciably in size.

(d) *Application.* An undercapitalized insured depository institution wishing to accept, renew or rollover brokered deposits may apply to the appropriate Federal Deposit Insurance Corporation regional director for supervision for the region in which the head office of the institution is located. The application may be in letter form and shall be accompanied by a resolution of the board of directors or trustees of the institution authorizing the filing of the application and a copy of a recent consolidated financial statement, including income and cash flow statements. A copy of the application should be submitted to the institution's primary federal regulator and any state regulator, as appropriate. An application shall provide the following additional information:

(1) The institution's plans to meet applicable capital requirements within a reasonable time period;

(2) The volume, rates and maturities on brokered deposits currently held;

(3) The scope of the waiver sought in terms of the volume and cost of brokered deposits to be obtained or retained and the time period for which a waiver may be needed;

(4) Alternative funding sources available to the institution, including prospects for the sale of assets at fair market value;

(5) Reasons the institution believes the acceptance, renewal or rollover of brokered deposits does not constitute an unsafe or unsound practice in its particular circumstances. In this regard, the institution should seek to demonstrate that its acceptance, renewal or rollover of brokered deposits would not likely increase materially the credit, interest-rate or operating risk of the institution; and

(6) The institution's plans for eliminating entirely its reliance on and/or need for brokered deposits, including applicable time frames.

(e) *Decision.* The Federal Deposit Insurance Corporation Director, Division of Supervision, and when confirmed in writing by the Director, an associate director or the appropriate regional director, or deputy regional director, shall have the authority to approve or deny any waiver application properly filed. An application is properly filed when complete and accurate information addressing each of the informational elements stated in paragraph (d) of this section has been provided to the appropriate regional director. Any waiver granted will be for a fixed period, generally no longer than one year, but may be extended upon re-application. The Corporation will provide notice to the financial institution's appropriate Federal and state regulatory agency that a request for waiver has been filed so that such agency may have an opportunity to consult with the Corporation prior to the Corporation's taking action on the institution's request for a waiver. Notwithstanding the foregoing, prior notice and/or consultation shall not be required in any particular case where the Corporation determines that the circumstances require the Corporation to take action without giving such notice and opportunity for consultation.

(f) *Exclusion for institutions in FDIC or RTC conservatorship or receivership.* (1) No insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver shall be subject to this § 337.6 or to section 29 of the Federal Deposit Insurance Act.

(2) So long as the Federal Deposit Insurance Corporation is the exclusive manager of the Resolution Trust Corporation, no insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver shall be subject to this § 337.6 or to section 29 of the Federal Deposit Insurance Act.

(Approved by the Office of Management and Budget under control number 3064-0099)

By order of the Board of Directors.

Dated at Washington, DC this 18th day of September, 1990.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards; Waiver of the Nonmanufacturer Rule for Aluminum Sheet Products

AGENCY: Small Business Administration.

ACTION: Notice to waive the nonmanufacturer rule for aluminum sheet products.

SUMMARY: This notice advises the public that the Small Business Administration (SBA) is establishing a waiver of the "nonmanufacturer rule" for aluminum sheet products. The basis for a waiver is that no small business manufacturer is supplying this class of products to the Federal Government. The effect of a waiver is to allow an otherwise qualified regular dealer to supply the product of any domestic manufacturer on a Federal contract set aside for small business or awarded through the 8(a) program.