increase in international commerce serving Orlando, Florida.

EFFECTIVE DATE: July 29, 1992.

FOR FURTHER INFORMATION CONTACT: Richard Gottlieb, Assistant Chief Inspector, Immigration and Naturalization Service, 425 I Street, NW., Washington, DC 20536, telephone (202) 514-2680.

SUPPLEMENTARY INFORMATION: This final rule adds Orlando, Florida, to the list of ports designated at 8 CFR 214.2(c)(1) as ports where, except for transit from one part of foreign contiguous territory to another part of the same territory, application for direct transit without visa must be made. The Orlando International Airport in Orlando, Florida, has added international passenger service, specifically arrivals transiting between Western Europe and Central and South America. In the context of the increase in international activity at Orlando, the airport authority wants to ensure that they can accommodate these commercial air passengers.

Compliance with the provisions of 5 U.S.C. 553 for notice of proposed rulemaking and delayed effective date is unnecessary, because this rule relates to agency management. See 5 U.S.C. 553(a)(2).

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. This is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have Federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Passports and visas, Ports of entry, Travel restrictions.

Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1186a, 8 CFR part 2.

§ 214.2 [Amended]

2. As designated in § 214.2 paragraph (c)(1), the listing of ports of entry authorized to accept transit without visa applications is amended by adding "Orlando, FL," in alphabetical sequence immediately after "Norfolk, VA."

Dated: June 23, 1992.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 92-17849 Filed 7-28-92; 8:45 am]

BILLING CODE 4410-10-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 70, 72, 73, and 75

RIN 3150-AD03

Minor Amendments to the Physical Protection Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations that cover the physical protection of special nuclear material. These amendments will (1) supplement the definitions section, (2) delete action dates that no longer apply, (3) correct outdated terms and cross references, (4) clarify wording that is susceptible to differing interpretations, (5) correct typographical errors, and (6) make other minor changes. The amendments are the result of a systematic review of NRC's safeguards regulations.

EFFECTIVE DATE: August 28, 1992.

FOR FURTHER INFORMATION CONTACT: Stanley P. Turel, Regulation Development Branch, Division of Regulatory Applications, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492-3739; Priscilla Dwyer, Domestic Safeguards Branch, Division of Safeguards and Transportation, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 504-2478; or Donald M. Carlson, Reactor Safeguards Branch, Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 504-3212.

SUPPLEMENTARY INFORMATION: The NRC Safeguards Interoffice Review Group has conducted a systematic review of the Agency's safeguards regulations and guidance documents to identify areas in the regulations that are out of date, inconsistent, or susceptible to differing interpretations. In doing so, the review group identified other areas in the regulations where minor changes are warranted. The NRC published in the **Federal Register** on August 15, 1989 (54 FR 33570), proposed amendments consisting of minor corrections and changes to its regulations identified by the review group that cover the physical protection of special nuclear material. The comment period ended on September 29, 1989. The changes are summarized here with a brief discussion.

1. The substance of paragraphs (b), (c), and (d) of 10 CFR 73.40 has been moved to appendix C of 10 CFR part 73 and combined with the safeguards contingency plan specifications already there. The requirement for having a safeguards contingency plan is included in each of the sections of the regulations covering security requirements for the specific class of licensee (i.e., §§ 73.20, 73.25, 73.26, 73.40, 73.46, 73.55, 73.60).

2. To avoid possible confusion, definitions of the commonly used terms Category I, Category II, and Category III have been added to the definitions sections of 10 CFR parts 70 and 73.

A formula quantity of strategic special nuclear material is sometimes referred to as a Category I quantity of material; special nuclear material of moderate strategic significance is sometimes referred to as a Category II quantity of material; and special nuclear material of low strategic significance is sometimes referred to as a Category III quantity of material. The current regulations do not include these category designations, although they are sometimes used.

3. Inconsistencies among the general auditing requirements have been removed for the safeguards contingency plans and physical security programs of transportation and fuel cycle licensees who possess Category I material.

Inconsistencies in both the content of the audits and resultant follow-up actions have been eliminated. The record retention period for results of these audits is being made consistent at 3 years.

4. A definition for the term "contiguous sites" has been added to 10 CFR parts 70 and 73. In the final definition, the words "* * * means locations subject to the control of a licensee, * * *" have been grammatically changed to read "* * * means licensee controlled locations, * * *" In addition, the words "* * * and for the possession, use, or storage of special nuclear material * * *" have been deleted from the definition since they generally appear in the introductory language of applicable regulations. Action dates that have passed have been eliminated. The outdated term "industrial sabotage" has been replaced by the current term "radiological sabotage." Incorrect

references to parts of the regulations that have been moved or deleted have been corrected. Paragraph designations in references, in other parts of the regulations, to definitions in § 70.4 have been removed because those designations were deleted in an amendment published in the **Federal Register** on April 28, 1989 (54 FR 14051). Several areas in the regulations have been clarified where the wording was susceptible to differing interpretations. The notification requirement for changes to the safeguards contingency plan that do not decrease the plan's effectiveness has been revised to require that the original be sent to the NRC headquarters office with a copy to the regional office, instead of vice versa. Finally, several typographical errors have been corrected.

Summary of Public Comments

Three letters of comment were received: Two from nuclear power plant licensees and one from NUMARC, an umbrella organization of the nuclear power industry whose membership includes every utility responsible for constructing or operating a commercial nuclear power plant in the United States. Copies of comment letters are available for public inspection and copying for a fee at the NRC Public Document Room at 2120 L Street NW. (Lower Level), Washington, DC.

All three commenters addressed only the amendment that would restore the sentence inadvertently omitted, while amending the physical protection requirements in 1986, from § 73.55(d), Access Requirements. It reads:

"Access to vital areas for the purpose of general familiarization and other nonwork-related activities may not be authorized except for good cause shown to the licensee." This sentence follows the requirement in § 73.55(d)(7)(i) that the licensee "Establish an access authorization system to limit unescorted access to vital areas during non-emergency conditions to individuals who require access in order to perform their duties."

The first commenter stated that the restrictions, presumably made explicit by the inserted sentence, should be withdrawn to allow tours with the provision of appropriate security measures to ensure plant safety and that "This change would limit access to nuclear plant vital areas even when under escort." Another commenter asserted that the inserted sentence "needs clarification" but did not specify what additional clarification was required. The third commenter stated that it would be beneficial if a definition of "good cause" were provided by the Commission in the rule and if additional guidance were provided as to what constitutes nonwork-related activities.

The NRC agrees that the subject sentence is not clear, particularly with respect to how it applies to escorted persons, and has decided not to reinsert the sentence. As stated in item 5 of the Supplementary Information published with the proposed rule, the NRC was concerned that the inadvertent omission of the sentence would be construed as a " 'signal' that vital areas could be 'opened up' to 'public sightseeing tours' or 'open house visits' without close licensee oversight." The NRC continues to be concerned about unnecessary escorted personnel traffic in vital areas, especially the control room, but considers that licensee security plans generally provide an adequate basis for the control of such practice. The NRC concludes that licensee security plans, in implementing 10 CFR 73.55(d)(7), would not permit licensees to grant access to persons, either unescorted or escorted, who have no legitimate purpose for such access. Further, prior to granting escorted access, licensees would consider the number of visitors each escort would be allowed to monitor and other controls. Means of achieving the purpose of the visit without entering vital areas also would be considered (e.g., touring the control room simulator rather than the control room). Examples of legitimate small tours, which might include brief access to vital areas, are visits by government officials, the press, or local science teachers. In summary, visitors should not be permitted access to vital areas at operating sites unless there is a good reason and due consideration is given to plant and personnel safety and radiological concerns.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in the categorical exclusion in 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this regulation.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved under the Office of Management and Budget approval number 3150–0009 for part 70, approval number 3150–0132 for part 72, approval number 3150–0002 for part 73, and approval number 3150–0055 for part 75.

Regulatory Analysis

These minor amendments impose no new restrictions or requirements, and therefore, have no significant impact. Accordingly, a regulatory analysis is considered not necessary and has not been prepared.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The amendments, as promulgated, are very minor in nature and the impact on any licensee is minimal. In the matter of reporting certain changes to the security program, the amendments merely reverse who receives the original and who receives the copy. The other changes are of an administrative nature and, therefore, do not alter the current implementation of the regulations by a licensee.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule because these amendments do not impose requirements on existing 10 CFR part 50 licensees. Therefore, a backfit analysis is not required for this final rule.

List of Subjects

10 CFR Part 70

Criminal penalties, Hazardous materials—Transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

10 CFR Part 73

Criminal penalties, Hazardous materials—Transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 75

Criminal penalties, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 70, 72, 73, and 75.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

1. The authority citation for part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 70.3, 70.7(g), 70.19(c), 70.21(c), 70.22(a), (b), (d)–(k), 70.24 (a) and (b), 70.32(a) (3), (5), (6), (d), and (i), 70.36, 70.39 (b) and (c), 70.41(a), 70.42 (a) and (c), 70.56, 70.57 (b), (c), and (d), 70.58 (a)–(g)(3), and (h)–(j) are issued under sec. 161b, 161i, and 161o, 68 Stat. 948, 949, and 950, as amended (42 U.S.C. 2201(b), 2201(i) and 2201(o)); §§ 70.7, 70.20a (a) and (d), 70.20b (c) and (e), 70.21(c), 70.24(b), 70.32 (a)(6), (c), (d), (e), and (g), 70.36, 70.51 (c)–(g), 70.56, 70.57 (b) and (d), and 70.58 (a)–(g)(3) and (h)–(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 70.5, 70.9, 70.20b (d) and (e), 70.38, 70.51 (b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58 (g)(4), (k) and (l), 70.59, and 70.60 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 70.4 is amended by adding a definition for "Contiguous sites" in proper alphabetical sequence, revising paragraph (2) of the definition "Plutonium processing and fuel fabrication plant," revising definitions "Formula quantity," "Special nuclear material of low strategic significance," and "Special nuclear material of moderate strategic significance" to read as follows:

§ 70.4 Definitions.

* * * * *

Contiguous sites means licensee controlled locations, deemed by the Commission to be in close enough proximity to each other, that the special nuclear material must be considered in the aggregate for the purpose of physical protection.

* * * * *

Formula quantity means strategic special nuclear material in any combination in a quantity of 5000 grams or more computed by the formula, grams=(grams contained U–235)+2.5 (grams U–233+grams plutonium). This class of material is sometimes referred to as a Category I quantity of material.

* * * * *

Plutonium processing and fuel fabrication plant * * *

(2) Research and development activities involving any of the operations described in paragraph (1) of this definition except for research and development activities utilizing unsubstantial amounts of plutonium.

* * * * *

Special nuclear material of low strategic significance means:

(1) Less than an amount of special nuclear material of moderate strategic significance as defined in paragraph (1) of the definition of strategic nuclear material of moderate strategic significance in this section, but more than 15 grams of uranium-235 (contained in uranium enriched to 20 percent or more in U-235 isotope) or 15 grams of uranium-233 or 15 grams of plutonium or the combination of 15 grams when computed by the equation, grams = (grams contained U-235) + (grams plutonium) + (grams U-233); or

(2) Less than 10,000 grams but more than 1,000 grams of uranium-235 (contained in uranium enriched to 10 percent or more but less than 20 percent in the U-235 isotope); or

(3) 10,000 grams or more of uranium-235 (contained in uranium enriched above natural but less than 10 percent in the U-235 isotope).

This class of material is sometimes referred to as a Category III quantity of material.

* * * * *

Special nuclear material of moderate strategic significance means:

(1) Less than a formula quantity of strategic special nuclear material but more than 1,000 grams of uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope) or more than 500 grams of uranium-233 or plutonium, or in a combined quantity of more than 1,000 grams when computed by the equation, grams = (grams contained U-235) + 2 (grams U-233 + grams plutonium); or

(2) 10,000 grams or more of uranium-235 (contained in uranium enriched to 10 percent or more but less than 20 percent in the U-235 isotope).

This class of material is sometimes referred to as a Category II quantity of material.

* * * * *

3. In § 70.19, paragraph (a)(2) is revised to read as follows:

§ 70.19 General license for calibration or reference sources.

(a) * * *

(2) Any Government agency as defined in § 70.4 that holds a specific license issued by the Commission that authorizes it to receive, possess, use, or transfer byproduct material, source material, or special nuclear material; and

* * * * *

4. In § 70.22, paragraphs (h)(1) and (k) are revised to read as follows:

§ 70.22 Contents of applications.

* * * * *

(h)(1) Each application for a license to possess or use at any site or contiguous sites subject to licensee control, a formula quantity of strategic special nuclear material as defined in § 70.4, other than a license for possession or use of this material in the operation of a nuclear reactor licensed pursuant to part 50 of this chapter, must include a physical security plan consisting of two parts. Part I must address vital equipment, vital areas, and isolation zones, and must demonstrate how the applicant plans to meet the requirements of §§ 73.20, 73.40, 73.45, 73.46, 73.50, 73.60, 73.70, and 73.71 of this chapter in the conduct of the activity to be licensed, including the identification and description of jobs as required by 10 CFR 11.11(a). Part II must list tests, inspections, and other means to demonstrate compliance with such requirements.

* * * * *

(k) Each application for a license to possess or use at any site or contiguous sites subject to licensee control, special nuclear material of moderate strategic significance or 10 kg or more of special nuclear material of low strategic significance as defined under § 70.4, other than a license for possession or use of this material in the operation of a nuclear power reactor licensed pursuant to part 50 of this chapter, must include a physical security plan that demonstrates how the applicant plans to meet the requirements of paragraphs (d), (e), (f), and (g) of § 73.67 of this chapter, as appropriate. The licensee shall retain a copy of this physical security plan as a record for the period during which the licensee possesses the appropriate type and quantity of special nuclear material under each license, and if any portion of the plan is superseded, retain that superseded portion of the plan for 3 years after the effective date of the change.

5. In § 70.32, paragraph (g) is revised to read as follows:

§ 70.32 Conditions of licenses.

* * * * *

(g) The licensee shall prepare and maintain safeguards contingency plan procedures in accordance with appendix C to part 73 of this chapter for bringing about the actions and decisions contained in the Responsibility Matrix of its safeguards contingency plan. The licensee shall retain the current safeguards contingency plan procedures as a record for the entire period during which the licensee possesses the appropriate type and quantity of special nuclear material under each license for which the procedures were developed and, if any portion of the plan is superseded, retain that superseded portion for 3 years after the effective date of the change. The licensee shall not make a change that would decrease the safeguards effectiveness of the first four categories of information (i.e., Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix) contained in any licensee safeguards contingency plan prepared pursuant to §§ 70.22(g), 70.22(j), 72.184, 73.20(c), 73.26(e)(1), 73.46(h)(1), or 73.50(g)(1) of this chapter without the prior approval of the NRC. A licensee desiring to make such a change shall submit an application for an amendment to its license pursuant to § 70.34. The licensee may make changes to the licensee safeguards contingency plan without prior NRC approval if the changes do not decrease the safeguards effectiveness of the plan. The licensee must maintain each change to the plan made without prior approval as a record during the period for which possession of a formula quantity of special nuclear material is authorized under a license and retain the superseded portion for 3 years after the effective date of the change and shall furnish a report containing a description of each change within 60 days after the change is made to the Director of Nuclear Material Safety and Safeguards, with a copy to the Regional Administrator of the appropriate NRC Regional Office as specified in appendix A to part 73 of this chapter.

* * * * *

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

6. The authority citation for part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244, (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 72.6, 72.22, 72.24, 72.26, 72.28(d), 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.72 (b), (c), 72.74 (a), (b), 72.76, 72.78, 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.148, 72.154, 72.156, 72.160, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.184, 72.186, are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 72.10(a), (e), 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44, (a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.90(a)–(d), (f), 72.92, 72.94, 72.98, 72.100, 72.102 (c), (d), (f), 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140 (b), (c), 72.142, 72.144, 72.146, 72.148, 72.150, 72.152, 72.154, 72.156, 72.158, 72.160, 72.162, 72.164, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.182, 72.184, 72.186, 72.190, 72.192, 72.194 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 72.10(e), 72.11, 72.16, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(b) (3), (c)(5), (d)(3), (e), (f), 72.48(b), (c), 72.50(b), 72.54(a), (b), (c), 72.56, 72.70, 72.72, 72.74(a), (b), 72.76(a), 72.78(a), 72.80, 72.82, 72.92(b), 72.94(b), 72.140 (b), (c), (d), 72.144(a), 72.146, 72.148; 72.150, 72.152, 72.154 (a), (b), 72.156, 72.160, 72.162, 72.168, 72.170, 72.172, 72.174, 72.176, 72.180, 72.184, 72.186, 72.192, 72.212(b), 72.216, 72.218, 72.230, 72.234(e) and (g) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

7. In § 72.184, paragraph (a) is revised to read as follows:

§ 72.184 Safeguards contingency plan.

(a) The requirements of the licensee's safeguards contingency plan for responding to threats and radiological sabotage must be as defined in appendix C to part 73 of this chapter. This plan must include Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix, the first four categories of information relating to nuclear facilities licensed under part 50 of this chapter. (The fifth and last category of information, Procedures, does not have to be submitted for approval.)

* * * * *

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

8. The authority citation for part 73 continues to read as follows:

Authority: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2201); secs. 201 as amended 204, 88 Stat. 1242, as amended, 1245 (42 U.S.C. 5841, 5844).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241, (42 U.S.C. 10155, 10161). Section 73.37(f) is also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 73.21, 73.37(g), and 73.55 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 73.20, 73.24, 73.25, 73.26, 73.27, 73.37, 73.40, 73.45, 73.46, 73.50, 73.55, and 73.67 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 73.20(c)(1), 73.24(b)(1), 73.26(b)(3), (h)(6), and (k)(4), 73.27 (a) and (b), 73.37(f), 73.40(b) and (d), 73.46(g)(6) and (h)(2), 73.50(g)(2), (3)(iii)(B), and (h), 73.55(h)(2) and (4)(iii)(B), 73.57, 73.70, 73.71, and 73.72 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

9. Section 73.2 is amended by adding a definition for "Contiguous sites" in proper alphabetical sequence, and revising the definitions of "Formula quantity," "Special nuclear material of moderate strategic significance," and "Special nuclear material of low strategic significance" to read as follows:

§ 73.2 Definitions.

* * * * *

Contiguous sites means licensee controlled locations, deemed by the Commission to be in close enough proximity to each other, that the special nuclear material must be considered in the aggregate for the purpose of physical protection.

* * * * *

Formula quantity means strategic special nuclear material in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U-235) + 2.5 (grams U-233 + grams plutonium). This class of material is sometimes referred to as a Category I quantity of material.

* * * * *

Special nuclear material of low strategic significance means:

(1) Less than an amount of special nuclear material of moderate strategic significance as defined in paragraph (1) of the definition of strategic nuclear material of moderate strategic significance in this section, but more than 15 grams of uranium-235 (contained in uranium enriched to 20 percent or more in U-235 isotope) or 15 grams of uranium-233 or 15 grams of plutonium or the combination of 15 grams when computed by the equation, grams = (grams contained U-235) + (grams plutonium) + (grams U-233); or

(2) Less than 10,000 grams but more than 1,000 grams of uranium-235 (contained in uranium enriched to 10 percent or more but less than 20 percent in the U-235 isotope); or

(3) 10,000 grams or more of uranium-235 (contained in uranium enriched above natural but less than 10 percent in the U-235 isotope).

This class of material is sometimes referred to as a Category III quantity of material.

* * * * *

Special nuclear material of moderate strategic significance means:

(1) Less than a formula quantity of strategic special nuclear material but more than 1,000 grams of uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope) or more than 500 grams of uranium-233 or plutonium, or in a combined quantity of more than 1,000 grams when computed by the equation, grams = (grams contained U-235) + 2 (grams U-233 + grams plutonium); or

(2) 10,000 grams or more of uranium-235 (contained in uranium enriched to 10 percent or more but less than 20 percent in the U-235 isotope).

This class of material is sometimes referred to as a Category II quantity of material.

* * * * *

10. In § 73.20, paragraph (b)(3) is redesignated as paragraph (b)(4), a new paragraph (b)(3) is added, and paragraphs (b)(2) and (c) are revised to read as follows:

§ 73.20 General performance objective and requirements.

* * * * *

(b) * * *

(2) Is designed with sufficient redundancy and diversity to ensure maintenance of the capabilities described in §§ 73.25 and 73.45;

(3) Includes a safeguards contingency capability that can meet the criteria in appendix C to this part "Licensee Safeguards Contingency Plans;" and

* * * * *

(c) Each licensee subject to the requirements of paragraphs (a) and (b) of this section shall establish, maintain, and follow NRC-approved safeguards physical protection and safeguards contingency plans that describe how the licensee will comply with the requirements of paragraphs (a) and (b) of this section.

11. In § 73.26, paragraph (h)(6) is revised to read as follows:

§ 73.26 Transportation physical protection systems, subsystems, components, and procedures.

* * * * *

(h) *Test and Maintenance Programs.* * * *

(6) The transportation security program must be reviewed at least every 12 months by individuals independent of both security program management and personnel who have direct responsibility for implementation of the security program. The review must include an audit of transportation security procedures and practices, an evaluation of the effectiveness of the transportation physical protection system, an audit of the transportation physical protection system testing and maintenance program, and an audit of commitments established for response by local law enforcement authorities. The results and recommendations of the review, management's findings on whether the transportation security program is currently effective, and any actions taken as a result of recommendations from prior reviews, must be documented in a report to the responsible organization management and to corporate management at least one level higher than that having responsibility for the day-to-day plant operation. These reports must be maintained in an auditable form, available for inspection for a period of 3 years.

* * * * *

§ 73.40 [Amended]

12. In § 73.40, paragraphs (b), including footnote 1, (c), and (d) and the designation (a) are removed.

13. In § 73.46, paragraphs (g)(6) and (h)(1) are revised to read as follows:

§ 73.46 Fixed site physical protection systems, subsystems, components, and procedures.

* * * * *

(g) *Test and Maintenance Programs.* * * *

(6) The security program must be reviewed at least every 12 months by individuals independent of both security program management and personnel who have direct responsibility for implementation of the security program. The security program review must include an audit of security procedures and practices, an evaluation of the effectiveness of the physical protection system, an audit of the physical protection system testing and maintenance program, and an audit of commitments established for response by local law enforcement authorities. The results and recommendations of the security program review, and any actions taken, must be documented in a report to the licensee's plant manager and to corporate management at least one level higher than that having responsibility for the day-to-day plant operations. These reports must be maintained in an auditable form, available for inspection for a period of 3 years.

(h) *Contingency and response plans and procedures.* (1) The licensee shall establish, maintain, and follow an NRC-approved safeguards contingency plan for responding to threats, thefts, and radiological sabotage related to the strategic special nuclear material and nuclear facilities subject to the provisions of this section. Safeguards contingency plans must be in accordance with the criteria in appendix C to this part, "Licensee Safeguards Contingency Plans." Contingency plans must include, but not limited to, the response requirements listed in paragraphs (h)(2) through (h)(5) of this section. The licensee shall retain the current safeguards contingency plan as a record until the Commission terminates the license and, if any portion of the plan is superseded, retain that superseded portion for 3 years after the effective date of change.

* * * * *

14. In § 73.50, paragraphs (g)(1) and (h) are revised to read as follows:

§ 73.50 Requirements for physical protection of licensed activities.

* * * * *

(g) *Response requirement.* (1) The licensee shall establish, maintain, and follow an NRC-approved safeguards contingency plan for responding to threats, thefts, and radiological sabotage related to the special nuclear material and nuclear facilities subject to the provisions of this section. Safeguards contingency plans must be in accordance with the criteria in appendix C to this part, "Licensee Safeguards Contingency Plans." The licensee shall retain the current safeguards contingency plan as a record until the Commission terminates the license and, if any portion of the plan is superseded, retain the superseded portion for 3 years after the effective date of the change.

* * * * *

(h) Each licensee shall establish, maintain, and follow an NRC-approved training and qualifications plan outlining the processes by which guards, watchmen, armed response persons, and other members of the security organization will be selected, trained, equipped, tested, and qualified to ensure that these individuals meet the requirements of paragraph (a)(4) of this section.

15. In § 73.55, paragraphs (b)(4)(ii), (g)(4), and (h)(1) are revised to read as follows:

§ 73.55 Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage.

* * * * *

(b) * * *

(4) * * *

(ii) Each licensee shall establish, maintain, and follow an NRC-approved training and qualifications plan outlining the processes by which guards, watchmen, armed response persons, and other members of the security organization will be selected, trained, equipped, tested, and qualified to ensure that these individuals meet the requirements of this paragraph. The licensee shall maintain the current training and qualifications plan as a record until the Commission terminates the license for which the plan was developed and, if any portion of the plan is superseded, retain that superseded portion for 3 years after the effective date of the change. The training and qualifications plan must include a schedule to show how all security personnel will be qualified 2 years after the submitted plan is approved. The training and qualifications plan must be followed by the licensee 60 days after the submitted plan is approved by the NRC.

* * * * *

(g) * * *

(4) The security program must be reviewed at least every 12 months by individuals independent of both security program management and personnel who have direct responsibility for implementation of the security program. The security program review must include an audit of security procedures and practices, an evaluation of the effectiveness of the physical protection system, an audit of the physical protection system testing and maintenance program, and an audit of commitments established for response by local law enforcement authorities. The results and recommendations of the security program review, management's findings on whether the security program is currently effective, and any actions taken as a result of recommendations from prior program reviews must be documented in a report to the licensee's plant manager and to corporate management at least one level higher than that having responsibility for the day-to-day plant operation. These reports must be maintained in an auditable form, available for inspection, for a period of 3 years.

(h) *Response requirement.* (1) The licensee shall establish, maintain, and follow an NRC-approved safeguards contingency plan for responding to threats, thefts, and radiological sabotage related to the nuclear facilities subject to the provisions of this section. Safeguards contingency plans must be in accordance with the criteria in appendix C to this part, "Licensee Safeguards Contingency Plans."

* * * * *

16. In § 73.60, the introductory text and paragraph (e) are revised to read as follows:

§ 73.60 Additional requirements for the physical protection of special nuclear material at nonpower reactors.

Each nonpower reactor licensee who, pursuant to the requirements of part 70 of this chapter, possesses at any site or contiguous sites subject to control by the licensee uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope), uranium-233, or plutonium, alone or in any combination in a quantity of 5000 grams or more computed by the formula, grams = (grams contained U-235) + 2.5 (grams U-233 + grams plutonium), shall protect the special nuclear material from theft or diversion pursuant to the requirements of paragraphs 73.67 (a), (b), (c), and (d), in addition to this section, except that a licensee is exempt from the requirements of paragraphs (a), (b), (c), (d), and (e) of this section to the extent that it possesses or uses special nuclear material that is not readily separable from other radioactive material and that has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding.

* * * * *

(e) *Response requirement.* Each licensee shall establish, maintain, and follow an NRC-approved safeguards contingency plan for responding to threats, thefts, and radiological sabotage related to the special nuclear material and nuclear facilities subject to the provisions of this section. Safeguards contingency plans must be in accordance with the criteria in Appendix C to this part, "Licensee Safeguards Contingency Plans."

* * * * *

17. In § 73.67, the introductory text of paragraphs (c), (d), and (f) and paragraph (c)(2) are revised to read as follows:

§ 73.67 Licensee fixed site and in-transit requirements for the physical protection of special nuclear material of moderate and low strategic significance.

* * * * *

(c) Each licensee who possesses, uses, transports, or delivers to a carrier for transport special nuclear material of moderate strategic significance, or 10 kg or more of special nuclear material of low strategic significance shall:

* * * * *

(2) Within 30 days after the plan submitted pursuant to paragraph (c)(1) of this section is approved, or when specified by the NRC in writing, implement the approved security plan.

(d) *Fixed site requirements for special nuclear material of moderate strategic significance.* Each licensee who possesses, stores, or uses quantities and types of special nuclear material of moderate strategic significance at a fixed site or contiguous sites, except as allowed by paragraph (b)(2) of this section and except those who are licensed to operate a nuclear power reactor pursuant to part 50, shall:

* * * * *

(f) *Fixed site requirements for special nuclear material of low strategic significance.* Each licensee who possesses, stores, or uses special nuclear material of low strategic significance at a fixed site or contiguous sites, except those who are licensed to operate a nuclear power reactor pursuant to part 50, shall:

* * * * *

18. In § 73.70, paragraph (c) is revised to read as follows:

§ 73.70 Records.

* * * * *

(c) A register of visitors, vendors, and other individuals not employed by the licensee pursuant to §§ 73.46(d)(13), 73.55(d)(6), or 73.60. The licensee shall retain this register as a record, available for inspection, for 3 years after the last entry is made in the register.

* * * * *

19. In appendix B to part 73, the Introduction is revised to read as follows:

Appendix B to Part 73—General Criteria for Security Personnel

* * * * *

Introduction

Security personnel who are responsible for the protection of special nuclear material on site or in transit and for the protection of the facility or shipment vehicle against radiological sabotage should, like other elements of the physical security system, be required to meet minimum criteria to ensure that they will effectively perform their assigned security-related job duties. In order to ensure that those individuals responsible for security are properly equipped and qualified to execute the job duties prescribed for them, the NRC has developed general criteria that specify security personnel qualification requirements.

These general criteria establish requirements for the selection, training, equipping, testing, and qualification of individuals who will be responsible for protecting special nuclear materials, nuclear facilities, and nuclear shipments.

When required to have security personnel that have been trained, equipped, and qualified to perform assigned security job duties in accordance with the criteria in this appendix, the licensee must establish, maintain, and follow a plan that shows how the criteria will be met. The plan must be submitted to the NRC for approval and must be implemented within 30 days after approval by the NRC unless otherwise specified by the NRC in writing.

* * * * *

20. In appendix C to part 73, the Introduction is revised and a new section on Audit and Review is added to read as follows:

Appendix C to Part 73—Licensee Safeguards Contingency Plans

Introduction

A licensee safeguards contingency plan is a documented plan to give guidance to licensee personnel in order to accomplish specific defined objectives in the event of threats, thefts, or radiological sabotage relating to special nuclear material or nuclear facilities licensed under the Atomic Energy Act of 1954, as amended. An acceptable safeguards contingency plan must contain: (1) a predetermined set of decisions and actions to satisfy stated objectives, (2) an identification of the data, criteria, procedures, and mechanisms necessary to efficiently implement the decisions, and (3) a stipulation of the individual, group, or organizational entity responsible for each decision and action.

The goals of licensee safeguards contingency plans for responding to threats, thefts, and radiological sabotage are:

(1) to organize the response effort at the licensee level,

(2) to provide predetermined, structured responses by licensees to safeguards contingencies,

(3) to ensure the integration of the licensee response with the responses by other entities, and

(4) to achieve a measurable performance in response capability.

Licensee safeguards contingency planning should result in organizing the licensee's resources in such a way that the participants will be identified, their several responsibilities specified, and the responses coordinated. The responses should be timely.

It is important to note that a licensee's safeguards contingency plan is intended to be complementary to any emergency plans developed pursuant to appendix E to part 50 or to § 70.22(i) of this chapter.

* * * * *

Audit and Review

At intervals not to exceed 12 months, the licensee shall provide for a review of the safeguards contingency plan by individuals independent of both security program management and personnel who have direct responsibility for implementation of the security program. The review must include an audit of safeguards contingency procedures and practices, and an audit of commitments established for response by local law enforcement authorities.

The licensee shall document the results and the recommendations of the safeguards contingency plan review, management findings on whether the safeguards contingency plan is currently effective, and any actions taken as a result of recommendations from prior reviews in a report to the licensee's plant manager and to corporate management at least one level higher than that having responsibility for the day-to-day plant operation. The report must be maintained in an auditable form, available for inspection for a period of 3 years.

* * * * *

PART 75—SAFEGUARDS ON NUCLEAR MATERIAL—IMPLEMENTATION OF US/IAEA AGREEMENT

21. The authority citation for part 75 continues to read as follows:

Authority: Secs. 53, 63, 103, 104, 122, 161, 68 Stat. 930, 932, 936, 937, 939, 948, as amended (42 U.S.C. 2073, 2093, 2133, 2134, 2152, 2201; sec. 201, 88 Stat. 1242 as amended, (42 U.S.C. 5841). Section 75.4 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161).

For purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), the provisions of this part are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

22. In § 75.4, paragraph (f)(1) is revised to read as follows:

§ 75.4 Definitions.

* * * * *

(f) *Effective Kilogram* * * *

(1) For special nuclear material: The amount specified in § 70.4 of this chapter.

* * * * *

Dated at Rockville, Maryland this 14th day of July, 1992.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 92-17666 Filed 7-28-92; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 561, 563, 563c, 567, and 571

[No. 92-26]

RIN 1550-AA01

Miscellaneous Capital and Capital-Related Amendments

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its regulations by modifying or removing obsolete or incorrect references to its regulations setting minimum regulatory capital requirements for savings associations. The OTS is also correcting citation errors and adding language clarifying the provisions contained in its risk-based capital regulation and the capital distribution regulation. The final rule also clarifies the treatment of sales with recourse and maturing capital instruments for purposes of the capital regulations and removes the accounting provisions for deferred loan losses.

EFFECTIVE DATE: August 28, 1992.

FOR FURTHER INFORMATION CONTACT: John Connolly, Program Manager, (202) 906-6465, Deborah Kennedy, Program Analyst, (202) 906-7324, Policy; Theresa Stark, Senior Attorney, (202) 906-7054, Deborah Dakin, Assistant Chief Counsel, (202) 906-6445, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: On November 8, 1989 the OTS published an interim final rule establishing the minimum regulatory capital requirements for savings associations as required by section 5(t) of the Home Owners' Loan Act, 12 U.S.C. 1464(t). 54

FR 46845 (Nov. 8, 1989). Because the capital regulations were promulgated as an interim final rule, the OTS requested further comment on all aspects of the rule.

On November 30, 1989 the OTS published a final rule transferring and recodifying regulations of the former Federal Home Loan Bank Board (Bank Board) and the Federal Savings and Loan Insurance Corporation pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). 54 FR 49411 (Nov. 30, 1989). This rule changed, reorganized, and removed obsolete references from the OTS's regulations made necessary by the passage of FIRREA. It also incorporated the text of the interim final minimum regulatory capital regulation, which had been adopted before the recodification. Certain typographical and other technical errors appeared in part 567 as it was printed in one or both of these documents and have been codified into the Code of Federal Regulations.

The OTS is today amending its capital regulations to conform the regulatory language to the intent of the OTS as expressed in the preamble to the interim final rule and to correct technical errors. The OTS is also amending its accounting requirements as they relate to deferred loan losses and open-end management companies. The removal of these regulatory provisions was proposed as part of a larger group of amendments to the accounting and reporting requirements for thrifts published at 56 FR 13085 (March 29, 1991) to conform with the capital treatment of those items as explained in 54 FR 46845, 46862–3 (Nov. 8, 1989).

The amendments made today were proposed on April 16, 1991. Some of the proposed amendments to part 567 were purely technical, such as the addition of a comma or removal of a parenthesis to clarify the meaning of a paragraph. Several other amendments were proposed to clarify the regulations in accordance with the statements of policy contained in the preamble to the interim final rule. For example, the definition of "qualifying multifamily mortgage loan" was amended to indicate that multifamily loans must be first mortgage loans to meet the definition. The OTS also proposed conforming amendments in order that all regulations cross-referencing the capital requirements for savings associations would refer to the appropriate requirements under part 567. In addition to these amendments, the proposal introduced regulatory changes of a more substantive nature for comment, including a definition of the term "recourse" for capital purposes and those amendments proposed by the Office of the Comptroller of the Currency (OCC) to its capital requirements. 55 FR 42017 (Oct. 17, 1990).

I. Summary of Comments; OTS Response

The OTS received a total of 33 comment letters in response to its proposed capital and capital-related amendments. Those who submitted comments included: 15 savings associations; 13 trade associations; three law firms; one government corporation; and one member of the United States Senate. The OTS also reviewed and considered 19 comment letters received in response to the invitation to comment on the interim final capital rulemaking while preparing this final rule.

Today's amendments are meant to bring consistency to the capital requirements of 12 CFR part 567 and to other, existing regulations that are tied to capital. Today's rulemaking is not intended to modify or update substantive aspects of those regulations that may otherwise require such attention. Rather, the OTS will address the policy issues raised by these amendments in future rulemakings.

A. "In Compliance" With Capital Standards

The OTS received 30 comment letters regarding whether thrifts operating in compliance with a capital plan approved by the OTS should be deemed to be "in compliance" with their capital requirements. All of these commenters urged adoption of the position of the OCC, which is set forth at 12 CFR 3.7 (1992).[1] The commenters strongly urged that institutions with approved capital plans be deemed to be in compliance with capital requirements generally. Many suggested that OTS's regulatory concerns regarding individual thrifts be handled on a case-by-case basis at the time a particular thrift's capital plan is approved.

The commenters argued that negative consequences result from OTS's current policy, which is that an institution operating under an approved capital plan is not deemed to be in compliance with its capital requirements. The negative consequences most frequently mentioned were: (1) Thrifts' competitive disadvantage vis-a-vis banks in raising capital and attracting deposits; (2) the erosion of public confidence in thrift institutions operating under approved capital plans; and (3) the effect on contractual arrangements such as debentures, mortgage servicing arrangements, and bond and liability insurance.

Several commenters believed that the recovery of the thrift industry would be further hindered unless institutions with approved capital plans are deemed to be in compliance with their capital requirements. Many also argued that the legislative history of FIRREA supports adoption of the same policy as the OCC follows and adherence to the principle that no thrift should be deemed out of compliance with its capital requirements unless its plan has been affirmatively rejected by the OTS.

After careful consideration of these comments, the OTS has determined to modify its policy as follows: A thrift will be deemed to be in compliance with section 567.2 of OTS's regulations [2] if: it is operating under an approved capital plan, and it is not critically undercapitalized within the meaning of section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) [3] and OTS regulations implementing that section. Neither the OTS nor the other Federal banking agencies have yet promulgated regulations implementing FDICIA's prompt corrective action provisions. Until the OTS's final implementing regulations take effect, a thrift will not be deemed to be critically undercapitalized for the purposes described here unless it has core capital [4] of less than 2%.

A thrift satisfying these two criteria may represent that it is in compliance with section 567.2. The thrift will not be able to avail itself of the more flexible treatment accorded well capitalized thrifts under OTS's differential regulation approach, however. The OTS has many regulations and policies that are applied differently depending on a savings association's actual capital levels. The OTS intends to maintain a clear distinction based on actual capital levels for purposes of applying these

[1] Section 3.7 requires that any bank having capital ratios lower than the minimum ratios required under 12 CFR 3.6 must submit a capital plan. The bank may assume that its plan is acceptable unless the OCC notifies it to the contrary. Moreover, "[a] bank in compliance with an acceptable plan to achieve the applicable minimum capital ratios will not be deemed to be in violation of § 3.6." 12 CFR 3.7 (1992).

[2] 12 CFR 567.2 (1992). Section 567.2 is the analogue of § 3.6 of the OCC's regulations: it sets forth the minimum capital requirements applicable to savings associations just as § 3.6 does for national banks.

[3] Pub. L. 102–242, 105 Stat. 2236, 2253 (Dec. 19, 1991).

[4] Core capital is defined at 12 CFR 567.5 (1992).

regulations and policies. Accordingly, OTS will continue to permit the most flexible treatment only for those institutions that meet or exceed the minimum statutory requirements of section 5(t)(2) of the Home Owners' Loan Act (HOLA). 12 U.S.C. 1464(t)(2). Those requirements currently include: 1.5% tangible capital; 3% core capital; [5] and the currently applicable risk-based capital requirement of 7.2%.

B. Recourse

OTS proposed to adopt the definition of recourse set forth in the June 1990 Federal Financial Institutions Examination Council (FFIEC) request for comment for capital purposes. The OTS received nine comments addressing the proposed definition of "recourse." One commenter applauded the OTS's effort to clarify the term, even if only temporarily, prior to the FFIEC's final report. Eight comments were critical of the proposal.

Many commenters thought that the final definition developed by FFIEC would be less stringent than the proposal and, therefore, that the OTS should not attempt to define the term before FFIEC's final action. Several commenters thought that an interim definition would serve only to confuse matters and to increase transaction costs overall.

Several commenters found the language of the proposed definition unclear, overbroad, and indefinite. These commenters pointed out that one could interpret the definition to include standard representations and warranties, implicit recourse arrangements, and non-credit risks such as interest rate, liquidity, currency, market and prepayment risks. The commenters uniformly argued that standard representations and warranties should be exempted from the definition because of the adverse impact on the secondary mortgage market that would result. The commenters also agreed that the definition should not apply to implicit recourse arrangements because no legally enforceable recourse arrangement exists. Commenters also favored separating the credit risks from other forms of risk and requested clarification of the definition.

Two commenters favored recognition of third party guarantees, such as mortgage insurance, in the definition of recourse. These commenters argued that where a savings association purchases insurance for the amount of recourse retained, then the risk of default on the underlying mortgages is effectively transferred from the association to the third party insurer.

Several other commenters favored the adoption of the Federal Reserve's treatment of spread accounts and risk-sharing arrangements. A spread account is an off-balance sheet account where funds accumulate in the account either through a charge against earnings or based on the difference between the rate paid to the purchasers of the securities and the higher yield on the underlying mortgages. Losses are charged against the spread account. Under risk-sharing arrangements, buyers and sellers proportionately share in any losses. Those commenters favoring the Federal Reserve's approach stated that the Federal Reserve currently excludes spread accounts and risk sharing arrangements from the definition of recourse, and urged OTS to do the same.

Finally, in response to the request for comments regarding the OCC's outstanding proposal on recourse, commenters were uniformly critical. The OCC has proposed to amend footnote 14 of its risk-based capital guidelines (regarding assets sold with recourse) to clarify that assets sold with recourse are included for purposes of computing a national bank's capital requirement even though a sale with recourse qualifies for sales treatment under the Call Report. The OCC has stated in its proposal, however, that it does not intend that mortgage sales should be included as "assets sold with recourse" for risk-based capital purposes if they carry less than significant risk of loss and meet certain other criteria. The criteria are: (1) the bank has not retained more than a minimal risk of loss; (2) the maximum amount of exposure to loss that the bank has retained at the time of the transfer is equal to or less than the amount of probable loss that the bank has reasonably estimated that it will incur on the transferred mortgages; and (3) the bank has created a liability account or other special reserve in an amount equal to its maximum exposure. See 55 FR 42017, 42020 (Oct. 17, 1990).

The commenters favored the approach the OTS has taken in Regulatory Bulletin 26 (April 26, 1991) (RB 26), recognizing limited recourse, rather than the proposed OCC approach. One commenter argued that the OCC's proposal would be highly problematic for thrifts selling loans into the mortgage securities market. In particular, the commenter stated that the proposed OCC requirement that the amount of recourse retained may not exceed the actual expected losses on the loans sold does not conform to long-standing practices in the mortgage securities market requiring credit enhancements greater than the actual expected loss. This commenter urged the OTS not to adopt the OCC proposal because it does not give credit or incentive for negotiating limited recourse arrangements where the exposure is greater than actual expected loss but less than the applicable capital requirement. Moreover, the commenter urged that the OTS not adopt the OCC proposal as part of a technical amendments package because of the significant impact on the mortgage securities industry. In fact, the commenter requested that the OTS repropose the recourse issue separately to provide for a more extensive discussion of all of the issues involved.

The OTS has determined that the benefits of defining recourse only for risk-based capital purposes outweigh the drawbacks identified by commenters. The OTS wishes to clarify that the definition adopted today does not include risks other than credit risk. Also excluded from the definition are contractual conditions that are under the direct control of the thrift or may be verified by the thrift at the time the contract is entered. The OTS does not intend, however, to exclude recourse obligations arising from contractual agreements that may be commonplace in the industry but over which the thrift has no control. The definition of "standard representations and warranties" is also under review in an interagency context and may be subject to further modification.

Implicit recourse arrangements are only included in the definition to the extent that OTS observes, with respect to a particular institution, a pattern of behavior in its transactions that, if consistently used to provide recourse, will be treated as recourse for capital computation purposes. Thus, OTS intends to retain enough flexibility in the definition of recourse to capture transactions that are intended to evade the capital regulations.

The OTS will reserve its response to the comments regarding third party guarantees at this time because that issue is being addressed by a FFIEC working group. The OTS will continue to participate in the FFIEC effort to develop a comprehensive treatment for recourse arrangements and represent the views of commenters on this issue in the context.

At this time, the OTS has decided not to adopt the same approach as the OCC has taken in its proposal regarding asset

[5] The OTS has proposed a regulation that would increase the leverage ratio requirement. 56 FR 16,283 (April 22, 1991).

sales with recourse. The OCC modifications are designed to clarify that, for risk-based capital purposes, loan sales with recourse under programs of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC) are considered sales with recourse. The OTS's current rule is clear with respect to this issue.[6] The amendment made to the OCC rule creates a difference between the two agencies' treatment of loan sales with recourse; the OTS believes, however, that the FFIEC working group addressing recourse will resolve such differences.

C. Non-Includable Subsidiaries

Four commenters addressed the treatment of investments in subsidiaries engaged as of April 23, 1989 in activities not permissible for a national bank. One commenter fully supported the approach set forth in the proposal: grandfathering the amount of a thrift's investment in its nonincludable subsidiary that existed on April 12, 1989, rather than each actual investment in the subsidiary. Thus, the amount of the investment subject to the phase-out would be the lesser of the current amount invested or the amount invested on April 12, 1989. For example, as of April 12, 1989, a thrift had $20 million invested in a nonincludable subsidiary. During 1990, the level of the investment decreased by $15 million to $5 million. During 1991, the investment in the subsidiary increases by $7 million to $12 million. The mount of investment that is subject to grandfathering on January 1, 1992, is $12 million since this is the lower of the current amount invested and the $20 million invested as of April 12, 1989.

Three commenters raised an issue related to the requirement that was not addressed in the proposal. Two of these three commenters said that the proposed amendments could be interpreted to mean that, in determining the amount of investments to be deducted from assets and capital, a savings association must compare current and April 12, 1989 investment levels for each non-includable subsidiary separately, rather than for all non-includable subsidiaries as a whole. The commenters argued that a subsidiary-by-subsidiary investment test will lead to inconsistent capital deductions among similarly situated savings associations during the phase-in period. In other words, some associations will be penalized because of the form of the corporate structures on April 12, 1989.

[6] See 12 CFR 567.6(a)(2)(i)(C) (1992).

After considering these comments, the OTS has revised the proposed amendment to 12 CFR 567.5(a)(2)(v)(A) to remove any ambiguity that could be construed to require savings associations with similar investments in one or more subsidiaries to deduct those investments differently based on the corporate structure of the initial investments.

D. Miscellaneous Amendments

Two commenters supported the proposed amendments to the capital distributions regulation, 12 CFR 563.134. Three commenters supported the amendment to permit savings associations to treat maturing capital instruments issued on or before October 7, 1989 on the same basis as those issued afterward.

Two commenters raised concern regarding the liability growth regulation, 12 CFR 563.131. Both commenters thought that the reference to 6% of liabilities was redundant, confusing and unnecessary. After consideration of these comments the OTS agrees that the reference to 6% of liabilities is obsolete and is deleting that portion of the regulation.

The OTS received comments regarding purchased mortgage servicing rights (PMSRs). One commenter objected to the language that would require PMSRs to meet the three-part test of 12 CFR 567.5(a)(2)(ii) because it would reopen the determination and confuse matters. Section 475 of the Federal Deposit Insurance Corporation Improvement Act of 1991 requires Federal financial institutions regulators to address PMSRs. This section takes effect on February 17, 1992. OTS anticipates that in conjunction with other regulatory agencies it will re-examine this issue and may propose regulatory changes. In the interim, in light of its new statutory authority under this section, OTS is temporarily leaving § 567.5(a)(2)(iii) unchanged.

One commenter asked for clarification that the term "qualifying mortgage loan" includes a loan to individuals for the purchase and construction of their own homes, secured by a first mortgage on the home. This commenter points out that this position would be consistent with the OCC's regulations.

The OTS has previously opined [7] that loans to individuals for the purchase and construction of their own homes are includable in the 50% risk-weight category if the loan meets all of the other qualifications of a "qualifying mortgage loan." The OCC explicitly addresses this issue in its risk-based guidelines. The OTS is adding comparable language to its regulation to clarify this point. The OTS is also taking this opportunity to clarify that non-qualifying mortgage loans that did not qualify solely due to loan-to-value ratios at origination and are subsequently paid down to a loan-to-value ratio of less than 80 percent (calculated using value at origination) may become qualifying loans if they meet all other requirements for qualifying mortgages.

[7] Chief Counsel Op., May 14, 1991.

One commenter, discussing the conforming changes from "regulatory capital" to "total capital," argued that these changes were not merely technical but would, if adopted, have significant substantive effects. The commenter argued that total capital would exclude or limit certain pre-FIRREA regulatory capital and, in so doing, would increase the capital levels required. Another commenter pointed out that the conforming amendments fail to change the term regulatory capital in 12 CFR 545.82(e).

The OTS believes that it has provided adequate notice and opportunity to comment on the proposed changes to the regulations tied to capital levels. It believes that the use of "total capital," rather than "core capital" or "tangible capital" in setting these levels best approximates the earlier levels tied to "regulatory capital."

Finally, the OTS received one comment regarding the removal of the regulatory provisions for deferred loan losses after the publication of the proposed amendments to the accounting and reporting requirements earlier this year. The commenter, a trade association, asserted that FIRREA mandated the removal of deferred loan losses and, therefore, agreed with the OTS's proposal to remove § 563c.14 and references to deferred loan losses contained in § 563.233 (c) and (d). The OTS is making those changes to bring this section into conformity with the capital rule revisions promulgated in November 1989. Other amendments to § 563.233 proposed in March are deferred until such time as the proposed amendments to the accounting and reporting requirements are finalized.

II. Description of Final Rule

Today's final rulemaking does not differ significantly from the proposal. Aside from changes made in response to comments received by the OTS, as discussed above, the major differences between today's rule and the proposal are: (1) The removal of the regulatory provisions for deferred loan losses (discussed above in section I.D.); (2) the deletion of section 563.94 (mortgage transactions with the Federal Home Loan Mortgage Corporation); and (3) the addition of several paragraphs of regulatory language modelled upon that proposed by the OCC.

Upon further reflection, OTS determined that the amendments proposed to 12 CFR 563.94 would render the regulation superfluous. Furthermore, the deletion of this section has no impact on other regulatory provisions. Thus, the section is removed in today's final rule.

The changes based on the OCC's October, 1990 proposal are adopted by the OTS pursuant to FIRREA's mandate that the OTS adopt "all relevant substantive definitions" established by the OCC for national banks and that the standards prescribed by the OTS be no less stringent than the capital standards applicable to national banks. The amendments that the OTS expects to be finalized by the OCC include definitions of the terms "central government", "original maturity", and "unconditionally cancelable". The amendments also add two items to the 20 percent risk-weight category and add certain unused commitments to the zero percent credit conversion factor under certain circumstances.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, it is certified that this proposal will not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Act Analysis is not required.

Executive Order 12291

The Director of the Office of Thrift Supervision has determined that this proposal does not constitute a "major rule" and, therefore, does not require the preparation of a regulatory impact analysis.

Paperwork Reduction Act

The collections of information referenced in this proposed rule may be found at 12 CFR 545.74, 545.82, 563.10, 563.131, 563.173, and 567.5. The approval of investments in and activities conducted by a service corporation contained in § 545.74 constitutes a collection of information that has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(h)) and has been assigned control number 1550–0013. The OTS requires this information to ascertain whether such activities of the service corporation reasonably relate to the activities of the parent savings association, and whether such activities are being conducted in the best interest of the association. The OTS requires this information only when a savings association files an application or notice with the OTS.

The approval of activities, the issuance of additional securities by, and the providing of capital by a Federal savings association to establish a finance subsidiary contained in § 545.82 constitute a collection of information that has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(h)) and has been assigned control number 1550–0033. The OTS requires this information to ascertain whether the establishment and operation of a finance subsidiary, the transfer of assets to an existing finance subsidiary or the issuance of additional securities by an existing finance subsidiary, is likely to adversely affect the financial condition or the safe and sound operation of the parent Federal savings association.

The approval to issue earnings-based accounts in an amount of up to 20% of the savings association's assets and information describing in detail the loans to be used in calculating the contingent interest on the certificates contained in § 563.10 constitute a collection of information that has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(h)) and has been assigned control number 1550–0027. The OTS requires this information to ascertain whether the savings association meets or exceeds its regulatory capital requirement or whether there are other bases for supervisory concern before the savings association is allowed to issue earnings-based accounts.

The approval of a savings association's growth plan to increase its total liabilities within any 2-quarter period at a rate greater than 12.50 percent contained in § 563.131 constitutes a collection of information that has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(h)) and has been assigned control number 1550–0028. The OTS requires this information to ascertain the effect of the growth plan upon the savings association's regulatory capital, the financial strength of the savings association, and the stability of the savings association's earnings over the 6 preceding calendar quarters.

Recordkeeping requirements for a savings association engaging in forward commitments is contained in § 563.173; it has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(h)) and has been assigned control number 1550–0011. The OTS requires these records to maintain a current register of the savings association's forward commitments, and documentation of the savings association's ability to fund all outstanding forward commitments when due.

The approval of subordinated debt securities for inclusion in a savings association's regulatory capital is contained in § 567.5; it has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507(h)) and has been assigned control number 1550–0030. The OTS requires this information to ascertain whether the subordinated debt securities were issued pursuant to regulations and memoranda of the OTS, may comprise an association's supplementary capital, and may therefore be included in a savings association's regulatory capital.

No revisions are proposed to the information collections and recordkeeping requirements contained in these sections. Only technical, nonsubstantive changes are being made to these regulations.

List of Subjects

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 561

Savings associations.

12 CFR Part 563

Accounting, Advertising, Crime, Currency, Flood insurance, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 563c

Accounting, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 567

Capital, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 571

Accounting, Conflicts of interest, Gold, Investments, Reporting and recordkeeping requirements, Savings associations.

Accordingly, the Office of Thrift Supervision hereby amends chapter V, title 12, *Code of Federal Regulations*, as set forth below:

SUBCHAPTER C—REGULATIONS FOR FEDERAL SAVINGS ASSOCIATIONS

PART 545—OPERATIONS

1. The authority citation for part 545 is revised to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1828.

2. Section 545.14 is amended by revising paragraph (c) to read as follows:

§ 545.14 Determination and distribution of earnings.

* * * * *

(c) *Distribution on share accounts.* No distribution of earnings on share accounts may be made under this section until provision has been made for payment of expenses and for the pro rata portion of credits to reserves required by the Federal savings association's charter and by part 567 of this chapter.

3. Section 545.35 is amended by revising paragraph (d) to read as follows:

§ 545.35 Other real estate loans.

* * * * *

(d) A Federal savings association's aggregate investment in nonresidential real estate loans under this section shall not exceed 400 percent of the association's total capital (as calculated pursuant to 12 CFR 567.5(c)), unless the OTS finds that such additional amount will not present a significant risk to the safe and sound operation of the association and is consistent with prudent operating practices. If the OTS authorizes any Federal savings association to exceed the 400 percent of total capital limitation, the OTS shall closely monitor the condition and lending activities of such association to ensure that the association carries out all authority under section 5(c) of the Act in a safe and sound manner and complies with this paragraph (d) and all other applicable laws and regulations.

4. Section 545.38 is amended by revising paragraph (b)(3) to read as follows:

§ 545.38 Insured and guaranteed loans.

* * * * *

(b) * * *

(3) The Federal savings association invests not more than the greater of 2.5 percent of its assets or one-half of its total capital (as calculated pursuant to 12 CFR 567.5(c)) in the aggregate outstanding balance of the non-guaranteed portions of all loans made under the program and held by the association.

* * * * *

5. Section 545.74 is amended by revising paragraph (d)(2) to read as follows:

§ 545.74 Service corporations.

* * * * *

(d) *Amount of investment.* (1) * * *

(2) In addition to the amounts that it may invest under paragraph (d)(1) of this section, an association that meets its applicable capital requirement under part 567 of this chapter may lend additional amounts as follows:

(i) An amount not to exceed the association's total capital as calculated pursuant to 12 CFR 567.5(c) may be invested in conforming loans and functionally equivalent leases made to each service corporation of which the association owns, or holds with power to vote, not more than ten percent of the capital stock; and to each joint venture in which a service corporation in which the association is a stockholder, including subsidiaries of such service corporation:

(A) Owns or holds with power to vote not more than a total of ten percent of the capital stock; or

(B) Is a limited partner and has contributed not more than ten percent of such joint venture's capital.

(ii) An aggregate outstanding amount not to exceed fifty percent of the association's total capital as calculated pursuant to 12 CFR 567.5(c) may be invested in conforming loans and functionally equivalent leases to all service corporations in which the association owns more than ten percent of the capital stock, and to all joint ventures in which service corporations in which the association is a stockholder, including subsidiaries of such service corporations:

(A) Own or hold with power to vote more than a total of ten percent of the capital stock; or

(B) Are partners.

* * * * *

6. Section 545.82 is amended by removing and reserving paragraph (c)(2) and by revising the introductory text of paragraph (e) to read as follows:

§ 545.82 Finance subsidiaries.

* * * * *

(c) * * *

(2) [Reserved]

* * * * *

(e) *Transfer of proceeds of the issuance of securities.* All proceeds from the issuance of any security by a finance subsidiary, net of the reasonable costs (including any proceeds held in the subsidiary for collateral maintenance, fee payment, or any other necessary expenses related to the finance subsidiary's securities issuances or collateralizing assets) associated with the issuance of securities by the finance subsidiary and the organization of the finance subsidiary, shall be remitted to the finance subsidiary's parent Federal savings association. Such remittance may be made by the payment of dividends on the common stock issued by the finance subsidiary to its parent; by a redemption of the common stock issued by the finance subsidiary to its parent Federal savings association; by the repayment of any loan made by the parent to the finance subsidiary as part of the capitalization of the subsidiary; or by the purchase of assets of, or liabilities issued by, the parent Federal savings association (subject to the limitations of paragraph (c)(1) of this section on the aggregate and per-issuance transfers by a parent Federal savings association to a finance subsidiary): *Provided,* That any capital stock (common or preferred), mutual capital certificate, subordinated debt, or any other security that would otherwise be considered to be capital as defined in part 567 of this chapter shall not, if issued by the parent Federal savings association to its finance subsidiary, be included in the parent Federal savings association's capital unless:

* * * * *

SUBCHAPTER D—REGULATIONS APPLICABLE TO ALL SAVINGS ASSOCIATIONS

PART 561—DEFINITIONS

7. The authority citation for part 561 is revised to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a.

8. Section 561.55 is amended by revising paragraph (b)(2) and adding paragraph (c) to read as follows:

§ 561.55 With recourse.

* * * * *

(b) * * *

(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 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 567 of this subchapter.

PART 563—OPERATIONS

9. The authority citation for part 563 is revised to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1468, 1828, 3806; 42 U.S.C. 4106.

10. Section 563.10 is amended by revising paragraphs (b)(2), (c)(1)(i), and (c)(3)(v) and by removing paragraph (d) and redesignating paragraph (e) as new paragraph (d) to read as follows:

§ 563.10 Earnings-based accounts.

* * * * *

(b) *Limitations.* * * *

(2) The savings association is in compliance with its capital requirements under part 567 of this subpchapter;

* * * * *

(c) *Permission for increased issuance.* (1) * * *

(i) Whether the savings association meets or exceeds the capital requirements specified in part 567 of this subchapter or any amount of capital required to be maintained in an applicable supervisory directive or operating agreement;

* * * * *

(3) * * *

(v) Information showing the financial condition of the applicant including, but not limited to, the applicant's capital adequacy (under part 567 of this subchapter and paragraph (c)(1)(i) of this section);

* * * * *

11. Section 563.80 is amended by revising the first sentence of the introductory text of paragraph (e)(1) to read as follows:

§ 563.80 Borrowing limitations.

* * * * *

(e) *Filing requirements for outside borrowings with maturities in excess of one year.* (1) Unless the savings association meets its capital requirement under part 567 of this subchapter, it shall, at least ten business days prior to issuance, file with the Regional Director or his or her designee a notice of intent to issue securities evidencing such borrowings. * * *

* * * * *

12. Section 563.84 is amended by revising the introductory text of paragraph (b)(7) to read as follows:

§ 563.84 Transfer and repurchase of government securities.

* * * * *

(b) * * *

(7) *Eligibility requirements.* A savings association that issues or has outstanding repurchase agreements issued pursuant to paragraph (b) of this section shall calculate its total capital on a monthly basis in accordance with part 567 of this subchapter. A savings association that does not have total capital equal to the sum of one percent of all liabilities of the savings association, plus an amount equal to 20 percent of the savings association's assets classified under § 563.160 of this part, shall not issue or renew repurchase agreements under paragraph (b) of this section unless it meets the following additional requirements:

* * * * *

§ 563.94 [Removed]

13. Section 563.94 is removed.

§ 563.96 [Amended]

14. Section 563.96 is amended by removing the term "regulatory capital" and by adding in lieu thereof the phrase "total capital as determined in accordance with § 567.5(c) of this subchapter".

15. Section 563.131 is amended by revising paragraph (b) to read as follows:

§ 563.131 Liability growth.

* * * * *

(b) Any savings association is exempted from the preapproval requirement of paragraphs (a) and (c) of this section if it meets its fully phased-in capital requirements as defined in part 567 of this subchapter. Such a savings association must provide notice to OTS of its intention to grow in excess of the standard set by paragraph (a) of this section.

* * * * *

16. Section 563.134 is amended by revising paragraphs (a)(3), (a)(6), and (b)(1) to read as follows:

§ 563.134 Capital distributions.

(a) *Definitions* * * *

* * * * *

(3) *Fully phased-in capital requirement* means an association's fully phased-in capital requirements as defined in § 567.1(kk) of this subchapter.

* * * * *

(6) *Shares* means common and preferred stock; and any options, warrants, or other rights for the acquisition of such stock. This term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution. The term "share" does include:

(i) Convertible securities upon their conversion into common or preferred stock; and

(ii) Securities structured for the purpose of evading the restrictions on capital distributions in this section.

* * * * *

(b) *Limits on capital distributions*—(1) *Tier 1 Association.* (i) A tier 1 association is authorized to make capital distributions during a calendar year up to the higher of:

(A) 100 percent of its net income to date during the calendar year plus the amount that would reduce by one-half its surplus capital ratio at the beginning of the calendar year; or

(B) 75 percent of its net income over the most recent four-quarter period.

(ii) A tier 1 association shall not make capital distributions in excess of the foregoing limit except in accordance with the notice and opportunity for objection process provided by paragraph (e) of this section.

* * * * *

17. Section 563.173 is amended by revising paragraph (c)(2) to read as follows:

§ 563.173 Forward commitments.

* * * * *

(c) *Limitations* * * *

(2) *Percent of assets.* A savings association's outstanding forward commitments to purchase securities plus short put options entered into pursuant to § 563.175 of this part may not exceed an amount equal to 5 percent of its assets if total capital is 3 percent or less of assets, 10 percent of its assets if total capital is over 3 percent but less than 5 percent of assets, or 15 percent of its assets if total capital is 5 percent or more of assets.

* * * * *

18. Section 563.175 is amended by revising paragraph (a)(13)(iii) to read as follows:

§ 563.175 Financial options transactions.

(a) *Definitions.* * * *

(13) *Permissible counterparty.* * * *

(iii) A savings association that is subject to the regulation and supervision of the OTS and is in compliance with the applicable capital requirements contained in part 567 of this subchapter;

* * * * *

19. Section 563.233 is amended by revising paragraphs (c) and (d) to read as follows:

§ 563.233 Accounting principles and procedures.

* * * * *

(c) By no later than the period beginning on or after January 1, 1989, all unaudited financial statements and financial reports to the OTS shall be prepared on the basis of generally accepted accounting principles.

(d) By no later than the period beginning on or after January 1, 1989, Statements of Condition shall be prepared on the basis of generally accepted accounting principles. Each statement of condition shall include in bold type in the body of the statement the following language: "Federal Deposit Insurance Corporation (FDIC), an agency of the U.S. government insures all depositors up to $100,000 in accordance with the rules and the regulations of the FDIC." A footnote indicating the savings association's regulatory capital requirements and the amount of regulatory capital that the savings association has available to meet those requirements. Regulatory capital requirements for savings associations are defined in 12 CFR Part 567. The footnote shall include the following language: "This statement has been prepared in accordance with the regulatory reporting requirements of the Office of Thrift Supervision (OTS). Tangible, Core, and Total Capital are the elements of regulatory capital determined under such reporting requirements. Regulatory capital is a basis by which the OTS determines whether a savings association is operating in a safe and sound manner."

* * * * *

PART 563C—ACCOUNTING REQUIREMENTS

20. The authority citation for part 563c is revised to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464; 15 U.S.C. 78c(b), m, n, w.

§ 563c.14 [Removed]

21. Section 563c.14 is removed.

PART 567—CAPITAL

22. The authority citation for part 567 is revised to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a.

22a. Part 567 is amended by removing footnote 2 in § 567.5(a)(1)(ii) and by redesignating footnotes 3 through 7 as footnotes 5 through 9, respectively.

23. Section 567.1 is amended by removing paragraph (a)(2)(i) and by redesignating existing paragraphs (a)(2)(ii), (a)(2)(iii), and (a)(2)(iv) as new paragraphs (a)(2)(i), (a)(2)(ii), and (a)(2)(iii); by revising paragraphs (a)(3)(iii), (k), and (o); by removing the fourth and fifth sentences of paragraph (p) and adding three new sentences in their place; by revising paragraphs (q), (u), (v) and (w)(2)(ii)(C); by adding a new footnote 2 to paragraph (ee) introductory text between the words "goodwill" and "resulting" to read: "[2] Goodwill that has been written off of an association's balance sheet for its GAAP financial statements or Thrift Financial Report cannot be counted as supervisory goodwill."; by revising paragraph (gg) and by adding new paragraphs (kk) and (ll) to read as follows:

§ 567.1 Definitions.

(a) *Adjusted total assets.* * * *

(3) * * *

(iii) Investments in any subsidiary subject to consolidation under paragraph (a)(2)(ii) of this section; and

* * * * *

(k) *High quality mortgage-related securities.* The term *high quality mortgage-related securities* means any mortgage-related security as defined in section 3(a)(41) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(41), and any mortgage-backed securities issued by, or fully guaranteed as to principal and interest by, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. It includes mortgage-backed bonds meeting rating and collateral requirements equivalent to those established under 15 U.S.C. 78c(a)(41).

* * * * *

(o) *Mortgage-related securities.* The term *mortgage-related securities* means any mortgage-related qualifying securities under section 3(a)(41) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(41), *Provided,* That the rating requirements of that section shall not be considered for purposes of this definition.

(p) *OECD-based country.* * * * The term *Central government* means the national governing authority of a country; it includes the departments of ministries and agencies of the central government and the central bank. The U.S. Central Bank includes the 12 Federal Reserve Banks. The definition does not include the following: State, provincial or local governments; commercial enterprises owned by the central government, which are entities engaged in activities involving trade, commerce or profit that are generally conducted or performed in the private sector of the United States economy; and non-central government entities whose obligations are guaranteed by the central government.

(q) *Original maturity.* The term *original maturity* means, with respect to a commitment, the earliest date after a commitment is made on which the commitment is scheduled to expire (*i.e.*, it will reach its stated maturity and cease to be binding on either party), *Provided,* That either:

(i) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(ii) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the customer at the time of the extension or renewal and upon a new, *bona fide* credit analysis utilizing current information on financial condition and trends.

* * * * *

(u) *Qualifying mortgage loan.* The term *qualifying mortgage loan* means a 1–4 family residential first mortgage loan that is prudently underwritten and is performing and not more than 90 days past due with a documented loan-to-value ratio not exceeding 80 percent (at origination) unless insured to at least an 80 percent loan-to-value ratio by private mortgage insurance provided by an issuer approved by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association. Nonqualifying mortgage loans that are subsequently paid down to a loan-to-value ratio of less than 80 percent (calculated using value at origination) may become qualifying loans if they meet all other requirements for qualifying mortgages. Loans to individual borrowers for the construction of their own homes may be included as qualifying mortgage loans.

(v) *Qualifying multifamily mortgage loan.* The term *qualifying multifamily mortgage loan* means a first mortgage loan on an existing property consisting of 5–36 dwelling units with an initial loan-to-value ratio of not more than 80% where an average annual occupancy rate of 80% or more of total units has existed for at least one year.

(w) *Qualifying supervisory goodwill.* * * *

(2) * * *

(ii) * * *

(C) Minus the amortization of the goodwill in paragraph (w)(2)(ii)(A) of this section through the current reporting period that results when the goodwill is amortized subsequent to April 12, 1989 on a straightline basis over the shorter of—

(*1*) 20 years; or

(*2*) The remaining period for amortization in effect on April 12, 1989 under regulatory accounting practices.

* * * * *

(gg) *Unconditionally cancelable.* The term *unconditionally cancelable* means, with respect to a commitment-type lending arrangement, that the savings association may, at any time, with or without cause, refuse to advance funds or extend credit under the facility. In the case of home equity lines of credit, the savings association is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by relevant Federal law.

* * * * *

(kk) *Recourse.* The term *recourse* means the acceptance, assumption, or retention of some or all of the risk of loss generally associated with ownership of an asset. It is not necessarily a function of ownership or prior ownership of an asset, nor does it arise only as an incident of an asset sale.

(ll) *Fully phased-in capital requirements.* The term *fully phased-in capital requirements* means the capital requirement that will be effective at the expiration of all transition periods and phase-ins established by section 5(t) of the Act or by this part 567.

24. Section 567.2 is amended by revising the heading of paragraph (b) and paragraph (b)(2) to read as follows:

§ 567.2 Minimum regulatory capital requirements.

* * * * *

(b) *Transition period for risk-based capital requirement.* * * *

(2) From December 31, 1990 until December 30, 1992, a savings association's minimum risk-based capital requirement for any calendar quarter shall be an amount equal to 90% of the amount required under paragraph (a)(1) of this section.

* * * * *

§ 567.4 [Amended]

25. Section 567.4 is amended in paragraph (a)(1) introductory text by removing the phrase "12 U.S.C. 1464(d)(2)" and adding in lieu thereof the phrase "12 U.S.C. 1464(s)" and in the concluding text of paragraph (a)(1) by removing the phrases "12 U.S.C. 1464(d)(8)" and "12 U.S.C. 1464(d)(2)" and adding in both places the phrase "12 U.S.C. 1818".

26. Section 567.5 is amended by adding new footnote 3 to paragraph (a)(1) introductory text between the words "elements," and "less" to read: "[3] Stock issues where the dividend is reset periodically based on current market conditions and the savings association's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to supplementary capital, regardless of cumulative or noncumulative characteristics."; by adding new footnote 4 to paragraph (a)(1)(ii) after the word "surplus" to read: "[4] Stock issued by subsidiaries that may not be counted by the parent savings association on the Thrift Financial Report, likewise shall not be considered in calculating capital. For example, preferred stock issued by a savings association or a subsidiary that is, in effect, collateralized by assets of the savings association or one of its subsidiaries shall not be included in capital. Similarly, common stock with mandatorily redeemable provisions is not includable in core capital."; by adding a semicolon in place of the comma at the end of paragraph (a)(1)(ii); by adding a semicolon in place of the period at the end of paragraph (a)(1)(iv); by revising paragraphs (a)(2)(v)(A) introductory text and (b)(3)(i); and by revising newly designated footnote 7 in paragraph (b)(4) to read as follows:

§ 567.5 Components of capital.

(a) *Core Capital.* * * *

(2) *Deductions from core capital.* * * *

* * * * *

(v)(A) If a savings association has any investments (both debt and equity) in one or more subsidiaries engaged as of April 12, 1989 and continuing to be engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, core capital in accordance with paragraph (a)(2)(v) of this section. The savings association must first deduct from assets and, thus, core capital the amount by which any investments in such subsidiary(ies) exceed the amount of such investments held by the savings association as of April 12, 1989. Next, the savings association must deduct from assets and, thus, core capital the applicable percentage set forth in paragraph (a)(2)(v)(B) of this section of the lesser of:

* * * * *

(b) *Supplementary Capital.* * * *

(3) *Transition rules for maturing capital instruments.—(i) Maturing capital instruments issued on or before November 7, 1989.* All maturing capital instruments issued on or before November 7, 1989, are includable in supplementary capital to the extent such instruments were includable in capital pursuant to the regulations of the OTS in effect as of that date, including any applicable amortization schedules. With the prior approval of the OTS, a savings association may include maturing capital instruments issued on or before November 7, 1989, in supplementary capital in accordance with the treatment set forth in paragraph (b)(3)(ii) of this section.

* * * * *

[7] The amount of the general valuation loan and lease loss allowances that may be included in capital is based on a percentage of risk-weighted assets. The gross sum of risk-weighted assets used in this calculation includes all risk-weighted assets, with the exception of the assets required to be deducted under § 567.6 in establishing risk-weighted assets—"excess GVA" defined as assets required to be deducted from capital under § 567.5(a)(2). A savings association may deduct excess GVA from the gross sum of risk-weighted assets (*i.e.*, risk-weighted assets including general valuation allowances) in computing the denominator of the risk-based capital standard. Thus, a savings association will exclude the same amount of excess GVA from both the numerator and the denominator of the risk-based capital ratio.

27. Section 567.6 is amended by revising the first sentence of the introductory text of paragraph (a); by adding a semicolon in place of the period at the end of paragraphs (a)(1)(ii)(N) and (O) and by revising paragraphs (a)(1) heading and (a)(1)(ii)(R) and adding paragraph (a)(1)(ii)(S); by revising paragraph (a)(1)(v)(A); by revising the heading for paragraph (a)(1)(vi) and paragraph (a)(1)(vi)(A); by redesignating paragraph (a)(1)(vi)(C) as paragraph (a)(1)(vi)(C)(*1*) and by adding a new paragraph (a)(1)(vi)(C)(*2*); by revising the heading and the introductory text of paragraph (a)(2); by revising the parenthetical at the end of paragraph (a)(2)(i)(C); and by revising paragraphs (a)(2)(iv) heading and (a)(2)(iv) (A) through (C) to read as follows:

§ 567.6 Risk-based capital credit risk weight categories.

(a) *Risk-weighted Assets.* Risk-weighted assets equal assets plus consolidated off-balance sheet items where each asset or item is multiplied by the appropriate risk weight as set forth in this section. * * *

(1) *On-balance sheet assets.* * * *

(ii) *20 percent risk weight (Category 2).* * * *

(R) Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a residual maturity of one year or less;

(S) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the savings association has local currency liabilities in that country.

* * * * *

(v) *200 percent risk weight (Category 5).* (A) All repossessed assets or assets that are more than 90 days past due, *provided,* that 1–4 family residential mortgage loans that are more than 90 days past due are placed in the 100 percent risk weight category;

* * * * *

(vi) *Indirect ownership interests in pools of assets.* (A) Except as provided in paragraph (a)(1)(vi)(C) of this section, assets representing an indirect holding of a pool of assets, *e.g.,* mutual funds, are assigned to risk-weight categories under this section based upon the risk weight that would be assigned to the assets in the portfolio of the pool.

* * * * *

(C) (*1*) * * *

(*2*) The minimum risk weight that may be assigned to an ownership interest described in this paragraph (a)(1)(vi) is 20%.

(2) *Off-balance sheet activities.* Risk weights for off-balance sheet items are determined by a two-step process. First, the face amount of the off-balance sheet item must be multiplied by the appropriate credit conversion factor listed in this section. This calculation translates the face amount of an off-balance sheet exposure into an on-balance sheet credit-equivalent amount. Second, the credit-equivalent amount must be assigned to the appropriate risk weight category depending on the obligor (*i.e.,* the 20 percent risk weight category if the obligor is a domestic depository institution or the 100 percent risk category if the obligor is a private party) and any underlying collateral, *provided* that, the maximum risk weight assigned to the credit-equivalent amount of an interest-rate or exchange-rate contract is 50 percent. Guarantees and other direct credit substitutes by savings associations of the obligations of their service corporations and subsidiaries that qualify as equity investments are assigned a credit-equivalent amount of the entire value of the direct credit substitute. The following are the credit conversion factors and the off-balance sheet items to which they apply:

(i) * * *

(C) * * * (Where associations hold a mortgage-related security or a participation certificate (PC) in a mortgage loan swap with recourse, or a subordinated portion as an on-balance sheet asset, the security, PC, or subordinated portion should not be risk-weighted for purposes of the risk-based capital requirement except where the amount of capital otherwise required against the recourse liability under this paragraph would be less than the amount of capital that would otherwise be required against the security, PC, or subordinated portion. The savings association must hold in capital the greater amount of capital that would be required to be held against either the liability or the security, PC, or subordinated portion.);

* * * * *

(iv) *Zero percent credit conversion factor (Group D).* (A) unused commitments with an original maturity of one year or less;

(B) Unused commitments with an original maturity greater than one year, if they are unconditionally cancelable at any time at the option of the savings association and the savings association has the contractual right to make, and in fact does make, either:

(*1*) A separate credit decision based upon the borrower's current financial condition before each drawing under the lending facility; or

(*2*) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(C) The unused portion of retail credit card lines or other related plans that are unconditionally cancelable by the savings association in accordance with applicable law.

* * * * *

28. Section 567.9 is amended by revising paragraphs (c)(1) and (c)(3)(i) introductory text to read as follows:

§ 567.9 Tangible capital requirement.

* * * * *

(c) *Deductions from tangible capital.* * * *

(1) Any intangible assets (except for purchased mortgage servicing rights, which are includable in assets and, therefore, not deducted from tangible capital in the lesser of the amount specified in § 567.5(a)(2)(iii)(A) of this part or any amount specified by the Federal Deposit Insurance Corporation by regulation pursuant to section 5(t)(4) of the Act).

* * * * *

(3)(i) If a savings association has any investments (both debt and equity) in one or more subsidiary(ies) engaged as of April 12, 1989 and continuing to be engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, tangible capital in accordance with this paragraph (c)(3)(i). The savings association must first deduct from assets and, thus, capital the amount by which any investments in such a subsidiary(ies) exceed the amount of such investments held by the savings association as of April 12, 1989. Next, the savings association must deduct from assets and, thus, tangible capital the applicable percentage set forth in paragraph (c)(3)(ii) of this section of the lesser of:

* * * * *

29. Section 567.10 is amended by revising the heading of paragraph (a); removing and reserving paragraph (a)(1); and by revising the introductory text of paragraph (a)(2) and paragraph (f) to read as follows:

§ 567.10 Consequences of failure to meet capital requirements.

(a) *Capital plans.* (1) [Reserved]

(2) The Director shall require any savings association not in compliance with capital standards to submit a capital plan that:

* * * * *

(f) The Director shall treat as an unsafe and unsound practice any material failure by a savings association to comply with any plan, regulation, written agreement undertaken under this section or order or directive issued to comply with the requirements of this part.

30. Section 567.11 is amended by revising paragraph (a) and the first sentence of paragraph (c) to read as follows:

§ 567.11 Reservation of authority.

(a) *Transactions for purposes of evasion.* The Director or the Regional Director for the region in which a savings association is located may disregard any transaction entered into primarily for the purpose of reducing the minimum required amount of regulatory capital or otherwise evading the requirements of this part.

* * * * *

(c) *Reservation of authority.* Notwithstanding the definitions of core and supplementary capital in § 567.5 of this part, OTS may find that a particular type of purchased intangible asset or capital instrument constitutes or may constitute core or supplementary capital, and may permit one or more savings associations to include all or a portion of such intangible asset or funds obtained through such capital instrument as core or supplementary capital, permanently or on a temporary basis, for the purposes of compliance with this part or for any other purposes. * * *

PART 571—STATEMENTS OF POLICY

31. The authority citation for part 571 is revised to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464.

§ 571.23 [Removed]

32. Section 571.23 is removed and reserved.

Dated: Jan. 31, 1992.

By the Office of Thrift Supervision.

Timothy Ryan,

Director.

[FR Doc. 92-17665 Filed 7-28-92; 8:45 am]

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Internal Revenue Service

26 CFR Parts 1 and 53

[TD 8423]

RIN 1545-AP93

Taxation of Tax-Exempt Organizations' Income From Ordinary and Routine Investments

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final rule.

SUMMARY: This document contains final regulations relating to the taxation of tax-exempt organizations' unrelated business taxable income. The Service published proposed regulations on September 3, 1991 (56 FR 43571), to conform to 1978 statutory amendments regarding securities loans and to clarify that income from certain investments is not subject to unrelated business income tax. After receiving and considering public comments, the Service is finalizing the proposed regulations with modifications.

EFFECTIVE DATE: These amendments are effective for income from notional principal contracts for amounts received after August 30, 1991. See "SUPPLEMENTARY INFORMATION" for further details.

FOR FURTHER INFORMATION CONTACT: Regina L. Oldak, (202) 622-6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Although generally exempt from federal income taxation, an organization described in section 501(a) of the Internal Revenue Code of 1986 must pay tax on its unrelated business taxable income, as defined in section 512. Section 512(a)(1) defines unrelated business taxable income (UBTI) as generally meaning gross income from any unrelated trade or business (as defined in section 513) regularly carried on by the organization, less deductions that are directly connected with that trade or business, computed with the modifications provided in section 512(b).

Section 512(b)(1) provides that "[t]here shall be excluded all dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and annuities, and all deductions directly connected with such income." The legislative history indicates that Congress intended to exclude investment income from UBTI. See S. Rep. No. 81-2375, 81st Cong., 2d Sess. 30 (Aug. 22, 1950); H.R. Rep. No. 81-2319, 81st Cong., 2d Sess. 38 (June 23, 1950); and S. Rep. No. 94-1172, 94th Cong., 2d Sess. 3 (1976).

In response to requests for clarification regarding whether income or expense derived from certain notional principal contracts is UBTI, the Service published a Notice of Proposed Rulemaking (NPRM) on September 3, 1991 (56 FR 43571). The NPRM proposed that the list of exclusions for dividends, interest, and annuities in § 1.512(b)-1(a) be expanded to also exclude from UBTI, to the extent determined by the Commissioner in a revenue ruling, substantially similar income from an exempt organization's ordinary and routine investments in connection with a securities portfolio. The NPRM also proposed that such substantially similar income be treated as gross investment income for purposes of sections 590(e) and 4940(c)(2). The preamble to the proposed regulations included the text of a revenue ruling proposed to be issued under the authority of the regulations. The proposed revenue ruling stated that, for purposes of sections 512(b), 590(e), and 4940(c)(2), income from interest rate swaps and currency swaps was determined by the Commissioner to be substantially similar income from ordinary and routine investments in connection with a securities portfolio.

The NPRM also proposed to add payments with respect to securities loans (as defined in section 512(a)(5)) to the list of exclusions from UBTI in § 1.512(b)-1(a) in order to conform the regulations to the statute, which was amended by Public Law 98-345 (1978). No comments were received regarding this provision.

A public hearing was held on December 6, 1991.

Public comments received by the Service generally welcomed the guidance as an important step to clarify this area of the law, but suggested several modifications. Most of the comments suggested that the exclusion from UBTI should apply to all notional principal contracts, not just interest rate and currency swaps. Several comments requested that the Service expressly exclude from UBTI income from particular types of notional principal contracts, notably equity and commodity swaps. Some comments requested that the exclusions be provided in the regulations, rather than in revenue rulings. Some comments also requested that the regulations (or revenue ruling) define the term notional principal contract.

Discussion of Final Regulations

The final regulations amend the regulations under section 512(b)(1) to conform to and incorporate the 1978 statutory amendment regarding securities loans. In addition, the final regulations respond to public comments by eliminating the need for a revenue ruling and clarifying that section 512(b)(1) generally excludes not only dividends, interest, payments with respect to securities loans, and annuities, but also income from notional principal contracts. The final regulations also exclude other income from an exempt organization's ordinary and routine investments that the Commissioner determines to be substantially similar to dividends, interest, payments with respect to securities loans, annuities, and income from notional principal contracts. The final regulations further respond to public comments by clarifying that for purposes of this regulation, the term notional principal contract includes contracts defined in Treas. Reg. § 1.863-7 or regulations issued under section 446.

The final regulations clarify that the new exclusions being added to § 1.512(b)-1(a) do not apply to exempt organizations that act as brokers or dealers (including organizations that make a market in derivative financial products, as described in Treas. Reg. § 1.954-2T(a)(4)(iii)(B)) and that none of the exclusions in § 1.512(b)-1(a) affects the exclusion from UBTI of certain gains or losses under section 512(b)(5). Thus, the regulations do not affect the treatment of any gain or loss from the extinguishment, assignment, or other disposition of any swap position. Generally, a non-dealer exempt organization's gain or loss from sales or other dispositions of non-inventory property would be excluded from UBTI under section 512(b)(5). The final regulations retain and restate the current regulations' limitations with respect to income from debt-financed property and interest and annuity