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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Parts 1 and 2

Forest Service

36 CFR Part 223

Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990

AGENCY: Office of the Secretary; Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends 7 CFR parts 1 and 2 and 36 CFR part 223 by adding a new subpart M to 7 CFR part 1 establishing rules of practice governing the adjudication of sourcing area applications pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990; by deleting, in 7 CFR part 2, the reference to the Forest Resources Conservation and Shortage Relief Act and adding, in its place, a reference to the rules of practice established by this rule; and by making technical amendments to 36 CFR part 223 to conform it to the rules of practice established by this rule.

The Forest Resources Conservation and Shortage Relief Act of 1990 (Act) prohibits the export of unprocessed Federal timber west of the 100th meridian in the 48 contiguous states and the substitution of such unprocessed Federal timber for unprocessed private timber from the west that is exported. The Act allows a person with an approved sourcing area to export unprocessed private timber originating from outside of the sourcing area while purchasing Federal timber within the sourcing area. The Act states that the Secretary shall approve or disapprove sourcing areas on the record and after an opportunity for a hearing. Therefore, formal adjudication is required under the Administrative Procedure Act. The Act also requires that reviews of sourcing areas be conducted at least every 5 years in accordance with the procedures of the Act. Pursuant to section 556 of the Administrative Procedure Act, adjudications of sourcing area applications and formal reviews of sourcing areas will be subject to the rules of practice adopted by this rulemaking. Informal reviews of sourcing areas will be conducted in accordance with 36 CFR 223.191(e).

EFFECTIVE DATE: February 24, 1994.

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SUPPLEMENTARY INFORMATION: The Forest Resources Conservation and Shortage Relief Act (Act), enacted August 20, 1990, prohibits both the export of unprocessed Federal logs originating west of the 100th meridian in the contiguous 48 states and the substitution of such unprocessed Federal logs for unprocessed private logs originating west of the 100th meridian in the contiguous 48 states that are exported.

The Act exempts persons with approved "sourcing areas" from the prohibition against substitution in certain circumstances. A sourcing area is the area from which an owner/manufacturer of logs obtains logs for his or her mill. To be approved, a sourcing area must be geographically and economically separate from any geographic area where the person harvests private timber for export. A person with an approved "sourcing area" may export unprocessed private logs whose origin is outside of the sourcing area, while continuing to purchase Federal logs within the sourcing area. Private logs originating from within the sourcing area may not be exported.

Section 490(c) of the Act states that the Secretary is to approve or disapprove the application, "on the record and after an opportunity for a hearing" 4 months after submission of a sourcing area application. Section 554 of Title 5, United States Code requires a formal adjudicatory process when a statute requires a determination to be made "on the record and after opportunity for an agency hearing." This rule amends 7 CFR part 1 by adding rules of practice governing sourcing area applications, pursuant to 5 U.S.C. 556. Specific rules governing sourcing area adjudications are necessary because of the short time in which the statute requires decisions to be made (4 months), and the unique procedural posture of sourcing area applications; i.e., sourcing area applications are submitted by a party other than the agency, expect in certain cases, pursuant to a review of a sourcing area.

This rule also amends 7 CFR 2.35 by deleting the words "in sourcing area adjudications under the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*)", and adding, in their place, the words "in adjudication proceedings subject to the 'Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*)' set forth in 7 CFR part 1, subpart M;".

Due to the amendments to 7 CFR parts 1 and 2, adopted by this rule, it is necessary in this rule, to make technical amendments to 36 CFR part 223 to conform it to the rules of practice, established by this rule, which govern the adjudication of sourcing area applications pursuant to the Act. This rule amends the rules governing initial sourcing applicants, published in an interim rule at 55 FR 48572 (Nov. 20, 1990). Specifically to conform the procedures in the interim rule to this rule, for ongoing applications, 36 CFR 223.190 is amended as follows:

1. Section 223.190(g) is revised to state that the application review process will be conducted pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), found at 7 CFR part 1, subpart M.

2. Section 223.190(h) (introductory text) and (h)(1)–(3) are removed.

3. Section 223.190(h)(4) is redesignated as 36 CFR 223.190(h) and is revised to state that a final decision will be issued within four (4) months of receipt of the sourcing area application or initiation date of the formal review of the sourcing area.

4. Section 223.190(h)(5) is redesignated as 36 CFR 223.190(i), and 36 CFR 223.190(h)(5)(i)–(iv) are redesignated as 36 CFR 223.190(i), (1)–(4).

5. Newly redesignated 36 CFR 223.190(i)(1) is amended by deleting the words "approving official" and adding, in their place, the words "the Administrative Law Judge, or, on appeal, the Judicial Officer."

This rule also makes technical amendments to 36 CFR 223.191(e) to conform the sourcing area review procedures to the rules of practice adopted in this rule (36 CFR 223.191 was published in a final rulemaking at 56 FR 65834, December 19, 1991). Specifically, this rule removes from 36 CFR 223.191(e) the words "deciding official" and adds, in their place, the words "the Administrative Law Judge, or, on appeal, the Judicial Officer." This rule also amends the following sentence in paragraph (e), "The deciding official shall, on the record and after opportunity for a hearing, approve or disapprove the sourcing area being reviewed" by adding to the end of the sentence the words "pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*), found at 7 CFR part 1, subpart M;".

Environmental Impact

This rulemaking consists primarily of technical and administrative changes related to the rules of practice governing the adjudication of sourcing area applications pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*). No extraordinary circumstances have been identified that might cause this proposed action to have a significant effect on the human environment. Therefore, this rulemaking is categorically excluded from documentation in an Environmental Impact Statement or an Environmental Assessment (40 CFR 1508.4; Forest Service Handbook 1909.15, Environmental Policy and Procedures, § 31.1b(2), 57 FR 43208, September 18, 1992).

Paperwork Reduction Act

This action contains no new or additional recordkeeping and reporting requirements, and contains no collections of information as defined in the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* and its implementing regulations at 5 CFR part 1320. Therefore, the Paperwork Reduction Act and its implementing regulations do not apply to this rulemaking.

Regulatory Impact

This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Order 12866. Finally, this action is not a rule as defined in Public Law No. 96–354, the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

This rule has been reviewed in accordance with the principles and criteria contained in Executive Order 12630 and it has been determined that the rule does not pose the risk of a taking of constitutionally protected private property.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under this rule: (1) All state and local laws and regulations that are in conflict with this rule or which could impede its full implementation will be preempted;

(2) No retroactive effect will be given to this rule; and

(3) No administrative proceedings are required before parties may file suit in court challenging its provisions.

List of Subjects

7 CFR Part 1

Office of the Secretary of Agriculture, Administrative practice and procedure.

7 CFR Part 2

Delegations of authority (government agencies).

36 CFR Part 223

Exports, Government contracts, National Forests, Reporting requirements, Timber sales.

Therefore, for the reasons set forth in the preamble, parts 1 and 2 of title 7 and part 223 of Title 36 of the Code of Federal Regulations are amended as set forth below.

Title 7

PART 1—ADMINISTRATIVE REGULATIONS

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

Authority: 5 U.S.C. 301, unless otherwise noted.

2. Amend part 1 by adding a new subpart M to read as follows:

Subpart M—Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, et seq.)

Sec.

Subpart M—Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, et seq.)

Authority: 5 U.S.C. 556 and 16 U.S.C. 620, *et seq.*

§ 1.410 Meaning of words.

As used in these procedures, words in the singular form shall be deemed to import the plural, and vice versa, as the circumstance may require.

§ 1.411 Definitions.

As used in these procedures, the terms as defined in the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620, *et seq.* (Act) and in the regulations issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in these procedures:

(a) *Applicant* or *Sourcing area applicant* means a person who submits a sourcing area application pursuant to these rules, or a person who sourcing area is subject to formal review pursuant to 36 CFR 223.191(e).

(b) *Decision" means:*

(1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 554, 556, 557, and 16 U.S.C. 620, *et seq.* and 36 CFR 223.190 and 223.191(e), which includes the Judge's findings and conclusions and the reasons or basis therefore on all material issues of fact, law or discretion, orders and rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial officer upon appeal of the Judge's decision.

(c) *Determination* is synonymous with *decision.*

(d) *Hearing* means that part of the proceeding which may be requested by a party of record, and which involves the submission of additional evidence before the Administrative Law Judge for the record in the proceeding.

(e) *Hearing Clerk* means the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250.

(f) *Judge* means any Administrative Law Judge Appointed pursuant to 5 U.S.C. 3105 and assigned to the proceeding involved.

(g) *Judicial Officer* means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c–459g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1988 ed., appendix, p. 1280), to perform the function involved (7 CFR 235(a)), or the Secretary of Agriculture, if the authority so delegated is exercised by the Secretary.

(h) *Party of record* or *Party* is a party to the proceeding to determine approval or disapproval of a sourcing area application, including the proceeding for formal review of a sourcing area. The sourcing area applicant and persons who submit written comments on the sourcing area application at issue during the 30 calendar day comment period, including the Regional Forester, are the parties of record. For purposes of a formal review of a sourcing area, the holder of the sourcing area that is the subject of the review and persons who submit written comments on the sourcing area application at issue during the 30 calendar day comment period after institution of the formal review, including the Regional Forester, are the parties of record.

(i) *Sourcing Area Application* means the application by which a person applies for a sourcing area or the application by which a sourcing area holder applies for a formal review of a sourcing area.

§ 1.412 Institution of proceedings.

(a) *Sourcing area applications.* The proceeding for determining sourcing areas shall be instituted by receipt of a sourcing area application by the Office of Administrative Law Judges, pursuant to 36 CFR 223.190.

(b) *Review of sourcing areas.* Informal review of a sourcing area precedes institution of a formal review as follows:

(1) *Request by Sourcing area holder.* A sourcing area holder who wishes to begin a review of a sourcing area shall send a written request for a review to the Regional Forester of the region in which the manufacturing facility being sourced is located. The request shall state the reason for the request.

(i) *Informal review.* The Regional Forester shall begin an informal review, pursuant to 36 CFR 223.191(e), based on the written request. If no agreement is reached in the informal review process, the Regional Forester of the region in which the manufacturing facility being sourced is located shall transmit to the Office of Administrative Law Judges any submissions received during the informal review process, within 5 working days of the meeting convened during the informal review (36 CFR 223.191)e)). Agreement is reached when all persons attending the meeting convened by the Regional Forester to resolve differences as to the proper sourcing area, including the Regional Forester, sign the document describing the sourcing area.

(ii) *Formal review.* Institution by a sourcing area holder of a formal review of the sourcing area occurs if the informal review process does not result in agreement among the parties, and the sourcing area holder submits a sourcing area application to the Office of the Administrative Law Judges, pursuant to 36 CFR 223.190, within 10 working days after the meeting convened by the Regional Forester as part of the informal process.

(2) *Initiation of Review By Agency.* If the Forest Service wishes to begin a review of a sourcing area, the Regional Forester of the region in which the manufacturing facility being sourced is located shall begin an informal review, pursuant to 36 CFR 223.191(e). If no agreement is reached in the informal review process, the Regional Forester of the region in which the manufacturing facility being sourced is located shall transmit to the Office of Administrative Law Judges any submissions received during the informal review process, within 5 working days of the meeting convened during the informal review (36 CFR 223.191(e)). Agreement is reached when all persons attending the meeting convened by the Regional Forester to resolve differences as to the proper sourcing area, including the Regional Forester, sign the document describing the sourcing area. Institution by the Forest Service of a formal review of a sourcing area occurs when the Office of Administrative Law Judges receives the papers and documents submitted during the informal review process.

§ 1.413 Submission of a sourcing area application.

A sourcing area applicant shall send the application to the Office of Administrative Law Judges and shall, simultaneously, send a copy of the sourcing area application to the Forest Service Regional Forester of the region in which the manufacturing facility being sourced is located. Where the sourcing area application will cover purchases from more than one agency, application is to be made to the agency from which the applicant expects to purchase the preponderance of its Federal timber. The sourcing area applicant must also send a complete copy of the application to each agency concerned. The lead agency shall make the decision in consultation with, and upon co-signature of, the other agency(ies) concerned. Sourcing area applications must be signed by the persons making the request, or in the case of a corporation, by its chief executive officer, and must be notarized. The application shall be on company letterhead.

§ 1.414 Docket number.

Each proceeding, following its institution, shall be assigned a docket number by the Hearing Clerk, and thereafter the proceeding shall be referred to by such number. The Hearing Clerk shall notify the sourcing area applicant and the Regional Forester to whom the applicant submitted a copy of the application of the docket number and the name of the Judge to whom the case has been assigned. In a formal review of a sourcing area instituted by the Forest Service, the Hearing Clerk shall inform the sourcing area holder whose sourcing area is subject to the review and the Regional Forester who submitted the comments instituting the formal review of the docket number and the name of the Judge to whom the case has been assigned.

§ 1.415 Notification of proceedings.

The Regional Forester of the region in which the manufacturing facility being sourced is located shall notify prospective parties of the sourcing area application and/or the formal review of a sourcing area after receipt of the docket number and the name of the Judge to whom the proceeding has been assigned, pursuant to § 1.414 of these rules. Notification will consist of publication of a notice in newspapers of general circulation in the area included in the sourcing area application. The Regional Forester shall promptly notify the Hearing Clerk of the date of the publication and the notice. Additional notification will be made through agency mailing lists. Notification shall include the docket number, the name of the Judge to whom the case has been assigned and the mailing address of the Judge. In the case of a sourcing area review, notification will also state the reason for the review.

§ 1.416 Comment period.

Written comments on a sourcing area application or on a formal review of a sourcing area shall include the docket number and may be submitted to the Judge for 30 calendar days following publication of the notice. Persons submitting comments shall send a copy of the comments to the Regional Forester of the region in which the manufacturing facility being sourced is located. All comments must be received by the Judge and by the Regional Forester by the 30th day of the comment period.

§ 1.417 Review period.

(a) *Review of comments.* The sourcing area applicant, the sourcing area holder whose sourcing area is the subject of a formal review and other parties who submitted written comments will be allowed 10 working days from the close of the comment period to review the written comments at the Regional Forester's office during regular business hours.

(b) *Recommendation to Judge to approve or disapprove a sourcing area application.* During the 10 working day review period, parties who have submitted written comments on an application or on a formal review of a sourcing area may submit a written recommendation to the Judge, including an analysis of the facts and law as to why the Judge should approve or disapprove that application. A sourcing area applicant whose sourcing area application is the subject of the proceeding, and a sourcing area holder whose sourcing area is the subject of a formal review, may also submit a written recommendation to the Judge. The recommendation must be postmarked no later than the 10th working day of the review period.

(c) *Request for a hearing.* The sourcing area applicant, the sourcing area holder whose sourcing area is the subject of a formal review and persons who submitted written comments, or the attorney of record for a party in the proceeding, may review the comments and request a hearing within 10 working days after the comment period, pursuant to 36 CFR 233.190(h)(2). The request must be postmarked no later than the 10th working day of the review period. An attorney may file an appearance of record prior to the scheduled hearing. The request for a hearing shall be filed with the Judge. The hearing is for the purpose of supplementing the written record submitted prior to the hearing. The written record submitted prior to the hearing consists of papers and documents submitted during the 30 calendar day comment period, the 10 working day review period, and any motions submitted before the hearing. For purposes of a formal review of a sourcing area, the written record also consists of the papers and documents submitted during the informal review.

(1) *Contents of the notice of hearing.* The Judge shall issue a notice of hearing regarding a particular sourcing area application or regarding formal review of a sourcing area application or regarding formal review of a sourcing area to all parties of record for that application or formal review. The notice of hearing shall contain a reference to the authority under which the sourcing area is proposed or formally reviewed; shall define the scope of the hearing; shall contain a reference to the sourcing area that is the subject of the hearing; and shall state the date, time and place of such hearing; and shall state the date, time and place of such hearing; which shall be set with due regard for the necessity and convenience of the parties of record or their representatives. The Judge shall schedule a hearing no later than 21 calendar days after the 10 working day period for reviewing written comments ends. The Judge may consolidate requests for a hearing regarding the same application.

(2) *Giving notice of hearing.* The notice of hearing shall be served upon the parties of record for the sourcing area application at issue by the Hearing Clerk.

§ 1.418 Procedure upon no request for hearing.

If no hearing is requested by a party of record, the Judge shall issue an initial decision based on the written record and without further procedure or hearing. If no hearing is requested, the written record consists of papers and documents submitted during the 30-day comment period, the 10-day review period, and includes motions submitted before the Judge issues an initial decision. For purposes of a formal review of a sourcing area, the written record also consists of the papers and documents submitted during the informal review. Copies of the decision shall be served by the Hearing Clerk upon each of the parties of record.

§ 1.419 Amendment of a sourcing area application.

The sourcing area applicant may move to amend the sourcing area application with clarifying and technical amendments at any time prior to the Judge's initial determination if there is no hearing, or prior to the close of the hearing if there is a hearing.

§ 1.420 Consent recommendation.

Any time before the Judge files the decision, the parties of record may enter a consent recommendation. Such consent recommendation shall be filed with the Hearing Clerk, signed by the parties with appropriate space for signature by the Judge. The consent recommendation shall contain an admission of the jurisdictional facts, the factual and legal basis for the recommended sourcing area, the consent to the issuance of the recommended decision as the final decision of the agency without further procedure and such other admissions or statements as may be recommended by the parties. The Judge shall review the recommendation to determine whether such recommendation conforms with the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), 36 CFR 223.190, 36 CFR 223.191(e) and these procedures. If the recommendation conforms to the aforementioned Act, regulations, and procedures, the Judge may enter such decision without further procedure, unless an error is apparent on the face of the document. If the Judge enters the decision, such decision shall have the same force and effect as a decision issued after full hearing and shall become final upon issuance to become effective in accordance with the terms of the decision.

§ 1.421 Prehearing conferences and procedures.

(a) *Purpose and Scope.* (1) Upon motion of a party of record or upon the Judge's own motion, the Judge may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Judge finds that the proceeding would be expedited by a prehearing conference. Reasonable notice of the time and place of the conference shall be given. The Judge may order each of the parties to furnish at or subsequent to the conference any or all of the following:

(i) An outline of a party's position;

(ii) The facts upon which the party will rely;

(iii) The legal theories upon which the party will rely;

(iv) Copies of or a list of documents which the party anticipates introducing at the hearing; and

(v) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

(2) The Judge shall not order any of the foregoing procedures that a party can show is inappropriate or unwarranted under the circumstances of the particular determination.

(3) At the conference, the following matters shall be considered:

(i) The simplification of issues;

(ii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(iii) The limitation of the number of expert or other witnesses;

(iv) Negotiation, compromise, or settlement of issues;

(v) The exchange of copies of proposed exhibits;

(vi) The identification of documents or matters of which official notice may be requested;

(vii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(viii) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A prehearing conference will not be stenographically reported unless so directed by the Judge.

(c) *Action in lieu of personal attendance at a conference.* In the event the Judge concludes that personal attendance by the Judge and the parties or counsel at a prehearing conference is unwarranted or impracticable, but determines that a conference would expedite the proceeding, the Judge may conduct such conference by telephone or correspondence.

(d) *Order.* Actions taken as a result of a conference shall be reduced to an appropriate written order, unless the Judge concludes that a stenographic report shall suffice, or if the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

§ 1.422 Conduct of the Hearing.

(a) *Time and place.* The hearing shall be held at the time and place fixed in the notice of hearing. If any change in the time or place of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be served upon the parties, unless it is made during the course of an oral script, or actual notice is given to the parties.

(b) *Appearances.* The parties may appear in person or by attorney of record in the proceeding. Any party who desires to be heard in person shall, before proceeding to testify, state his name, address, and occupation. If any such person is appearing through counsel, such person or such counsel shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names, addresses, and occupations of such person and such counsel. Any such person or such counsel shall give such other information respecting his appearance as the Judge may request. Any person who appears as counsel must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(c) *Failure to appear.* A party of record who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision.

(d) *Order of proceeding.* The Judge shall determine the order in which the parties shall proceed.

(e) *Evidence*—(1) *In general.* (i) The testimony of witnesses at a hearing shall be on oath or affirmation and shall be subject to cross-examination. Cross-examination shall be permitted to the extent required for a full and true disclosure of the facts. The Judge may require that testimony on one issue raised by numerous parties be heard at one time.

(ii) Upon a finding of good cause, the Judge may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) After a witness has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the party who called the witness, which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(iv) Evidence which is immaterial, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(2) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted in the manner provided in and subject to the provisions of § 1.228 of these procedures.

(4) *Exhibits.* Unless the Judge finds that the furnishing of copies is impracticable, two copies of each exhibit shall be filed with the Judge. The party submitting the exhibit shall serve on every other party of record a copy of the exhibit, pursuant to § 1.427(c) of these procedures. A true copy of an exhibit may be substituted for the original.

(5) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such record or document shall be evidenced by an official publication thereof or a copy certified by a person having legal authority to make such certification.

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noted by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided,* That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

(7) *Offer of proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record.

(f) *Transcript.* Hearings shall be recorded and transcribed verbatim. Transcripts thereof shall be made available to any person, at actual cost of duplication (5 U.S.C. App. 2, section 11).

§ 1.423 Post-hearing procedure.

(a) *Corrections to transcript.* (1) Within the period of time fixed by the Judge, any party may file a motion proposing corrections to the transcript.

(2) Unless a party files such motion in the manner prescribed, the transcript shall be presumed, except for obvious typographical errors, to be complete.

(3) As soon as practicable after the close of the hearing and after consideration of any timely objections filed as to the transcript, the Judge shall issue an order making any corrections to the transcript which the Judge finds are warranted, which corrections shall be entered onto the original transcript by the Hearing Clerk (without obscuring the origianl text).

(b) *Proposed findings of fact, conclusions, order, and brief.* Prior to the close of the hearing, each party may submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.

(c) *Judge's decision.* (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within 10 calendar days after the close of the hearing, or within 10 calendar days after submission of the record, if no hearing is requested.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript of the record, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in § 1.427.

(4) The Judge's decision shall become effective without further proceedings 21 calendar days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 21 calendar days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.426; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

(5) The Judicial Officer shall issue a decision within 10 calendar days of the receipt of the response to the appeal.

§ 1.424 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties except motions and requests made on the record during the oral hearing.

(b) *Motions entertained.* No dispositive motions, including motions to dismiss on the pleadings and motions for summary judgment, shall be entertained unless specifically mentioned herein or allowed in the discretion of the Judge.

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefore.

(d) *Response to motions and requests.* Within 5 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response.

§ 1.425 Judges.

(a) *Assignment.* No Judge shall be assigned to serve in any proceeding who:

(1) Has any pecuniary interest in any matter or business involved in the proceeding;

(2) Is related within the third degree by blood or marriage to any party to the proceeding; or

(3) Has any conflict of interest which might impair the Judge's objectivity in the proceeding.

(b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

(2) A Judge shall withdraw from any proceeding for any reason deemed by the Judge to be disqualifying.

(c) *Powers.* Subject to review as provided elsewhere in this part, the Judge, in any assigned proceeding shall have power to:

(1) Rule upon motions and requests;

(2) Set the time and place of a pre-hearing conference and the hearing, adjourn the hearing from time to time, and change the time and place of hearing;

(3) Administer oaths and affirmations;

(4) Request the presence of and examine witnesses and receive relevant evidence at the hearing;

(5) Take or order the taking of depositions as authorized under these rules;

(6) Admit or exclude evidence;

(7) Hear oral argument on facts or law,

(8) Do all acts and take all measures necessary for the maintenance of order, including the exclusion of contumacious counsel or other persons;

(9) Request additional information from any party to aid in the Judge's determination; and

(10) Take all other actions authorized under these procedures.

(d) *Who may act in the absence of the Judge.* In case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge.

§ 1.426 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 10 calendar days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.422(e)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other rulings made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition. A party filing a petition of appeal to the Judicial Officer, and any brief in support thereof, shall serve the other parties to the proceeding with a copy of the petition and supporting brief. The copies of the petition and supporting brief shall be served on the parties to the proceeding with a copy of the petition and supporting brief. The copies of the petition and supporting brief shall be served on the parties to the proceeding on the same day as the petition and supporting brief are filed with the Judicial Officer.

(b) *Response to appeal petition.* Within 10 calendar days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised. A party filing a response to a petition of appeal to the Judicial Officer shall serve the other parties to the proceeding with a copy of the response. The copies of the response shall be served on the parties to the proceeding on the same day as the response is filed with the Judicial Officer.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: The pleadings; motions and requests filed and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a prehearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Decision of the Judicial Officer on appeal.* The Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal within 4 months after the institution of the proceeding, pursuant to 16 U.S.C. 620b(c)(3). If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by a party as final for purposes of judicial review.

§ 1.427 Filing; identification of parties of record; service; and computation of time.

(a) *Filing; number of copies.* Except as otherwise provided in this section, all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be filed in duplicate. Any document or paper required or authorized under the rules in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the Judge.

(b) parties of record shall receive a list from the Hearing Clerk of the names and addresses of all parties of record immediately after the close of the comment period.

(c) *Service; proof of service.* (1) Each party of record is responsible for serving on every other party and to the Judge all papers and documents submitted after the comment period. Service shall be made either:

(i) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or

(ii) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or

(iii) by registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney or agent of record, at the last known residence or principal office or place of business of such person: *Provided,* That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail; or

(iv) by mailing the document or paper by regular mail.

(2) Proof of service hereunder shall be made by the certificate of the person who actually made the service: *Provided,* that if the service is made by mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by the return post-office receipt, in the case of registered or certified mail, and if that service is made by regular mail, as outlined in paragraphs (b)(3) and (b)(4) of this section, proof of service shall be made by the certificate of the person who mailed the matter by regular mail. The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding. The Judge and the Hearing Clerk shall follow the procedures outlined in (c) for service of papers or documents signed by the Judge and/or the Hearing Clerk.

(d) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

(e) *Computations of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper except as provided in these rules; *Provided,* that, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

§ 1.428 Depositions.

(a) *Motion for taking deposition.* Upon the motion of a party to the proceeding, the Judge may, at any time after the filing of the submission, order the taking of testimony by deposition. The Motion shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent;

(2) The name and address of the person (referred to hereafter in this section as the "officer") qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made;

(3) The proposed time and place of the examination; and

(4) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of the hearing, for uses as provided in paragraph (g) of this section.

(b) *Judge's order for taking deposition.* (1) If the Judge finds that testimony may not be otherwise available at the hearing, the taking of the deposition may be ordered. The order shall be served upon the parties, and shall state:

(i) The time and place of the examination;

(ii) The name of the officer before whom the examination is to be made; and

(iii) The name of the deponent.

(2) The officer and the time and place need not be the same as those suggested in the motion.

(c) *Qualifications of officer.* The deposition shall be made before the Judge or before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(d) *Procedure on examinations.* (1) The deponent shall be subject to cross-examination. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. The questions propounded, together with all objections made (but not including argument or debate), shall be recorded verbatim. In lieu of oral examination, parties may transmit written questions to the officer prior to the examination and the officer shall propound such questions to the deponent.

(2) The applicant shall arrange for the examination of the witness either by oral examination, or by written questions upon agreement of the parties or as directed by the Judge. If the examination is conducted by means of written questions, copies of the questions shall be served upon the other party to the proceeding and filed with the officer and the other party may serve cross questions and file them with the officer at any time prior to the time of the examination.

(e) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties in the proceeding, in which case there should be another copy for each additional party), in an envelope and mail the same by registered or certified mail to the Hearing Clerk.

(f) *Corrections to the transcript.* (1) At any time prior to the hearing any party may file a motion proposing corrections to the transcript of the deposition.

(2) Unless a party files such a motion in the manner prescribed, the transcript shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript of the testimony given in the deposition proceeding and to contain an accurate description or reference to all exhibits in connection therewith, and shall be deemed to be certified correct without further procedure.

(3) At any time prior to use of the deposition in accordance with paragraph (g) of this section and after consideration of any objections filed thereto, the Judge may issue an order making any corrections in the transcript which the Judge finds are warranted, which corrections shall be entered onto the original transcript by the Hearing Clerk (without obscuring the original text).

(g) *Use of deposition.* A deposition ordered and taken in accordance with the provisions of this section may be used in a proceeding under these rules if the Judge finds that the evidence is otherwise admissible and that the witness is dead; that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or that such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any thereof in evidence. If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction of any other part which ought in fairness to be considered with the part introduced and any party may introduce any other parts.

§ 1.429 Ex parte communications.

(a) At no stage of the proceeding between its institution and issuance of the final decision shall an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding discuss ex parte the merits of the proceeding with any person having an interest in the proceeding, or with any representative of such person: *Provided,* That, procedural matters and status reports shall not be included within this limitation; and *Provided further,* That an employee of the Department who is or may be involved in the decisional process of the proceeding may discuss the merits of the proceeding if all parties of record have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(b) No interested person shall make or knowingly cause to be made to the Judge an ex parte communication relevant to the merits of the proceeding.

(c) If the Judge reviews an ex parte communication in violation of this section, the one who receives the communication shall place in the public record of the proceeding:

(1) All such written communication;

(2) Memoranda stating the substance of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses thereto.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Judge may, to the extent consistent with the interests of justice and the policy of the underlying statute, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(e) To the extent consistent with the interests of justice and the policy of the underlying statute, a violation of this section shall be sufficient grounds for a decision adverse to the party who knowingly commits a violation of this section or who knowingly causes such a violation to occur.

(f) For purposes of this section "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or the proceeding.

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

3. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301 and Reorganization Plan No. 2 of 1953.

Subpart D—Delegation of Authority to Other General Officers and Agency Heads

§ 2.35 [Amended]

4. Amended § 2.35 by removing in paragraph (a) the words "in sourcing area adjudications under the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*);", and adding, in their place, the words "in adjudication proceedings subject to the 'Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*)' set forth in 7 CFR part 1, subpart M;".

Title 36

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER

5. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, 104 Stat. 714–726, 16 U.S.C. 620–620h, unless otherwise noted.

Subpart F—Interim Rules to Implement the Forest Resources Conservation and Shortage Relief Act 1990

6. Amend § 223.190 as follows:

a. Remove paragraph (h) introductory text, and (h)(1) through (3);

b. Redesignate paragraph (h)(4) as paragraph (h) and redesignate paragraphs (h)(5) (i) through (iv) as paragraphs (i) (1) through (4);

c. In newly redesignated paragraph (i)(1), remove the words "approving official", and add, in their place, the words, "the Administrative Law Judge, or, on appeal, the Judicial Officer"; and

d. Revise paragraph (g) and newly designated paragraph (h) to read as follows:

§ 223.190 Sourcing area procedures.

* * * * *

(g) The sourcing area application review process will be conducted pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et. seq.*), found at 7 CFR part 1, subpart M.

(h) A final decision on a sourcing area application or a formal sourcing area review will be issued within four (4) months of the receipt of the application or initiation of the review.

* * * * *

7. Amend § 223.191 by removing the words "deciding official's" in the second sentence of paragraph (e)(1) and adding, in their place, the words, "the Administrative Law Judge, or, on appeal, the Judicial Officer", and by revising the last sentence in paragraph (e)(1) to read as follows:

§ 223.191 Sourcing area disapproval and review procedures.

* * * * *

(e) * * *

(1) * * * The deciding official shall on the record and after opportunity for a hearing, approve or disapprove the sourcing area being reviewed pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*), found at 7 CFR part 1, subpart M.

* * * * *

Dated: February 11, 1994.

Mike Espy,

Secretary.

[FR Doc. 94-3884 Filed 2-23-94; 8:45 am]

BILLING CODE 3410-11-M

FEDERAL RESERVE SYSTEM

12 CFR Part 215

[Regulation O; Docket Nos. R-0800 and R-0809]

Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks; Loans to Holding Companies and Affiliates

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is revising Regulation O to permit the aggregate limit on lending to insiders by eligible, adequately capitalized small banks to be increased from 100 percent of unimpaired capital and surplus to 200. The Board also is revising Regulation O to permit banks to follow alternative recordkeeping procedures on loans to insiders of affiliates, to narrow the definition of "extension of credit," and to adopt certain exceptions to the general restrictions on lending to insiders and the special restrictions on lending to executive officers. Other minor revisions clarifying certain exemptions and conforming certain provisions to the enabling statutes are included as well.

EFFECTIVE DATE: Effective February 18, 1994.

FOR FURTHER INFORMATION CONTACT: Gregory Baer, Senior Attorney (202/452-3236), Gordon Miller, Attorney (202/452-2534), or Stephen Van Meter, Attorney (202/452-3554), Legal Division; Stephen M. Lovette, Manager of Policy Implementation (202/452-3469), or Mark Benton, Senior Financial Analyst (202/452-5205), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunications Device for the Deaf (TDD), Dorothea Thompson (202/452-3544), Board of Governors of the Federal Reserve System, 20th & C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Background

The Board is making permanent, with certain additional qualifications, its interim rule permitting small, adequately capitalized banks to extend credit to insiders up to 200 percent of unimpaired capital and surplus, in circumstances where such lending is necessary to serve local credit needs or to attract directors. The Board also is adopting amendments to Regulation O (12 CFR part 215) designed to increase the ability of banks to make extensions of credit that pose minimal risk of loss, to eliminate recordkeeping requirements that impose a paperwork burden but do not significantly aid compliance with the regulation, and to remove certain transactions from the regulation's coverage consistent with bank safety and soundness. The above amendments are expected to increase the availability of credit, particularly in communities served by small banks, and to reduce the cost of compliance with the regulation.

In view of the extensive changes made to Regulation O as a result of this rulemaking, the Board is restating subpart A of Regulation O as amended, rather than separately describing each amendment.

The Board is making the rule effective immediately in order to prevent a lapse in the 200 percent lending limit available to eligible banks under the interim rule for loans to insiders, and to make all other provisions effective at the same time.

II. The 200 Percent Aggregate Lending Limit

Section 22(h) of the Federal Reserve Act (12 U.S.C. 375b) restricts the amounts and terms of extensions of credit from a bank to executive officers, directors, and principal shareholders of the bank and its holding company affiliates and to any related interest of those persons (insiders). Section 306 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) [1] amended section 22(h) to impose an aggregate limit on the amount a bank may lend to its insiders as a class. See 12 U.S.C. 375b(5). In general, the limit is equal to 100 percent of the bank's unimpaired capital and unimpaired surplus. The Board is authorized, however, to make exceptions to the general limit for banks with deposits of less than $100 million "if the Board determines that the exceptions are important to avoid constricting the availability of credit in small communities or to attract directors of such banks." 12 U.S.C. 375b(5)(C). The higher limit may not exceed 200 percent of the bank's unimpaired capital and unimpaired surplus. *Id.*

Effective May 18, 1992, the Board amended Regulation O, which implements section 22(h), to incorporate the aggregate lending limit added by FDICIA. The general limit on lending to insiders and their related interests—100 percent of the bank's unimpaired capital and unimpaired surplus—was adopted. The Board also decided as an interim measure to permit banks with deposits under $100 million to adopt a higher limit, not to exceed 200 percent of the bank's unimpaired capital and unimpaired surplus, for a period of one year to expire May 18, 1993. The interim period was intended to allow the Board to consult with the other federal banking agencies and collect data on the lending practices of banks in order to analyze the effect of the aggregate lending limit on the availability of credit and service of directors. See 57 FR 22417, 22420, May 28, 1992.

The Board subsequently extended the interim rule for six months, through November 18, 1993, in order to obtain public comments on whether the

[1] Pubic Law 102-242, Section 306, 105 Stat. 2236 (1991).

interim rule should be made permanent, modified, or permitted to expire. See 58 FR 28492, May 14, 1993. The Board thereafter extended the interim rule an additional three months, through February 18, 1994, in order to review the written comments, call reports of small banks, and relevant information from other governmental agencies. See 58 FR 61803, November 23, 1993.

The interim rule established requirements that a small bank had to meet in order to adopt a higher aggregate lending limit. Under that rule, the board of directors of the bank had to determine by resolution that a higher aggregate lending limit was consistent with prudent, safe, and sound banking practices in light of the bank's experience in lending to its insiders, and that a higher limit was necessary to attract or retain directors or to prevent restricting the availability of credit in small communities. The resolution had to set forth the facts and reasoning that supported this determination, including the amount of the bank's aggregate lending to insiders, expressed as a percentage of unimpaired capital and unimpaired surplus, as of the date of the resolution. The bank also was required to submit its resolution to the appropriate federal banking agency, with a copy to the Board. Finally, the bank had to meet or exceed all applicable capital requirements. See 12 CFR 215.4(d)(2).

In response to the notice of the extension of the interim rule, the Board received 147 written comments, with 144 respondents in favor of making the 200 percent limit permanent. Small banks subject to the rule submitted the large majority of comments. Other commenters included numerous state and national banking trade associations, several state banking superintendents and Federal Reserve Banks, individual bank directors, bank holding companies, and law firms.

Adverse comment focused on the relatively low level of use of the interim provision. Two of the three adverse commenters argued that a higher aggregate lending limit was not important to credit or director availability because very few banks had used the interim rule. One state banking commissioner noted that of the 88 small banks it supervised, only one had aggregate insider loans in excess of 60 percent of unimpaired capital and unimpaired surplus as of March 31, 1993.

Call report data reflected a similar low level of aggregate insider lending. As of September 30, 1993, of a total population of 7,435 banks with deposits of less than $100 million, only 17 reported loans to insiders in an amount greater than 100 percent of capital. A total of 131 banks reported insider loans greater than 60 percent of capital. Only 54 banks have notified the Board pursuant to the interim rule that they have adopted a higher aggregate lending limit.

In support of the proposed rule, sixty-two commenters stated that a higher aggregate lending limit was important in order that small banks not be forced to choose between refusing credit to qualified insiders and asking insiders to resign as directors. Several banks observed that this was a particular hardship because qualified directors typically are active businesspersons whose businesses have substantial yet healthy credit requirements.

Fifteen commenters observed that the aggregate lending limit was a particular hardship in small communities and rural markets because in those settings small banks were dependent on insiders as a loan source, insiders had fewer alternative credit sources, and insiders tended to be closely identified with their banks, making it difficult for them to seek credit from a competitor.

In order to demonstrate that the higher limit was being used and would have important benefits if made permanent, the Independent Bankers Association of America (IBAA) presented in its comment a survey of 8,057 small banks. Of 1,060 banks that responded to the survey, 152 reported that the general aggregate lending limit had prevented them from making a loan to an insider; 95 respondents reported that the aggregate lending limit had prevented them from naming an individual as a director; and 53 respondents reported that they had accepted a director resignation attributable to the aggregate lending limit.

Additional commenters presented a variety of reasons for the low level of use of the interim 200 percent limit: concern that the interim rule would be eliminated, thereby forcing banks to retract credit extended in reliance on it; historically low lending levels; loan participations as an alternative to approving a higher limit; and deferral of consideration of the issue by small banks whose insider loans had not matured since adoption of the interim rule. Some commenters also observed that the interim rule imposed detailed requirements and that some banks may have feared attracting additional regulatory scrutiny by adopting the interim rule.

After the close of the comment period, the General Accounting Office (GAO) provided to the Board a draft report on bank insider activities. The GAO reviewed banks that failed during 1990 and 1991 in order to determine whether insider practices contributed to the banks' failures. (The GAO did not evaluate any existing or proposed regulation in this area.) The GAO found that insider problems (which the GAO defined very broadly) were prevalent at failed banks, that banks with less than $100 million of assets were more likely than larger banks to be cited for insider problems, and that the most frequently cited violations were loans to insiders made in excess of lending limits and on preferential terms not available to the general public.

However, the GAO report did not establish a causal link between insider problems and bank failures. Rather, the GAO appeared to conclude that insider problems, as broadly defined by the GAO, were correlated with poor internal controls and underwriting practices. The GAO was not able to measure the actual level of insider lending at failed or troubled banks, and therefore was not able to address specifically the relationship of the actual level of insider lending to bank failures. The major GAO recommendations were for increased monitoring of insider lending and more effective follow-up on violations.

The Board has concluded that the concerns raised in the GAO report do not justify preventing qualified banks from utilizing a higher aggregate lending limit. If the higher limit should present safety and soundness problems at an institution, then the appropriate banking supervisor retains general authority to require a reduction in the level of insider loans. If problems should occur more generally, the Board retains authority to eliminate or reduce the exemption.

Although the 100 percent aggregate lending limit does not appear to be currently creating a widespread problem with credit or director availability, the Board has concluded that it does appear to pose important problems for banks in certain communities. Given the available data and the comments, the Board believes that the 100 percent limit is restricting the availability of credit and the recruitment of directors in communities where the proper certification can be made. In such circumstances, the Board believes that an eligible small bank should be permitted to establish a higher lending limit up to 200 percent of unimpaired capital and unimpaired surplus. Each eligible bank's board of directors will still be required to certify that the higher limit is necessary to avoid restricting credit or to assist in attracting directors and is consistent with prudent, safe, and sound banking practices.

The Board emphasizes that, as was the case prior to FDICIA, borrowing by insiders will continue to be subject to scrutiny during the examination process, including an evaluation of whether such borrowing represents an inappropriate concentration of loans.

In the final rule, the Board has adopted three modifications to the proposed rule. First, the Board has provided that to qualify for the higher lending limit, a bank must be in satisfactory overall condition as determined in the most recent report of examination of the bank, as well as being adequately capitalized, as was already required in the interim rule. Second, a provision has been added clarifying that a bank operating above the 100 percent limit that subsequently becomes ineligible for the higher limit may retain its existing insider loans but may not extend credit that would maintain aggregate insider lending in excess of 100 percent of unimpaired capital and surplus. Third, banks are not be required to file the required resolutions with their primary regulator or the Board, as was required by the interim rule. The resolutions are to be made available for inspection during the examination process.

III. Recordkeeping Procedures

Section 215.8 of Regulation O currently requires that each bank maintain records necessary for compliance with the insider lending restrictions of Regulation O. Specifically, banks are required to maintain records (1) identifying all directors, officers, and principal shareholders of the bank and its affiliates and all related interests of those persons (collectively, "insiders"), and (2) specifying the amounts and terms of all credit extended to these insiders. Section 215.8 further requires each bank to request on an annual basis that its insiders and insiders of its affiliates identify their related interests. The list of insiders is then used by the bank to identify all existing or proposed extensions of credit covered by Regulation O, to monitor the amount thereof subject to the individual and aggregate lending limits, and to ensure that all appropriate approval procedures are followed.

Since adoption of the initial recordkeeping requirement, the annual survey has grown in size and complexity. Bank holding companies have become increasingly large and diversified, and commercial organizations have acquired credit card banks and limited purpose banks. Thus, for example, a small, grandfathered bank owned by a large diversified holding company may have hundreds of affiliates with thousands of officers and directors. Although the bank may have no contact with these officers and directors and companies controlled by them, it currently is required to collect information on all these parties. In another example, a CEBA credit card bank is prevented by law from making loans to anyone but individuals,[2] and is thus effectively prohibited from lending to insiders' related interests, but the current rule nonetheless requires the bank to conduct an annual survey of related interests.

On September 9, 1993, the Board published notice of proposed rulemaking and requested comment concerning alternative recordkeeping procedures that banks may follow to monitor loans to insiders of the bank and its affiliates. See 58 FR 47400. The Board proposed to allow each bank to decide on its own how to gather information on related interests, so long as its method was effective. For example, in the case of a nonbank credit card bank or other bank that does not make commercial loans, the bank could decide not to keep records on related interests. For banks that make commercial loans, two acceptable recordkeeping methods were identified: (1) The "survey" method currently required, under which all insiders are asked annually to identify all their related interests; and (2) the "borrower inquiry" method, under which the bank would (a) ask each commercial borrower as part of the loan application process whether it is a related interest of an insider of the bank, and (b) maintain a record of each affirmative response. Finally, the proposed rule sought comment on whether any other recordkeeping methods would be effective in monitoring compliance with Regulation O.

The draft GAO report, discussed above, urged the federal bank agencies to emphasize the importance of accurate and complete insider recordkeeping. Management recordkeeping failures, the GAO argued, were indicative of larger bank management problems, and management solutions in this area, the GAO reasoned, would contribute to the resolution of management's larger problems. The Board believes that the proposed recordkeeping amendments, which attempt to eliminate unnecessary recordkeeping and allow for alternative methods of recordkeeping, are consistent with the GAO's recommendations.

Commenters supported the recordkeeping amendments as a means of decreasing unnecessary paperwork burden. Commenters uniformly supported no longer requiring credit card banks and other institutions that do not make commercial loans to keep records on the related interests of insiders. No commenter proposed any general recordkeeping methods in addition to those identified in the rule.

A few commenters expressed concerns about the second recordkeeping option put forth in the proposed rule—the "borrower inquiry" method. Commenters noted that in some cases a corporate borrower might be unaware that it is a related interest of a bank insider and therefore might inadvertently misinform a bank's loan officer. For example, a corporate employee negotiating a loan may not know that one of his company's controlling shareholders is also a director of one of the lending bank's affiliates. Citing this possibility, several bank commenters supported the recordkeeping provision but requested that the Board specify that use of the borrower inquiry method would give a bank a "safe harbor" from criticism during an examination in the event that inaccurate certifications were accepted from borrowers. On a related point, two commenters sought assurance that internal controls consistent with the proposed recordkeeping alternatives would meet the compliance certification requirements of section 112 of FDICIA.

The Board believes protections currently exist to prevent intentional misreporting by borrowers under the borrower inquiry method. Intentional misreporting could bring criminal or civil penalties. First, a borrower that knowingly misstates whether it is a related interest of the lending bank is criminally liable. 18 U.S.C. 1014. Second, a bank insider to whom the corporate borrower is related and who is aware of the loan violates Regulation O if the insider permits the related interest to receive any extension of credit not authorized under Regulation O. 12 CFR 215.6.

The Board has also concluded that any unintentional misreporting should not be a matter of serious concern. While there could be cases in large multi-bank holding companies where a borrower and lender are genuinely ignorant of the relationship between them, there is no potential in those circumstances for an insider's status to improperly affect the credit decision.

The Board has decided to adopt the recordkeeping provisions, as proposed, with three amendments. First, in order to address concerns about inaccurate

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[2] See 12 U.S.C. 1841(c)(2).

reporting, the Board has adopted an additional safeguard to prevent the occurrence of those reporting errors, both intentional and unintentional, that are likely to occur most frequently and that raise the greatest concern. The final rule establishes a minimum requirement that every bank, regardless of the recordkeeping method it selects, must conduct an annual survey to identify its own insiders (that is, its own executive officers, directors, and principal shareholders and their related interests, but not those of its holding company affiliates). Every bank is expected to check this short list before extending credit, even if it is employing the borrower inquiry method of recordkeeping for affiliates in lieu of the survey method. In addition to addressing possible violations of Regulation O, the limited survey and the short list it produces will be available for monitoring compliance with section 23A of the Federal Reserve Act.

As for concerns about a "safe harbor," the Board believes that an implicit safe harbor exists for banks electing either one of the two recordkeeping options included in the final rule, and that following either of these options would allow the necessary certification to be made for purposes of section 112 of FDICIA. Furthermore, under the enforcement guidelines, the federal banking agencies should not assess civil money penalties for an inadvertent or accidental violation of their rules.

Second, because the commenters did not identify any recordkeeping methods other than the two proposed by the Board, the Board has adopted a presumption in the final rule that a bank must use either one of the two identified methods unless it can demonstrate that another method is equally effective. The suitability of any alternative procedure for monitoring lending to insiders and their related interests must be determined, of course, on the basis of the effectiveness of the procedure in preventing violations of law and insider abuse. Any alternative recordkeeping procedure must sufficiently identify extensions of credit covered by Regulation O to ensure that proper monitoring of and compliance with insider lending restrictions is maintained.

Finally, the Board has made an explicit exemption from the requirement that a bank keep records of, or inquire about related interests of insiders of the bank or its affiliates, for banks that are prohibited from making commercial loans in the first place.[3] Related interests consist only of companies or other similar entities, as a result of which a bank that is prohibited from making commercial loans is prohibited from making loans to any company or other entity that may be a related interest. When such a prohibition exists, recordkeeping or inquiries with respect to related interests is unnecessarily burdensome.

IV. Definition of Extension of Credit

The Board proposed three amendments to the definition of "extension of credit" in Regulation O: a clarification of the "tangible economic benefit" rule; a new exception for the discount by a bank of obligations sold by an insider without recourse; and an increase in the threshold for treating credit card debt as an extension of credit. See 58 FR 47400, September 9, 1993.

A. "Tangible Economic Benefit" Rule

Regulation O provides that an extension of credit is deemed to be made to an insider when the proceeds of the credit are used for the tangible economic benefit of, or are transferred to, the insider. 12 CFR 215.3(f). These extensions of credit are thereby counted toward the lending limits of Regulation O.

Following the enactment of FDICIA, which expanded the lending limit provision of section 22(h) of the Federal Reserve Act to cover directors and their related interests, questions were raised more frequently regarding the scope and proper application of the tangible economic benefit rule. If interpreted literally, the tangible economic benefit rule would apply whenever a bank extended credit to any person, including a member of the general public with no other relationship to the bank, and the proceeds of the extension of credit were transferred to or used for the benefit of an insider or an insider's related interest. For example, as one commenter noted, loans on non-preferential terms to members of the general public to purchase homes from a builder who is a director of the bank would be treated as loans to the builder/director.

The tangible economic benefit rule is similar to a provision contained in section 23A of the Federal Reserve Act, and was adopted at a time when the Board was required by section 22(h) of the Federal Reserve Act to use the definition of "extension of credit" found in section 23A. See Public Law 95–630 Section 104, 92 Stat. 3644 (1978). The definition of extension of credit in section 22(h), however, is no longer tied to section 23A, and the Board is authorized to adopt appropriate definitions of terms in the statute. See 12 U.S.C. 375b(9)(D) and 375b(10). The Board therefore proposed to revise the tangible economic benefit rule to clarify that it was not intended to reach such transactions, by providing explicitly that the rule does not apply to an arm's-length[4] extension of credit by a bank to a third party where the proceeds of the credit are used to finance the bona fide acquisition of property, goods, or services from an insider or an insider's related interest.

Commenters supported the proposal, and no adverse comments were received. Three commenters objected to the requirement that any arm's-length loan satisfy the non-preferential provisions for insider loans found in § 215.4(a), labelling that requirement overly restrictive. The Board has retained the requirement, however, that loans be on non-preferential terms, in order to prevent banks from participating in commercial promotions that benefit the bank's insiders to the detriment of the bank.[5]

Continuing to be covered by the tangible economic benefit rule are extensions of credit to an insider's nominee and transactions in which the proceeds of the credit are loaned to an insider. The Board also notes that provisions of the definition of "extension of credit" outside the tangible economic benefit rule will continue to reach transactions in which an insider actually becomes obligated to a bank, "whether the obligation arises directly or indirectly, or because of an endorsement on an obligation or otherwise, or by any means whatsoever." 12 CFR 215.3(a)(8).

B. Discount of Obligations without Recourse

Regulation O includes within the definition of "extension of credit" any "discount of promissory notes, bills of exchange, conditional sales contracts, or similar paper, *whether with or without*

[3] For example, a nonbank credit card bank, in order to maintain its exception from the definition of "bank" in the Bank Holding Company Act, may not engage in the business of making commercial loans. See 12 U.S.C. 1841(c)(2)(E).

[4] In order to satisfy this requirement, the extension of credit to the general public must be on terms that would satisfy the standard set forth in § 215.4 of Regulation O if the extension of credit was being made directly to an insider or an insider's related interest.

[5] One other commenter sought clarification on the relationship between the tangible economic benefit rule and another rule in Regulation O that states that loans made by a bank to a partnership in which one or more executive officers of the bank hold a majority interest are to be attributed in full to each of the executive officers. 12 CFR 215.5(b). The introductory portion of § 215.5 has been revised to clarify the interplay between § 215.5 and the general provisions of Regulation O.

recourse." 12 CFR 215.3(a)(5) (emphasis added). At the time this provision was adopted, the Board was required by section 22(h) to include such items in the regulatory definition of extension of credit.[6] However, the current statutory definition does not require the inclusion of such items where the transaction is made without recourse to the transferor.[7] The Board proposed to delete this provision so as to exclude non-recourse transactions from Regulation O coverage. Transactions entered into with recourse to the transferor would continue to be covered under other provisions of the definition. See 12 CFR 215.3(a)(4) and (8).

The Board has adopted this amendment as proposed. Non-recourse transactions resemble a purchase of assets more than the lending of money, and the final rule conforms the treatment of these transactions to the treatment of other asset pruchases between a bank and its insiders. Moreover, these non-recourse transactions do not constitute "extensions of credit" to the transferor under the National Bank Act as interpreted by the Office of the Comptroller of the Currency. See 12 U.S.C. 84(b)(1); 12 CFR 32.2(a). These transactions will continue to be governed, however, by general standards of safety and soundness, prohibitions against fraud and abuse, and corporate fiduciary duties.[8]

Commenters supported the proposal, and no adverse comments were received. One commenter asked the Board to clarify whether limited or partial recourse transactions would be treated as extensions of credit. The Board believes that it is more appropriate to address the numerous possible recourse arrangements on a case-by-case basis.

C. Credit Card Plan Indebtedness

Regulation O exempts from the definition of "extension of credit," and thus from Regulation O's lending limits, indebtedness of $5,000 or less arising through any general arrangement by which a bank: (1) Acquires charge or time credit accounts; or (2) makes payments to or on behalf of participants in a bank credit card plan or other open-end credit plan. 12 CFR 215.3(b)(5). To qualify for the exemption, the indebtedness must be on market terms and must not involve prior individual clearance or approval by the bank other than for the purpose of determining the borrower's eligibility and compliance with any applicable dollar limit. *Id.*

The Board proposed to increase from $5,000 to $15,000 the threshold above which standard credit card loans to insiders would be counted as extensions of credit. This proposed increase reflected widespread increases by credit card issuers in pre-approved lending limits and, to some extent, inflation since the initial adoption of the $5,000 limit in 1979. The Board did not propose raising the limit for extensions of credit through overdraft plans, leaving that limit at $5,000. Extensions of credit through overdrafts in amounts up to $15,000 have not become routine.

Commenters supported the proposed increase. Many commenters, however, requested that the increase be expanded. Thirteen commenters suggested that the proposed $15,000 cap on the amount of excluded credit card debt either be eliminated, increased, indexed, or periodically reviewed. Two commenters requested that credit card debt be exempted from the cap on general purpose loans to executive officers.

Eight commenters requested that the overdraft limit be raised by an identical amount. Commenters reasoned that one extension of credit is the same as another and thus that no substantive difference exists between credit card loans and overdraft extensions of credit. Moreover, some overdraft protection plans are now tied directly to credit card lines of credit. Commenters also noted that the rationale that the credit card limit was being raised to compensate for inflation applied equally to overdraft protection.

The Board has decided to increase the credit card exemption from $5,000 to $15,000 and to maintain the overdraft limit at $5,000. Raising the limit could encourage insiders to view overdraft plans as a source of credit, rather than solely as protection against infrequent and unplanned events. The Board is not prohibiting payment of overdrafts over $5,000 pursuant to a permissible pre-approved overdraft plan, but merely providing that overdrafts over $5,000 are counted toward the individual and aggregate lending limits of Regulation O.

The Board believes that the proposed limit is an appropriate compromise between its concern to prevent insider lending abuse and the added convenience that even higher or indexed limits may provide. Commenters presented no evidence to support their argument that a cap on exempt credit card lending is no longer necessary. Finally, the Board believes that exempting credit card loans from the cap on general purpose loans to executive officers would be more properly addressed in the context of a more general review of executive officer lending restrictions.

V. Consumer Installment Paper

Pursuant to the authority granted it by the Housing and Community Development Act of 1992 (HCDA),[9] the Board proposed an exception to the aggregate lending limit for the discount of consumer installment paper from an insider with recourse, so long as the bank is relying primarily upon the creditworthiness of the maker of the paper and not on any endorsement or guarantee of the insider. Such transactions would continue to constitute extensions of credit subject to the aggregate lending limit if the maker of the consumer installment paper was an insider. See 58 FR 47400, September 9, 1993.

The legislative history of HCDA states that the Board should make a "zero-based review" of any exceptions it adopts.[10] The proposed exception is consistent with this directive. The Board has concluded that, where the bank is relying primarily upon the creditworthiness of the underlying maker, the accompanying extension of credit to an insider transferring the paper with recourse poses minimal risk of loss to the bank.[11] In addition like the previous three exceptions, the new exception is found in the National Bank Act,[12] and is incorporated as an

[6] The current definition of "extension of credit" in Regulation O was adopted in 1979, when the Board substantially amended the regulation in order to implement the Financial Institutions Regulatory Act of 1978 (FIRA), Public Law 95–630 Section 104, 92 Stat. 3644 (1978). 44 FR 12963, March 9, 1979. FIRA added section 22(h) to the Act, which in turn incorporated the definition of "extension of credit" contained in section 23A. At that time, section 23A's definition included the above-referenced provision concerning the discount of paper acquired with or without recourse. See Public Law 89–485 Section 12, 80 Stat. 241 (1966).

[7] The statutory cross-reference to section 23A was deleted from section 22(h) in 1982. See Public Law 97–230 Section 410, 96 Stat. 1520 (1982). FDICIA added a new definition of "extension of credit" to section 22(h), which applies whenever a member bank makes or renews a loan, grants a line of credit, or enters into any similar transaction as a result of which a person becomes obligated to pay money or its equivalent to the bank. See 12 U.S.C. 375b(9)(D). This definition does not cover all transactions, such as the purchase of assets, covered by section 23A.

[8] In addition, sections 23A and 23B of the Act may be applicable to such transactions if the insider or the insider's related interest is an affiliate, as defined in section 23A, of the lending bank.

[9] Public Law 102–550 Section 955, 106 Stat. 3672 (1992).

[10] See 138 Cong. Rec. S17,914–15 (daily ed. October 8, 1992).

[11] Although extensions of credit made in conformity with the proposed exception would not count toward a bank's aggregate lending limit, such extensions of credit would continue to be treated as extensions of credit under 12 CFR 215.3(4) (a) and (b) of Regulation O, as a safeguard against abuse of this exception.

[12] All interpretations by the Comptroller of the Currency of the exceptions contained in 12 U.S.C.

Continued

exception to the individual lending limit in Regulation O. See 12 U.S.C. 84(c)(8); 12 CFR 215.2(h) and 215.4(c).

Commenters generally supported the new exception, and no adverse comments were received. Three commenters argued that the proposed requirement that a designated officer of the bank certify in writing that the bank is relying primarily upon the maker of the discounted paper was too burdensome because it did not accommodate itself to bulk transactions in which the bank may perform only a statistical sampling of a discounted loan portfolio. One commenter asked the Board to clarify that the discount of consumer lease paper was included in the provision. Six commenters suggested adoption of additional exceptions contained in the National Bank Act, and one commenter suggested an additional exception not included in the National Bank Act.

The requirement that a designated officer certify that the bank has followed appropriate underwriting procedures is found in the National Bank Act, and the Board has decided to maintain consistency with that Act.

Concerning consumer lease paper, the Board notes that an interpretative letter concerning the circumstances under which a lease transaction may be considered to be an extension of credit for purposes of Regulation O has previously been issued. See Interpretative Letter dated April 8, 1976. The Board believes that it would be more appropriate to provide further guidance as to the treatment of particular transactions under Regulation O on a case-by-case basis.

Additional exemptions found in the National Bank Act have not been adopted. Those are either limited exemptions, exemptions for credit secured by collateral that is not stable and liquid, or exemptions that would be difficult to administer in the Regulation O context. Other exemptions suggested by commenters would require statutory change.

VI. Loans to Executive Officers

The Board proposed three amendments to the rules governing extensions of credit by a bank to its executive officers: A new exemption to the limit for general purpose loans that are fully collateralized by certain categories of highly stable and liquid collateral; clarification that home mortgage loan refinancing, subject to certain limitations, is included in the category of home mortgage loans; and a restatement of the prior approval requirement in section 22(g) of the Federal Reserve Act. See 58 FR 47400, September 9, 1993.

A. General Purpose Loans

Section 22(g) of the Federal Reserve Act establishes a special additional rule for extensions of credit by a bank to its executive officers. In general, a bank's lending to each of its executive officers is limited to an amount equal to the greater of $25,000 or 2.5 percent of the bank's capital and unimpaired surplus, but not to exceed $100,000. 12 CFR 215.5(c). Qualifying home mortgage loans and educational loans are not counted toward this limit, although they do count toward the general individual and aggregate lending limits applicable to all insiders under § 215.4 of Regulation O. 12 CFR 215.5(c)(1) and (2). Also, unlike the general individual and aggregate lending limits, there has been no exception to the executive officer lending limit based on the manner in which the extension of credit is collateralized.

The Board proposed to create an exemption to the general purpose lending limit for loans to executive officers for loans fully secured by: (a) Obligations of the United States or other obligations fully guaranteed as to principal and interest by the United States; (b) commitments or guarantees of a department or agency of the United States; or (c) a segregated deposit account with the lending bank.

The Board previously has determined that extensions of credit collateralized in the manner described above pose minimal risk of loss to a bank. See 58 FR 26507, May 4, 1993. In view of this determination, the Board has concluded that it is consistent with safe and sound banking practices to increase the amount of credit that a bank may extend to its executive officers when the credit is secured as described above. Because such loans would continue to be subject to the prohibitions against preferential lending, the Board also believes that the proposed exception would not lend itself to evasions of the law or any other abuse.

Commenters supported the proposed exception. Six commenters suggested that additional categories of exempt extensions of credit be adopted. Nine commenters requested that the current $100,000 cap on general purpose loans be increased, and two commenters suggested that the cap be eliminated altogether. One commenter suggested that loans to an executive officer serving in a bona fide fiduciary capacity not be included as loans to the executive officer for purposes of 12 CFR 215.5(c).

The additional exceptions that have been proposed apply more readily to loans made in a commercial context rather than to personal loans. Section 215.5 primarily governs personal loans, however, and the additional proposals therefore are neither necessary nor appropriate. The Board also considers it more appropriate to reconsider the appropriate lending limit for executive officers in connection with a more general review of executive officer restrictions. Finally, the Board notes that the proper treatment under Regulation O of loans to an executive officer serving in a bona fide fiduciary capacity has previously been addressed. See 1 Fed. Res. Reg. Serv. 3–1048. The Board will provide any further guidance on this issue on a case-by-case basis.

B. Refinancing of Home Mortgage Loans

Section 22(g) of the Federal Reserve Act provides that a bank may make a loan to its executive officer, without restriction as to amount, if the loan is secured by a first lien on a dwelling that is owned by the executive officer and used by the executive officer as a residence after the loan is made. 12 U.S.C. 375a(2). Section 215.5(c)(2) of Regulation O implements this provision, and sets forth additional restrictions on such loans.

The Board proposed to revise the regulation to provide clearly that the refinancing of a home mortgage loan is included within this category to the extent that the proceeds are used to pay off the prior home mortgage loan or for one or more of the permissible purposes enumerated in 12 CFR 215.5(c)(2).

Comments were generally supportive. Two commenters asked the Board to clarify that the closing costs of a home mortgage refinancing are included as part of the qualifying portion of the loan. Two commenters requested that all proceeds of a home mortgage refinancing be included in this category.

The Board, as requested in the comments, has revised the regulation further to provide expressly that closing costs are included as part of the exempt portion of a home mortgage refinancing, and to make other clarifying changes. Inclusion within the exemption of proceeds of a refinancing that may be used for unrestricted purposes is prohibited by the enabling statute.

C. Prior Approval of Home Mortgage Loans

Section 22(g) provides that the board of directors of a bank must specifically approve in advance a home mortgage loan to an executive officer. 12 U.S.C.

84 are applicable to Regulation O to the extent that these exceptions are incorporated by reference into or otherwise adopted in Regulation O.

375a(2). Regulation O, however, does not set forth this requirement. The Board proposed that 12 CFR 215.5(c) be revised to conform to the enabling statute.

Comments upon this proposal were mixed. One commenter asked the Board to clarify that prior approval is required for all home mortgage loans regardless of size, notwithstanding the general provisions of Regulation O that require prior approval only for loans in excess of a calculated amount. See 12 CFR 215.4(b). Two commenters suggested that the Board rely on its rulemaking authority not to conform to the statute, and two commenters asked the Board to seek relief from this requirement from Congress.

The Board has adopted this provision substantially as proposed. As discussed above, the Board has added an introductory statement to § 215.5 to clarify that the requirements for extensions of credit to executive officers under that section, pursuant to section 22(g), are in addition to the general requirements for insiders set forth elsewhere in Regulation O. The Board lacks the authority to adopt a provision of Regulation O that does not conform to the statutory prior approval requirement. The additional comments are beyond the scope of this rulemaking.

VII. Conforming Definition of "Bank"

Subpart B of Regulation O partially implements the reporting requirements of title VIII of FIRA, as amended by the Garn-St. Germain Depository Institutions Act of 1982 [13] and FDICIA. 12 U.S.C. 1972(2)(G). Section 215.22 requires an executive officer or principal shareholder of a bank to report to the bank each year if the person or any related interest of the person borrowed during the prior calendar year from a correspondent bank of the bank.

As originally enacted, a correspondent bank was defined in title VIII of FIRA to include a bank as defined in the Bank Holding Company Act. Title VIII was subsequently amended to include in the definition a mutual savings bank, a savings bank, and a savings association as defined in section 3 of the Federal Deposit Insurance Act. 12 U.S.C. 1971 and 1972(H). The Board proposed to amend the definition of bank in subpart B of Regulation O to conform the rule to the statutory amendments. See 58 FR 47400, September 9, 1993.

Comments were favorable, and the Board has adopted this provision as proposed.

[13] Public Law 97–320, 96 Stat. 1469 (1982).

VIII. Technical Amendments

The Board has adopted a series of technical amendments to Regulation O that are designed to make the regulation more easily understandable and somewhat shorter. The amendments include a new definition of "affiliate," which makes the regulation read more clearly and allows various cross-references and footnotes to be eliminated. Because the technical amendments do not make any substantive change to the regulation, notice and comment on them was not required.

IX. Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to prepare a final regulatory flexibility analysis when the agency promulgates a final rule. Two of the requirements of a final regulatory flexibility analysis, a succinct statement of the need for and objectives of the rule, and a summary and assessment of issues raised by the public comments and of any changes made in the proposed rule as a result thereof (5 U.S.C. 604(b)), are contained in the summary and supplementary information above. No significant alternatives to the final rule were considered by the agency.

X. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3507, and 5 CFR 1320.130, the Board, under authority delegated by the Office of Management and Budget, has reviewed its amendments to Regulation O. The Board has determined that the revisions do not significantly increase the burden of the reporting institutions. The changes are expected to reduce regulatory burden for some banks, particularly small community banks and rural banks, but the estimated effect on aggregate burden calculations is not deemed to be significant.

List of Subjects in 12 CFR Part 215

Credit, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board is amending 12 CFR part 215 as follows:

PART 215—LOANS TO EXECUTIVE OFFICERS, DIRECTORS, AND PRINCIPAL SHAREHOLDERS OF MEMBER BANKS (REGULATION O)

1. The authority citation for part 215 is revised to read as follows:

Authority: 12 U.S.C. 248(i), 375a(10), 375b(9) and (10), 1817(k) and 1972(2)(G)(ii); Pub. L. 102–242, 105 Stat. 2236.

Subpart A—Loans by Member Banks to Their Executive Officers, Directors, and Principal Shareholders

2. 12 CFR part 215, subpart A, is amended by revising §§ 215.1 through 215.13, to read as follows:

§ 215.1 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to sections 11(i), 22(g), and 22(h) of the Federal Reserve Act (12 U.S.C. 248(i), 375a, and 375b), 12 U.S.C. 1817(k), and section 306 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)).

(b) *Purpose and scope.* This subpart A governs any extension of credit by a member bank to an executive officer, director, or principal shareholder of: The member bank; a bank holding company of which the member bank is a subsidiary; and any other subsidiary of that bank holding company. It also applies to any extension of credit by a member bank to: A company controlled by such a person; and a political or campaign committee that benefits or is controlled by such a person. This subpart A also implements the reporting requirements of 12 U.S.C. 375a concerning extensions of credit by a member bank to its executive officers and of 12 U.S.C. 1817(k) concerning extensions of credit by a member bank to its executive officers or principal shareholders, or the related interests of such persons.

§ 215.2 Definitions.

For the purposes of this subpart A, the following definitions apply unless otherwise specified:

(a) *Affiliate* means any company of which a member bank is a subsidiary or any other subsidiary of that company.

(b) *Company* means any corporation, partnership, trust (business or otherwise), association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, or any other form of business entity not specifically listed herein. However, the term does not include:

(1) An insured depository institution (as defined in 12 U.S.C. 1813); or

(2) A corporation the majority of the shares of which are owned by the United States or by any State.

(c)(1) *Control of a company or bank* means that a person directly or indirectly, or acting through or in concert with one or more persons:

(i) Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the company or bank;

(ii) Controls in any manner the election of a majority of the directors of the company or bank; or

(iii) Has the power to exercise a controlling influence over the management or policies of the company or bank.

(2) A person is presumed to have control, including the power to exercise a controlling influence over the management or policies, of a company or bank if:

(i) The person is:

(A) An executive officer or director of the company or bank; and

(B) Directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company or bank; or

(ii)(A) The person directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company or bank; and

(B) No other person owns, controls, or has the power to vote a greater percentage of that class of voting securities.

(3) An individual is not considered to have control, including the power to exercise a controlling influence over the management or policies, of a company or bank solely by virtue of the individual's position as an officer or director of the company or bank.

(4) A person may rebut a presumption established by paragraph (b)(2) of this section by submitting to the appropriate Federal banking agency (as defined in 12 U.S.C. 1813(q)) written materials that, in the agency's judgment, demonstrate an absence of control.

(d) *Director of a member bank* means any director of a member bank, whether or not receiving compensation. An advisory director is not considered a director if the advisory director:

(1) Is not elected by the shareholders of the company or bank;

(2) Is not authorized to vote on matters before the board of directors; and

(3) Provides solely general policy advice to the board of directors.

(e)(1) *Executive officer* of a company or bank means a person who participates or has authority to participate (other than in the capacity of a director) in major policymaking functions of the company or bank, whether or not: the officer has an official title; the title designates the officer an assistant; or the officer is serving without salary or other compensation.[1] The chairman of the board, the president, every vice president, the cashier, the secretary, and the treasurer of a company or bank are considered executive officers, unless the officer is excluded, by resolution of the board of directors or by the bylaws of the bank or company, from participation (other than in the capacity of a director) in major policymaking functions of the bank or company, and the officer does not actually participate therein.

(2) Extensions of credit to an executive officer of an affiliate of a member bank (other than a company that controls the bank) shall not be subject to §§ 215.4, 215.6 and 215.8 of this part, provided that:

(i) The executive officer of the affiliate is excluded (by name or by title) from participation in major policymaking functions of the member bank by resolutions of the boards of directors of both the affiliate and the member bank, and does not actually participate in such major policymaking functions; and

(ii) The executive officer is not otherwise subject to such requirements as a director or principal shareholder.

(f) *Foreign bank* has the meaning given in 12 U.S.C. 3101(7).

(g) *Immediate family* means the spouse of an individual, the individual's minor children, and any of the individual's children (including adults) residing in the individual's home.

(h) *Insider* means an executive officer, director, or principal shareholder, and includes any related interest of such a person.

(i) *Lending limit*. The lending limit for a member bank is an amount equal to the limit of loans to a single borrower established by section 5200 of the Revised Statutes,[2] 12 U.S.C. 84. This amount is 15 percent of the bank's unimpaired capital and unimpaired surplus in the case of loans that are not fully secured, and an additional 10 percent of the bank's unimpaired capital and unimpaired surplus in the case of loans that are fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the loan. The lending limit also includes any higher amounts that are permitted by section 5200 of the Revised Statutes for the types of obligations listed therein as exceptions to the limit. A member bank's unimpaired capital and unimpaired surplus equals the sum of:

(1) The "total equity capital" of the member bank reported on its most recent consolidated report of condition filed under 12 U.S.C. 1817(a)(3);

(2) Any subordinated notes and debentures that comply with requirements of the appropriate Federal banking agency for addition to the member bank's capital structure and are reported on its most recent consolidated report of condition filed under 12 U.S.C. 1817(a)(3); and

(3) Any valuation reserves created by charges to the member bank's income reported on its most recent consolidated report of condition filed under 12 U.S.C. 1817(a)(3).

(j) *Member bank* means any banking institution that is a member of the Federal Reserve System, including any subsidiary of a member bank. The term does not include any foreign bank that maintains a branch in the United States, whether or not the branch is insured (within the meaning of 12 U.S.C. 1813(s)) and regardless of the operation of 12 U.S.C. 1813(h) and 12 U.S.C. 1828(j)(3)(B).

(k) *Pay an overdraft on an account* means to pay an amount upon the order of an account holder in excess of funds on deposit in the account.

(l) *Person* means an individual or a company.

(m)(1) *Principal shareholder* means a person (other than an insured bank) that directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 percent of any class of voting securities of a member bank or company. Shares owned or controlled by a member of an individual's immediate family are considered to be held by the individual.

(2) A principal shareholder of a member bank does not include a company of which a member bank is a subsidiary.

(n) *Related interest* of a person means:

(1) A company that is controlled by that person; or

(2) A political or campaign committee that is controlled by that person or the funds or services of which will benefit that person.

(o) *Subsidiary* has the meaning given in 12 U.S.C. 1841(d), but does not include a subsidiary of a member bank.

§ 215.3 Extension of credit.

(a) An extension of credit is a making or renewal of any loan, a granting of a

[1] The term is not intended to include persons who may have official titles and may exercise a certain measure of discretion in the performance of their duties, including discretion in the making of loans, but who do not participate in the determination of major policies of the bank or company and whose decisions are limited by policy standards fixed by the senior management of the bank or company. For example, the term does not include a manager or assistant manager of a branch of a bank unless that individual participates, or is authorized to participate, in major policymaking functions of the bank or company.

[2] Where State law establishes a lending limit for a State member bank that is lower than the amount permitted in section 5200 of the Revised Statutes, the lending limit established by applicable State laws shall be the lending limit for the State member bank.

line of credit, or an extending of credit in any manner whatsoever, and includes:

(1) A purchase under repurchase agreement of securities, other assets, or obligations;

(2) An advance by means of an overdraft, cash item, or otherwise;

(3) Issuance of a standby letter of credit (or other similar arrangement regardless of name or description) or an ineligible acceptance, as those terms are defined in § 208.8(d) of this chapter;

(4) An acquisition by discount, purchase, exchange, or otherwise of any note, draft, bill of exchange, or other evidence of indebtedness upon which an insider may be liable as maker, drawer, endorser, guarantor, or surety;

(5) An increase of an existing indebtedness, but not if the additional funds are advanced by the bank for its own protection for:

(i) Accrued interest; or

(ii) Taxes, insurance, or other expenses incidental to the existing indebtedness;

(6) An advance of unearned salary or other unearned compensation for a period in excess of 30 days; and

(7) Any other similar transaction as a result of which a person becomes obligated to pay money (or its equivalent) to a bank, whether the obligation arises directly or indirectly, or because of an endorsement on an obligation or otherwise, or by any means whatsoever.

(b) An extension of credit does not include:

(1) An advance against accrued salary or other accrued compensation, or an advance for the payment of authorized travel or other expenses incurred or to be incurred on behalf of the bank;

(2) A receipt by a bank of a check deposited in or delivered to the bank in the usual course of business unless it results in the carrying of a cash item for or the granting of an overdraft (other than an inadvertent overdraft in a limited amount that is promptly repaid, as described in § 215(4)(e) of this part);

(3) An acquisition of a note, draft, bill of exchange, or other evidence of indebtedness through:

(i) A merger or consolidation of banks or a similar transaction by which a bank acquires assets and assumes liabilities of another bank or similar organization; or

(ii) Foreclosure on collateral or similar proceeding for the protection of the bank, provided that such indebtedness is not held for a period of more than three years from the date of the acquisition, subject to extension by the appropriate Federal banking agency for good cause;

(4)(i) An endorsement or guarantee for the protection of a bank of any loan or other asset previously acquired by the bank in good faith; or

(ii) Any indebtedness to a bank for the purpose of protecting the bank against loss or of giving financial assistance to it;

(5) Indebtedness of $15,000 or less arising by reason of any general arrangement by which a bank:

(i) Acquires charge or time credit accounts; or

(ii) Makes payments to or on behalf of participants in a bank credit card plan, check credit plan, or similar open-end credit plan, provided:

(A) The indebtedness does not involve prior individual clearance or approval by the bank other than for the purposes of determining authority to participate in the arrangement and compliance with any dollar limit under the arrangement; and

(B) The indebtedness is incurred under terms that are not more favorable than those offered to the general public;

(6) Indebtedness of $5,000 or less arising by reason of an interest-bearing overdraft credit plan of the type specified in § 215.4(e) of this part; or

(7) A discount of promissory notes, bills of exchange, conditional sales contracts, or similar paper, without recourse.

(c) Non-interest-bearing deposits to the credit of a bank are not considered loans, advances, or extensions of credit to the bank of deposit; nor is the giving of immediate credit to a bank upon uncollected items received in the ordinary course of business considered to be a loan, advance or extension of credit to the depositing bank.

(d) For purposes of § 215.4 of this part, an extension of credit by a member bank is considered to have been made at the time the bank enters into a binding commitment to make the extension of credit.

(e) A participation without recourse is considered to be an extension of credit by the participating bank, not by the originating bank.

(f) *Tangible economic benefit rule*—(1) *In general.* An extension of credit is considered made to an insider to the extent that the proceeds are transferred to the insider or are used for the tangible economic benefit of the insider.

(2) *Exception.* An extension of credit is not considered made to an insider under paragraph (f)(1) of this section if:

(i) The credit is extended on terms that would satisfy the standard set forth in § 215.4(a) of this part for extensions of credit to insiders; and

(ii) The proceeds of the extension of credit are used in a bona fide transaction to acquire property, goods, or services from the insider.

§ 215.4 General prohibitions.

(a) *Terms and creditworthiness.* No member bank may extend credit to any insider of the bank or insider of its affiliates unless the extension of credit:

(1) Is made on substantially the same terms (including interest rates and collateral) as, and following credit underwriting procedures that are not less stringent than, those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank; and

(2) Does not involve more than the normal risk of repayment or present other unfavorable features.

(b) *Prior approval.* (1) No member bank may extend credit (which term includes granting a line of credit) to any insider of the bank or insider of its affiliates in an amount that, when aggregated with the amount of all other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 percent of the member bank's unimpaired capital and unimpaired surplus, unless:

(i) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank; and

(ii) The interested party has abstained from participating directly or indirectly in the voting.

(2) In no event may a member bank extend credit to any insider of the bank or insider of its affiliates in an amount that, when aggregated with all other extensions of credit to that person, and all related interests of that person, exceeds $500,000, except by complying with the requirements of this paragraph (b).

(3) Approval by the board of directors under paragraphs (b)(1) and (b)(2) of this section is not required for an extension of credit that is made pursuant to a line of credit that was approved under paragraph (b)(1) of this section within 14 months of the date of the extension of credit. The extension of credit must also be in compliance with the requirements of § 215.4(a) of this part.

(4) Participation in the discussion, or any attempt to influence the voting, by the board of directors regarding an extension of credit constitutes indirect participation in the voting by the board of directors on an extension of credit.

(c) *Individual lending limit*—No member bank may extend credit to any insider of the bank or insider of its affiliates in an amount that, when aggregated with the amount of all other extensions of credit by the member bank to that person and to all related interests of that person, exceeds the lending limit of the member bank specified in § 215.2(i) of this part. This prohibition does not apply to an extension of credit by a member bank to a company of which the memoer bank is a subsidiary or to any other subsidiary of that company.

(d) *Aggregate lending limit* —(1) *General limit.* A member bank may not extend credit to any insider of the bank or insider of its affiliates unless the extension of credit is in an amount that, when aggregated with the amount of all outstanding extensions of credit by that bank to all such insiders, does not exceed the bank's unimpaired capital and unimpaired surplus (as defined in § 215.2(i) of this part).

(2) *Member banks with deposits of less than $100,000,000.* (i) A member bank with deposits of less than $100,000,000 may by an annual resolution of its board of directors increase the general limit specified in paragraph (d)(1) of this section to a level not to exceed two times the bank's unimpaired capital and unimpaired surplus, if:

(A) The board of directors determines that such higher limit is consistent with prudent, safe, and sound banking practices in light of the bank's experience in lending to its insiders and is necessary to attract or retain directors or to prevent restricting the availability of credit in small communities;

(B) The resolution sets forth the facts and reasoning on which the board of directors bases the finding, including the amount of the bank's lending to its insiders as a percentage of the bank's unimpaired capital and unimpaired surplus as of the date of the resolution;

(C) The bank meets or exceeds, on a fully-phased in basis, all applicable capital requirements established by the appropriate Federal banking agency; and

(D) The bank received a satisfactory composite rating in its most recent report of examination.

(ii) If a member bank has adopted a resolution authorizing a higher limit pursuant to paragraph (d)(2)(i) of this section and subsequently fails to meet the requirements of paragraph (d)(2)(i)(C) or (d)(2)(i)(D) of this section, the member bank shall not extend any additional credit (including a renewal of any existing extension of credit) to any insider of the bank or its affiliates unless such extension or renewal is consistent with the general limit in paragraph (d)(1) of this section.

(3) *Exceptions.* (i) The general limit specified in paragraph (d)(1) of this section does not apply to the following:

(A) Extensions of credit secured by a perfected security interest in bonds, notes, certificates of indebtedness, or Treasury bills of the United States or in other such obligations fully guaranteed as to principal and interest by the United States;

(B) Extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission or establishment of the United States or any corporation wholly owned directly or indirectly by the United States;

(C) Extensions of credit secured by a perfected security interest in a segregated deposit account in the lending bank; or

(D) Extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper that is acquired from an insider and carries a full or partial recourse endorsement or guarantee by the insider, provided that:

(*1*) The financial condition of each maker of such consumer paper is reasonably documented in the bank's files or known to its officers;

(*2*) An officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of the obligation and not upon any endorsement or guarantee by the insider; and

(*3*) The maker of the instrument is not an insider.

(ii) The exceptions in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this section apply only to the amounts of such extensions of credit that are secured in the manner described therein.

(e) *Overdrafts.* (1) No member bank may pay an overdraft of an executive officer or director of the bank [3] on an account at the bank, unless the payment of funds is made in accordance with:

(i) A written, preauthorized, interest-bearing extension of credit plan that specifies a method of repayment; or

(ii) A written, preauthorized transfer of funds from another account of the account holder at the bank.

(2) The prohibition in paragraph (e)(1) of this section does not apply to payment of inadvertent overdrafts on an account in an aggregate amount of $1,000 or less, provided:

(i) The account is not overdrawn for more than 5 business days; and

(ii) The member bank charges the executive officer or director the same fee charged any other customer of the bank in similar circumstances.

§ 215.5 Additional restrictions on loans to executive officers of member banks.

The following restrictions on extensions of credit by a member bank to any of its executive officers apply in addition to any restrictions on extensions of credit by a member bank to insiders of itself or its affiliates set forth elsewhere in this part. The restrictions of this section apply only to executive officers of the member bank and not to executive officers of its affiliates.

(a) No member bank may extend credit to any of its executive officers, and no executive officer of a member bank shall borrow from or otherwise become indebted to the bank, except in the amounts, for the purposes, and upon the conditions specified in paragraphs (c) and (d) of this section.

(b) No member bank may extend credit in an aggregate amount greater than the amount permitted in paragraph (c)(3) of this section to a partnership in which one or more of the bank's executive officers are partners and, either individually or together, hold a majority interest. For the purposes of paragraph (c)(3) of this section, the total amount of credit extended by a member bank to such partnership is considered to be extended to each executive officer of the member bank who is a member of the partnership.

(c) A member bank is authorized to extend credit to any executive officer of the bank:

(1) In any amount to finance the education of the executive officer's children;

(2) With the specific prior approval of the board of directors, in any amount to finance or refinance the purchase, construction, maintenance, or improvement of a residence of the executive officer, provided:

(i) The extension of credit is secured by a first lien on the residence and the residence is owned (or expected to be owned after the extension of credit) by the executive officer; and

(ii) In the case of a refinancing, that only the amount thereof used to repay the original extension of credit, together with the closing costs of the refinancing, and any additional amount thereof used for any of the purposes enumerated in this paragraph (c)(2), are included within this category of credit;

(3) In any amount, if the extension of credit is secured in a manner described in § 215.4(d)(3)(i)(A) through (d)(3)(i)(C) of this part; and

[3] This prohibition does not apply to the payment by a member bank of an overdraft of a principal shareholder of the member bank, unless the principal shareholder is also an executive officer or director. This prohibition also does not apply to the payment by a member bank of an overdraft of a related interest of an executive officer, director, or principal shareholder of the member bank.

(4) For any other purpose not specified in paragraphs (c)(1) through (c)(3) of this section, if the aggregate amount of extensions of credit to that executive officer under this paragraph does not exceed at any one time the higher of 2.5 per cent of the bank's capital and unimpaired surplus or $25,000, but in no event more than $100,000.

(d) Any extension of credit by a member bank to any of its executive officers shall be:

(1) Promptly reported to the member bank's board of directors;

(2) In compliance with the requirements of § 215.4(a) of this part;

(3) Preceded by the submission of a detailed current financial statement of the executive officer; and

(4) Made subject to the condition in writing that the extension of credit will, at the option of the member bank, become due and payable at any time that the officer is indebted to any other bank or banks in an aggregate amount greater than the amount specified for a category of credit in paragraph (c) of this section.

§ 215.6 Prohibition on knowingly receiving unauthorized extension of credit.

No executive officer, director, or principal shareholder of a member bank or any of its affiliates shall knowingly receive (or knowingly permit any of that person's related interests to receive) from a member bank, directly or indirectly, any extension of credit not authorized under this part.

§ 215.7 Extensions of credit outstanding on March 10, 1979.

(a) Any extension of credit that was outstanding on March 10, 1979, and that would, if made on or after March 10, 1979, violate § 215.4(c) of this part, shall be reduced in amount by March 10, 1980, to be in compliance with the lending limit in § 215.4(c) of this part. Any renewal or extension of such an extension of credit on or after March 10, 1979, shall be made only on terms that will bring the extension of credit into compliance with the lending limit of § 215.4(c) of this part by March 10, 1980. However, any extension of credit made before March 10, 1979, that bears a specific maturity date of March 10, 1980, or later, shall be repaid in accordance with its repayment schedule in existence on or before March 10, 1979.

(b) If a member bank is unable to bring all extensions of credit outstanding on March 10, 1979, into compliance as required by paragraph (a) of this section, the member bank shall promptly report that fact to the Comptroller of the Currency, in the case of a national bank, or to the appropriate Federal Reserve Bank, in the case of a State member bank, and explain the reasons why all the extensions of credit cannot be brought into compliance. The Comptroller or the Reserve Bank, as the case may be, is authorized, on the basis of good cause shown, to extend the March 10, 1980, date for compliance for any extension of credit for not more than two additional one-year periods.

§ 215.8 Records of member banks.

(a) *In general.* Each member bank shall maintain records necessary for compliance with the requirements of this part.

(b) *Recordkeeping for insiders of the member bank.* Any recordkeeping method adopted by a member bank shall:

(1) Identify, through an annual survey, all insiders of the bank itself; and

(2) Maintain records of all extensions of credit to insiders of the bank itself, including the amount and terms of each such extension of credit.

(c) *Recordkeeping for insiders of the member bank's affiliates.* Any recordkeeping method adopted by a member bank shall maintain records of extensions of credit to insiders of the member bank's affiliates by:

(1) *Survey method.* (i) Identifying, through an annual survey, each insider of the member bank's affiliates; and

(ii) Maintaining records of the amount and terms of each extension of credit by the member bank to such insiders; or

(2) *Borrower inquiry method.* (i) Requiring as part of each extension of credit that the borrower indicate whether the borrower is an insider of an affiliate of the member bank; and

(ii) Maintaining records that identify the amount and terms of each extension of credit by the member bank to borrowers so identifying themselves.

(3) *Alternative recordkeeping methods for insiders of affiliates.* A member bank may employ a recordkeeping method other than those identified in paragraphs (c)(1) and (c)(2) of this section if the appropriate Federal banking agency determines that the bank's method is at least as effective as the identified methods.

(d) *Special rule for non-commercial lenders.* A member bank that is prohibited by law or by an express resolution of the board of directors of the bank from making an extension of credit to any company or other entity that is covered by this part as a company is not required to maintain any records of the related interests of the insiders of the bank or its affiliates or to inquire of borrowers whether they are related interests of the insiders of the bank or its affiliates.

§ 215.9 Reports by executive officers.

Each executive officer of a member bank who becomes indebted to any other bank or banks in an aggregate amount greater than the amount specified for a category of credit in § 215.5(c) of this part, shall, within 10 days of the date the indebtedness reaches such a level, make a written report to the board of directors of the officer's bank. The report shall state the lender's name, the date and amount of each extension of credit, any security for it, and the purposes for which the proceeds have been or are to be used.

§ 215.10 Reports on credit to executive officers.

Each member bank shall include with (but not as part of) each report of condition (and copy thereof) filed pursuant to 12 U.S.C. 1817(a)(3) a report of all extensions of credit made by the member bank to its executive officers since the date of the bank's previous report of condition.

§ 215.11 Disclosure of credit from member banks to executive officers and principal shareholders.

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

(1) *Principal shareholder of a member bank* means any person[4] other than an insured bank, or a foreign bank as defined in 12 U.S.C. 3101(7), that, directly or indirectly, owns, controls, or has power to vote more than 10 percent of any class of voting securities of the member bank. The term includes a person that controls a principal shareholder (e.g., a person that controls a bank holding company). Shares of a bank (including a foreign bank), bank holding company, or other company owned or controlled by a member of an individual's immediate family are presumed to be owned or controlled by the individual for the purposes of determining principal shareholder status.

(2) *Related interest* means:

(i) Any company controlled by a person; or

(ii) Any political or campaign committee the funds or services of which will benefit a person or that is controlled by a person. For the purpose of this section and subpart B of this part, a related interest does not include a

[4] The term "stockholder of record" appearing in 12 U.S.C. 1972(2)(G) is synonymous with the term "person."

bank or a foreign bank (as defined in 12 U.S.C. 3101(7)).

(b) *Public disclosure.* (1) Upon receipt of a written request from the public, a member bank shall make available the names of each of its executive officers and each of its principal shareholders to whom, or to whose related interests, the member bank had outstanding as of the end of the latest previous quarter of the year, an extension of credit that, when aggregated with all other outstanding extensions of credit at such time from the member bank to such person and to all related interests of such person, equaled or exceeded 5 percent of the member bank's capital and unimpaired surplus of $500,000, whichever amount is less. No disclosure under this paragraph is required if the aggregate amount of all extensions of credit outstanding at such time from the member bank to the executive officer or principal shareholder of the member bank and to all related interests of such a person does not exceed $25,000.

(2) A member bank is not required to disclose the specific amounts of individual extensions of credit.

(c) *Maintaining records.* Each member bank shall maintain records of all requests for the information described in paragraph (b) of this section and the disposition of such requests. These records may be disposed of after two years from the date of the request.

§ 215.12 Reporting requirement for credit secured by certain bank stock.

Each executive officer or director of a member bank the shares of which are not publicly traded shall report annually to the board of directors of the member bank the outstanding amount of any credit that was extended to the executive officer or director and that is secured by shares of the member bank.

§ 215.13 Civil penalties.

Any member bank, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of the bank, that violates any provision of this part (other than § 215.11 of this part) is subject to civil penalties as specified in section 29 of the Federal Reserve Act (12 U.S.C. 504).

Subpart B—[Amended]

§ 215.21 [Amended]

3. Section 215.21 is amended by removing "1841(c)" where it appears in paragraph (a) and adding in its place "1971 and 1972" and by removing footnote 10 and redesignating footnotes 11 and 12 as footnotes 5 and 6.

§ 215.22 [Amended]

4. Section 215.22 is amended by removing "12 CFR 226.2(p)" where it appears in paragraph (c)(1)(ii) and adding in its place "12 CFR 226.2(a)(12)".

By order of the Board of Governors of the Federal Reserve System, February 15, 1994.

Dated: February 15, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94-3860 Filed 2-18-94; 3:20 pm]

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RESOLUTION TRUST CORPORATION

12 CFR Part 1630

RIN 3205-AA21

Definition of Predominantly Minority Neighborhood

AGENCY: Resolution Trust Corporation.

ACTION: Interim rule; request for comments.

SUMMARY: The Resolution Trust Corporation (RTC) is hereby adopting an interim rule which defines "predominantly minority neighborhood" as used in section 21A(s) of the Federal Home Loan Bank Act (FHLBA) and section 21A(w)(17) of the FHLBA, as amended by the Resolution Trust Corporation Completion Act. Section 21A(w)(17) of the FHLBA requires, among other things, that in considering offers to acquire any insured depository institution, or any branch of an insured depository institution, located in a predominantly minority neighborhood (as defined in regulations prescribed under section 21A(s) of the FHLBA), the Corporation shall give preference to an offer from any minority individual, minority-owned business, or a minority depository institution, over any other offer that results in the same cost to the Corporation, as determined under section 13(c)(4) of the Federal Deposit Insurance Act. Section 21A(s) of the FHLBA permits the RTC to lease to a minority acquiror, on a rent-free basis, subject to certain conditions, any branch of a failed institution which is located in a "predominantly minority neighborhood." Section 21A(w)(17) of the FHLBA also generally provides that the RTC may provide to such minority individual, minority-owned business, or minority depository institution additional preferences in the form of capital assistance and performing assets. The interim rule generally defines "predominantly minority neighborhood" as any U.S. Postal Zip Code geographical area in which 50% or more of the persons residing therein are minorities based upon the most recent Census data, unless the RTC has determined, in its sole discretion, that other reasonably reliable, readily accessible data indicates different neighborhood boundaries. The RTC is also seeking comment on the interim rule.

This interim rule is effective on February 24, 1994.

DATES: Comments must be submitted on or before March 28, 1994.

ADDRESSES: Written comments regarding the interim rule should be addressed to John M. Buckley, Jr., Secretary, Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434-0001. Comments may be hand delivered to room 321 on business days between the hours of 9 a.m. and 5 p.m. Comments may also be inspected in the Public Reading Room, 801 17th Street, NW., during the same business hours. Phone number: 202-416-6940; FAX number: 202-416-4753.

FOR FURTHER INFORMATION CONTACT: Robert C. Fick, Counsel, TRC Legal Division, (202) 736-3069; Gregory B. Smith, Senior Counsel, RTC Legal Division, (202) 736-3013; Mark G. Flanigan, Senior Attorney, RTC Legal Division, (202) 736-3085; Edward Thomas, Resolutions Analyst, (202) 416-7179; Sherry Chen, Field Resolutions Specialist, (202) 416-7209. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

In August 1989, Congress enacted section 501 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, (FIRREA), (codified as section 21A(b) of the FHLBA, 12 U.S.C. 1441a(b)), which established the Resolution Trust Corporation (RTC). Pursuant to FIRREA the RTC has the duty to manage and resolve failed depository institutions that come under its jurisdiction and to conduct the operations of the RTC in a manner which "maximizes the * * * return from the sale of institutions or assets," "makes efficient use of funds" and "minimizes * * * losses * * * in the resolution of [failed institutions]". Section 21A(b)(3) of the FHLBA, as added by section 501(a) of FIRREA. In addition, the RTC is required to resolve all failed institutions in the "least costly * * * of all possible methods" (collectively Cost Constraints). Section 13(c)(4)(A)(ii) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1823(c)(4)(A)(ii), as made applicable by section 21A(b)(4) of the FHLBA, 12